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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

**THE OFFICE OF GOVERNOR
DOUGLAS A. DUCEY'S
OBJECTIONS TO ORDER
(DOC. 238)**

(Oral Argument Requested)

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Pursuant to Federal Rule of Civil Procedure (“Rule”) 72(a) and 28 U.S.C.A. § 636(b)(1), The Office of Governor Douglas A. Ducey (the “Governor’s Office”) objects to the August 27, 2021 Order entered by United States Magistrate Judge Leslie A. Bowman (Doc. 238) (the “Order”) granting Plaintiff Russell B. Toomey’s June 4, 2021 Motion for Entry of An Order Compelling the Production of Documents (Doc. 202) (“Motion”). Respectfully, the Order is clearly erroneous and contrary to the law because:

- (1) The Order misconstrues the scope of the Subpoena at issue, inaccurately stating that the Subpoena was narrowly tailored to seek relevant documents. The Magistrate’s erroneous construction of the Subpoena serves as the foundation for the Magistrate’s faulty relevancy conclusion and privilege analysis.
- (2) The Order improperly rejects the Governor’s Office’s executive communications privilege, erroneously concluding the privilege “is not part of the federal common law.”
- (3) While recognizing the Governor’s Office holds a deliberative process privilege over the documents at issue, the Order misapplies the *Warner* factors to erroneously conclude the Plaintiff has overcome the privilege.
- (4) The Order requires blanket production of privileged documents without the Magistrate first conducting an *in camera* review to confirm the documents’ relevancy, excise irrelevant material, and ensure the Governor’s Office’s privilege is not unnecessarily breached. The Magistrate erroneously treated communications within the State’s Executive Branch as just another source of information.

Each of these errors warrants reversal of the Order. *See, e.g.*, Fed. R. Civ. P. 72(a); *Raghav v. Wolf*, 2021 WL 763850, at *2 (D. Ariz. Feb. 26, 2021) (factual findings are “clearly erroneous” if the District Court is “left with the definite and firm conviction that a mistake has been committed”; a decision is “contrary to law” if the magistrate “applies an incorrect legal standard or fails to consider an element of the applicable standard” (citations omitted)); *accord Morgal v. Maricopa Cnty. Bd. Of Sup’rs*, 284 F.R.D. 452, 458–59 (D. Ariz. 2012).

I. THE ORDER MISCONSTRUES THE SCOPE OF PLAINTIFF’S SUBPOENA.

The Magistrate’s misreading of the scope of the Subpoena infected her analysis and led to a

1 clearly erroneous outcome. Plaintiff's Motion sought to compel 17 documents technically
 2 responsive to a February 2021 Subpoena, which broadly demanded all documents over a ten-year
 3 period that contain any reference to surgery to treat gender dysphoria:

4 **All documents** created or transmitted **from January 1, 2011 to the present**
 5 **regarding surgery to treat gender dysphoria** (also referred to as “transition
 6 related” surgery, “sex reassignment” surgery, “gender reassignment” surgery, “sex
 7 change,” “transgender surgery” or “transsexual surgery”), **including but not limited**
 8 **to documents regarding insurance coverage** for such surgeries

8 [See Doc. 202-3, Ex. 2, p. 4 (emphasis added).]

9 The Subpoena was unbounded: if a document mentioned gender-related surgery, it was
 10 responsive and must be produced. The Order, however, repeatedly mischaracterizes the Subpoena.
 11 [See Order (Doc. 238) at 1:18-21 & 2:25-3:2 (selectively quoting the Motion's mischaracterization of
 12 the Subpoena, omitting the “but not limited to” language), 7:26-8:2 & 9:27-10:4 (mischaracterizing
 13 the Subpoena as limited to documents “on the issue of ‘surgery to treat gender dysphoria’ in
 14 connection with ‘insurance coverage for such surgeries’”).] Indeed, the Order says Plaintiff “cabins
 15 his request by specifying that the documents’ mention of ‘surgery to treat gender dysphoria’ must be
 16 within the context of ‘insurance coverage.’” [*Id.* at 10:2-4.] This statement is patently incorrect.

17 The impact of the Magistrate's misreading of the Subpoena permeates the Order, as the
 18 Magistrate, operating under the false impression that a responsive document necessarily relates to
 19 insurance coverage for gender dysphoria, equates a document's responsiveness with its relevancy.
 20 Further compounding this error, the Order states that the Governor's Office's own description of
 21 the documents reveals their relevancy. Yet, to support this reference, the Order relies exclusively
 22 on Plaintiff's self-serving assertions regarding the content of documents he has not seen. [*See id.*, at
 23 3-4 (citing Plaintiff's Motion as support for its description of the documents).] Finally, the Order
 24 repeats the same misconstruction of the Subpoena's scope in applying the *Warner* factors to
 25 overcome the Governor's Office's assertion of deliberative process privilege. [*Id.* at 8.]

26 The Order's erroneous characterization of the Subpoena may have been caused by Plaintiff's
 27 repeated, but unsupported, characterizations. For example, during oral argument on the Motion,
 28 counsel for Plaintiff stated the “request here is no mere fishing contest....plaintiff has made a



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1 narrowly tailored request for just 17 documents that are both relevant and proportional to the needs
 2 of this specific case.” [August 11, 2021 Telephonic Motion Hearing, attached at **Exhibit A**, at 8:5-
 3 9.] Counsel later stated: “Plaintiff has focused on just 17 [documents] because they explicitly relate
 4 to health care coverage and policies.” [*Id.* at 43:2-3.] These statements are false. Plaintiff did not
 5 serve a narrowly tailored request for 17 documents; he served an expansive subpoena that resulted
 6 in the Governor’s Office producing hundreds of documents (thousands of pages). [*See id.* at 19:16-
 7 25, 37:23-25.] Plaintiff also did not focus his Motion on 17 documents “because they explicitly
 8 relate to health care coverage and policies”; he moved to compel every single document withheld
 9 solely on the basis of executive privilege, regardless of the documents’ content (about which
 10 Plaintiff, by definition, can only speculate). [*See* Doc. 202, at 2-3, 6.] Regardless of the source of
 11 the error, the Magistrate’s findings rely upon a misreading of the Subpoena and must be reversed.

12 Finally, the Magistrate’s conclusion – again founded upon this misconstruction of the
 13 Subpoena – that the subject documents are “relevant” under Rule 26 imposes an impermissibly
 14 broad standard on a non-party and disregards on-point authority. As explained in Governor’s
 15 Office’s Opposition (but not mentioned in the Order), courts in the Ninth Circuit and Arizona have
 16 repeatedly recognized heightened relevancy requirements for non-party discovery. *See Dart Indus.*
 17 *Co. v. Westwood Chem. Co.*, 649 F.2d 646, 649 (9th Cir. 1980) (“While discovery is a valuable right and
 18 should not be unnecessarily restricted ... the ‘necessary’ restriction may be broader when a
 19 nonparty is the target of discovery.”); *BBK Tobacco & Foods LLP v. Skunk Inc.*, 2020 WL 2395104, at
 20 *2 (D. Ariz. May 12, 2020) (“In the third-party subpoena context, however, courts have often
 21 demanded a stronger-than-usual showing of relevance[.]”); *AmSurg Holdings Inc. v. Anireddy*, 2020
 22 WL 1703617, at *2 (D. Ariz. Apr. 8, 2020) (“[A] party must demonstrate that its need for discovery
 23 outweighs the nonparty’s interest in nondisclosure.”) (*quoting R. Prasad Indus. v. Flat Iron Env’t. Sols.*
 24 *Corp.*, 2014 WL 2804276, at *2 (D. Ariz. June 20, 2014)). The Magistrate erroneously failed to
 25 impose, and Plaintiff has not met, this burden to demonstrate the relevancy of the documents at
 26 issue. As the Magistrate based the relevance finding on the erroneous assumption that a responsive
 27 document mentions insurance coverage for gender dysphoria, the Order should be reversed or, at
 28 minimum, vacated to permit the Magistrate to conduct the *in camera* review discussed *infra*.

1 **II. THE ORDER WRONGLY REJECTS THE EXECUTIVE COMMUNICATIONS PRIVILEGE.**

2 The executive communications privilege protects from disclosure communications
3 involving, and documents solicited or received by, the chief executive or his/her immediate
4 advisors. *See Karnoski v. Trump*, 926 F.3d 1180, 1203 (9th Cir. 2019). The purpose of the privilege is
5 to facilitate governmental decision-making and ensure executives are informed by candid advice. *In*
6 *re Sealed Case*, 121 F.3d 729, 741, 747-53 (D.C. Cir. 1997); *accord United States v. Nixon*, 418 U.S. 683,
7 708 (1974) (addressing the expectation of confidentiality of communications with the President,
8 which has “all the values to which we accord deference for the privacy of all citizens and, added to
9 those values, is the necessity for protection of the **public interest** in candid, objective, and even
10 blunt or harsh opinions in Presidential decisionmaking” (emphasis added)). “The privilege is
11 fundamental to the operation of Government and inextricably rooted in the separation of powers
12 under the Constitution.” [Order (Doc. 238), at 5:20-22 (quoting *Nixon*, 418 U.S. at 708).]

13 The purpose of the privilege and the public interests at stake apply equally to the Governor’s
14 Office. *See Hayes v. Reed*, 1997 WL 125742, *9 n.8 (E.D. Pa. Mar. 13, 1997). As *Hayes* explained:

15 Plaintiffs also overlook the fact that the executive privilege serves an important public
16 function. **The Governor, as chief executive, must be accorded a qualified**
17 **power to protect the confidentiality of communications pertaining to the**
18 **function of the executive branch. This power is analogous to the qualified**
19 **constitutionally-based privilege of the President, which is “fundamental to the**
20 **operation of government** and inextricably rooted in the separation of powers....”
Confidentiality is vital 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.

21 *Id.* (emphasis added) (quoting *Nixon*, 418 U.S. at 708). Another district judge has aptly explained in
22 the context of deliberative process privilege that there is “no principled distinction” between state
23 and federal officials in the context of this privilege: “If there exists a need to protect candid, private
24 communications among federal executive officials and their staff, the need to protect candid,
25 private communications among county officials and their staff is no less compelling.” *United States*
26 *v. Irvin*, 127 F.R.D. 169, 172 (C.D. Ca. 1989). Federal Rule of Evidence 501 requires that this Court
27 interpret the common law of privilege in light of reason and experience. *Accord Trammel v. United*
28 *States*, 445 U.S. 40, 47-53 (1980) (explaining that Rule 501 reflects an intent to afford courts the





1 flexibility to develop rules of privilege on a case-by-case basis and leave the door open to change).
 2 Applying this authority and respecting the reality that the purpose of the privilege is no less
 3 fundamental to the operation of the Governor’s Office than to the President’s Office, an executive
 4 communications privilege naturally extends to the Governor’s Office. The Order’s flat rejection of
 5 the Governor’s Office’s executive communications privilege based on the absence of separation of
 6 powers considerations improperly ignores the critical policy justifications underlying the privilege.¹

7 The Order further references the lack of Ninth Circuit precedent extending the executive
 8 communications privilege to governors. [Order (Doc. 238), at 6:6-9.] While true that **neither party**
 9 has identified Ninth Circuit authority accepting or rejecting the privilege, that fact is not dispositive²
 10 and does not negate the multiple other district courts that have recognized this privilege for state
 11 governors. *See Merritt v. State*, CV17-4540-PHX-DGC, ¶ 2(b) (D. Ariz. March 19, 2018) (Judge
 12 Campbell allowing the Governor’s Office to assert executive communications privilege to withhold
 13 documents, subject to preparation of a privilege log) (attached to the Motion at Doc. 202-3, Ex. 13-
 14 F); *In re Fin. Oversight & Mgmt. Bd. for P.R.*, 385 F. Supp. 3d 130, 134-35 (D.P.R. 2019) (recognizing
 15 existence of executive privilege protecting communications between governor and his advisors),
 16 *objections overruled*, 390 F. Supp. 3d 311 (D.P.R. 2019); *JM through Foley v. N.M. Dep’t of Health*, 2009
 17 WL 10698414, at *3, 6 (D.N.M. Aug. 20, 2009) (applying executive privilege to the New Mexico
 18 Governor’s Office to shield executive branch communications); *Hayes*, 1997 WL 125742 at n.8
 19 (recognizing executive privilege for state governors); *Haber v. Evans*, 2004 WL 963995, *4 (E.D. Pa.
 20 May 4, 2004) (applying executive privilege to state inspector general; describing the privilege as
 21 protecting “the sensitive decisional and consultative responsibilities of the Governor”). The
 22 Magistrate ignores these cases (and their underlying rationale) and relies on a single Northern

23 ¹ The Order further creates problematic federalism concerns, effectively suggesting that
 24 federal courts can – through the recognition or rejection of executive privileges – directly affect the
 25 “fundamental operation” of the highest executive office within State government. *See, e.g. Bond v.*
 26 *U.S.*, 564 U.S. 211, 221 (2011) (“The allocation of powers in our federal system preserves the
 27 integrity, dignity, and residual sovereignty of the States. The federal balance is, in part, an end in
 28 itself, to ensure that States function as political entities in their own right.”).

² Indeed, this Court recently recognized a federal law enforcement privilege despite no Ninth
 Circuit authority formally recognizing the privilege. *See Moore v. Garnand*, 2020 WL 1432838, at *5
 (D. Ariz. Mar. 24, 2020), *clarified on denial of reconsideration*, 2020 WL 2308481 (D. Ariz. May 8, 2020).

1 District of Illinois case for the proposition that “[t]he court finds no federal authority for extending
2 to a state governor the presidential communications.” [Order (Doc. 238), at 6:18-22 (quoting
3 *Patterson v. Burge*, 451 F. Supp. 2d 947, 956 (N.D. Ill. 2006)).] Given the clear policy and purpose
4 underlying the privilege, *Patterson* reached the wrong result.³ The Order’s rejection of executive
5 communications privilege for the Governor’s Office is contrary to the law and must be reversed.

6 **III. THE ORDER MISAPPLIES THE WARNER FACTORS TO IMPROPERLY SURMOUNT THE**
7 **DELIBERATIVE PROCESS PRIVILEGE.**

8 There is no dispute that the deliberative process privilege extends to the Governor’s Office,
9 protecting from disclosure communications relating to its decision-making process. [See Order
10 (Doc. 238), at 6:23-24.] Similar to the executive communications privilege, “the ultimate purpose of
11 the privilege is to protect the quality of agency decisions.” *FTC v. Warner Commc’ns, Inc.*, 742 F.2d
12 1156, 1161 (9th Cir. 1984). The privilege “is rooted in ‘the obvious realization that officials will not
13 communicate candidly among themselves if each remark is a potential item of discovery and front
14 page news.’ To encourage candor, which improves agency decisionmaking, the privilege blunts the
15 chilling effect that accompanies the prospect of disclosure.” *U.S. Fish & Wildlife Serv. v. Sierra Club,*
16 *Inc.*, 141 S. Ct. 777, 785 (2021) (citation omitted). Although the privilege is qualified, a plaintiff may
17 only obtain protected, “deliberative materials if his or her need for the materials and the need for
18 accurate fact-finding override the government’s interest in non-disclosure.” *Warner Commc’ns*, 742
19 F.2d at 1161; *accord In re Sealed Case*, 121 F.3d at 737–38.

20 Although correctly recognizing that the Governor’s Office holds a deliberative process
21 privilege, the Order erroneously applies the factors articulated by the Ninth Circuit to overcome the
22 privilege. [See Order (Doc. 238), at 7-10 (addressing the *Warner* factors, including (1) the relevance
23 of the evidence sought, (2) the availability of other evidence, (3) the Governor’s Office’s role in the
24 litigation, and (4) the extent to which disclosure would hinder frank and independent discussions).]

25 _____
26 ³ While the Northern District of Illinois has a history of refusing to extend executive
27 privileges to state entities, the District of Arizona has rejected that approach. See *Wilson v. Maricopa*
28 *Cnty.*, 2006 WL 842247, at *1 (D. Ariz. Mar. 29, 2006) (recognizing that the deliberative process
privilege extends to local governments; distinguishing 2001 decision from the Northern District of
Illinois that held the opposite).





1 In particular, the Order’s analysis of the first factor is clearly erroneous, as the Magistrate’s
 2 relevancy analysis hinged on the misconstruction of the Subpoena described above. [*See id.* at 7:22-
 3 8:7 (inaccurately describing the Subpoena as being limited to documents “in connection with
 4 ‘insurance coverage for such surgeries”).] The Order then erroneously concludes that the first
 5 factor favors disclosure because the mischaracterized Subpoena (**not** the subject documents)
 6 “seems reasonably calculated to uncover the thought processes,” which might “reveal
 7 discriminatory intent” in other circumstances, which might be relevant to whether discriminatory
 8 intent animated the exclusion at issue. [*Id.* at 7:26-8:5.] Whether an inaccurately framed Subpoena
 9 could encompass documents that might be relevant to Plaintiff’s claims is **not** the governing
 10 standard – the documents themselves should be “highly relevant” to the Plaintiff’s claims. *See Ariz.*
 11 *Rehabilitation Hosp., Inc. v. Shalala*, 185 F.R.D. 263, 271 (D. Ariz. 1998) (applying the *Warner* factors
 12 and finding materials “not highly relevant,” as they did not include “the agency’s statement of what
 13 it will do and why”); *cf. ICM Registry, LLC v. U.S. Dep’t of Com.*, 538 F.Supp.2d 130, 133 (D.D.C.
 14 2008) (“If every hint of marginal misconduct sufficed to erase the privilege, the exception would
 15 swallow the rule.”). The Magistrate’s conclusion that the subject documents are relevant based on a
 16 misconstrued Subpoena and speculation about the documents’ content is erroneous.⁴

17 The Magistrate also erred in applying the fourth *Warner* factor. Court after court has
 18 recognized the “obvious realization” that candor will be chilled and the quality of governmental
 19 decisions will suffer if officials are “forced to operate in a fishbowl.” *E.g. Sierra Club, Inc.*, 141 S. Ct.
 20 at 785 (citing cases); *Nixon*, 418 U.S. at 705 (“Human experience teaches that those who expect
 21 public dissemination of their remarks may well temper candor with a concern for appearances . . . to
 22 the detriment of the decisionmaking process.”). The Order improperly dismisses this “obvious”
 23 reality. Instead, relying almost exclusively on *Arizona Dream Act Coalition v. Brewer*, the Magistrate
 24 concludes that “the disclosure sought here [of privileged documents] will have only a minimal

25 _____
 26 ⁴ As the Order notes, the subject documents do not address the exclusion at issue in this case
 27 and evidence concerning that exclusion has been produced. [Order (Doc. 238), at 8:9-13.] Thus,
 28 even if the documents were somehow marginally relevant, Plaintiff has “little need” for them.
Warner Commc’ns, 742 F.2d at 1161-62 (finding documents relevant, but concluding that the
 requesting party “had little need” for them in view of the availability of other evidence).



1 adverse effect on future healthcare coverage deliberations” because Arizona’s public records law
2 favors “full and open disclosure.” [Order (Doc. 238), at 9.]

3 The Magistrate misinterprets Arizona public records law, which is actually fatal to her
4 conclusion. While Arizona indeed favors disclosure of public records, privileged documents do **not**
5 fall within the scope of records subject to disclosure. *See* A.R.S. §§ 41-1279.05, 49-1403 (addressing
6 exceptions to the public records laws); *Fann v. Kemp*, 2021 WL 3674157, at *3, ¶ 16 (Ariz. App. Aug.
7 19, 2021) (“[T]hough there is a presumption in favor of disclosing public records, this presumption
8 can be rebutted by a demonstration of ‘confidentiality, privacy, or the best interests of the state’ . . .
9 If any of these interests outweigh the public’s right to access the records,” the public entity can
10 refuse disclosure. (citing *Scottsdale Unified Sch. Dist. No. 48 of Maricopa Cnty. v. KPNX Broad. Co.*, 191
11 Ariz. 297, 300, ¶ 9 (1998)); *Mathews v. Pyle*, 75 Ariz. 76, 80 (1952) (“documents received by the
12 Governor in his official capacity” are “subject to inspection by an interested citizen unless they are
13 confidential or of such a nature that it would be against the best interests of the state to permit a
14 disclosure of their contents”). The Magistrate’s rationale is circular. Arizona’s public policy
15 favoring open public records does not justify disclosure of privileged materials from the Governor’s
16 Office, as privileged materials are not subject to disclosure under that public records law.

17 The Order next suggests that disclosure of the subject documents will only have a “minimal
18 adverse effect on future healthcare coverage deliberations” because the Subpoena is supposedly
19 narrowly tailored and the Order only requires production of 17 documents. [*See* Order (Doc. 238),
20 at 9-10.] Respectfully, this analysis misses the point. As set forth above, the Subpoena is not
21 narrowly tailored and the Magistrate’s analysis of this fourth *Warner* factor is again based on a
22 misunderstanding of the Subpoena. [*See id.* at 10:1-4.] The breadth of the Subpoena weighs against
23 disclosure, not in favor of it. [*See* Opposition (Doc. 208), at 16-17.] Moreover, the number of
24 documents at issue is not the determining factor. Disclosure of even one privileged document can
25 have a chilling effect on future deliberations within the Governor’s Office. The focus here must be,
26 as a matter of law and logic, on the extent to which disclosure will hinder frank and independent
27 discussions in the future (which, in turn, hinders candid, informed decision making). *See, e.g.*,
28 *Shalala*, 185 F.R.D. at 271 (disclosure of privileged documents “would hinder the Agency’s **future**



1 rulemaking ability as it would stifle ‘creative debate and candid consideration of alternatives’ and
 2 undermine ‘the integrity of the decision-making process itself’ (emphasis added). Applying the
 3 *Warner* factors in view of the **actual** scope of the Subpoena, the actual scope of Arizona public
 4 records law (and its exceptions), the Governor’s Office’s interest in the confidentiality of privileged
 5 communications, and the obvious risk of harm from disclosure, Plaintiff has not overcome the
 6 privilege and the Magistrate’s Order is clearly erroneous.

7 The Magistrate’s deliberative process analysis further improperly applied the *Warner* factors
 8 to all 17 subject documents as a whole, without considering classes of documents separately. This
 9 error also warrants reversal of the Magistrate’s Order. *See Karnoski*, 926 F.3d at 1206 (explaining
 10 “the district court should consider classes of documents separately when appropriate” and
 11 recognizing that certain types of documents “may require greater deference”). Had the Magistrate
 12 reviewed the documents *in camera* as requested, she could have avoided many of the errors in the
 13 Order’s deliberative process privilege analysis. *See, e.g., Labr v. Nat’l Transp. Safety Bd.*, 569 F.3d 964,
 14 980, 982 (9th Cir. 2009); *Shalala*, 185 F.R.D. at 270.

15 **IV. THE MAGISTRATE SHOULD CONDUCT AN *IN CAMERA* REVIEW.**

16 Because of the tension created by the invocation of the executive communications or
 17 deliberative process privilege, courts must first “explore other avenues” for resolving a discovery
 18 dispute. *See Karnoski*, 926 F.3d at 1207 (vacating discovery order involving executive
 19 communications and deliberative process privileges “because the district court did not fulfill its
 20 obligation ‘to explore other avenues, short of forcing the Executive to invoke privilege’”). These
 21 avenues include assessing the relevancy of the subject documents before addressing privilege claims
 22 and conducting an *in camera* review to confirm the documents’ relevancy. *See id.* *In camera* review is
 23 common in cases involving relevancy or privilege concerns. *See, e.g., Labr*, 569 F.3d at 980, 982
 24 (district court reviewed documents *in camera* to confirm application of deliberative process privilege;
 25 Ninth Circuit also reviewed the documents *in camera* to assess the same); *Wilson v. Larson*, 2019 WL
 26 9078642, *10–11 (D. Ariz. Nov. 14, 2019) (confirming, after *in camera* review, the documents
 27 involved an unrelated investigation and were not relevant to petitioner’s claims), *report and*
 28 *recommendation adopted*, 2020 WL 3129691 (D. Ariz. June 12, 2020); *Acosta v. Austin Elec. Servs., LLC*,



1 2018 WL 10799180 (D. Ariz. Dec. 6, 2018) (conducting *in camera* review of documents prior to
 2 deciding deliberative process privilege assertions); *Shalala*, 185 F.R.D. at 270 (conducting *in camera*
 3 review to determine, *inter alia*, applicability of the deliberative process privilege, the existence of
 4 factual material that could be excised from the deliberative materials, and “whether Plaintiffs’ need
 5 for the document[s] outweighs the Government’s interest in nondisclosure”). When executive
 6 communications are at issue, *in camera* review is required prior to ordering production. *Karnoski*, 926
 7 F.3d at 1205-06 (“[T]he district court must conduct *in camera* review before any materials are turned
 8 over to Plaintiffs to excise non-relevant material and ‘ensure that presidential confidentiality is not
 9 unnecessarily breached.’”).

10 Without addressing the specific request for *in camera* review, the Order compels production
 11 of privileged documents the Magistrate presumes are relevant based on their responsiveness to a
 12 misinterpreted Subpoena. Respectfully, the Magistrate could not adequately assess relevancy or the
 13 Governor’s Office’s privilege assertions without first reviewing the documents *in camera*. The
 14 Magistrate’s failure to conduct an *in camera* review warrants reversal of her decision. *Cf. In re Sealed*
 15 *Case*, 121 F.3d at 740 (explaining that no deference is given to a district court’s ruling on a subpoena
 16 that “rests upon a misapprehension of the relevant legal standard,” “is unsupported by the record,”
 17 is made without explanation, or is made without *in camera* review of the subject documents (citations
 18 omitted)). As only 17 documents are at issue, review of the documents is necessary in view of the
 19 importance of the privileges at issue. Prior to ordering production of any of the privileged
 20 documents, the District Court, or at minimum the Magistrate, must review the subject documents *in*
 21 *camera* to determine their relevance, excise irrelevant material, and ensure the Governor’s Office’s
 22 significant interests are not unnecessarily breached.

23 **V. CONCLUSION.**

24 For the reasons set forth above, the findings in the Magistrate’s Order are clearly erroneous
 25 and the decisions are contrary to law. The Governor’s Office respectfully requests that the Court
 26 reverse the Order and instruct the Magistrate to deny Plaintiff’s Motion. Alternatively, at minimum,
 27 the Court should vacate the Order and order *in camera* review of the subject documents.

28 . . .

1 RESPECTFULLY SUBMITTED this 10th day of September, 2021

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EXHIBIT A

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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Russell B. Toomey, CV-19-00035-TUC-RM(LAB)
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., August 11, 2021
11:00 a.m.
Defendants. Tucson, Arizona

OFFICIAL TRANSCRIPT OF PROCEEDINGS
TELEPHONIC MOTION HEARING
BEFORE THE HONORABLE LESLIE A. BOWMAN
UNITED STATES MAGISTRATE JUDGE

PROCEEDINGS WERE DIGITALLY RECORDED

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A P P E A R A N C E S

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1 P R O C E E D I N G S

2 THE CLERK: Now going on the record with civil
3 matter Russell B. Toomey vs. State of Arizona. I would like
4 to call what counsel I know is appearing for the plaintiff.

5 Do we have Jordan Wall on the phone?

6 MR. WALL: Yes, ma'am. This is Jordan Wall over at
7 Willkie Farr & Gallagher.

8 THE CLERK: Thank you so much.

9 How about Joshua Block?

10 MR. WALL: I should clarify, ma'am. I'll be
11 presenting on behalf of plaintiff. I believe my co-counsel
12 Joshua Block and Christine Wee of the ACLU are going to join
13 me on this call, as well as my colleagues from Willkie Farr &
14 Gallagher: Wesley Powell, Victoria Sheets, and Justin
15 Garbacz.

16 THE CLERK: Okay. Fantastic. Thank you.

17 Then how about our parties for the defendants. Do
18 we have Danielle Dowd on the phone?

19 MR. DOWD: Good morning, yes.

20 THE CLERK: Thank you, Mr. Dowd.

21 How about Betsy Lamm?

22 MS. LAMM: Good morning, yes, Betsy Lamm is also on
23 the phone. And just to clarify, Mr. Dowd and I are counsel
24 for the Office of the Governor, who is not a defendant.

25 THE CLERK: Okay. Okay. Perfect. Thank you.

1 And what about Ryan Curtis for the State of Arizona?

2 MR. CURTIS: Good morning, yes. This is Ryan Curtis
3 on behalf of the State defendants.

4 THE CLERK: Perfect. Thank you so much.

5 Betsy, thank you for clarifying that. I apologize.
6 I wrote it down incorrectly.

7 Is there anyone else that needs to state their
8 presence for this hearing?

9 MR. YOST: Yes, Your Honor. This is Austin Yost on
10 behalf of the Arizona Board of Regents. I'm joined by Paul
11 Eckstein from Perkins Coie and Stephanie Rosenberg from the
12 University of Arizona's General Counsel's Office.

13 THE CLERK: Okay.

14 THE COURT: I didn't catch -- I didn't catch that.

15 (A discussion was had off the record between the
16 clerk and the Court.)

17 THE CLERK: I'm sorry. And then you said, Paul --
18 Paul. Did you say Stephanie is also appearing?

19 MR. YOST: Yes, Paul Eckstein from Perkins Coie and
20 Stephanie Rosenberg from the University of Arizona's General
21 Counsel's Office is here.

22 THE CLERK: Okay. Thank you. Stephanie Rosenberg.

23 Okay. And is there anyone else? Just one more
24 call: Anyone else that needs to state their presence?

25 Okay. Fantastic. Then we are on for this motion

1 hearing.

2 Judge?

3 THE COURT: Are we on the record?

4 THE CLERK: Yes, we are.

5 THE COURT: Oh, okay. Great.

6 Good morning, counsel. This is Leslie Bowman. I'm
7 the magistrate judge who's assigned to this case, and I'll be
8 conducting the motion hearing this morning.

9 So I think it's a little bit of an unusual position
10 that we're in because there was already a ruling made, but
11 that was before the Governor's Office filed their -- filed
12 their motion. So I think what I would like to do, unless the
13 parties have a strong preference otherwise, is to let counsel
14 from the Governor's Office begin.

15 MR. WALL: So Your Honor, this is Mr. Wall on behalf
16 of plaintiff.

17 THE COURT: Yes.

18 MR. WALL: I believe we're before Your Honor on
19 plaintiff's motion to compel the Governor's Office to produce
20 documents.

21 THE COURT: Oh, okay. That's a good way of putting
22 it. So -- so you'd like to make your argument first and then
23 allow the Governor's Office to respond?

24 MR. WALL: I would, Your Honor.

25 THE COURT: Okay. That's fine. Go ahead, please,

1 Mr. Wall.

2 MR. WALL: Thank you, Your Honor, for this
3 opportunity to be heard.

4 In his lawsuit, plaintiff challenges the State of
5 Arizona's categorical exclusion of gender reassignment surgery
6 from coverage under the self-funded state employee health care
7 plan administered by the Arizona Department of Administration
8 or ADOA.

9 Plaintiff reasonably seeks from the Arizona
10 Governor's Office, which was directly involved in the
11 decisionmaking about that exclusion, including through its
12 Senior Policy Advisor Ms. Christina Corieri, among others, to
13 produce just 17 documents. These 17 documents are, number
14 one, responsive to the single request for production plaintiff
15 made of the Governor's Office for documents regarding surgery
16 to treat gender dysphoria, and number two, by the Governor's
17 own admission, concerning health care plans, health care
18 coverage, or a former Arizona House bill that sought to
19 statutorily exclude coverage for gender reassignment surgery
20 by other Arizona state entities administering public health
21 benefits.

22 Notably, that health bill was introduced in January
23 of 2017 and died on the House Floor on that same month, just a
24 short time after the Governor and the ADOA appear to have
25 concluded their decisionmaking on the exclusion in November

1 and December of 2016, as reflected in Exhibit 1 to my
2 co-counsel Ms. Christine Wee's second declaration, Bates
3 Number AZ State 246062, which was filed under seal with your
4 chambers.

5 Contrary to the Governor's assertion, plaintiff's
6 request here is no mere fishing contest. Rather, plaintiff
7 has made a narrowly tailored request for just 17 documents
8 that are both relevant and proportional to the needs of this
9 specific case.

10 The parties here have agreed that disputed factual
11 -- that the factual question in dispute is whether the
12 decision to exclude gender reassignment surgery in the health
13 care plan was actually motivated by a legitimate governmental
14 interest, and while plaintiff argues that the exclusion
15 facially discriminates based on sex and transgender status, in
16 violation of Title VII and the Equal Protection Clause, Your
17 Honor has held in this matter that the related issue of
18 whether the exclusion was adopted or maintained based on the
19 discriminatory intent of the decisionmakers towards
20 transgender and gender nonconforming groups and individuals
21 may be a dispositive issue in this case.

22 The Governor's Office does not dispute its
23 involvement in the decisionmaking to maintain the State of
24 Arizona's categorical exclusion of gender reassignment
25 surgery, and the State's written discovery also identifies

1 that the Governor's Office was involved in that
2 decisionmaking.

3 These 17 documents may reflect specific bias towards
4 transgender and gender nonconforming groups and individuals on
5 the part of the Governor's Office or they may reflect a
6 general policy of the Governor opposing all forms of state-
7 subsidized coverage for transition-related surgery. Given
8 that the permissible scope of discovery here is broad and
9 relevant evidence is not limited, as the Governor suggests,
10 just to those documents specifically discussing exclusion,
11 plaintiff thinks this request is more than reasonable.

12 By way of example, if you were to adopt the
13 Governor's logic that plaintiff is only entitled to discovery
14 of documents specifically addressing the exclusion,
15 Ms. Corieri's tweet expressing discontent with the expenditure
16 of government funds for gender affirming surgery in which she
17 stated, "Advocates now demanding taxpayer dollars for gender
18 reassignment surgery under Medicare -- bet Medicaid is next,"
19 would be irrelevant. It would be nondiscoverable if in the
20 possession and custody and control of the Governor's Office,
21 and that's plainly incorrect.

22 Lastly, on this topic of relevance, I will say the
23 Governor's request for in camera review to determine the
24 relevance of the documents, the 17 documents requested, is
25 improper, and Ms. Corieri's tweet is a great example of why

1 such a review would be inappropriate.

2 If the Court were to review that tweet about
3 coverage for gender reassignment surgery in the abstract, it
4 might very well or theoretically conclude that it's unrelated
5 or irrelevant to the instant dispute about the State health
6 plan. However, discovery has revealed thus far in this matter
7 that Ms. Corieri received at her governmental email address
8 newsletters that were regularly providing her with
9 inflammatory content regarding gender affirming surgery, and
10 those documents are included in the second declaration of my
11 co-counsel Ms. Christine Wee at Exhibits 2 and 3.

12 Taken into context with this additional evidence,
13 Ms. Corieri's tweet is all the more relevant because this is
14 just a pattern of behavior and interest opposing
15 state-subsidized coverage for transition-related care.

16 We think, therefore, the Governor's request for in
17 camera review to determine relevance is inappropriate because
18 outside of this context of the additional evidence adduced
19 thus far in the case, it would be difficult for the Court to
20 judge whether these documents are relevant or not.

21 THE COURT: Okay.

22 MR. WALL: Additionally, I will say, if I may be
23 given just a few moments --

24 THE COURT: Yes.

25 MR. WALL: There is no other basis for the

1 withholding of these documents on the part of the Governor's
2 Office. There is no reasonable claim of privilege that
3 protects these documents, and the privileges asserted by the
4 Governor, including the executive communications privilege,
5 which is more appropriately called the presidential
6 communications privilege, and the deliberative process
7 privilege, are inapplicable here for several reasons.

8 I would say with respect to the presidential
9 communications privilege, that privilege is simply
10 inapplicable here as it has not been recognized under federal
11 common laws extending to a state governor and should not be
12 here. And even it were applicable to a state governor, the
13 Governor's Office has failed to state that privilege with the
14 requisite particularity supporting the need to maintain the
15 secrecy of these documents.

16 And even if the Governor's Office had stated --
17 asserted the privilege with the requisite particularity, it
18 isn't absolute, and it would be overcome in all events because
19 the Governor's Office's decisionmaking here is directly at
20 issue in this dispute.

21 The Governor's Office admits that federal common law
22 controls the question of the existence or applicability of the
23 privilege, and the Governor's Office acknowledges that this
24 Court would need to extend the federal court's recognition of
25 other executive privileges, such as the deliberative process

1 privilege, to this particular privilege for it to apply.

2 And the Governor cites no authority recognizing the
3 presidential communications privilege as applicable to a state
4 governor a matter of federal common law. At best the Governor
5 relies on Merritt v. the State of Arizona in which an order of
6 Judge Campbell asserted that the Governor's Office in that
7 case may assert that executive privilege generally, it makes
8 no mention of the presidential communications privilege or
9 executive communications privilege, but that executive
10 privilege generally may apply to withhold certain documents.

11 Importantly, Judge Campbell did not decide or
12 preemptively rule that that privilege applied or is
13 applicable. Judge Campbell merely recognized that the
14 Governor's Office may assert that claim, and it would
15 therefore need to provide a privilege log asserting that claim
16 of privilege, ostensibly to allow further review of that claim
17 later on.

18 And even if the Court -- even if the Governor's
19 Office admitted that there is no federal common law
20 recognizing this, there is also no Arizona state law
21 recognizing the existence of this presidential communications
22 privilege. This is not a trivial mistake on the Governor's
23 Office's part. Each of the cases that the Governor's Office
24 cites to and relies on for the recognition of this
25 presidential communications privilege is recognizing that

1 privilege is a matter of state law in those particular cases.
2 JM through Foley recognizes it's matter of Puerto Rican law,
3 Cap. Info Group v. the State of Governor recognizes it's a
4 matter of Alaskan law, Republican Party of New Mexico
5 recognizes it's a matter of New Mexican law, and the Freedom
6 Foundation v. Gregoire recognizes it's matter of Washington
7 state law.

8 For reasons that this -- Your Honor has already
9 cited in this case, there is good reason to believe that an
10 Arizona state court would not recognize this presidential
11 communications privilege, precisely because there are statutes
12 in Arizona requiring the open inspection of public records in
13 state officials' custody, and that includes Arizona Statute --
14 Revised Statute 39-121, as well as case law that Your Honor
15 has previously relied on to make this point, including Arizona
16 Dream Act Coal. v. Brewer.

17 This Court should reject any invitation to create
18 new federal law and extend the presidential communications
19 privilege to the Arizona Governor's Office for three reasons.
20 First, the issues that are animating that privilege, the
21 separations of powers doctrine, do not apply here. Second,
22 the Governor, again, failed to make particularized objections
23 demonstrating why these documents need to be maintained
24 secretly or prevented from disclosure, and again, even if they
25 were to do so, it would be overcome in this context because

1 that privilege is not absolute and would clearly be overcome.

2 It's important I think to note on that first point,
3 too, that the presidential communications privilege, it's not
4 a mistake to use that terminology. That privilege arises out
5 of the unique conditions of the President's role as the
6 federal executive and in constitutional functions, a point
7 that has both been recognized by the United States Supreme
8 Court in U.S. v. Gillock, as well as the In re Sealed case
9 upon which the Governor's Office relies.

10 Those same considerations do not apply here to the
11 Arizona Governor, and they certainly don't apply in the
12 context of this case, which is a case in federal court
13 applying federal law, constitutional and statutory law, to
14 enforce federal rights against a state entity.

15 As to the Governor's Office's failure to state these
16 privileged records with particularity, they rely on
17 Ms. Corieri's declaration, which only provides a generalized
18 statement of why these 17 documents should remain secret in
19 its paragraph 9. Ms. Corieri otherwise goes through certain
20 categories of documents and repeats almost verbatim the same
21 blanket statement that these documents are both -- should be
22 withheld from discovery because they reflect communications
23 that might inform advice given to the Governor.

24 Nowhere does she state that any of these documents
25 were actually a part or informed the advice she gave to the

1 Governor or that they would need to be withheld from
2 disclosure because they somehow would impede the Governor's
3 decisionmaking. And it's not a matter of course or logic
4 intuitive to us that these documents would, in fact, impede
5 upon the Governor's ability to make a decision on entirely
6 unrelated legislation that occurs either today or years after
7 the documents that we're talking about. As I said earlier,
8 the majority of these documents concern their discussions of a
9 bill proposed in January 2017 that lived and died within that
10 month.

11 And then, finally, I would say, on the overcoming of
12 this privilege, which are largely similar reasons as to why
13 the deliberative process privilege doesn't apply, these
14 documents clearly evidence -- are evidence that are necessary
15 and needed here and cannot be obtained from another source.
16 As I stated earlier, the Governor's Office does not contest
17 that it was involved in the decisionmaking of the decision
18 whether to maintain the exclusion.

19 To the extent these documents reflect internal
20 deliberations within the Governor's Office, there is no other
21 source of this information. It has not been obtained from the
22 State of -- the Arizona Department of Administration, nor can
23 it be obtained from other entities outside of the Arizona
24 Governor's Office.

25 In fact, these documents are all the more important

1 because, from our depositions thus far of representatives from
2 those offices, including Ms. Marie Isaacson, who was largely
3 in charge of the decision whether to maintain this exclusion
4 in 2016 and 2017, she stated that there was no discussion
5 between the Arizona Governor's -- between the Governor's
6 Office and the ADOA about the decision to maintain this
7 exclusion. Rather, she attended a meeting where that decision
8 was announced by Ms. Corieri, and there was no deliberations,
9 and that's reflected in the excerpts of the transcripts that
10 we submitted from Ms. Isaacson's deposition. Those are
11 Exhibit 9 to my co-counsel Ms. Christine Wee's first
12 declaration in this motion.

13 And I think it's crucially important we talk about,
14 not only are these documents needed for their potential
15 evidentiary weight, but also to assist us in acquiring
16 additional evidence and discovery in this matter. We have
17 held in abeyance pending the resolution of this motion the
18 depositions of Ms. Corieri, as well as the depositions of the
19 director, current director, of the ADOA, Mr. Andy Tobin.
20 These documents would obviously be, the topics on which they
21 are, deliberations of the Governor's Office about health care
22 plans relating to gender reassignment surgery or a bill
23 intended to exclude coverage of gender reassignment surgery,
24 these would naturally be topics or areas of discussion in
25 those depositions, and absent these documents, we would not be

1 able to explore these fully or question Ms. Corieri about the
2 analysis that occurred in the Governor's Office there.

3 And I think for those same reasons I'll conclude
4 that the deliberative process privilege is also overcome here
5 if it was even applicable. Again, we think the Governor has
6 failed to state or assert that privilege with the requisite
7 particularity. Again, Ms. Corieri only states in a very
8 perfunctory manner that these documents are both predecisional
9 and deliberative, as is required by that privilege, but even
10 if she had stated or the Governor's Office otherwise made that
11 privilege claim out, these would be overcome if you apply the
12 four factors recognized in *F.T.C. v. Warner*.

13 First, the 17 documents are clearly relevant for the
14 reasons I stated above, which goes to the first factor.
15 Second, they are the only source of evidence of potentially
16 the discriminatory intent of the Governor's Office. And
17 third, the Governor's Office is intimately involved in
18 decisionmaking here. And fourth, the disclosure of these
19 years-old documents do not in any way suggest they would show
20 discussion within the Governor's Office as to its policymaking
21 to other unrelated pieces of legislation or decisionmaking.

22 And finally, I will say I think the chief argument
23 that the Governor's Office relies on here is that these
24 documents are not directly -- do not directly speak to
25 exclusion, and as I've stated above, that it's perfectly

1 acceptable within the broad scope of discovery for the
2 plaintiff to seek documents that might evidence both a
3 specific bias towards transgender individuals and groups but
4 also a policy of general opposition to the coverage of
5 transition-related-care, of which these documents very well
6 may reflect.

7 Thank you, Your Honor.

8 THE COURT: All right. Thank you, Mr. Wall. I
9 appreciate that.

10 And which counsel will be responding?

11 MR. DOWD: Good morning, Your Honor. This is Dan
12 Dowd on behalf of the Office of Arizona Governor Douglas A.
13 Ducey, a nonparty to this action, and with the Court's
14 permission, I'll proceed.

15 THE COURT: Okay. Yes, thank you. Please go ahead.

16 MR. DOWD: Your Honor, we appreciate the opportunity
17 to be heard. We had hoped beyond hope that we could be in a
18 courtroom in person, but perhaps next time.

19 THE COURT: Yes, that would be so nice.

20 MR. DOWD: Boy, wouldn't it?

21 Your Honor, you have a lot of paper in front of you,
22 and we have done our due diligence and know your penchant for
23 preparation, so it's not my intent to repeat what is in the
24 briefs but instead to try to give light to that cold paper and
25 respond to the arguments of my colleague Mr. Wall.

1 If I do my job, I hope to establish that the motion
2 to compel must be denied for the following three reasons.
3 First, the 17 requested documents are not relevant to
4 plaintiff's claims, and really, the analysis can start and
5 stop there. If it proceeds, the documents are privileged
6 under both the executive communications and deliberative
7 process privileges, and I will show to you that the
8 irrelevance of the documents actually derails plaintiff's
9 effort to overcome those privileges or to credibly claim a
10 focused need for them.

11 And third, if the Court somehow gets past relevance
12 and privilege, it must conduct an in camera review to confirm
13 relevancy and to ensure that the privileges are not
14 unnecessarily breached, especially when dealing with the
15 executive branch of the state government.

16 These are important issues, Your Honor, but I'm
17 going to start first with a bit of context that my colleague
18 left out. Since receiving the subpoena in February, the
19 Governor's Office has worked diligently to produce all
20 nonprivileged documents responsive to a very broad subpoena.
21 We haven't stiff-armed the plaintiff, nor have we drawn
22 arbitrary lines in the sand. Rather, through significant
23 effort, we produced over 3,500 pages of responsive material,
24 including the very documents that Mr. Wall summarized for you
25 during his argument.

1 We've also withheld a small subset of technically
2 responsive but privileged documents, including the 17 emails
3 at issue today. We did that consistent with the Governor's
4 Office's long history of rigorously protecting the
5 confidentiality of the manner in which it considers
6 legislation and formulates policy. Those 17 emails are both
7 irrelevant and privileged, and I'll start with relevance,
8 because that's where Mr. Wall started.

9 Now, while the plaintiff has contended over and
10 over, as if saying it enough times will somehow make it true,
11 that the 17 documents are relevant to the intent of the
12 Governor's Office regarding the exclusion of gender
13 reassignment surgery under the State health plan, in
14 plaintiff's reply, he goes so far as to say that those 17
15 documents might be the most reliable evidence of
16 discriminatory intent, but what Mr. Wall must concede is
17 that's sheer speculation. There is not a shred of support in
18 the record for an argument that the documents at issue today
19 bear on any fact that's at issue in the lawsuit. Rather, that
20 is an entirely false premise stringing from an overbroad
21 subpoena.

22 The plaintiff also repeatedly repeats in his papers
23 that the subpoena is, quote, narrowly tailored to seek records
24 directly relevant to the central issue in this litigation: the
25 intent of the decisionmakers. I'd ask the Court to recall

1 that phrase "narrowly tailored" as it considers the rest of
2 this argument. That's a shockingly false statement and one
3 that undermines the credibility of plaintiff's entire
4 argument.

5 Here's what the subpoena actually seeks: 10 years
6 worth of documents. It's not limited to the exclusion at
7 issue. Rather, that subpoena seeks any single document in the
8 Governor's Office that contains a reference to surgery for
9 gender dysphoria, no matter how remote, no matter how
10 disconnected to the claims plaintiff has brought not against
11 the Governor but against the State. That subpoena's not even
12 limited to the State health plan that's at issue here.

13 THE COURT: Does it --

14 MR. DOWD: It extends to Medicaid --

15 THE COURT: Can I interrupt? Does it have to --
16 does it have to be limited to the insurance policy at issue
17 here if the plaintiffs are looking for pattern and practice?

18 MR. DOWD: Well, no, but I guess, Your Honor, it
19 needs to be -- the scope of the subpoena to surmount the
20 privileges that I'm going to talk about in a moment has to be,
21 in the words of the Supreme Court, narrowly tailored, and when
22 Mr. Wall says this is narrowly tailored, we're only fighting
23 about 17 documents, that's a misstatement of what's going on
24 here.

25 That subpoena is as broad as you could imagine.

1 It's any document that floated across the desk at the
2 Governor's Office over 10 years. An unsolicited newsletter,
3 spam, you name it, that has the words "gender dysphoria" in
4 it, that's what that subpoena seeks. And that's important as
5 you consider whether the plaintiff has provided the kind of
6 showing necessary to surmount the privileges that apply.

7 THE COURT: So Mr. Dowd, here's my question about
8 that, because from what you mentioned, the Governor's Office
9 has done a thorough job, a good job, of providing over 3,500
10 relevant documents, but today we are only talking about 17
11 documents. Isn't that a fair analysis?

12 MR. DOWD: Yes. They've moved on 17 documents. Our
13 privilege log was longer. They chose 17 that were withheld
14 based on executive communication privilege to be the subject
15 of this motion.

16 THE COURT: Okay.

17 MR. DOWD: Correct.

18 THE COURT: And that -- the privilege log, I'm
19 trying to remember the exact number, which I won't be able to,
20 but it was in the 600s or something, wasn't it?

21 MR. DOWD: No, I believe it's 67.

22 THE COURT: Oh, 67. I'm sorry. Okay.

23 MR. DOWD: And the others were obviously withheld on
24 grounds other than executive communications.

25 THE COURT: Oh, I see what you're saying. Okay.

1 Thank you for clarifying that.

2 MR. DOWD: So what happened here is that we have
3 documents that were technically responsive to the subpoena,
4 they would have the word or the phrase "gender dysphoria" or
5 any of its cousins, as identified in the subpoena, but they
6 had nothing to do with the issues in the case, and those are
7 the 17 that we analyzed, but not only do they have nothing to
8 do with the issues in the case, they also invaded on the
9 privileges that I'm going to talk about in just a moment.

10 And we detailed that in Ms. Corieri's declaration,
11 and you know, we're both using adjectives to describe it, the
12 Court will read it and draw her own opinions, but she goes
13 through all 17 documents. None of them address the exclusion
14 at issue or the intent behind the exclusion, none of them
15 involve plaintiff's actual employer, the Board of Regents, and
16 they're not evidence of an intent to burden transgender
17 individuals, and that's a problem entirely of plaintiff's own
18 making through the overbreadth of the subpoena.

19 A mere reference in a document to gender
20 reassignment surgery cannot through the ipse dixit of counsel
21 be automatically evidence of intent. And it's within the
22 prerogative of the Governor's Office that, when documents come
23 back from that search, if they don't bear on the issue in the
24 case, the fact that it's technically responsive to the scope
25 of an overbroad subpoena doesn't swing the door wide open,

1 especially when there are privileges.

2 THE COURT: Now, but what if they lead to
3 information? In other words, do they have to -- do they have
4 to be exactly on point, or is it enough if they discuss or
5 infer something that would lead to evidence?

6 MR. DOWD: Yeah, I need to right, Your Honor, it is
7 not our position that, if they don't mention the exclusion,
8 they're not relevant. That's -- we've never taken that
9 position. That's not the law. But when you're subpoenaing
10 documents from the executive branch, and you've got issues
11 like policy formation, deliberations, and all of the things
12 attendant, again, to the privileges that I promise I'll get to
13 right away, that that just doesn't surmount it.

14 You can't say -- you can't say, gee, intent's an
15 issue, give me everything, and I'll determine whether it bears
16 on intent when you have other larger or at least equal issues
17 of importance at play. And there's certainly no law that
18 suggests we have to turn over irrelevant documents. If they
19 send a subpoena -- in any case, if you send a subpoena that is
20 overbroad, and the yield from that subpoena brings back stuff
21 that in a good-faith estimation is not relevant to the case,
22 you don't have to produce it.

23 And I do agree with Your Honor that evidence on the
24 issue of intent can be found in materials other than those
25 that specifically mention the exclusion that's framed by this

1 complaint, but as you see in Ms. Corieri's declaration, which
2 is the only recitation of the content of those documents that
3 exist, these don't, and that's why I'm going to end the
4 relevance argument where I'm going to end the privilege
5 arguments, as to the extent you have any concern, we're
6 talking about 17 documents here, they should be reviewed by
7 you in camera, especially when on the other side of the
8 balance are things like executive privilege and deliberative
9 process privilege and a federal district court instructing the
10 chief executive of a state on what he or she should be doing
11 in the way that it communicates in formulating policy.

12 It's really a cheap date, to provide you with the 17
13 so you can make these decisions yourself. We provided as much
14 detail as we could without waiving the privilege in
15 Ms. Corieri's declaration. And it is not a summary, as
16 Mr. Wall decides. She goes through each document and provides
17 a paragraph as to its general nature and what its role was in
18 connection with the actions of senior advisors of the
19 Governor's Office in formulating policy, considering
20 legislation, et cetera.

21 So maybe that's where I should end the relevance
22 discussion, Your Honor. We think, through the Corieri
23 declaration, we satisfied our obligation to establish that
24 they're not relevant, and if they're not relevant, they
25 shouldn't be produced, but if there's any debate, you should

1 review them in camera. You have the plaintiff's recitation of
2 what he believes they might be, you have Ms. Corieri's
3 declaration of what she believes they actually are, and you
4 should make that decision after looking at them. It's a very
5 thin notebook of materials.

6 But that's relevance, Your Honor, and really, that's
7 where you should stop, is once you do that, you should stop
8 and deny the motion, because these 17 simply aren't relevant.
9 Technically responsive to the subpoena, yes. Relevant to the
10 claims and defenses asserted with particularity, no chance.

11 And if you do that, you don't even have to reach the
12 privilege issues that I'm now going to talk about. We know
13 from Justice Kennedy in the Cheney case, where he said a court
14 must first explore all other avenues for resolving a motion to
15 compel before reaching the executive privilege issue when
16 asked to enforce a broad subpoena. That was reiterated in the
17 Karnoski case by the Ninth Circuit two years ago. So you
18 shouldn't even get there. You should review them in camera,
19 make a decision on relevance, and that, we believe, will cause
20 the motion to be denied. If you do move forward, the
21 documents are privileged.

22 Now, I'll start with the executive communications
23 privilege because we understand your familiarity with
24 deliberative process through your prior ruling, but the
25 executive communication privilege that applies to executive

1 branch communications involving decisionmaking and policy
2 formulation, its purpose is well settled. I don't think
3 there's any debate. It's to facilitate governmental
4 decisionmaking and ensure executives are informed by candid
5 advice.

6 And court after court has said that the importance
7 of getting candid advice is that it improves decisionmaking
8 and it protects a public interest, and that's going to be
9 important here as you weigh whether the federal common law
10 reaches a state governor. But there's a public interest that
11 the Courts have announced in candid, objective, and even blunt
12 conversations in policy formulation, consideration of
13 alternatives, and decisionmaking. That first came from
14 Justice Burger in the Nixon case.

15 Now, Justice Burger also said something very
16 important, and that is that the executive communication
17 privilege is fundamental to the operation of government. It
18 fosters frank communications. And contrary to Mr. Wall's
19 argument, we're not seeking the creation of a new legal
20 doctrine. We're simply seeking the application of the
21 existing federal common law in light of reason and experience,
22 which is exactly what Federal Rule of Evidence 501 directs you
23 to do.

24 Mr. Wall says that the executive communication
25 privilege under federal common law does not extend to

1 governors and that there's no federal case so saying. We
2 disagree. There are state and federal courts across the
3 country that have applied the privilege to state governors,
4 and while the state cases are not binding on you, there's a
5 plethora of federal authority that says state law can be
6 informative to a federal court on federal common law privilege
7 issues.

8 And again, contrary to the plaintiff's assertion in
9 the briefs, both the motion and the reply, multiple district
10 courts have extended that privilege to governors as the chief
11 executives of their state. We cited five for six cases in our
12 papers. The most important one from our view is Merritt v.
13 State, decided in 2018 by your colleague Judge Campbell. And
14 in that case he ruled that the Governor, who was a nonparty to
15 that litigation, was allowed to redact information protected
16 by the executive privilege and to produce a privilege log
17 identifying said documents, very familiar and very analogous
18 to what has happened here.

19 The purpose of the privilege and the public policy
20 rationale applies with equal force to communications between a
21 governor and senior advisors as it does to the President and
22 his or her senior advisors because that public policy goal,
23 ensure candid advice and policy formulation and fostering
24 sound executive decisionmaking, applies with equal force to
25 the federal executive branch as it does to the state executive

1 branch.

2 There's brief reference in the briefs, and Mr. Wall
3 mentioned it today, that Arizona wouldn't adopt such a
4 privilege because of its strong policy favoring open
5 disclosure and access to records. That was a part of the
6 rationale that you articulated on your ruling to the State's
7 opposition under the deliberative process privilege.

8 And they cite to the Brewer case. Now, in Brewer,
9 the court found that there the state agency involved simply
10 didn't meet its burden, applying the elements of the
11 privilege. There were 174 documents, and they said they
12 didn't show why those documents fell within the scope of the
13 articulated privilege.

14 And of course Arizona's open record law has limits.
15 You can't say Arizona has open records in a public records
16 statute, ergo, there is nothing that is privileged. That
17 would fly in the face of Mathews v. Pyle decided almost 60
18 years ago, 70 years ago, saying that even that disclosure has
19 limits. Confidential information and information where it's
20 in the best interests of the State to not disclose it is not
21 subject to those open records laws.

22 So like Merritt, where the Governor was a nonparty,
23 here the Governor's Office is a nonparty, and here, where the
24 executive privilege is being asserted, just as it was there,
25 the appropriate response by a federal district court or a

1 magistrate is to recognize the privilege and make sure that
2 there is a privilege log and a supporting declaration that
3 substantiates it.

4 Well, here, the Governor's Office certainly properly
5 invoked the privilege, followed the rules that have been set
6 forth in the decisions. Again, you have Christina Corieri,
7 the senior policy advisor's declaration. And as that
8 declaration articulates -- and again, we just disagree with
9 plaintiff's characterization or disparagement of that
10 declaration. She identified each communication, shows how
11 they're among senior advisors in the Governor's Office. They
12 were carried out in the course and scope of advising the
13 Governor or formulating policy. They were made to foster
14 sound, candid, and informed deliberations, policymaking and
15 decisionmaking. They fall within the wheelhouse of the types
16 of communications protected by this privilege.

17 And importantly, as the Ninth Circuit recently said
18 in the Karnoski decision, once that privilege is invoked by
19 the chief executive, the Court should give it due deference,
20 and that's what we're asking here, that due deference be given
21 to it based on the strength of the declaration.

22 Now, plaintiff argues that, even if it applies, it
23 would be overcome here, and he attempts to pierce the
24 privilege. Well, that standard, which again, is well
25 established in federal case law, to overcome the executive

1 communication privilege, the plaintiff has to make a focused
2 showing of need demonstrating that the evidence sought is
3 directly relevant to central issues and not available with
4 diligence elsewhere.

5 The plaintiff says that he has satisfied this
6 requirement, but the briefs are bereft of any reasoned
7 analysis as support. The plaintiff presumes the relevance of
8 the documents by saying that we need documents on intent,
9 intent's an issue in this case, we think, it hasn't been
10 completely decided yet, but because we need documents on
11 intent, we get these documents. Well, that in no way is the
12 standard, and it in no way gives the proper deference to the
13 state agency that's asserting the privilege.

14 And as I said, the subpoena here wasn't narrowly
15 tailored. We're down to 17 documents on this issue. They
16 asked for 10 years of information that had that term in any
17 document. And as Ms. Corieri states, the documents don't
18 relate to the exclusion or the decision.

19 Absent something, something more than a tweet from
20 2013 by a member of the private sector, something, the
21 plaintiff has not established that there's a focused showing
22 of need for documents that are collateral to the issues that
23 bring us all here. He hasn't met his burden.

24 And I know this is going to sound familiar, but if
25 you have concern on that issue and concern as to whether

1 plaintiff has met his clear burden to overcome the privilege,
2 you should conduct an in camera review. We don't believe
3 there's any authority that says the outcome of this motion
4 should be a turnover of the documents. There has to be the
5 step of an in camera review by this Court to excise the
6 relevant material and ensure that the executive communication
7 privilege is not unnecessarily breached.

8 Now, I'll be quick on the deliberative process
9 privilege given your familiarity with that and there's full
10 briefing on it, but the same result is compelled there.
11 Everyone knows that privilege protects communications relating
12 to decisionmaking and the process of formulating policy by
13 government agencies. Here the plaintiff concedes that that
14 privilege exists at federal common law. Whether it exists
15 under Arizona state law really isn't at issue, because under
16 Rule 501 you're guided by federal common law.

17 Requirements are very straightforward as to the
18 documents or communications have to be predecisional and
19 deliberative, "deliberative" meaning prepared to help an
20 agency formulate its position, and it has to be invoked by a
21 responsible officer of the agency asserting the privilege.

22 So I'll return to the declaration. She explains
23 each document, she explains its role in deliberations, and she
24 also says that the communications embodied in those documents
25 assisted the Governor's Office in making informed decisions

1 regarding proposed legislation or formulating policy. That
2 fulfills the Governor's constitutional mandate to sign or veto
3 legislation presented to him or her and to ensure that the
4 laws are faithfully executed.

5 We also describe what those documents discuss.
6 Plaintiff has broken that down into four categories, which are
7 generally accurate. None of them have anything to do with the
8 decision or the intent behind the decision. So let's get to
9 whether that privilege can be overcome under the Warner
10 factors, which this Court is very familiar with and for which
11 no one debates the plaintiff has the clear burden.

12 The first and most important element under Warner is
13 the relevance of the evidence. And in the reply, the
14 plaintiff somehow felt comfortable signing a brief that says
15 the Governor has argued nothing to rebut the relevance of the
16 17 documents. We've provided you a 17-page brief and a
17 lengthy declaration of Ms. Corieri that were almost
18 exclusively focused on the irrelevance of the documents at
19 issue. It's a gross mischaracterization.

20 You also have uncontroverted evidence that the
21 documents do not address the decision to maintain the
22 exclusion or the intent behind that, and if they reference
23 gender reassignment surgery, they do it in a completely
24 different context.

25 And Your Honor, this is where this motion diverges

1 materially from the Court's prior ruling on the State's
2 assertion of the deliberative process privilege. There was no
3 debate as we understand that dispute that the documents for
4 which the State asserted the deliberative process privilege
5 actually dealt with the exclusion or the intent behind the
6 exclusion. That was not at issue in that debate, and those
7 documents were provided. We don't have that here. It is not
8 central to their claim, these documents. We've identified why
9 in a declaration, and there's really nothing to respond to it.

10 The second factor is the availability of other
11 evidence. Well, as I just said, the plaintiff received from
12 the State the actual relevant evidence on the issue of intent
13 and the issue of the exclusion.

14 THE COURT: But if they -- if they -- if they needed
15 the information in these 17 documents, they could not get that
16 information in any other way but this; correct?

17 MR. DOWD: Correct, with an emphasis on "if." And
18 again, that's where the in camera review comes down. Because
19 the premise here is, it's really a -- it's really a false
20 syllogism, Your Honor. It's that, one, plaintiff has to show
21 intent. Two, plaintiff has requested documents that have the
22 phrase "gender dysphoria" embedded in them somewhere. Ergo,
23 the documents responsive to that search are relevant to the
24 issue of intent. And that just -- that just can't be. That
25 just does not hold water.

1 And I know everyone on this call except the
2 Governor's Office is operating in a vacuum because we've seen
3 the documents and you haven't, which ties in to the importance
4 of your in camera review, but just because they respond to a
5 search term does not mean they're relevant, and it doesn't
6 mean that they bear on intent, and parties responding to
7 subpoenas and requests for productions have to make those
8 judgment calls every single day. It's just rare that you have
9 to make them run the other side of the balance as a privilege
10 being asserted by the chief executive of the State of Arizona.

11 So I'll end quickly, Your Honor. The third factor
12 under the Warner analysis is the Governor's Office's role in
13 the litigation. Now, an immutable fact in this case is the
14 Governor's Office is a nonparty. That matters. We provided
15 you with the case law showing that that matters in this
16 analysis, and they can't get around that by making unsupported
17 accusations of misconduct.

18 Now, Mr. Wall said that Ms. Corieri sent a tweet
19 that expressed discontent with state-funded gender
20 reassignment surgery. That's the characterization of the
21 tweet. The tweet's from 2013, when she worked in the private
22 sector, and here it is. "Advocates now demanding taxpayer
23 dollars for gender reassignment surgery under Medicare -- bet
24 Medicaid is next."

25 That's the entirety of it, and that is the entire

1 toehold upon which they're trying to break down the door and
2 say, once we've alleged intent and once we give you a neutral
3 statement from 2013, we get all these documents because
4 somewhere in them they say "gender dysphoria." There is no
5 way to connect those dots.

6 And lastly, Your Honor, Ms. Corieri talks about the
7 impact of breaching this privilege in response to a subpoena
8 of this nature, seeking documents that relate to issues
9 unrelated to the actual issues that remain in this case and
10 seeking them because they contain some reference to, quote,
11 gender affirming surgery, closed quote.

12 As she says, in her experience, and there's nothing
13 to controvert it, that to permit such an overreaching
14 subpoena, defeat the privilege that protects the deliberations
15 by which the Governor's Office operates, would hinder candid
16 debate and go right to the very heart of the public policy
17 concern that court after court after court has recognized in
18 finding the existence of these privileges. The plaintiff has
19 not met his burden on these 17 documents, and again if the
20 Court has any question, we would beg of you to conduct an in
21 camera review.

22 So let me close, Your Honor. The plaintiff's motion
23 rises and ultimately falls on the reality that he's seeking to
24 compel production from the executive branch of documents that
25 do not concern issues of the exclusion or intent, and the only

1 thing he's offered in response is sheer speculation as to
2 their content. That's not enough for many salient reasons,
3 and you can deny the motion on that ground alone. They're
4 also privileged, but for the reasons set forth in the
5 authorities briefed in the papers, you really don't need to go
6 there.

7 And lastly, if you remain unconvinced, we would urge
8 you to conduct the in camera examination required by court
9 after court that has addressed these issues.

10 Thank you.

11 THE COURT: All right. Thank you, Mr. Dowd.

12 MR. WALL: Your Honor, may I be allowed a brief
13 opportunity to respond to just a few points?

14 THE COURT: Absolutely.

15 MR. WALL: Thank you, Your Honor.

16 First, I'd like to provide some more context, as
17 Mr. Dowd alluded to, to clarify how it is that we arrived at
18 the motion today, and I'd also like to correct some
19 misconceptions and misstatements that Mr. Dowd failed to do so
20 in his presentation.

21 First, I think, Your Honor, he said earlier that the
22 Governor's Office has produced 3,500 documents in this case,
23 and that is not correct, unfortunately. They have produced
24 3,500 pages of documents but in actuality have produced only
25 about 340 documents responsive to plaintiff's subpoena, and I

1 think that's a critical factor for Your Honor to consider.

2 Again, the Governor's Office does not dispute that
3 it was intimately involved in the decisionmaking on the
4 decision whether to maintain this exclusion. We put before
5 Your Honor in that document I referenced as Exhibit 1 to
6 Ms. Wee's second declaration an email correspondence showing
7 the involvement and ultimate approval by the Governor's Office
8 of this decision to maintain the exclusion.

9 So that's the first point. The second point, I
10 would say, is the Governor's focus on the nature of the
11 subpoena is entirely misplaced. The plaintiff moved to compel
12 the Governor's Office to respond to and produce 17 documents
13 out of the 66 it withheld on the basis of privilege.

14 It's important to note that we are here on
15 plaintiff's motion to compel, not the Governor's Office motion
16 to quash the subpoena. The argument it makes about the nature
17 of the requests in the subpoena are larger, relevant, and a
18 red herring. We are here talking about 17 documents that
19 plaintiff looked through and reviewed from the privilege log
20 to ascertain whether they were relevant to the claims and
21 defenses and issues in this case, and it believes fairly they
22 are.

23 And that leads me to my third point, which is you
24 can very, I think, quickly dispense of this matter by relying
25 on the parties' papers. Mr. Dowd and the Governor's Office of

1 course is free to make whatever argument they want to make,
2 but I would note that the argument they're making today is
3 entirely inconsistent or largely inconsistent with the
4 argument that they made in their papers.

5 In particular, Mr. Dowd said earlier, we have never
6 said that if they do not address the exclusion, these
7 documents aren't relevant, and I think from Mr. Dowd's
8 presentation where he continued to reference throughout
9 whether the documents refer to the exclusion or the plan
10 itself as the basis for his argument as to nonrelevance of the
11 documents, that's telling in and of itself.

12 But you need only look to their opposition itself
13 where on I believe page 4 it says: Plaintiff has not met his
14 burden demonstrating the relevance of the documents at issue
15 in this motion. Plaintiff simply speculates in proclaiming
16 the demanded documents are relevant to establish whether
17 Christine Corieri and other members of the Governor's Office
18 acted with discriminatory intent when they made the decision
19 to maintain the exclusion challenged in this case. As the
20 Governor's Office has repeatedly explained to plaintiff's
21 counsel in attempting to avoid the burden and expense of this
22 very motion, the documents do not address the decision
23 regarding the exclusion at issue in this lawsuit.

24 I think if you then look at Ms. Corieri's
25 declaration, throughout she repeats this same argument. On

1 paragraph 6 she states broadly -- and again, this is document
2 208-1: I have personally reviewed each of the documents.
3 They do not discuss or relate to the decision regarding the
4 exclusion at issue in the plaintiff's complaint. She then
5 goes through in paragraph 11 categories of the 17 documents,
6 not each document, as Mr. Dowd stated, and says within each of
7 those descriptions that they do not relate to the plan or the
8 exclusion.

9 The Governor's Office's arguments as to relevance
10 are entirely premised on the mistaken assumption that
11 discovery here is limited only to those documents that
12 specifically address the exclusion and that documents that
13 relate more broadly to the Governor's either policy that is
14 adverse to transition-related care or that evidence bias
15 without discussing the exclusion are irrelevant.

16 They say that we have provided no evidence that
17 these documents in fact meet those qualifications. Again, you
18 can look at the documents submitted and the papers of the
19 parties.

20 You referenced earlier that you did not have the
21 privilege log before you, and that privilege log has been
22 provided to you as Exhibit 7 to Ms. Wee's first declaration,
23 which is document 202-3, beginning at page 70.

24 And I think it's important that we go through and
25 look at each of the requests there, each of the entries on

1 that privilege log, to ascertain what information the
2 Governor's Office has provided itself that leads us to
3 conclude that these 17 documents are relevant to the question
4 of whether there is discriminatory intent, potentially
5 relevant to the question of whether there's discriminatory
6 intent that animated its decisionmaking on the exclusion or
7 whether there is a policy of general opposition to
8 transition-related care.

9 I don't know, Your Honor, if you have that in front
10 of you, but I'm happy to go through it just very quickly.

11 THE COURT: Yes.

12 MR. WALL: If you look at that revised privilege
13 log, the 17 documents at issue, the first of which appears on
14 page 1 is a document dated July 17, 2015. It is an email from
15 Gerrie Marks to Christina Corieri, and the subject matter is
16 "Health Care Plans."

17 The plaintiff thinks it is entirely reasonable for
18 it and this Court to assume that the fact that this document's
19 both responsive to its request for production concerning
20 documents related to transition-related care, and a document
21 whose subject matter is "Health Care Plans," that this is a
22 document that is relevant to the claims and issues in this
23 case.

24 If you look on page 4 and 5 of that privilege log,
25 the next I believe 14 documents that are at issue in this

1 motion are included halfway down page 4 to the top of page 5.
2 You will see that all of those documents concern for the most
3 part the proposed legislation which I referenced earlier,
4 which was a bill specifically to exclude gender reassignment
5 surgery and related care from being covered as matter of
6 Arizona statute by other Arizona entities administering public
7 health benefits, specifically AHCCCS, which administers the
8 State's Medicaid program, I believe, and the Department of
9 Corrections in its administration of public health care for
10 inmates.

11 Those documents, that legislation, again, was
12 revealed or introduced to the legislature in January 2017, a
13 mere few weeks after the Governor's Office, along with the
14 ADOA, concluded its decisionmaking maintaining the exclusion
15 here. Those documents are clearly relevant and discussions
16 about that legislation are clearly relevant to the claims at
17 issue in this case where we are discussing whether the
18 decisionmaking around the exclusion was born of legitimate
19 government interest or based on discriminatory intent or a
20 policy of general opposition to transition-related care or
21 transgender individuals.

22 And I think parsing through this privilege log, Your
23 Honor, it goes to the point that Mr. Dowd continually made,
24 that these requests are not narrowly tailored. If you review
25 this privilege log, you'll notice that there, again, are 66

1 documents here, all of which are responsive to plaintiff's
2 request. Plaintiff has focused on just 17 because they
3 explicitly relate to health care coverage and policies.

4 If you again look at the papers provided by the
5 parties, including Ms. Corieri's deposition, I mean
6 Ms. Corieri's declaration, you will notice that, when she
7 reviewed, goes through the categories of these documents, she
8 in almost every instance concludes, and this is paragraph 11
9 of her declaration, and I'm reading paragraph -- subparagraph
10 1 in paragraph 11 of her declaration: This communication and
11 the attached materials were also deliberative as they were
12 made in the course of preparing to advise the Governor and to
13 assist in the Governor's Office's formulation of health care
14 policy.

15 It defies logic and reason to assume that documents
16 that are about the formulation of health care policies that
17 include a discussion or reference "transition-related care"
18 are not relevant to the claims and issues in this dispute.

19 Finally, just briefly, on the presidential
20 communications privilege and deliberative process privilege, I
21 think what's notable here is that Mr. Dowd had an ample
22 opportunity to respond to plaintiff's arguments that are made
23 distinctly in both his opening and reply brief, and he failed
24 to do so.

25 There is no dispute that what animates the

1 presidential communications privilege, the separations of
2 power doctrine, does not apply to a federal court enforcing
3 federal law against a state individual. That case, which we
4 set out in our reply brief, *United States v. Gillock* is very
5 clear on this point, and that is from the United States
6 Supreme Court.

7 And you can look to footnote 9 in that reply brief
8 where -- and I'm quoting this case that says: Under our
9 federal structure, we do not have a struggle for power between
10 the federal and state systems such as inspired the need for
11 the Speech and Debate Clause as a restraint on the federal
12 executive to protect federal legislators. And further, the
13 federal interference in the state legislative process is not
14 on the same constitutional footing with the interference of
15 one branch of the federal government in the affairs of a
16 coequal branch.

17 I think it's critically important that the Court
18 bear this in mind and bear in mind what is the seminal case on
19 this topic in the Ninth Circuit, which is *Karnoski*. That case
20 specifically refers to the history of the presidential
21 communications privilege, which is not in dispute here, and it
22 explains why it is inapplicable to a state governor,
23 specifically, and I believe I referenced this in my earlier
24 presentation, that it talks about the unique conditions of the
25 presidential communications privilege only to the

1 constitutional role that the president has under our federal
2 system.

3 Those same concerns are not at issue with respect to
4 an Arizona governor, and if they were, you would expect an
5 Arizona court to have recognized such a privilege under
6 Arizona law. The Governor's Office cannot point to any such a
7 decision by an Arizona court making that point.

8 Thank you.

9 THE COURT: Thank you, Mr. Wall.

10 So I just want to make sure I understand a couple of
11 things that you said. I think that maybe the difference in
12 the arguments are that the Governor's Office takes the
13 position that, if the emails or the documents don't relate
14 specifically to this exclusion in this insurance policy, that
15 they're not relevant, whereas the plaintiff's position is
16 that, if they relate to any discussions around any kind of
17 similar exclusions in any State of Arizona health care
18 policies, that that could show intent or pattern and practice
19 or something like that, and that's why they would be relevant.

20 Did I understand that correctly?

21 MR. WALL: Yes, Your Honor. I think that's a fair
22 characterization of the parties' position.

23 MR. DOWD: Your Honor, this is Dan Dowd. I don't
24 think that's accurate with respect to the Governor's Office
25 position. We're not --

1 THE COURT: Okay.

2 MR. DOWD: We're not saying, if it doesn't mention
3 the exclusion, it can't be relevant. What we're saying is the
4 exclusion and the intent behind it are what we have been told
5 is what is relevant, and these documents don't mention the
6 exclusion, and from it you can't glean any information that
7 would bear on intent.

8 THE COURT: Or any -- or any information that would
9 lead to discovery of information that would bear on intent.
10 Is that --

11 MR. DOWD: Correct.

12 THE COURT: Okay. All right. Thank you. I think
13 -- I think I understand both sides' positions.

14 And let's see. I just want to make sure -- I'm
15 looking through my notes to see if there was anything else. I
16 think I've got it. Between the briefings and the really
17 informative oral arguments today, I feel pretty clear on both
18 parties' positions, so I will take this under advisement, and
19 we will issue a written order.

20 Is there anything else that we need to address
21 today?

22 MR. WALL: No, Your Honor. From plaintiff's
23 perspective, that covers it. Thank you.

24 THE COURT: All right. Thank you.

25 Mr. Dowd?

1 MR. DOWD: Thank you for your time today, Your
2 Honor. Nothing more from the Governor's Office.

3 THE COURT: Of course. And just to make sure, there
4 were no other counsel that wanted to be heard today or are
5 there?

6 MR. CURTIS: Your Honor, this is Ryan Curtis on
7 behalf of State defendants. We do not have any comments to
8 make.

9 THE COURT: All right. Thank you.

10 MR. YOST: Your Honor, this is Austin Yost on behalf
11 of the Arizona Board of Regents, and we don't have any
12 comments today. Thank you.

13 THE COURT: Thank you very much.

14 All right. So I think everyone's had their
15 opportunity. I really appreciate it. These are -- they are
16 complicated and interesting issues, and we'll get to work on
17 this and get the order issued as soon as possible.

18 MR. WALL: Thank you, Your Honor.

19 MR. DOWD: Thank you, Your Honor.

20 THE COURT: Thank you, counsel. Hope I get to meet
21 you in person at some point and that, you know, we can have
22 oral argument in court again some day.

23 All right. Thank you. And enjoy the rest of your
24 day.

25 MR. WALL: Thank you. Bye.

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THE COURT: Bye.

(Proceedings concluded in this matter at 12:03 p.m.)

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C E R T I F I C A T E

I, Erica R. McQuillen, do hereby certify that the preceding pages of typewritten matter are a true, correct, and complete transcription of the digital recording of proceedings in the above-entitled matter.

Dated this 12th day of August, 2021.

s/ERICA R. McQuillen
ERICA R. McQuillen, RDR, CRR