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UNITED STATES DISTRICT COURT  
DISTRICT OF ARIZONA

11 Russell B. Toomey,  
12 Plaintiff,  
13 v.  
14 State of Arizona, *et al.*  
15 Defendants.

No. 4:19-cv-00035

**DEFENDANTS STATE OF  
ARIZONA’S, ANDY TOBIN’S, AND  
PAUL SHANNON’S MOTION TO  
STAY ORDER**

**(EXPEDITED CONSIDERATION  
REQUESTED)**

18 Defendants State of Arizona (the “State”), Andy Tobin, and Paul Shannon  
19 (collectively, the “State Defendants”) hereby submit their Motion to Stay enforcement of  
20 this Court’s Order dated September 21, 2021, which compels production of documents  
21 withheld by the State Defendants pursuant to the attorney-client privilege (the “Order”).  
22 The State Defendants intend to petition the United States Court of Appeals for the Ninth  
23 Circuit for a Writ of Mandamus regarding the Order prior to the date required by the Order  
24 for production of the documents. As further detailed below, a ruling by the Ninth Circuit  
25 could significantly affect, or even invalidate, the Order. If the Order is not stayed, the State  
26 Defendants would be required to produce privileged documents and that production could

1 not be unwound if the Ninth Circuit later modifies or invalidates the Order. As a result, a  
2 stay is necessary and appropriate.

3 This Motion is supported by the following Memorandum of Points and Authorities,  
4 the pleadings and papers filed in this matter, and any oral argument heard.

### 5 **MEMORANDUM OF POINTS AND AUTHORITIES**

#### 6 **I. PROCEDURAL BACKGROUND**

7 On May 20, 2021, Plaintiff filed its Second Motion to Compel Production of  
8 Documents (the “Motion”), seeking a court order compelling the State Defendants to  
9 produce documents withheld on the basis of the attorney-client privilege. (Doc. 195.)  
10 Plaintiff contends that the State Defendants waived the attorney-client privilege with respect  
11 to those documents by “asserting and relying on legal advice as a defense to the charge that  
12 discriminatory intent [motivated] [Defendants’] decision to maintain the Exclusion.”<sup>1</sup> (*Id.*  
13 at 2.) The State Defendants timely opposed Plaintiff’s Motion, and clarified that they have  
14 not asserted an “advice-of-counsel” defense. (*See* Doc. 201.)

15 On June 28, 2021, Magistrate Judge Bowman granted the Motion. (Doc. 213 (the  
16 “Magistrate Order”).) Magistrate Judge Bowman ruled that the State Defendants *implicitly*  
17 waived the attorney-client privilege with respect to the withheld documents by asserting an  
18 advice of counsel defense as “evidence that they harbored no discriminatory intent” in  
19 maintaining the Exclusion. (*Id.* at 1-2.) Magistrate Judge Bowman relied on the State  
20 Defendants’ Interrogatory Responses and deposition testimony in reaching this conclusion.  
21 (*Id.* at 4-6.) The Magistrate Order concluded that Plaintiff cannot realistically dispute  
22 Defendants’ claimed reason for maintaining the Exclusion without access to the attorney-  
23 client privileged documents and that “fairness” thus mandates that Plaintiff be able to

24 \_\_\_\_\_  
25 <sup>1</sup> Plaintiff also asserted that the State Defendants waived the attorney-client privilege by  
26 disclosing the substance of it during depositions. (Doc. 195 at 6, 11-13.) However, neither  
the Magistrate Order nor District Court’s order reached this argument by Plaintiff. (*See*  
*generally* Doc. 213; Doc. 241.)

1 review the substance of the legal advice. (*Id.* at 6.)

2 The State Defendants appealed the Magistrate Order. (Doc. 223.) Again, the State  
3 Defendants made clear that they have not asserted an “advice-of-counsel” defense. (*Id.* at  
4 1-6.) The State Defendants emphasized that the attorney-client privilege is too important  
5 to be waived based on inaccurate or incomplete characterizations. (*Id.* at 7-8.) The State  
6 Defendants urged the District Court to reverse the Magistrate Order and deny Plaintiff’s  
7 Motion. (*See generally id.*)

8 On September 21, 2021, the Court denied the State Defendant’s objection. (Doc.  
9 241 (the “Order”).) The Order affirms Magistrate Judge Bowman’s finding that the State  
10 Defendants asserted an advice of counsel defense, stating “the State Defendants’  
11 Interrogatory Responses indicate that they relied on the advice of legal counsel in deciding  
12 to maintain the exclusion of coverage for gender reassignment surgery.” (*Id.* at 7.) The  
13 Order further states that “[w]ithout disclosure of the withheld documents, Plaintiff cannot  
14 fully respond to Defendants’ argument that their reason for maintaining the exclusion was  
15 lawful and non-discriminatory because it was based on legal advice” and that “fairness  
16 mandates that the documents be disclosed.” (*Id.*)

17 The State Defendants intend to petition the Ninth Circuit for a writ of mandamus,  
18 directing the Court to vacate its order compelling production of the privileged documents.

19 **II. THE COURT SHOULD STAY THE ORDER PENDING RESOLUTION OF**  
20 **THE STATE DEFENDANTS’ PETITION FOR A WRIT OF MANDAMUS.**

21 “[T]he power to stay proceedings is incidental to the power inherent in every court  
22 to control the disposition of the causes on its docket with economy of time and effort for  
23 itself, for counsel, and for litigants.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). When  
24 considering a motion for stay, courts consider: “(1) whether the stay applicant has made a  
25 strong showing that he is likely to succeed on the merits; (2) whether the applicant will be  
26 irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure

1 the other parties interested in the proceeding; and (4) where the public interest lies.” *Hilton*  
2 *v. Braunskill*, 481 U.S. 770, 776 (1987). Courts apply a sliding scale analysis to these  
3 factors, where “[a]t one end of the continuum, the moving party is required to show both a  
4 probability of success on the merits and the possibility of irreparable injury. . . . [and a]t the  
5 other end of the continuum, the moving party must demonstrate that serious legal questions  
6 are raised and that the balance of hardships tips sharply in its favor.” *Golden Gate*  
7 *Restaurant Ass’n v. City & Cnty. Of San Francisco*, 512 F.3d 1112, 1116 (9th Cir. 2008)  
8 (internal citations and quotations omitted); *see also Alliance for the Wild Rockies v. Cottrell*,  
9 632 F.3d 1127, 1134 (9th Cir. 2011) (a movant can obtain a stay by showing that there are  
10 “serious questions going to the merits” and the balance of hardships that favors the movant).

11 First, State Defendants are likely to succeed on the merits in their Petition for a Writ  
12 of Mandamus. A movant need not show a high probably of success on the merits; instead,  
13 a finding that he has “at least a fair chance of success . . . is all that is required.” *Republic*  
14 *of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988). Further, a movant can  
15 obtain a stay by showing that there are “serious questions going to the merits.” *Alliance for*  
16 *the Wild Rockies*, 632 F.3d at 1131–32. The State Defendants have consistently and  
17 continuously maintained that they did not assert an advice-of-counsel defense. (*See* Doc.  
18 201, 223.) A review of the Interrogatory Responses does not change this conclusion. As  
19 outlined in the State Defendants’ opposition to Plaintiff’s Motion and their objection to the  
20 Magistrate Order, the content of the Interrogatory Responses does not assert an advice-of-  
21 counsel defense or waive the attorney-client privilege. (*See* Doc. 201 at 4-9; Doc. 223 at 1-  
22 6.) At the very least, the State Defendants have “at least a fair chance of success” on  
23 mandamus. In addition, the writ petition will raise “serious questions” about Plaintiff’s  
24 contentions, the impact of the State Defendants’ Interrogatory Responses, and the Court’s  
25 determination that “fairness” requires disclosure of the documents. It is crucial that the  
26 Ninth Circuit be given the opportunity to review and rule upon State Defendants’ Petition

1 before they are required to produce the privileged documents to Plaintiff.

2 Second, it cannot be disputed that State Defendants will be irreparably injured if the  
3 Order is not stayed. Preservation of the “status quo” will often prevent irreparable injury.  
4 *See Golden Gate Restaurant*, 512 F.3d at 1116. Staying the Order will merely stay the  
5 production of the privileged documents to Plaintiff for a brief period. No other case  
6 deadlines will be affected by a stay. Moreover, it is extremely unlikely that other  
7 contemplated discovery will be affected by a stay. The only outstanding discovery is the  
8 depositions of key witnesses for the State of Arizona, and the parties have agreed to  
9 postpone these depositions until the Court issues final rulings on both Plaintiff’s Motion to  
10 compel the privileged documents and Plaintiff’s motion to compel documents from the  
11 Governor’s Office (which is currently still pending). If the State Defendants’ Petition is  
12 denied, they can produce the documents within 5 court days of the denial. A stay would  
13 clearly preserve the status quo in this matter. If a stay is not granted, however, the State  
14 Defendants will be required to produce their confidential, attorney-client privileged  
15 documents to opposing parties in litigation. Once this production is made, it cannot be  
16 entirely undone even if Plaintiff is precluded from using the documents. Thus, the grave  
17 harm of disclosure cannot be unwound if the Ninth Circuit grants a Writ of Mandamus.

18 Third, Plaintiffs will not be injured by a stay. A delay in the case is the only possible  
19 harm that could result from a stay of the Order. As noted above, however, granting a stay  
20 of the Order will not delay any case deadlines or any discovery. In addition, this stay request  
21 is narrow and limited only to the Order, not the case in its entirety. A stay would not require  
22 further delaying the deadline for dispositive motions or any other case deadlines. For these  
23 reasons, any delay in enforcing the Order will not detrimentally affect Plaintiffs.

24 Finally, public interest favors granting a stay here. “The public interest is served in  
25 preserving the integrity of the right to appellate review.” *Gila River Indian Cmty. v. United*  
26 *States*, No. CV-10-1993-PHX-DGC, 2011 WL 1656486, at \*4 (D. Ariz. May 3, 2011)

1 (internal citations and quotations omitted). Defendants’ right to review of the Order will  
2 be rendered effectively futile should the Order be enforced before review can be obtained.  
3 The Ninth Circuit may well hold that the State Defendants did not waive their attorney-  
4 client privilege and order the District Court to deny Plaintiff’s Motion. As discussed above,  
5 staying enforcement of the Order will merely stay the production of the subject, privileged  
6 documents. The attorney-client privilege is “the oldest of the privileges for confidential  
7 communications known to the common law.” *Upjohn Co. v. United States*, 449 U.S. 383,  
8 389, 101 S. Ct. 677, 682, 66 L. Ed. 2d 584 (1981). Preserving this cherished protection  
9 unless and until a waiver has been conclusively determined is, without question, within the  
10 public interest.

11 **III. CONCLUSION**

12 For the foregoing reasons, a stay of the Order is warranted and necessary here. The  
13 State Defendants respectfully request that this Court stay enforcement of the Order until the  
14 Ninth Circuit rules on its Petition for a Writ of Mandamus. If the Ninth Circuit denies the  
15 State Defendant’s Petition, the State Defendants will produce the documents at-issue within  
16 5 court days of the Ninth Circuit’s order.

17 DATED this 1st day of October, 2021.

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9 UNITED STATES DISTRICT COURT  
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11 Russell B. Toomey,  
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No. 4:19-cv-00035

**[PROPOSED] ORDER GRANTING  
 DEFENDANTS STATE OF  
 ARIZONA’S, ANDY TOBIN’S, AND  
 PAUL SHANNON’S MOTION TO  
 STAY ORDER**

18 Having reviewed Defendants State of Arizona’s, Andy Tobin’s, and Paul Shannon’s  
 19 Motion To Stay Order and finding good cause,

20 IT IS ORDERED that the Motion is granted.

21 IT IS FURTHER ORDERED that the Order (Doc. 241) is stayed until the Ninth  
 22 Circuit rules on State Defendants’ Petition for a Writ of Mandamus.

23 IT IS FURTHER ORDERED that, if the Ninth Circuit denies the Petition, State  
 24 Defendants will produce the documents at-issue within 5 court days of the Ninth Circuit’s  
 25 order.

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