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10 **UNITED STATES DISTRICT COURT**

11 **DISTRICT OF ARIZONA**

12 Russell B. Toomey,

13 Plaintiff,

14 vs.

15 State of Arizona; The Arizona Board of Regents,
16 D/B/A University of Arizona, a governmental
17 body of the State of Arizona; et al.,

18 Defendants.
19

Case No. 4:19-CV-00035-RM-LAB

**NON-PARTY THE OFFICE OF
GOVERNOR DOUGLAS A.
DUCEY'S RESPONSE IN
OPPOSITION TO MOTION TO
COMPEL**

(Oral Argument Requested)

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Pursuant to Federal Rule of Civil Procedure (“Rule”) 45 and LRCiv 7.2(c), non-party The Office of Governor Douglas A. Ducey (the “Governor’s Office”) hereby responds in opposition to Plaintiff Russell B. Toomey’s Motion for Entry of an Order Compelling the Production of Documents (Doc. 202) (the “Motion”). The Motion fails because it rests entirely on the false foundation that the subject documents are relevant to the State’s intent. Moreover, given the subject matter of the documents, Plaintiff’s need for these privileged materials pales in comparison to the Governor’s Office’s interests in nondisclosure. The Motion should be denied.

I. SALIENT FACTUAL AND PROCEDURAL HISTORY.

On January 23, 2019, Plaintiff initiated this lawsuit against the State of Arizona (the “State”), the Arizona Board of Regents, and certain individuals in their official capacity as regents or officers of the Arizona Department of Administration. (*See* Doc. 1; *see also* Doc. 86.) In Plaintiff’s own words, his lawsuit “challenges the State of Arizona’s categorical exclusion for ‘gender reassignment surgery’ (the ‘Exclusion’) from coverage under the self-funded health care plan (the ‘Plan’) controlled by the Arizona Department of Administration (‘ADOA’).” (Doc. 202, pp. 1-2.) Plaintiff did not sue the Governor of Arizona or any advisors within the Governor’s Office. (*Id.*) The Governor’s Office is not “pretending” to be a non-party; it is a non-party to this litigation.¹

In February 2021, two years after filing this action, Plaintiff served a Subpoena on the Governor’s Office demanding the production of all documents referencing surgery to treat gender dysphoria. (*See* Doc. 202-3, Ex. 2, p. 4.) The Subpoena literally sought production of documents over a more than ten-year period that contain any reference, no matter the context, to gender affirming surgery, regardless of whether the document relates to the challenged Exclusion. (*Id.*) On March 10, 2021, the Governor’s Office responded to the Subpoena, serving detailed objections, producing documents, and producing a document-by-document privilege log, consistent with Rule

¹ Plaintiff states the Governor’s Office “was integral to the decision to maintain the Exclusion.” (Doc. 202, p. 5.) Neither the citations on page 2 of the Motion, nor the deposition transcripts attached in the exhibits describe the Governor’s Office as “integral” to the decision. Instead, the testimony indicates that the Governor’s Office was among several participants involved in the decision concerning the Exclusion. Moreover, contrary to Plaintiff’s erroneous assertion, Mr. Fry and Ms. Ong were not “from the Governor’s Office.” (Doc. 202, p. 3.)

1 45. (Doc. 202-3, Exs. 3 & 4.) Following lengthy meet and confer discussions, the Governor's
 2 Office served an Amended and Supplemental Privilege Log ("Privilege Log") (*see* Doc. 202-3, Ex.
 3 7). As reflected on the Privilege Log, the Governor's Office withheld certain documents as
 4 privileged under the executive communications and deliberative process privileges.² (*See*
 5 Declaration of Christina Corieri, dated June 17, 2021, attached at **Exhibit A** ("Corieri
 6 Declaration"), ¶ 5; *see also id.*, ¶¶ 6-8, 11.)

7 **II. PLAINTIFF'S MOTION TO COMPEL MUST BE DENIED, AS PLAINTIFF IS NOT**
 8 **ENTITLED TO A NON-PARTY'S IRRELEVANT AND PRIVILEGED DOCUMENTS.**

9 As the party seeking to compel discovery from a non-party, Plaintiff must demonstrate not
 10 only relevance of the demanded materials, but that his "need for discovery outweighs the
 11 nonparty's interest in nondisclosure." *AmSurg Holdings Inc. v. Anireddy*, 2020 WL 1703617, at *2 (D.
 12 Ariz. Apr. 8, 2020) (*quoting R. Prasad Indus. v. Flat Iron Env't. Sols. Corp.*, 2014 WL 2804276, at *2 (D.
 13 Ariz. June 20, 2014)). If Plaintiff meets his burden, the Court then considers the executive
 14 privileges the Governor's Office holds with respect to the 17 documents at issue in the Motion. In
 15 view of the separation of powers and sovereignty issues at the core of Plaintiff's demand for the
 16 Governor's Office's privileged documents, the Court must first explore all other avenues for
 17 resolving Plaintiff's Motion before reaching the executive privilege issue. *See Cheney v. U.S. Dist. Ct.*
 18 *for D.C.*, 542 U.S. 367, 389–90 (2004) (explaining that, because the executive privilege forces the
 19 judiciary into the "awkward position of evaluating the Executive's claims of confidentiality and
 20 autonomy, and pushes to the fore difficult questions of separation of powers and checks and
 21 balances[,] the confrontation "should be avoided whenever possible" (citations omitted); *Karnoski*
 22 *v. Trump*, 926 F.3d 1180, 1204 (9th Cir. 2019) ("[C]ourts are urged to 'explore other avenues, short
 23 of forcing the Executive to invoke privilege, when they are asked to enforce against the Executive
 24

25 ² The Governor's Office withheld additional documents as attorney-client privileged and
 26 work-product protected. These documents are not at issue in the Motion. (*See* Doc. 202-3, Ex. 7.)
 27 In a footnote, Plaintiff attempts to "reserve[] all rights to later challenge" these privilege assertions.
 28 Plaintiff's resort to serial motions is wasteful and inefficient. If Plaintiff directs another motion to
 compel against the Governor's Office, the Governor's Office will seek reimbursement of its legal
 fees and costs given the undue burden being placed on a non-party.



1 Branch unnecessarily broad subpoenas” (*quoting Cheney*, 926 U.S. at 390)). The same logic applies to
 2 the Governor’s Office’s assertion of executive communications privilege, which involves principles
 3 of comity between the State’s chief executive and the federal court.

4 Here, the Court need not reach the complex privilege issues. The documents Plaintiff seeks
 5 are not relevant and Plaintiff’s Motion may be denied on that basis alone. If, however, the Court
 6 finds relevance, the documents are protected from disclosure under the executive communications
 7 privilege or, at minimum, the related deliberative process privilege.

8 **A. Plaintiff Seeks Documents Not Relevant To The Decision To Maintain The**
 9 **Exclusion Under The Plan.**

10 The scope of discovery is well-settled and non-controversial: “Parties may obtain discovery
 11 regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional
 12 to the needs of the case....” Fed. R. Civ. P. 26(b). Limitations on the permissible scope of
 13 discovery under Rule 26(b), including relevancy and privilege, extend to discovery sought from a
 14 non-party under Rule 45. *See Evanston Ins. Co. v. Murphy*, 2020 WL 6869292, *2 (D. Ariz. Nov. 23,
 15 2020). Although relevancy is determined broadly, discovery is not boundless. *In re Williams-Sonoma,*
 16 *Inc.*, 947 F.3d 535, 539 (9th Cir. 2020) (recognizing that the 2015 amendments to Rule 26 were
 17 “intended to restrict, not broaden, the scope of discovery” and that “discovery, like all matters of
 18 procedure, has ultimate and necessary boundaries” (citations omitted)). Discovery is not permitted
 19 based on speculation or a wishful hope that inquiry might reveal something to support otherwise
 20 conclusory allegations of wrongdoing. *See, e.g., Mil. Audit Project v. Casey*, 656 F.2d 724, 751-52 (D.C.
 21 Cir. 1981) (holding that trial court did not abuse discretion in denying discovery that “would only
 22 have afforded an opportunity to pursue a ‘bare hope of falling upon something that might impugn
 23 the [government’s] affidavits” (citation omitted)); *Nei v. Travelers Home & Marine Ins. Co.*, 326 F.R.D.
 24 652, 660 (D. Mont. 2018) (stating that the proportionality requirement “must mean that
 25 burdensome, tangential discovery should not be permitted based on the mere possibility that
 26 something may turn up to support what is otherwise only speculation” (citation omitted)); *cf. Rivera*
 27 *v. NIBCO, Inc.*, 364 F.3d 1057, 1072 (9th Cir. 2004) (“District courts need not condone the use of
 28 discovery to engage in ‘fishing expedition[s].’” (citation omitted)); *LNS Enters. LLC v. Cont’l Motors*





1 *Inc.*, 464 F. Supp. 3d 1065, 1077-78 (D. Ariz. 2020) (denying request for jurisdictional discovery
 2 “based on little more than a hunch that it might yield jurisdictionally relevant facts.” (citation
 3 omitted)). This is precisely what Plaintiff is doing here.

4 Courts in the Ninth Circuit and Arizona repeatedly recognize the additional protections and
 5 heightened relevancy requirements for discovery sought from non-parties. *See Dart Indus. Co. v.*
 6 *Westwood Chem. Co.*, 649 F.2d 646, 649 (9th Cir. 1980) (“While discovery is a valuable right and
 7 should not be unnecessarily restricted ... the ‘necessary’ restriction may be broader when a
 8 nonparty is the target of discovery.” (internal citation omitted)); *AmSurg Holdings*, 2020 WL
 9 1703617, at *2 (“The mere “relevance” standard, however, does not apply to non-parties To
 10 obtain discovery from a nonparty, a party must demonstrate that its need for discovery outweighs
 11 the nonparty’s interest in nondisclosure.” (*quoting R. Prasad Indus.*, 2014 WL 2804276, at *2)); *BBK*
 12 *Tobacco & Foods LLP v. Skunk Inc.*, 2020 WL 2395104, at *2 (D. Ariz. May 12, 2020) (“Rule 26
 13 usually allows parties to obtain discovery on any nonprivileged matter that is relevant to a claim or
 14 defense.... In the third-party subpoena context, however, courts have often demanded a stronger-
 15 than-usual showing of relevance[.]” (citation omitted)).

16 Plaintiff has not met his burden of demonstrating the relevance of the documents at issue in
 17 the Motion. Plaintiff simply speculates in proclaiming the demanded documents “are relevant to
 18 establish whether Christina Corieri and other members of the Governor’s Office acted with
 19 discriminatory intent when they made the decision to maintain the Exclusion challenged in this
 20 case.” (Doc. 202, p. 7.) As the Governor’s Office has repeatedly explained to Plaintiff’s counsel (in
 21 attempting to avoid the burden and expense of this very Motion), the documents do *not* address
 22 the decision regarding the Exclusion at issue in this lawsuit. (*See, e.g.*, Doc. 202-3, Ex. 6, p. 10 & Ex.
 23 7, n.1; Corieri Declaration, ¶¶ 6, 11.) Moreover, seven of the 17 documents at issue do *not* include
 24 Ms. Corieri or Mr. Liburdi, the only two advisors from the Governor’s Office identified as having
 25 any involvement with the Exclusion.³ (*See* Doc. 202, pp. 2-3, n.1 (docs. 4, 5, 6, 8, 13, 14 and 15);

26
 27 ³ At page 2 of the Motion, Plaintiff identifies John Fry and Nicole Ong as “from the
 28 Governor’s Office” and “persons with knowledge of the genesis, formulation, adoption,
 maintenance, or continuation of (a) the Challenged Exclusion and (b) any earlier versions”
 (Doc. 202, p. 2.) This characterization misleadingly suggests that the Governor’s Office had a larger



1 Corieri Declaration, ¶ 11(4-6), (8), (13-15).) As such, they necessarily cannot establish whether Ms.
 2 Corieri or any other members of the Governor’s Office acted with discriminatory intent in
 3 connection with the Exclusion.

4 Plaintiff next states, as purported fact: “All of the documents, identified as responsive to the
 5 Subpoena, discuss gender reassignment surgery.” (Doc. 202, p. 7.) Having not seen the
 6 documents, Plaintiff’s assertion is by definition unfounded. It rests on a false premise created by
 7 his overbroad Subpoena. If Plaintiff narrowly tailored the Subpoena to request documents actually
 8 discussing gender reassignment surgery, his assertion in the Motion might be correct. Plaintiff,
 9 however, wrote the Subpoena broadly, demanding all documents created or transmitted over a ten-
 10 year period “regarding surgery to treat gender dysphoria[.]” (Doc 202-3, Ex. 2, p. 4.) The
 11 Subpoena demands any document that contains any reference to surgery to treat gender dysphoria,
 12 regardless of whether the document actually *discusses* such surgery and regardless of whether the
 13 document relates in any way to the decision to maintain the Exclusion at issue in this litigation. A
 14 document’s responsiveness to the overbroad Subpoena does not equate to relevance to this action.

15 To be clear, Plaintiff has already received copies of responsive documents that actually
 16 pertain to the Exclusion or Plan.⁴ He, thus, has already received the relevant materials. Plaintiff is
 17 not entitled to receive additional documents not pertaining to the Exclusion, based on a wishful
 18 hope that they might contain evidence of a “discriminatory attitude” or reflect some “personal” or
 19 “ideological opposition” to gender reassignment surgery generally. *Heyne v. Caruso* does not change
 20 the result. *See* 69 F.3d 1475 (9th Cir. 1995). *Heyne* involved quid-pro-quo sexual harassment and
 21 wrongful termination claims against the Plaintiff’s employer. *Id.* at 1478-49. While the *Heyne* court
 22 cautioned against using evidence of other sexual harassment to support the quid-pro-quo claim, the
 23 court found such evidence “tending to demonstrate hostility towards a certain group is both
 24 relevant and admissible where the employer’s general hostility towards that group is the true reason

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 26 role in the discussions and decision concerning the Exclusion. Mr. Fry and Ms. Ong, however,
 27 were not from the Governor’s Office. (*See* Doc. 202-3, p. 4 (identifying Mr. Fry as from the
 28 Attorney General’s Office and Ms. Ong as former General Counsel of ADOA).)

⁴ The only exception is a single attorney-client privileged communication (not at issue in the
 Motion) between Ms. Corieri and Mr. Liburdi on November 28, 2016. (*See* Doc. 202-3, Ex. 7, p. 3.)



1 behind firing an employee who is a member of that group.” *Id.* at 1479. Critically, unlike *Heyne*, the
 2 Governor’s Office is not Plaintiff’s employer and is not even a party to this litigation. Additionally,
 3 as the 17 documents at issue in the Motion to Compel do not address the Exclusion and do not
 4 involve Plaintiff’s employer (the Arizona Board of Regents), the documents necessarily cannot
 5 demonstrate his “employer’s general hostility” toward a protected group.⁵

6 Plaintiff has no meaningful evidence to support his accusations against the Governor’s
 7 Office.⁶ His speculation is plainly insufficient to establish that his need for the documents
 8 outweighs the Governor’s Office’s interests in nondisclosure. The Motion must be denied because
 9 the subject documents are not relevant. At minimum, if the Court believes helpful to confirm the
 10 irrelevancy of the 17 documents at issue in the Motion, the Court should exercise her discretion to
 11 conduct an *in camera* review before ruling. *See, e.g., Wilson v. Larson*, 2019 WL 9078642, *10–11 (D.
 12 Ariz. Nov. 14, 2019) (confirming, after *in camera* review, that the documents involved an unrelated
 13 investigation and did not contain material evidence relating to petitioner’s claims), *report and*
 14 *recommendation adopted*, 2020 WL 3129691 (D. Ariz. June 12, 2020).

15 ⁵ Plaintiff falsely points to Magistrate Bowman’s November 30, 2020 Report and
 16 Recommendation to suggest any evidence that the “Plan authors do not like gender transition” is
 17 relevant. (Doc. 202, p. 8.) The Report is not so broad. Rather, the Report stated: “[Plaintiff] is
 18 apparently arguing that the Plan exclusion exists because the Plan authors do not like gender
 19 transition **and have created this exclusion specifically to burden transgender individuals**. If
 20 that were true then the exclusion would indeed be intentional discrimination.” (Doc. 134, p. 6
 21 (emphasis added).) The Report does not justify Plaintiff’s sweeping demands. Plaintiff has **no**
 22 **evidence** “the Plan exclusion exists because the Plan authors do not like gender transition.” And,
 23 as Plaintiff demands documents that do not address the Exclusion, they are not evidence the
 24 Exclusion was created “specifically to burden transgender individuals.”

25 ⁶ Plaintiff relies on a single unremarkable “tweet” from **2013** to brand Ms. Corieri as a person
 26 “oppos[ed] to government insurance coverage for transition-related surgery.” From this false
 27 foundation, Plaintiff states he has “good reason to suspect that the documents at issue in this
 28 motion may bear on this exact issue.” (Doc. 202, p. 8.) Yet the tweet at issue, written more than
 three years before Ms. Corieri began work at the Governor’s Office, does not express any opinion,
 personal opposition, or ideological stance on gender affirming surgery. (*See* Doc. 202-3, Ex. 11.)
 And, even if it did (it does not), a years-old stray remark is not evidence of discriminatory intent.
Bauer v. Metz Baking Co., 59 F. Supp. 2d 896, 909 (N.D. Iowa 1999) (noting that stray remarks
 remote in time or unrelated to the decisional process are insufficient to demonstrate discrimination).
 One innocuous 2013 tweet is too thin a reed upon which to allow Plaintiff’s desired fishing
 expedition. And, Plaintiff’s gross mischaracterization undermines the credibility of its entire brief.

1 **B. The Documents At Issue Are Protected By The Executive Communications**
 2 **Privilege.**

3 If the Court considers issues beyond relevance, Plaintiff's Motion further improperly
 4 demands the production of documents protected by executive privilege, including the executive
 5 communications privilege or, at minimum, the deliberative process privilege. *See Karnoski*, 926 F.3d
 6 at 1204 (recognizing the executive communications privilege and deliberative process privilege are
 7 both forms of executive privilege). As Plaintiff recognizes, executive communications privilege is
 8 rooted in the separation of powers doctrine. The privilege "recognizes that a chief executive has a
 9 qualified power to keep confidential certain internal governmental communications so as to protect
 10 the deliberative and mental processes of decision-makers." *Doe v. Alaska Superior Ct., Third Jud.*
 11 *Dist.*, 721 P.2d 617, 622–23 (Ala. 1986); *see also United States v. Nixon*, 418 U.S. 683, 708 (1974). The
 12 executive communications privilege is founded upon "the necessity of candor" from advisors in
 13 order to provide the chief executive "and those who assist him [or her] ... [with] freedom to explore
 14 alternatives in the process of shaping policies and making decisions and to do so in a way many
 15 would be unwilling to express except privately." *Am. C.L. Union v. Dep't of Just.*, 2011 WL
 16 10657342, *10 (D.D.C. Feb. 14, 2011) (*quoting Nixon*, 418 U.S. at 708); *accord Nixon*, 418 U.S. at 708
 17 (addressing the expectation of confidentiality of communications with the President, which has "all
 18 the values to which we accord deference for the privacy of all citizens and, added to those values, is
 19 the necessity for protection of the public interest in candid, objective, and even blunt or harsh
 20 opinions in Presidential decisionmaking"); *In re Sealed Case*, 121 F.3d 729, 741, 747-53 (D.D. Cir.
 21 1997) (addressing purpose of executive privilege to facilitate governmental decision-making and
 22 ensure executives are informed by candid advice); *Cap. Info. Grp. v. Off. of Governor*, 923 P.2d 29, 33–
 23 34 (Alaska 1996) ("[A] chief executive has a qualified power to" maintain confidentiality of "certain
 24 internal governmental communications so as to protect deliberative and mental processes of
 25 decision-makers." (citation omitted)). At bottom, the privilege facilitates the chief executive's
 26 ability to obtain candid advice, to explore policy alternatives and to make considered decisions.

27 Plaintiff asserts that that there is no basis in federal common law to apply the executive
 28 communications privilege to a state governor and that the Governor's Office is "invit[ing] this





1 Court to create new federal common law.” (Doc. 202, p. 8.) To the contrary, the Governor’s
 2 Office is not arguing for the pronouncement of new legal doctrine. Rather, applying the executive
 3 communications privilege here is a natural extension of existing federal common law regarding
 4 federal privileges. Federal and state courts across the country recognize the executive
 5 communications privilege as a form of executive privilege. *E.g.*, *Karnoski*, 926 F.3d at 1204-05
 6 (addressing the unique features that distinguish the executive communications privilege from the
 7 deliberative process privilege and recognizing that both privileges are “forms of executive
 8 privilege”); *In re Sealed Case*, 121 F.3d at 744 (recognizing “presidential communications privilege”
 9 over “documents or other materials that reflect presidential decisionmaking and deliberations and
 10 that the President believes should remain confidential”); *Jud. Watch, Inc. v. Dep’t of Just.*, 365 F.3d
 11 1108, 1114 (D.C. Cir. 2004) (recognizing the privilege extends to White House advisors formulating
 12 policy for the executive); *Doe*, 721 P.2d at 623 (“the public policy rationale upon which the Supreme
 13 Court relied in *United States v. Nixon* is equally applicable to our state government”); *Freedom Found.*
 14 *v. Gregoire*, 310 P.3d 1252, 1261-62 (Wash. 2013) (reasoning that the executive privilege, rooted in
 15 separation of powers concerns, ensures a governor’s access to frank advice in order to execute his
 16 constitutional duties); *Republican Party of N. M. v. N. M. Tax’n & Revenue Dep’t*, 283 P.3d 853, 868
 17 (N.M. 2012) (extending executive communications privilege to policy communications about
 18 activities or matters before the Governor’s Office).⁷

19 ⁷ While federal common law applies to privilege claims in connection with the federal causes
 20 of action Plaintiff has asserted, *see, e.g.*, Fed. R. Evid. 501; *Clarke v. Am. Com. Nat. Bank*, 974 F.2d
 21 127, 129 (9th Cir. 1992), state court decisions bear on the analysis. *See, e.g.*, *Tennenbaum v. Deloitte &*
 22 *Touche*, 77 F.3d 337, 340 (9th Cir. 1996) (noting that the court “may also look to state privilege law
 23 ... if it is enlightening”); *Lewis v. United States*, 517 F.2d 236, 237 (9th Cir. 1975) (“In determining the
 24 federal law of privilege in a federal question case, absent a controlling statute, a federal court may
 25 consider state privilege law.”); *United States v. McKesson Corp.*, 2021 WL 2037965, at *15, 19 (N.D.
 26 Cal. May 21, 2021) (finding arguments that the court should ignore California privilege law
 27 altogether to be unavailing); *see also Trammel v. United States*, 445 U.S. 40, 47-53 (1980) (explaining
 28 that, in enacting Rule 501, Congress manifested an affirmative intent to afford courts the flexibility
 to develop rules of privilege on a case-by-case basis and to leave the door open to change, not to
 freeze the law of privilege). *In re TFT-LCD (Flat Panel) Antitrust Litig.*, upon which Plaintiff relies to
 suggest the Court may not look at state privilege law, is inapposite. *See* 835 F.3d 1155, 1158-59 (9th
 Cir. 2016) (rejecting court’s reliance on the California Evidence Code alone, to the exclusion of
 federal privilege law).

1 Federal district courts have similarly recognized that the privilege extends to governors as
 2 the chief executives of their states. *See, e.g., JM through Foley v. N.M. Dep't of Health*, 2009 WL
 3 10698414, at *3, 6 (D.N.M. Aug. 20, 2009) (applying executive privilege to the New Mexico
 4 Governor's Office to shield executive branch communications); *Merritt v. State*, CV17-04540-PHX-
 5 DGC, ¶ 2(b) (D. Ariz. March 19, 2018) (allowing the Governor's Office to assert executive
 6 communications privilege and permitting privileged information to be withheld subject to
 7 preparation of a privilege log) (attached to the Motion at Doc. 202-3, Ex. 13-F)⁸; *In re Fin. Oversight*
 8 *& Mgmt. Bd. for P.R.*, 385 F. Supp. 3d 130, 134-35 (D.P.R. 2019) (recognizing existence of executive
 9 privilege protecting communications between governor and his advisors; permitting Puerto Rico
 10 Fiscal Agency and Financial Advisory Authority to claim the executive privilege "as an advisor to
 11 the Governor"), *objections overruled*, 390 F. Supp. 3d 311 (D.P.R. 2019); *Hayes v. Reed*, 1997 WL
 12 125742, *9 n.8 (E.D. Pa. Mar. 13, 1997) (recognizing executive privilege for state governors); *Haber*
 13 *v. Evans*, 2004 WL 963995, *4 (E.D. Pa. May 4, 2004) (holding that the executive privilege applies to
 14 state inspector general; describing the privilege as protecting and insulating "the sensitive decisional
 15 and consultative responsibilities of the Governor"); *cf. Marisol ex rel. Forbes v. Giuliani*, 1998 WL
 16 158948, *1 (S.D.N.Y. Apr. 1, 1998) (granting in part order to quash discovery concerning Governor
 17 of the State of New York, finding discovery proper "except in the limited instances where they
 18 involve executive privilege").

19 As recognized by these decisions, the purpose of (and rationale for) the executive
 20 communications privilege applies with equal force to communications with the Governor and those
 21 assisting the Governor in making decisions and shaping policy. As one court aptly explained:

22 Plaintiffs also overlook the fact that the executive privilege serves an important public
 23 function. ***The Governor, as chief executive, must be accorded a qualified***
 24 ***power to protect the confidentiality of communications pertaining to the***
 25 ***function of the executive branch. This power is analogous to the qualified***

26 ⁸ Plaintiff disparages *Merritt* as a "one-off order" primarily concerned with the disclosure of
 27 "personal identifying information." To the contrary, the Order in *Merritt* allowed the Governor's
 28 Office, a non-party to the litigation, to withhold documents under the executive communications
 privilege, subject to the preparation of a privilege log. That is wholly consistent with the
 Governor's Office assertion of executive privilege in response to the Subpoena.

1 *constitutionally-based privilege of the President, which is “fundamental to the*
 2 *operation of government and inextricably rooted in the separation of*
 3 *powers...”* *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039
 4 (1974). Confidentiality is vital not only because it serves to protect government
 5 sources of information but also because it enhances the effectiveness of investigative
 techniques and procedures.... More importantly, this executive privilege protects and
 insulates the sensitive decisional and consultative responsibilities of the Governor
 which can be discharged most effectively with privacy and security.

6 *Hayes*, 1997 WL 125742, at n.8 (emphasis added). Moreover, similar to the United States
 7 Constitution, the Arizona Constitution firmly embraces, indeed firmly compels, separation of
 8 powers. *See Mecham v. Gordon*, 751 P.2d 957, 960 (Ariz. 1988) (“Nowhere in the United States is
 9 [separation of powers] more explicitly and firmly expressed than in Arizona.”). As Ms. Corieri’s
 10 Declaration establishes, the communications at issue are precisely the type that are made to “foster
 11 informed and sound gubernatorial deliberations, policymaking, or decision-making[.]” *see Gregoire*,
 12 310 P.3d at 1256, and are communications expressly within the Governor’s obligations under the
 13 Arizona Constitution, *see* Ariz. Const. art. 5, § 4. (*See* Corieri Declaration, ¶¶ 3-5, 7-9.) *Cf. United*
 14 *States v. Irvin*, 127 F.R.D. 169, 172 (C.D. Ca. 1989) (finding “no principled distinction” between state
 15 and federal government officials in the context of deliberative process privilege: “If there exists a
 16 need to protect candid, private communications among federal executive officials and their staff,
 17 the need to protect candid, private communications among county officials and their staff is no less
 18 compelling”).

19 Plaintiff’s reliance on two decisions from the Northern District of Illinois to argue “[t]here is
 20 simply ‘no federal authority for extending’ the executive communications privilege ‘to a state
 21 governor’” is unavailing. (*See* Doc. 202, p. 9.) As set forth above, there *is* federal authority for
 22 applying the executive communications privilege to the Governor’s Office. Moreover, considering
 23 the purpose of the privilege and the multiple cases recognizing the privilege applies to state
 24 governors, the decisions from Illinois should be rejected.⁹ Indeed, Arizona district courts have
 25 declined to follow decisions from the Northern District of Illinois concerning executive privilege.
 26 *See Wilson v. Maricopa Cnty.*, 2006 WL 842247, at *1 (D. Ariz. Mar. 29, 2006) (recognizing that the
 27

28 ⁹ *Child. First Found., Inc. v. Martinez*, 2007 WL 4344915, at *6 n.11 (N.D.N.Y. Dec. 10, 2007)
 and 98 C.J.S. Witnesses § 423 n.3 (Mar. 2021), which rely on *Hobley*, are similarly inapposite.



1 deliberative process privilege extends to local governments; distinguishing 2001 decision from the
2 Northern District of Illinois that declined to extend the privilege).

3 Plaintiff's reliance on Arizona's "strong policy favoring open disclosure and access" to
4 public records is a *non sequitur* that does not aid his stance. (Doc. 202, p. 10 (*citing Ariz. Dream Act*
5 *Coal. v. Brewer*, 2014 WL 171923, at *3 (D. Ariz. Jan. 15, 2014)). While the court in *Brewer* stated that
6 "persons giving advice to Arizona government officials should ordinarily assume that their advice
7 will not be hidden from the public gaze," 2014 WL 171923, at *3, Arizona's open public records
8 policy does have limits and, of course, does not require disclosure of privileged documents.¹⁰ *See*,
9 *e.g.*, *Carlson v. Pima Cnty.*, 687 P.2d 1242, 1245 (Ariz. 1984) (citing, *inter alia*, Am. Jur. 2d *Records and*
10 *Recording Laws*); *Mathews v. Pyle*, 75 Ariz. 76, 80 (1952) ("documents received by the Governor in his
11 official capacity" are "subject to inspection by an interested citizen unless they are confidential or of
12 such a nature that it would be against the best interests of the state to permit a disclosure of their
13 contents"); *accord* 66 Am. Jur. 2d *Records and Recording Laws* § 31 (1973) ("The right of inspection of
14 public records is not absolute or unlimited, and does not extend to public records or documents
15 which public policy demands remain secret, such as ... documents within the scope of a privilege,
16 such as the attorney-client or attorney-work-product privilege, the judicial deliberations privilege, a
17 medical deliberative materials privilege, or the executive privilege."). Public records laws in and of
18 themselves do not overcome executive privilege. *See Gregoire*, 310 P.3d at 1257-58 (rejecting
19 argument that public records laws enacted to "ensure governmental transparency" can overcome
20 executive communications privilege; reasoning that executive communications privilege is a
21 constitutional privilege that supersedes such laws); *Wilson v. Brown*, 962 A.2d 1122, 1136 (N.J. App.
22 Div. 2009) ("A general assertion of a need for full disclosure of the basis for governmental decision
23 making, such as presented here by Wilson, does not establish a specific or focused need sufficient to
24 overcome the executive privilege.").

25
26
27 ¹⁰ Judge Campbell's discussion in *Brewer* does not erase his *later* Order in *Merritt* recognizing
28 the Governor's Office's ability to invoke the executive privilege. Indeed, like *Merritt* and unlike
Brewer, the Governor's Office is not a party to the underlying litigation and is asserting not only the
deliberative process privilege, but also the more robust executive communications privilege.



COHEN DOWD QUIGLEY



1 As set forth in the attached Declaration, the Governor’s Office has invoked the executive
 2 privilege with respect to the 17 documents at issue in the Motion, asserting both the executive
 3 communications privilege and deliberative process privilege. (*See* Corieri Decl., ¶ 5.) These
 4 documents reflect confidential communications between and among senior advisors in the
 5 Governor’s Office, made in the course and performance of their duties in advising the Governor
 6 and to foster sound, candid and informed deliberations, explanations of alternatives, decisions, and
 7 policies. (*Id.*, ¶¶ 7-9.) These documents fall within the heart of the executive communications
 8 privilege. *In re Sealed Case*, 121 F.3d at 751-52 (“[C]ommunications made by presidential advisers in
 9 the course of preparing advice for the President come under the presidential communications
 10 privilege, even when these communications are not made directly to the President.”); *Gregoire*, 310
 11 P.3d at 1262 (privilege encompasses communications authored, solicited or received by the
 12 governor and senior policy advisors “for the purpose of fostering informed and sound
 13 gubernatorial deliberations, policymaking, and decisionmaking”). Once invoked by the Governor’s
 14 Office, the Court “should give due deference” to the privilege. *Karnoski*, 926 F.3d at 1205.

15 Plaintiff cannot overcome the privilege unless he makes a “showing of need demonstrating
 16 ‘that the evidence sought [is] directly relevant to issues that are expected to be central to the trial’
 17 and ‘is not available with due diligence elsewhere.’” *Id.* (citation omitted); *see also, e.g., In re Sealed*
 18 *Case*, 121 F.3d at 746 (“a party seeking to overcome the presidential privilege seemingly must always
 19 provide a focused demonstration of need, even when there are allegations of misconduct by high-
 20 level officials”). Recognizing this appropriately high burden, Plaintiff suggests that his “need” and
 21 the relevance of the documents he demands is met “so long as his ‘discovery requests are narrowly
 22 tailored to seek evidence that is directly relevant to the central issues in the litigation and is not
 23 available with due diligence elsewhere.’” (Doc. 202, pp. 11-12 (*citing Karnoski*, 926 F.3d at 1205).)
 24 Plaintiff then conspicuously avoids addressing this critical inquiry. Fatal to Plaintiff’s argument, his
 25 Subpoena is *not* “narrowly tailored” to seek evidence “***directly relevant to the central issues in***
 26 ***the litigation.***” Instead, the Subpoena demands ten years’ worth of documents that contain any
 27 reference to gender affirming surgery regardless of context or whether they pertain to the central
 28 issue in the litigation: the decision to maintain the Exclusion under the Plan. (Doc. 202-3, Ex. 2, p.



1 4.) Indeed, as the Governor’s Office has repeatedly informed Plaintiff and Plaintiff appears to
 2 acknowledge, the documents at issue in the Motion do *not* involve this decision. (*See* Corieri Decl.,
 3 ¶¶ 6, 11.) Plaintiff has already received the documents relating to the Exclusion (the only
 4 documents Plaintiff can in good faith claim to “need”).¹¹ Plaintiff has not met and cannot meet his
 5 burden of showing a “focused demonstration of need” for documents unrelated to the decision
 6 regarding the Exclusion at issue in this litigation. *See, e.g., Moore v. Valder*, 2001 WL 37120629, at
 7 *2–4 (D.D.C. July 31, 2001) (rejecting effort to overcome executive privilege, in context of
 8 deliberative process privilege, where the documents at issue are “collateral to Plaintiff’s suit”). In
 9 any event, the Governor’s Office’s interest in nondisclosure of these materials outweighs Plaintiff’s
 10 need for irrelevant documents. (*See* Corieri Decl., ¶¶ 6-9.)

11 Finally, even if Plaintiff were able somehow to provide a “focused demonstration of need”
 12 (a standard Plaintiff has not met) and overcome the privilege, he is not entitled to simply receive the
 13 documents. (*See* Doc. 202-4.) Rather, if the Court believes that Plaintiff has satisfied his burden
 14 and finds the privilege overcome, the Court should conduct an *in camera* review of the documents to
 15 first excise irrelevant material and ensure the executive privilege “is not unnecessarily breached.”
 16 *See Karnoski*, 926 F.3d at 1205-06 (*quoting In re Sealed Case*, 121 F.3d at 759); *accord Protect Democracy*
 17 *Project, Inc. v. U.S. Nat’l Sec. Agency*, 453 F. Supp. 3d 339, 349 (D.D.C. 2020), *hearing in banc denied sub*
 18 *nom. Protect Democracy Project, Inc. v. Nat’l Sec. Agency*, 2020 WL 4135125 (D.C. Cir. July 7, 2020).

19 **C. The Documents Are Also Protected By The Deliberative Process Privilege.**

20 A form of executive privilege, the deliberative process privilege protects from disclosure
 21 communications relating to the decision-making process of governmental agencies. *See NLRB v.*
 22 *Sears, Roebuck & Co.*, 421 U.S. 132, 148-53 (1975); *Karnoski*, 926 F.3d at 1203-04. Like the executive
 23 communications privilege, the deliberative process privilege “protect[s] agencies from being ‘forced
 24 to operate in a fishbowl.’” *U.S. Fish & Wildlife Serv. v. Sierra Club, Inc.*, 141 S. Ct. 777, 785 (2021)

25 _____
 26 ¹¹ Plaintiff cannot rely on the Court’s April 20, 2021 Order to meet his burden. The Order
 27 addressed only the deliberative process privilege and documents relating specifically to the
 28 Exclusion at issue. (*See* Doc. 187, pp. 4-5.) Plaintiff has already received those documents.
 Plaintiff’s “ability to litigate this case” is not “compromised” (*see* Doc. 202, p. 11) by the Governor’s
 Office’s protection of its privileges.



1 (citation omitted). The Supreme Court recently explained: “The privilege is rooted in “the obvious
 2 realization that officials will not communicate candidly among themselves if each remark is a
 3 potential item of discovery and front page news.” To encourage candor, which improves agency
 4 decisionmaking, the privilege blunts the chilling effect that accompanies the prospect of
 5 disclosure.” *Id.* (citations omitted). “The ‘ultimate purpose’ of the privilege is to ‘prevent injury to
 6 the quality of agency decisions.’” *Cause of Action Inst. v. U.S. Dep’t of Com.*, 2021 WL 148386, at *4
 7 (D.D.C. Jan. 14, 2021) (*quoting NLRB*, 421 U.S. at 150–51)). While “not as robust” as the executive
 8 communications privilege, *Karnoski*, 926 F.3d at 1206, the “deliberative process privilege[] protects
 9 ‘documents reflecting advisory opinions, recommendations and deliberations comprising part of a
 10 process by which governmental decisions and policies are formulated.’” *Id.* at 1203-04 (*quoting Dep’t*
 11 *of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8 (2001)); *accord U.S. Fish & Wildlife Serv.*,
 12 141 S. Ct. at 783 (recognizing the deliberative process privilege “protects from disclosure
 13 documents generated during an agency’s deliberations about a policy, as opposed to documents that
 14 embody or explain a policy that the agency adopts”; holding the privilege protects “drafts that
 15 proved to be the agencies’ last word” on an issue). Plaintiff concedes that the deliberative process
 16 privilege extends as a matter of established common law to the Governor’s Office. (*See, e.g., Doc.*
 17 *202-3, Ex. 5, p. 5.*)

18 To qualify for the deliberative process privilege, documents must be predecisional and
 19 deliberative. *Karnoski*, 926 F.3d at 1204. “Documents are ‘predecisional’ if they were generated
 20 before the agency’s final decision on [a] matter, and they are ‘deliberative’ if they were prepared to
 21 help the agency formulate its position.” *U.S. Fish & Wildlife Serv.*, 141 S. Ct. at 786. Moreover,
 22 documents may be predecisional and deliberative even when they relate to decisions or policies that
 23 are not ultimately effectuated. *Id.* (explaining documents are “not final solely because nothing else
 24 follows it,” as a proposal sometimes “dies on the vine,” languishes or is abandoned). The
 25 Governor’s Office may invoke the privilege through the declaration of a responsible officer. *See,*
 26 *e.g., Landry v. FDIC*, 204 F.3d 1125, 1135-36 (D.C. Cir. 2000) (*citing In re Sealed Case*, 856 F.2d 268,
 27 271 (D.C. Cir. 1988)); *Unknown Parties v. Johnson*, 2016 WL 8199308, at *4 (D. Ariz. July 21, 2016)

28 . . .



1 (the privilege may be invoked by the agency head or his/her delegate). Contrary to Plaintiff's
2 suggestion, the declaration need not precede the Governor's Office's response to Plaintiff's Motion.

3 As set forth in Senior Policy Advisor Corieri's Declaration, the documents at issue in the
4 Motion are predecisional and deliberative. (Corieri Decl., ¶ 11.) The documents fall within a few
5 general categories, with the largest number of documents pertaining to proposed legislation. (*See*
6 *id.*) These documents are predecisional and deliberative. They pertain to the Governor's Office's
7 monitoring and formulation of policy regarding proposed legislation (not addressing the Plan or the
8 Exclusion), which the Governor's Office would ultimately be responsible for signing and
9 implementing or vetoing if passed by the Legislature. (*Id.*, ¶¶ 3, 6, 7, 11.) Whether the proposed
10 legislation ultimately reached the Governor's desk does not change the documents' predecisional
11 nature. *U.S. Fish & Wildlife Serv.*, 141 S. Ct. at 786. Critically, the documents do not relate to the
12 decision at the heart of Plaintiff's claims – whether to modify or retain the Exclusion. (*See* Corieri
13 Decl., ¶¶ 6, 11.) Plaintiff's Motion conspicuously ignores this fact.

14 While the deliberative process privilege is a qualified privilege, it is not overcome unless
15 Plaintiff can demonstrate that his “need for the materials and the need for accurate fact-finding
16 override the government's interest in non-disclosure.” *FTC v. Warner Commc'ns, Inc.*, 742 F.2d 1156,
17 1161 (9th Cir. 1984). In evaluating whether the privilege is overcome, courts consider “1) the
18 relevance of the evidence; 2) the availability of other evidence; 3) the government's role in the
19 litigation; and 4) the extent to which disclosure would hinder frank and independent discussion[s]
20 regarding contemplated policies and decisions.” *Id.* Each of these factors weighs in favor of
21 upholding the privilege asserted here. *First*, the documents are not relevant to the decision at the
22 core of Plaintiff's claims. (*See* Section II(A), *supra*; *see also* Corieri Decl., ¶¶ 6, 11.) The documents
23 do **not** address the decision to maintain the Exclusion under the Plan. (*See* Corieri Decl., ¶¶ 6, 11.)
24 To the extent they reference gender affirming surgery, they do so in the context of other decisions
25 and policies not at issue in Plaintiff's case.¹² (*Id.*) *Second*, Plaintiff has in fact received other evidence
26

27 ¹² Plaintiff argues the documents “bear directly on the issue of intent” and “concerns an
28 indispensable element of Plaintiff's causes of action.” (Doc. 202, p. 12.) Plaintiff impermissibly
tries to import language from the Court's prior analysis of State documents **actually addressing**



1 – actual relevant evidence – that Plaintiff contends “bear directly on the issue of intent.” Indeed,
 2 following Plaintiff’s first Motion to Compel against the State Defendants, the Court ordered and the
 3 State Defendants produced the documents and communications relating to the Exclusion. (*See*
 4 *generally* Doc. 187.) If any documents are the “most reliable evidence” relating to the Exclusion, it is
 5 the documents actually addressing the Exclusion and **not** the documents sought by the present
 6 Motion. *Third*, although the State and several individual officers of the State are defendants in this
 7 action, the Governor’s Office is a non-party. Plaintiff’s accusations of misconduct by the State are
 8 insufficient to overcome the privilege, particularly as applied to the non-party documents at issue in
 9 the Motion. *See, e.g., ICM Registry, LLC v. U.S. Dep’t of Com.*, 538 F.Supp.2d 130, 133 (D.D.C. 2008)
 10 (“If every hint of marginal misconduct sufficed to erase the [deliberative process] privilege, the
 11 exception would swallow the rule.”); *Breakthrough Towing, LLC v. Hall*, 2017 WL 1164523, at *5–6
 12 (E.D. Mich. Mar. 29, 2017) (denying motion to compel, despite allegations of improper conduct by
 13 the government, reasoning that the information sought was of marginal relevance and could not
 14 overcome the city’s interest in preventing “future timidity” of its officers).

15 *Fourth*, disclosure of the scope demanded here is virtually limitless, *i.e.* exceeding the actual
 16 decision/Exclusion/Plan at issue and extending to executive communications and deliberative
 17 documents relating to **other decisions and policies** simply because those documents contain a
 18 reference to “gender affirming surgery.” Permitting such an expansive and over-reaching request to
 19 defeat the deliberative process privilege would hinder open and candid discussion, chill debate and
 20 impact the quality of decisions from the Governor’s Office.¹³ (*See, e.g., Corieri Declaration*, ¶¶ 3-4,
 21 9.) *See also, e.g., U.S. Fish & Wildlife Serv.*, 141 S. Ct. at 785. The exception would swallow the rule.
 22 In similar circumstances where the scope of documents demanded exceeds or is tangential to the
 23 decision or policy at issue, courts have not hesitated to uphold the privilege. *See, e.g., Convertino v.*
 24 *U.S. Dep’t of Just.*, 669 F. Supp. 2d 1, 4 (D.D.C. 2009) (government misconduct exception did not

25
 26 **the Exclusion** to the present analysis. As documents at issue in this Motion do not address the
 Exclusion, they do not “bear directly on the issue of intent” behind the Exclusion.

27 ¹³ The Subpoena and Motion demand documents if they reference gender affirming surgery.
 28 Responsive documents are not limited to “the construction of a healthcare plan and exceptions to
 coverage.” (*See* Doc. 187, p. 7; Doc. 202, pp. 12-13.)



1 apply to “various decisions defendant made” that were “collateral to [the] plaintiff’s cause of
 2 action”); *Moore*, 2001 WL 37120629 at *2–3 (upholding the deliberative process privilege where the
 3 documents pertaining to the actions and decisions directly challenged in Plaintiff’s suit were already
 4 produced and the motion to compel sought documents addressing other “governmental decision-
 5 making processes ... collateral to Plaintiff’s suit”).

6 Again, without reasoned analysis or recognition of the material distinction between the
 7 documents at issue in the present Motion and the documents subject to Plaintiff’s prior Motion to
 8 Compel documents from the State Defendants, Plaintiff seeks to superimpose the Magistrate’s April
 9 20, 2021 Order on the Governor’s Office. (*See* Doc. 202, pp. 11 (asserting “the same arguments
 10 from the Motion to Compel filed on March 18, 2021 (Doc. 168) apply to the Governor’s Office”),
 11 12-13 (arguing that “this Court’s prior analysis and holding is equally applicable here”).) Plaintiff’s
 12 overreach is mistaken. The Governor’s Office is not a party to this action and did not brief the
 13 deliberative process privilege challenges at issue in Plaintiff’s prior Motion to Compel. The prior
 14 Motion to Compel further sought documents actually addressing the Exclusion. The Court, in
 15 analyzing the parties’ arguments as to those documents, found the deliberative process privilege
 16 overcome. (*See* Doc. 187.) The Court’s Order did not address the documents at issue in this
 17 Motion. Application of the four *FTC* factors to the documents at issue in this Motion compels the
 18 opposite conclusion: each factor weighs in favor of the Governor’s Office and the Plaintiff has not
 19 satisfied his burden of demonstrating that his “need for the materials and the need for accurate fact-
 20 finding override the government’s interest in non-disclosure.” *FTC*, 742 F.2d at 1161. The Motion
 21 must be denied.

22 **III. CONCLUSION.**

23 Plaintiff demands the Governor produce privileged documents that do not concern the
 24 decision at issue in Plaintiff’s pending claims against the State of Arizona and the Arizona Board of
 25 Regents. Plaintiff’s desire for the documents is supported only by his speculation regarding their
 26 content. The Motion should be denied because the documents are not relevant. Alternatively, they
 27 are privileged. At minimum, the Court should review the subject documents *in camera* to confirm
 28 their irrelevance and ensure that the executive privilege is “not unnecessarily breached.”

1 DATED: June 18, 2021

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EXHIBIT A

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14 **UNITED STATES DISTRICT COURT**
15 **DISTRICT OF ARIZONA**

16 Russell B. Toomey,

17 Plaintiff,

18 vs.

19 State of Arizona; The Arizona Board of Regents,
20 D/B/A University of Arizona, a governmental
21 body of the State of Arizona; et al.,

22 Defendants.

Case No. 4:19-CV-00035-RM-LAB

**DECLARATION OF CHRISTINA
CORIERI**

23 I, Christina Corieri, submit this declaration under penalty of perjury pursuant to 28 U.S.C. §
24 1746 and declare as follows:

25 1. I currently serve as a Senior Policy Advisor for The Office of Governor Douglas A.
26 Ducey (the “Governor’s Office”). I have served in this role since September 2016. Immediately
prior to becoming a Senior Policy Advisor, I served as the Health and Human Services Policy
Advisor for the Governor’s Office from January 2015 to August 2016. All actions described below

1 were taken in my capacity as a policy advisor for the Governor's Office. I submit this declaration in
2 connection with the Governor's Office's Response in Opposition to Plaintiff Russell B. Toomey's
3 Motion for Entry of an Order Compelling the Production of Documents (the "Motion to Compel")
4 in the above-captioned case.

5 2. This declaration is based on my personal knowledge, information available to me in
6 the performance of my official duties, my knowledge of the issues being litigated in the above-
7 captioned case, and my personal review of each of the 17 documents at issue in the Motion to
8 Compel.

9 3. Pursuant to Arizona law, the Governor is charged with, among other responsibilities,
10 "transacting all executive business with the officers of the government," overseeing executive state
11 agencies, ensuring that the laws are "faithfully executed," and signing or vetoing legislation. In
12 execution of these Constitutional and statutory duties, the Governor's Office monitors and analyzes
13 bills introduced during the legislative session, and communicates with and collects information and
14 opinions from individual executive officers and state agencies regarding State policy and issues of
15 concern. Further, the Governor's Office works with these officers and agencies to develop and
16 evaluate policy alternatives, make informed decisions, and formulate and carry out those executive
17 decisions.

18 4. My responsibilities as a Health and Human Services Policy Advisor and Senior Policy
19 Advisor include, among other duties, assisting and reporting directly to the Governor in the
20 development of policies and acting as a liaison with the Arizona Legislature and executive state
21 agencies. In carrying out my responsibilities, I seek candid advice and input, explore policy
22 alternatives and assist the Governor's Office in making informed, considered decisions. The
23 Governor's Office vigilantly protects the confidentiality of its decision-making process and how
24 policies are shaped and formulated. This confidentiality is essential to obtaining candid input,
25 provides freedom to explore alternatives, and enhances decision-making.

26 5. While not a party to the above-captioned case, the Governor's Office has produced
27 non-privileged documents responsive to Plaintiff's subpoena request for documents containing any
28 reference to any surgery to treat gender dysphoria. The Governor's Office also reviewed and

1 withheld certain technically responsive documents on privilege grounds. In our view, the 17
2 documents at issue in the Motion to Compel (the “Documents”) are confidential and fall within the
3 executive communications privilege and the deliberative process privilege.

4 6. I have personally reviewed each of the Documents. They do not discuss or relate to
5 the decision regarding the Exclusion at issue in the Plaintiff’s Complaint. While I am unable to
6 specifically describe the content of each Document without waiving the privileges asserted, I can
7 testify that, in general, the Documents relate to the state Affordable Care Act benchmark plan,
8 healthcare available through the Arizona Health Care Cost Containment System (“AHCCCS”),
9 healthcare available through the Arizona Department of Corrections (“ADC”), or proposed
10 legislation relating to healthcare. The Documents do not relate to the Exclusion decision at issue in
11 this action.

12 7. The Documents reflect confidential communications between and with senior
13 advisors in the Governor’s Office, made in the course and performance of their duties in advising
14 the Governor. The Documents relate to policy, regulatory, legislative, and budgetary matters of
15 interest to the Governor’s Office, in furtherance of the Governor’s decision-making. The
16 Documents, and the communications of the type reflected in the Documents, foster sound, candid
17 and informed deliberations, explanations of alternatives, decision-making, and policy formulation.

18 8. The Documents are not, on their face, directed to the Governor. However, each of
19 the Documents concerns an area of gubernatorial decision-making or policy and assists policy
20 advisors in advising the Governor.

21 9. The public interest and the efficient and effective operation of the Governor’s Office
22 would be adversely affected by disclosure of the Documents. Disclosure would jeopardize the
23 quality of the Governor’s Office’s decision-making regarding State policy and proposed legislation.
24 If the confidentiality of the discussions occurring among senior personnel of the Governor’s Office
25 and the State’s executive agencies in formulating policy is not maintained, it would severely impair
26 our ability to have the frank discussion of legal and policy matters necessary to enhance and
27 improve the quality of decisions by the Governor’s Office in the exercise of the Governor’s
28 Constitutional and statutory duties. Such discussions may include, for example, information

1 concerning the benefits, risks and consequences of a proposed policy. The benefits, risks and
2 consequences, in turn, need to be balanced with the costs and legal implications of such policies.
3 The details of such discussions could at times shock the conscience by discussing such sensitive
4 topics as cuts in funding to essential services or prioritizing funding that is not sufficient to cover
5 every expenditure that every citizen desires. These discussions result in decisions that are in the best
6 interests of all Arizonans and are necessary to govern effectively.

7 10. The Governor's Office appropriately and consistently asserts the executive
8 communications privilege and the deliberative process privilege when necessary in other litigation or
9 in response to requests for information and relies on these privileges in carrying out the Governor's
10 Constitutional and statutory duties.

11 11. The Documents, which are enumerated in the Motion to Compel at footnote one, are
12 described in more detail as follows:

13
14 (1) June 17, 2015 email communication between the director of the Arizona
15 Department of Insurance and me attaching deliverables and due diligence materials
16 regarding healthcare coverage and exclusions in various options for the state's
17 selection of an Affordable Care Act benchmark plan. As set forth above, this
18 communication does not discuss or relate to the decision regarding the Exclusion at
19 issue in this action. The information contained in the email and attachments was
20 provided to me in the course and performance of my duties in advising the Governor
21 regarding healthcare policy for the state, specifically, which plan the state should use
22 for other plans to benchmark their plans against for purposes of the Affordable Care
23 Act. This email had nothing to do with decisions about the state's employee health
24 benefits plan. The information was predecisional, as it preceded the selection of an
25 Affordable Care Act benchmark plan. This communication and the attached
26 materials were also deliberative as they were made in the course of preparing to
27 advise the Governor and to assist in the Governor's Office's formulation of
28 healthcare policy.

1
2 (2) January 17, 2017 email communication and attachment between the Legislative
3 Liaison at ADC and me regarding ADC's healthcare coverage for inmates. The
4 communication does not address the Exclusion challenged by Plaintiff. The
5 information contained in these documents was provided to me in the course and
6 performance of my duties in assisting in the formulation of policy and preparing to
7 advise the Governor regarding proposed Legislation. This information was
8 predecisional as the Governor would ultimately be responsible for signing or vetoing
9 the legislation if passed by the Legislature. These documents were deliberative as
10 they were made to assist a senior policy advisor in the Governor's Office's
11 formulation of healthcare policy and decision-making concerning the proposed
12 legislation. They were further deliberative as they bore on policies the Governor's
13 Office was considering regarding the proposed legislation.

14
15 (3) January 18, 2017 email communication from the Chief Legislative Liaison of
16 AHCCCS to me regarding AHCCCS's coverage and proposed Legislation. The
17 communication does not address the Exclusion challenged by Plaintiff. The
18 information received was disclosed to me in the course and performance of my duties
19 in assisting in the consideration and formulation of policy and advising the Governor
20 regarding this proposed legislation. These documents were predecisional as the
21 Governor would ultimately be responsible for signing or vetoing the legislation if
22 passed by the Legislature. These documents were deliberative as they contained
23 information designed to assist in the Governor's Office's formulation of healthcare
24 policy and decision-making concerning the proposed legislation. They were further
25 deliberative as they bore on the policies the Governor's Office was considering
26 regarding the proposed legislation.

1 (4)-(6) January 22-23, 2017 email communications between the Director of Legislative
2 Affairs and the Deputy Chief of Staff of the Governor's Office relating to monitoring
3 various proposed legislation. The communications do not address the Exclusion
4 challenged by Plaintiff. These communications were between senior advisors in the
5 Governor's Office and were made in the course and performance of their duties in
6 assisting in the formulation of policy and advising the Governor regarding proposed
7 legislation that the Governor would ultimately be responsible for signing or vetoing if
8 passed by the Legislature. The communications were predecisional. They were also
9 deliberative as they were made to assist in the Governor's Office's formulation of
10 healthcare policy and decision-making concerning the proposed legislation. The
11 communications were further deliberative as they reflected preliminary assessments
12 of the significance of proposed legislation by senior advisors in the Governor's
13 Office and were made in the course of advising (or preparing to advise) the
14 Governor.

15
16 (7)-(9) January 23, 2017 internal email communications within the Governor's Office
17 between senior advisors, including me, the Deputy Chief of Staff and legislative
18 liaisons relating to proposed legislation. These communications do not address the
19 Exclusion challenged by Plaintiff. These communications were between senior
20 personnel in the Governor's Office and were made in the course and performance of
21 their duties in assisting in the formulation of policy and preparing to advise the
22 Governor regarding proposed legislation which the Governor
23 would ultimately be responsible for signing or vetoing if passed by the Legislature.
24 Accordingly these communications were predecisional. They were also deliberative
25 as they were made to assist in the Governor's Office's formulation of healthcare
26 policy and decision-making concerning the proposed legislation. These
27 communications involved internal deliberations relating to the proposed legislation,
28 reflected ongoing assessments by senior personnel in the Governor's Office of the

1 significance of the bills, and were made in the course of preparing to advise the
2 Governor.

3
4 (10)-(11) January 24, 2017 internal email communications within the Governor's
5 Office between the Special Assistant to the Deputy Chief of Staff of the Governor's
6 Office and me relating to proposed legislation. These communications do not address
7 the Exclusion challenged by Plaintiff. These communications were predecisional as
8 the Governor would ultimately be responsible for signing or vetoing the bills if
9 passed by the Legislature. These communications were made in the course of
10 preparing to advise the Governor regarding proposed legislation and to assist in the
11 Governor's Office's formulation of healthcare policy. They are further deliberative as
12 they contain the information that influenced preliminary assessments by senior
13 personnel at the Governor's Office of the significance of the bills.

14
15 (12)-(15) January 25, 2017 email communications between the Legislative Liaison of
16 the Arizona Department of Homeland Security and senior advisors, the Deputy Chief
17 of Staff and legislative liaisons of the Governor's Office regarding proposed
18 legislation. These communications do not address the Exclusion challenged by
19 Plaintiff. These communications were predecisional as the Governor
20 would ultimately be responsible for signing or vetoing the proposed legislation if
21 passed by the Legislature. These communications were made in the course of
22 preparing to advise the Governor regarding the proposed legislation. They were
23 deliberative as they were made to assist in the Governor's Office's formulation of
24 policy and decision-making concerning the proposed legislation and contain the
25 preliminary assessments by the Legislative Liaison for the Governor's Office's
26 consideration of the significance of the bills to the Governor's policy.

1 (16) August 6, 2020 email communications between the Director of AHCCCS and
2 me regarding an assessment of other states' Medicaid coverage policies. The
3 communication does not address the Exclusion challenged by Plaintiff. The
4 communication was made in the course of my duties in preparing to advise the
5 Governor and assisting in the formulation of decisions regarding policy surrounding
6 litigation separate from this case. These documents were predecisional, as they
7 preceded the policy decisions necessary in that litigation. These documents were
8 deliberative as they offer information and commentary regarding the underlying
9 subject matter, which was gathered to assist the Governor's Office in the formulation
10 of healthcare policy.

11
12 (17) August 6, 2020 email communications between the Director of AHCCCS and
13 me regarding aspects of AHCCCS's healthcare coverage. The communication does
14 not address the Exclusion challenged by Plaintiff. The information contained in the
15 communication was provided to me in the course and performance of my duties in
16 assisting policy formation and preparing to advise the Governor on decisions needed
17 regarding policy surrounding litigation separate from this case. This documents was
18 predecisional, as the communications preceded the decisions necessary in that
19 litigation. These documents were deliberative as they contained information and
20 policy the Governor's Office was considering and would employ to advise the
21 Governor and assist in the Governor's Office's formulation of policy.

22
23 I declare under the penalty of perjury that the foregoing is true and correct.

24 Executed this 17th day of June, 2021.

25 

26 CHRISTINA CORIERI