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Attorneys for Defendant

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Helen Roe, a minor, by and through her parent and next friend Megan Roe; James Poe, a minor, by and through his parent and next friend Laura Poe; and Carl Voe, a minor, by and through his parent and next friend, Rachel Voe,

Plaintiffs,

v.

Don Herrington, in his official capacity as Interim State Registrar of Vital Records and Interim Director of the Arizona Department of Health Services,

Defendant.

NO. 4:20-cv-00484-JAS

DEFENDANT'S RESPONSE TO PLAINTIFFS' CORRECTED MOTION TO COMPEL RESPONSES TO INTERROGATORIES AND PRODUCTION OF DOCUMENTS

Defendant Don Herrington ("Director Herrington") opposes Plaintiffs' Corrected Motion to Compel Responses to Interrogatories and Production of Documents (Dkt. 121). Plaintiffs' requests regarding Director Herrington's "governmental interest(s) and other justification(s)" for A.R.S. § 36-337(A)(3) are improper, irrelevant, and based on a false premise. The discovery of information regarding "corrections" as defined A.R.S. § 36-301(6) is entirely irrelevant to any claims or defenses in this case. And finally, Plaintiffs' request for ESI discovery is irrelevant, overbroad, unduly burdensome, and grossly disproportionate to the needs of this case. Plaintiffs' Motion to Compel should be denied.

I. Plaintiffs' Motion to Compel Should be Denied.

A. Plaintiffs' Interrogatory Nos. 9-16 and Requests for Production Nos. 14-17 Seek Irrelevant, Improper, and Privileged Information.

Interrogatory Nos. 9-16 and Request for Production Nos. 14-17 request Director Herrington to describe and explain *his* "governmental interest(s) and other justification(s)" under both the Equal Protection and Substantive Due Process clauses "for denying transgender individuals who have not undergone a 'sex change operation' the ability to CHANGE the sex listed on their BIRTH RECORDS under subsection (A)(3) of Arizona Revised Statute section 36-337."[1] (Dkt. 120-1 at 5-20.)

First, these requests are based on the false premise that Director Herrington "denies" transgender individuals who have not undergone a sex change operation the ability to amend the sex listed on their birth certificates. Every individual—sex change operation or not—has the opportunity to amend the sex listed on an Arizona birth certificate through the court order process set forth in A.R.S. § 36-337(A)(4). Moreover, Plaintiffs' requests presume that the statute and/or Director Herrington discriminates against them. To respond to these requests as currently worded would be conceding that necessary element of Plaintiffs' equal protection and due process claims. Only *if* Plaintiffs are discriminated against must there

[1] Contrary to Plaintiffs' assertions, these requests do not seek any information regarding Director Herrington's governmental interests and/or justifications for any regulation promulgated by ADHS. (*See* Dkt. 121 at 8.)

be a legitimate governmental purpose. *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1064 (9th Cir. 2014). Director Herrington does not concede that Plaintiffs' constitutional rights have been or will be violated here or that the statute is discriminatory. By compelling him to respond, he must concede either that false premise or that no governmental interest and/or justification exists for "denying" transgender individuals who have not undergone a sex change operation the opportunity to amend their birth certificates under Subsection (A)(3). Director Herrington requested that Plaintiffs re-phrase these requests so that he could adequately respond, but Plaintiffs refused.

Next, these requests seek information regarding *Director Herrington's* alleged "denial" of Plaintiffs' ability to amend their birth certificates under Subsection (A)(3). That too is a false premise because Plaintiffs do not allege that Director Herrington and/or ADHS denied them anything. ADHS does not create, construct, and/or adopt Arizona statutes. Neither ADHS, nor Director Herrington, were involved in or have ever been involved in this process. Rather, ADHS is required by law to follow applicable statutes, including A.R.S. § 36-337, and is tasked only with implementing and enforcing those statutes. *See* A.R.S. §§ 36-302, 36-303. Thus, to the extent Plaintiffs' requests seek information underlying the enactment and/or adoption of this statute or the interests and/or justifications behind Subsection (A)(3), Director Herrington cannot respond to it. Such legislative intent is in the possession of the Arizona Legislature.

Finally, Plaintiffs' contention that Director Herrington bears the burden to "offer a justification *for enforcing* the surgical requirement" is misplaced. (*See* Dkt. 121 at 8, citing *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982), emphasis added.) Under *Hogan*, "the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an 'exceedingly persuasive justification' *for the classification*." 458 U.S. at 724 (emphasis added). "The burden is met only by showing at least that *the classification* serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Id*. (emphasis added). Plaintiffs have not asked for that. Moreover, the

"justification" analysis under the Equal Protection and Due Process Clauses is legal *argument*. "Discovery as to legal arguments is impermissible." *Kendrick v. Sullivan*, 125 F.R.D. 1, 4 (D.D.C. 1989). Really, Plaintiffs are asking Director Herrington to divine all the reasons why the Arizona legislature enacted the statute. They are asking the wrong person.

B. Information Regarding "Corrections" to Registered Birth Certificates is Irrelevant to Any Claim or Defense in This Case.

Plaintiffs' Interrogatory No. 1 requests that Defendant "List and describe each and every ADHS and/or BVR POLICY CONCERNING a CHANGE or request to CHANGE the sex listed on a BIRTH RECORD." (Dkt. 121-1 at 1.) Plaintiffs defined "CHANGE" as "any amendment, addition, alteration, deletion, correction, modification, or substitution." (Dkt. 121-2 at 7.) Director Herrington appropriately objected to this definition of "CHANGE." (Dkt. 121-2 at 35-37.) As stated in his objections, a birth certificate registered in the State of Arizona can *only* be amended or corrected pursuant to A.R.S. § 36-323. (*Id.* at 35.) Thus, there is no legal meaning to the words "addition," "alteration," "deletion," "modification," and/or "substitution," and Plaintiffs' use of these terms in their definition of CHANGE are both superfluous and legally inapplicable.

Director Herrington also objected to the word "CHANGE" to the extent it encompasses the term "correction." (Dkt. 121-1 at 4; Dkt. 121-2 at 35-37.) The terms "correction" and "amend[ment]" are legally distinct. The Arizona Legislature has defined "correction" as "a change made to a registered birth certificate because of a typographical error, including misspelling and missing or transposed letters or numbers." *See* A.R.S. § 36-301(6). (*See also* Dkt. 121-2 at 35-36.) It has defined "amend" as "a change, other than a correction, to a registered certificate by adding, deleting or substituting information on that certificate." A.R.S. § 36-301(2). (*See also* Dkt. 121-2 at 36.)

Plaintiffs improperly conflate the terms "correct" with "amend" and have

unnecessarily and protractedly confused that distinction in this case.[2] (*See*, *e.g.*, Dkt. 47 ¶¶ 6, 19-21, 45, 47, 49, 52, 54, 56, 69-70, 81, 83, 93, 102, 111, 125-126, 142-143.) Contrary to the conclusory arguments contained in Plaintiffs' Motion to Compel, Plaintiffs' claims relate *solely* to the alleged unconstitutionality of the "surgical requirement" contained in A.R.S. § 36-337(A)(3) and its "implementing regulation" A.A.C. R-9-19-208(O). (*See* Dkt. 47 at ¶¶ 121-44.) Their equal protection claim specifically alleges that Plaintiffs and the putative class—transgender people who have *not* undergone a sex change operation—are prevented "from obtaining birth certificates through the process created by Subsection (A)(3)" because they have not undergone a sex change operation, which "impermissibly discriminates" against them on the basis of sex and transgender status. (*Id.* at ¶¶ 125-26.) There is no allegation or claim regarding "corrections" made to the named Plaintiffs' birth certificates due to typographical errors, and they have not alleged that "corrections" as defined in § 36-301(6) are at issue in this case. There are no allegations that Plaintiffs' birth certificates contain typographical errors, including misspelling and missing or transposed letters or numbers, so that a "correction" would be appropriate or applicable here.

Indeed, § 36-337 is titled "Amending birth certificates," and is applicable *only* to amendments. *See* A.R.S. § 36-337(A) ("The state registrar shall *amend* the birth certificate for a person born in this state when the state registrar receives any of the following[.]") (emphasis added.) The statute is devoid of the term "correction" as defined in § 36-301(6). Where there is no typographical error, *no one*—even those who submit a physician's statement that verifies an individual's sex change operation under Subsection (A)(3)—in the State of Arizona can "correct" the sex listed on their birth certificates via the process outlined in Subsection (A)(3).[3] It is impossible to correct a birth certificate under

[2] Director Herrington has repeatedly made Plaintiffs aware of this distinction. (*See* Dkt. 23 at 3-6; Dkt.54 at 3-4.)

[3] Plaintiffs' allegation that Director Herrington has a "policy of accepting a physician's letter to correct information on a person's birth certificate pursuant to A.R.S. § 36-323(C)" showcases Plaintiffs' fundamental misunderstanding of A.R.S. 36-337(A). (Dkt. 121 at 3.) Plaintiffs should not be permitted to conduct discovery based on their own incorrect misunderstanding.

Subsection (A)(3) because an operation is not a "typographical error" as defined. Individuals may only *amend* the sex listed on their birth certificates through Subsection (A)(3). Thus, Plaintiffs are seeking to *amend* the sex listed on their birth certificates.

Plaintiffs have failed to satisfy their threshold burden by demonstrating that the information regarding a "correction" to a birth certificate is relevant to their claims in this lawsuit. *See Heffernan v. Pinnacle Health Facilities XXVI LP*, 2021 WL 2530837, at *1 (D. Ariz. Jan. 22, 2021) ("The party seeking to compel discovery has the burden of establishing that its request satisfies the relevancy requirements of Rule 26(b)(1)."). Plaintiffs' entire argument is based on the incorrect assumption that, absent a typographical error, individuals can "correct" the sex listed on a birth certificate under Subsection (A)(3) when they cannot. Information related to "corrections" cannot (and should not) be used to "test the veracity and persuasiveness of Defendant's purported justification(s) for enforcing A.R.S. § 36-337" because Plaintiffs' claims fall solely within § 36-337(a), and § 36-337(a) relates only to amendments. (Dkt. 121 at 11.) Allowing Plaintiffs to conduct discovery into "corrections" opens a Pandora's Box of immaterial information that will only further confuse the issues in this case.

Moreover, Plaintiffs' reliance on a single email from an ADHS employee dated September 5, 2018, is not enough to allow wholesale discovery into an irrelevant topic, particularly because there is no context provided for the information contained in this email. (*See* Dkt. 121-2 at 100-01.) Nevertheless, the information described in the email is accurate and consistent with Director Herrington's position. If there is a typographical error (referred to as a "data entry error" in the email) involving the registrant's sex (i.e., the hospital incorrectly entered the wrong sex on the birth certificate registration worksheet after the birth of a child), the birth certificate could be "corrected" if certain supporting worksheets, medical records, and/or physician letters are provided to support the correction. (Dkt. 121-2 at 100-01.) That is different from the allegations in this case because Plaintiffs have not asserted any typographical and/or data entry errors.

Director Herrington provided information responsive to this Interrogatory with

respect to amendments only. (Dkt. 121-2 at 36-38.) Information related to "corrections" as defined in § 36-301(6) is inappropriate because it is inapplicable to any of the claims or defenses in this case. Plaintiffs' Motion to Compel should be denied with respect to Interrogatory No. 1.[4]

C. Plaintiffs' Proposed ESI Search Protocol is Unduly Burdensome, Overbroad, and Disproportionate to the Needs of this Case.

Plaintiffs' vague recitation of the events regarding ESI discovery is neither complete nor accurate. At the outset, Director Herrington has not yet conducted a search of available ESI for the sole reason that the parties have yet to agree on an appropriate and proportionate ESI search protocol, including custodians, search terms, and a date range. Director Herrington's responses to Plaintiffs' numerous discovery requests that may seek information contained in ESI as referenced in Plaintiffs' Motion to Compel are therefore appropriate at this stage.

On January 12, 2022, Plaintiffs proposed that the parties enter into an agreement regarding the production of documents and ESI. (*See* Exhibit 1, email correspondence between counsel, at 2.) On January 24, 2022, Director Herrington stated that he needed more information before entering into an agreement and requested that Plaintiffs provide a list of their proposed ESI custodians, search terms, and a date range so that he could evaluate the relevance and burden of Plaintiffs' ESI search protocol and tailor the proposed agreement to the specifics of this case. (Ex. 1 at 1.) On January 25, 2022, Plaintiffs provided a list of proposed custodians, search terms, and a date range (hereafter referred to as "Plaintiffs' proposed search protocol"). (Ex. 1 at 1; *see also* Dkt. 121-2 at 102-103.) On February 7, 2022, Director Herrington advised Plaintiffs that he was evaluating Plaintiffs' proposed search protocol and was in the process of developing a counterproposal. (Ex. 2,

[4] Contrary to Plaintiffs' assertions, Director Herrington *did* assert an overbreadth, unduly burdensome, and proportionality objection to this Interrogatory based on the time-period of 2004 to present. (Dkt. 121 at 11; *see* Dkt. 121-2 at 36-37.) To the extent the Court finds that this information is relevant, the time-period should be limited to 2019 to present. (*See* Dkt. 121-2 at 36-37.)

email correspondence between counsel, at 1.)

At no point during this process did Plaintiffs disclose that counsel for Plaintiffs had previously submitted an expansive Public Records Request ("PRR") to ADHS on behalf of former Plaintiff Lizette Trujillo on July 27, 2020, prior to filing Plaintiffs' Complaint. (Ex. 3, correspondence from defense counsel dated May 16, 2022, at 2.) Numerous correspondence was exchanged between Plaintiffs' counsel and Robert Lane, Administrative counsel for ADHS, regarding the scope of this PRR and an ESI search protocol was agreed upon. (*Id.*) Documents and ESI responsive to the PRR were produced by ADHS in August and October of 2020. (*Id.*) Neither Director Herrington, nor defense counsel, were involved in responding to the PRR, establishing an ESI search protocol, or producing any of the documents responsive to the PRR. (*Id.*) It was not until after Plaintiffs submitted their proposed search protocol on January 25, that Director Herrington became aware of the PRR and the previously established ESI protocol. (*Id.*)

On April 6, 2022, Director Herrington provided an ESI counterproposal containing custodians, search terms, and a date range. (Ex. 4, email correspondence between counsel, at 6-7.) At that point, it was Director Herrington's understanding that Plaintiffs' proposed search protocol overlapped in both time and scope with the ESI search protocol agreed to as part of the PRR. (*See id.*; *see also* Ex. 3 at 2.) Director Herrington mistakenly believed that his counterproposal contained search terms, custodians, and a date range that were identical to those agreed upon by ADHS in responding to the PRR, and that ADHS had already produced the majority of ESI sought by Plaintiffs.[5] (Ex. 3 at 2-3.) He made it clear that he should not have to duplicate his efforts in collecting, reviewing, and producing ESI that was already produced in response to the PRR. (Ex. 4 at 6-7; Ex. 3 at 2.)

Director Herrington ultimately discovered that the ESI search protocol agreed to as

[5] Director Herrington relied on the correspondence exchanged between Plaintiffs' counsel and Robert Lane, as well as information provided to him by ADHS. Pursuant to the PRR, ADHS had already assessed many of the proposed search terms and determined that those terms would produce massive amounts of irrelevant ESI and were thus overbroad and unduly burdensome. (Ex. 3 at 2-3.)

part of the PRR response was indeed significantly narrower than his counterproposal. (Ex. 3 at 2.) At the parties' meet and confer on April 19, he withdrew the counterproposal and reiterated his position that the search terms and custodians should match those agreed upon in response to the PRR—again, to conserve resources and prevent the duplication of efforts—but also agreed to assess Plaintiffs' proposed search protocol further. Director Herrington subsequently withdrew the position that ESI search protocol in this case should match the ESI protocol agreed to as part of the PRR, and Plaintiffs' representations to the Court that this is his current position is inaccurate. (Ex. 4 at 2.)

After the April 19 meet and confer, Director Herrington conducted a "hit count report" for all of Plaintiffs' proposed search terms for five of the proposed custodians who would likely generate the most email traffic (Cara Christ, Krystal Colburn, Thomas Salow, Colby Bower, and Nicole Heath). (Ex. 4 at 2.) He made Plaintiffs aware of the results of the "hit count report" on April 25. (*Id.*) The "hit count report" encompassed the number of times each search term appeared in the five custodians' saved emails from Plaintiffs' proposed date range of January 1, 2017 to April 25, 2022. (*Id.*) A total of 68,021 emails appeared on the "hit count report" for just these five custodians. (*Id.*) This total does not include a page count. (*Id.*) Nor does it include attachments to emails. (*Id.*) Thus, the total number of *pages* of documents (including attachments) for *all* custodians would likely number in the hundreds of thousands. (*Id.*) This number is staggering. It would undoubtedly take Director Herrington months to obtain, review, and produce these documents. Plaintiffs' proposed search terms are, therefore, overbroad, unduly burdensome, and disproportionate to the needs of this case.

The terms "sex," "surgical," "surgery," "operation," "(A)(3)," and "(A)(4)" generated an inordinate amount of hits in comparison to Plaintiffs' other proposed search terms.[6] (*Id.* at 2-3.) Director Herrington agreed to the application of all other search terms

[6] The terms "sex," "surgical," "surgery," and "operation" are general words that could be used in almost unlimited contexts at ADHS. (Ex. 4 at 3.) It is likely that most, if not all, of the emails that contain these words are entirely irrelevant to the issues in this lawsuit. Similarly, the terms "(A)(3)" and "(A)(4)" likely relate to other policies, statutes,

if Plaintiffs removed these six search terms from their list. (*Id.* at 3.) He also attempted to narrow Plaintiffs' proposed custodians by removing the individuals who were not employed by ADHS during the relevant timeframe and could not have responsive information. (Ex. 4 at 1-2.) Plaintiffs refused to narrow their search terms, citing Director Herrington's refusal to provide them with legal arguments and/or "positions" he intends to assert on the merits or in response to Plaintiffs' Motion for Class Certification as the reason for their refusal. (Ex. 5, correspondence from Plaintiffs' counsel dated April 28, 2022, at 2-3.) Plaintiffs then added an additional six custodians to their proposed list of custodians. (*Id.* at 3.) Director Herrington stated that he could not agree to additional custodians prior to determining the breadth and scope of Plaintiffs' search terms. (Ex. 3 at 5, 8.)

First, Director Herrington is not required to provide Plaintiffs with any of the legal arguments or "positions" he intends to assert in this case. That information is protected by the work-product doctrine and/or attorney-client privilege. To the extent Plaintiffs are requesting information regarding Director Herrington's "justifications," Director Herrington has objected to those improper requests as outlined in Section I.A., above. Information related to Director Herrington's "justifications" is completely unrelated to the ESI issue.

Nevertheless, even if Director Herrington is required to respond to Plaintiffs' Interrogatory Nos. 9-16 and Request for Production No. 14-17, Plaintiffs are still bound by the proportionality requirement contained in Rule 26(b)(1). Director Herrington should not be ordered to compile, review, and produce potentially hundreds of thousands of pages of irrelevant ESI discovery so that Plaintiffs can engage in a fishing expedition for information they *imagine* Director Herrington will rely on.[7] *See Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1072 (9th Cir. 2004) ("District courts need not condone the use of discovery to engage in

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or regulations that in no way relate to the statute at issue. (*Id.*) Documents containing these terms likely have little to no value in this case.

[7] Plaintiffs' insinuation that Defendant will somehow have an unfair advantage by using documents he has not disclosed is entirely speculative and does not entitle Plaintiffs to this discovery.

fishing expeditions.") (quotations omitted). Plaintiffs have failed to provide any explanation as to what it is that they are looking for specifically or how this information could possibly be relevant. *See In re Bard IVC Filters Prod. Liab. Litig.*, 317 F.R.D. 562, 565 (D. Ariz. 2016) ("A party claiming that a request is important to resolve the issues should be able to explain the ways in which the underlying information bears on the issues as that party understands them.") (quoting Fed. R. Civ. P. 26 advisory committee's note to 2015 Amendment). Plaintiffs' refusal to narrow their search terms because they think evidence supporting Defendant's "anticipated justifications" may or may not be contained in documents with those search terms is the definition of a fishing expedition and is entirely speculative and improper. *See Calderon v. U.S. Dist. Ct. for the N. Dist. of California*, 98 F.3d 1102, 1106 (9th Cir. 1996) (Courts should not allow parties "to use federal discovery for fishing expeditions to investigate mere speculation."); *see also Zewdu v. Citigroup Long Term Disability Plan*, 264 F.R.D. 622, 626 (N.D. Cal. 2010) ("Discovery must be narrowly tailored to reveal the nature and extent of the conflict, and must not be a fishing expedition.")

Contrary to Plaintiffs' unsupported assertions, there is *no* correlation between Director Herrington's "positions" in this case and the enormous amount of ESI discovery they have requested. Plaintiffs have failed to provide any good-faith basis as to why the application of all their proposed search terms, particularly general terms like "sex," "surgical," "surgery," "operation," "(A)(3)," and "(A)(4)", are relevant and proportional to the needs of this case. The amount of time and resources necessary to compile, review, and produce these documents compared to the exorbitant number of irrelevant documents this ESI search protocol would likely uncover is not proportional to any of the issues in this case, and thus the burden drastically outweighs any benefit under Rule 26(b)(1)'s proportionality analysis.

Director Herrington's initial intent in evaluating Plaintiffs' proposed search protocol was to conserve resources and to avoid having to compile, review, and produce ESI already in Plaintiffs' possession, and he acted in good faith in attempting to do so. Since then,

Director Herrington has made a good faith effort to come to an agreement regarding an ESI search protocol. Plaintiffs have refused to narrow their search terms, which has prevented the parties from agreeing on a reasonable ESI search protocol. For the reasons stated above, Plaintiffs' representation that their proposed search protocol constitutes a "reasonable and proportional search for ESI" is unsupportable. (*See* Dkt 121 at 12.) Thus, Plaintiffs' Motion to Compel Director Herrington to "run" their proposed search protocol as is should be denied.

Director Herrington will agree to apply all search terms aside from "sex," "surgical," "surgery," "operation," "(A)(3)," and "(A)(4)." In addition, ESI custodians have yet to be finalized. Plaintiffs' proposed search protocol includes eight former ADHS employees who were not employed there during the relevant timeframe and therefore would not have responsive emails.[8] (*See* Dkt. 121-2 at 102-103; Ex. 4 at 1.) Those individuals should not be included on Plaintiffs' list of custodians.[9] In addition, it is unclear whether Plaintiffs are still seeking the addition of six custodians as stated in their April 28, correspondence. (Ex. 5 at 3.) If they are, one of these custodians (Cecilia Vargas) would not have unique information independent of those custodians already on the proposed custodians list and should be removed. (*See* Ex. 5 at 3, Ex. 3 at 5.) The addition of five custodians would bring Plaintiffs' proposed custodian list up to 17 individuals. Director Herrington will need to analyze the breadth and burden of the application of these search terms to these 17 custodians, and respectfully reserves the right to object to the addition of these custodians once this analysis is complete.

[8] Those individuals are Will Humble, Cory Nelson, Patricia Adams, Valerie Grina, Khaleel Hussaini, Jeffrey Bloomberg, Kathleen Phillips, and Donald Schmid.

[9] Instead of agreeing to this, Plaintiffs demanded that Director Herrington agree that he shall not use or otherwise offer as evidence in this litigation any document or information created by these individuals. (Ex. 5 at 3.) Director Herrington is not agreeing to this. While there will be no ESI regarding these individuals, Director Herrington is entitled to rely on non-ESI documents that these individuals may have "created" prior to the relevant ESI timeframe. He is also entitled to rely on their declarations and is entitled to call any of these individuals as witnesses at trial. (Ex. 3 at 5.) Plaintiffs' proposal regarding the exclusion of potential evidence "created by" these witnesses is therefore improper.

II. Conclusion.

For all these reasons, Plaintiffs' Motion to Compel should be denied.

DATED this 8th day of June, 2022.

STRUCK LOVE BOJANOWSKI & ACEDO, PLC

By /s/Dana M. Keene

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CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2022, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Asaf Orr	aorr@nclrights.org
Barrett J. Anderson	banderson@cooley.com
Colin M. Proksel	cproksel@omlaw.com
Mary R. O'Grady	mogrady@omlaw.com
Patrick P. Gunn	pgunn@cooley.com
Payslie M. Bowman	pbowman@omlaw.com

I hereby certify that on this same date, I served the attached document by U.S. Mail, postage prepaid, on the following, who is not a registered participant of the CM/ECF System:

N/A

/s/Dana M. Keene

EXHIBIT 1

From: Anderson, Barrett
To: Dana Keene; Nick Acedo; Dan Struck; Aubrey Joy Corcoran; patricia.lamagna@azag.gov; Andrea Bartles; Christie Marsh
Cc: Asaf Orr; "Colin Proksel"; Payslie Bowman; Gunn, Patrick; Martin, Christopher L.; Taylor, Jessica L.; sbhindwale@nclrights.org
Subject: RE: Roe v. Harrington - Proposed stipulation re production of documents and ESI
Date: Tuesday, January 25, 2022 8:29:12 PM

Dana:

The letter that we recently sent dated January 25, 2022, contains a list of identifiable ESI with custodian names, a date range, and keywords/search terms. Let us know if you would like to discuss.

Sincerely,
Barrett

From: Dana Keene <dkeene@strucklove.com>
Sent: Tuesday, January 25, 2022 2:05 AM
To: Anderson, Barrett <banderson@cooley.com>; Nick Acedo <NAcedo@strucklove.com>; Dan Struck <DStruck@strucklove.com>; Aubrey Joy Corcoran <aubreyjoy.corcoran@azag.gov>; patricia.lamagna@azag.gov; Andrea Bartles <abartles@strucklove.com>; Christie Marsh <CMarsh@strucklove.com>
Cc: Asaf Orr <AOrr@nclrights.org>; 'Colin Proksel' <cproksel@omlaw.com>; Payslie Bowman <pbowman@omlaw.com>; Gunn, Patrick <pgunn@cooley.com>; Martin, Christopher L. <cmartin@cooley.com>; Taylor, Jessica L. <jtaylor@cooley.com>; sbhindwale@nclrights.org
Subject: RE: Roe v. Harrington - Proposed stipulation re production of documents and ESI

[External]

Counsel:

We need additional information before we can consider the terms of Plaintiffs' proposed Agreed Order for the Production of Documents and ESI.

Please provide us with a list of identifiable ESI Plaintiffs are seeking. With that list, please include your proposed custodian names, date ranges, and keywords/search terms. This will allow us to evaluate the relevance and burden of your request and tailor this agreement to the specifics of this case.

Thank you,

Dana

From: Anderson, Barrett <banderson@cooley.com>
Sent: Wednesday, January 12, 2022 12:47 AM
To: Dana Keene <dkeene@strucklove.com>; Nick Acedo <NAcedo@strucklove.com>; Dan Struck

<DStruck@strucklove.com>; Aubrey Joy Corcoran <aubreyjoy.corcoran@azag.gov>; patricia.lamagna@azag.gov; Andrea Bartles <abartles@strucklove.com>; Lisa Hamilton <LHamilton@strucklove.com>
Cc: Asaf Orr <AOrr@nclrights.org>; 'Colin Proksel' <cproksel@omlaw.com>; Payslie Bowman <pbowman@omlaw.com>; Gunn, Patrick <pgunn@cooley.com>; Martin, Christopher L. <cmartin@cooley.com>; Taylor, Jessica L. <jtaylor@cooley.com>; sbhindwale@nclrights.org
Subject: Roe v. Harrington - Proposed stipulation re production of documents and ESI

Counsel:

We believe that it would benefit the parties to reach an agreement regarding the production of documents and ESI before the parties start to produce the next round of documents. Attached is a draft stipulation to that end. Could you please review and let us know if you have any proposed edits?

Sincerely,
Barrett

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attachments), unless otherwise specifically stated, was not intended or written to be used, and cannot be used, for the purpose of (1) avoiding penalties under the Internal Revenue Code or (2) promoting, marketing or recommending to another party any matters addressed herein.

EXHIBIT 2

From: Dana Keene
To: Anderson, Barrett; Nick Acedo; Dan Struck; Aubrey Joy Corcoran; patricia.lamagna@azag.gov; Andrea Bartles; Christie Marsh; Sherri Burns
Cc: Asaf Orr; "Colin Proksel"; Payslie Bowman; Gunn, Patrick; Martin, Christopher L.; Taylor, Jessica L.; sbhindwale@nclrights.org
Subject: RE: Roe v. Harrington - Meet and confer
Date: Monday, February 7, 2022 7:59:00 AM

Counsel:

We don't believe a meet and confer would be fruitful at this point.

We intend to object to one or more of the deposition topics outlined in Exhibit A to Plaintiffs' Notice of Deposition Pursuant to Fed. R. Civ. P. 30(b)(6). We will provide you with these objections by February 11, after which time a meet and confer may be appropriate.

With respect to the ESI production protocol agreement, we indicated that we could not agree to enter into this agreement prior to Plaintiffs providing us with custodians, date ranges, and search terms. We received this information via letter on January 25, 2022. We are currently determining the feasibility of gathering and producing ESI with Plaintiffs' proposed custodians, search terms, and date range. We are also in the process of developing a counterproposal given that this search would be a massive undertaking and would likely produce mostly irrelevant information. We are not prepared to discuss any counterproposal at this time.

In addition, we cannot enter into an ESI production protocol agreement until we agree on the custodians, search terms, and date range. Once we reach an agreement about this information, we can determine whether the ESI production protocol agreement is reasonable and feasible. The agreement also needs to contain the agreed upon custodians, search terms, and date ranges.

Finally, we received your correspondence dated January 25, 2022, where you outline the alleged deficiencies contained in Defendant's discovery responses. As a reminder, Defendant sent Plaintiffs a similar deficiency letter on December 16, 2021, which Plaintiffs did not respond to until January 12, 2022. We need additional time to respond to this correspondence. We would be open to scheduling a meet and confer after we do.

Sincerely,

Dana

From: Anderson, Barrett <banderson@cooley.com>
Sent: Wednesday, February 2, 2022 8:30 PM
To: Dana Keene <dkeene@strucklove.com>; Nick Acedo <NAcedo@strucklove.com>; Dan Struck <DStruck@strucklove.com>; Aubrey Joy Corcoran <aubreyjoy.corcoran@azag.gov>; patricia.lamagna@azag.gov; Andrea Bartles <abartles@strucklove.com>; Christie Marsh <CMarsh@strucklove.com>; Sherri Wolford <SWolford@strucklove.com>
Cc: Asaf Orr <AOrr@nclrights.org>; 'Colin Proksel' <cproksel@omlaw.com>; Payslie Bowman <pbowman@omlaw.com>; Gunn, Patrick <pgunn@cooley.com>; Martin, Christopher L.

<cmartin@cooley.com>; Taylor, Jessica L. <jtaylor@cooley.com>; sbhindwale@nclrights.org
Subject: RE: Roe v. Harrington - Meet and confer

Thank you, Dana. We look forward to your further response.

Barrett

From: Dana Keene <dkeene@strucklove.com>
Sent: Thursday, February 3, 2022 12:27 PM
To: Anderson, Barrett <banderson@cooley.com>; Nick Acedo <NAcedo@strucklove.com>; Dan Struck <DStruck@strucklove.com>; Aubrey Joy Corcoran <aubreyjoy.corcoran@azag.gov>; patricia.lamagna@azag.gov; Andrea Bartles <abartles@strucklove.com>; Christie Marsh <CMarsh@strucklove.com>; Sherri Wolford <SWolford@strucklove.com>
Cc: Asaf Orr <AOrr@nclrights.org>; 'Colin Proksel' <cproksel@omlaw.com>; Payslie Bowman <pbowman@omlaw.com>; Gunn, Patrick <pgunn@cooley.com>; Martin, Christopher L. <cmartin@cooley.com>; Taylor, Jessica L. <jtaylor@cooley.com>; sbhindwale@nclrights.org
Subject: RE: Roe v. Harrington - Meet and confer

[External]

Barrett,

We approve the stipulation, and you have our permission to file it.

We will get back to you regarding the other issues you mentioned.

Dana

From: Anderson, Barrett <banderson@cooley.com>
Sent: Wednesday, February 2, 2022 5:48 PM
To: Dana Keene <dkeene@strucklove.com>; Nick Acedo <NAcedo@strucklove.com>; Dan Struck <DStruck@strucklove.com>; Aubrey Joy Corcoran <aubreyjoy.corcoran@azag.gov>; patricia.lamagna@azag.gov; Andrea Bartles <abartles@strucklove.com>; Lisa Hamilton <LHamilton@strucklove.com>
Cc: Asaf Orr <AOrr@nclrights.org>; 'Colin Proksel' <cproksel@omlaw.com>; Payslie Bowman <pbowman@omlaw.com>; Gunn, Patrick <pgunn@cooley.com>; Martin, Christopher L. <cmartin@cooley.com>; Taylor, Jessica L. <jtaylor@cooley.com>; sbhindwale@nclrights.org
Subject: Roe v. Harrington - Meet and confer

Counsel:

We write regarding the status of several outstanding issues, including the draft document and ESI production protocol that we sent on January 12, 2022; the Rule 30(b)(6) deposition notice that we served on January 21, 2022; our letter concerning Plaintiffs' discovery requests dated January 25, 2022; and the proposed stipulation on the case schedule that we sent on January 27, 2022.

We propose a meet and confer to discuss those items. Are you available on any of the following dates and times?

- February 7 between 2-6 PM Pacific
- February 10 between 9 AM-2 PM Pacific
- February 11 between 10 AM-2 PM Pacific

Sincerely,
Barrett

Barrett J. Anderson
Cooley LLP
4401 Eastgate Mall
San Diego, CA 92121-1909
+1 858 550 6161 office
+1 858 550 6420 fax
banderson@cooley.com
Pronouns: he, him, his

www.cooley.com/people/barrett-anderson

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EXHIBIT 3

STRUCK LOVE BOJANOWSKI & ACEDO, PLC

Dana M. Keene
480.420.1620
dkeene@strucklove.com

May 16, 2022

VIA E-MAIL

Barrett Anderson
Cooley LLP
4401 Eastgate Mall
San Diego, CA 92121-1909
banderson@cooley.com

Re: *Roe, et al. v. Herrington,* Case No. 4:20-cv-484-JAS
Plaintiff's Discovery Requests

Mr. Anderson:

This correspondence serves as a response to your April 28, 2022, correspondence entitled "Plaintiffs' discovery requests in *Roe, et al. v. Herrington*, No. CV-20-00484-TUC-JAS."

1. **April 19 meet-and-confer call**

Plaintiffs' correspondence contains numerous inaccuracies and misrepresentations that are, at best, entirely misleading. The following assertions in Plaintiffs' correspondence are clarified by Defendant in red:

- **"Plaintiffs have in good faith collected, reviewed, and produced thousands of documents from multiple sources on a rolling basis." (April 28, letter at 1.)**
  - This statement implies that Plaintiffs have diligently moved this case along while Defendant has delayed it. Plaintiffs produced approximately 2,400 pages of documents on **April 28, 2022**, after Defendant stated his intention to move to compel Plaintiffs' responses to discovery and the numerous records they had yet to produce. Plaintiffs' accusations that Defendant has wasted time and delayed this lawsuit is false and misleading when Plaintiffs failed to produce the vast majority of their documents until April 28th, and to date have failed to supplement their disclosure statement or substantive responses to Defendant's Request for Production of Documents to indicate how these documents are responsive.

- **"As you stated on the call on April 19, 2022, Defendant had as of that date not even assessed the burden of reviewing or producing responsive electronically stored information ("ESI"), despite having months to do so." (April 28, letter at 1.)**

- **"On that call, instead of discussing the compromise offer, you instead stated that, because you had not fully investigated the basis for Defendant's April 6 counterproposal before sending it, you were withdrawing it. You then informed Plaintiffs that Defendant's intended to agree to even *fewer* search terms than offered in the April 6 counterproposal that you had now withdrawn. Plaintiffs requested that you explain the basis of Defendant's refusal to use the search terms that Plaintiffs proposed on January 25. You stated the objection was based on burden and overbreadth. However, when asked that the burden could be, you stated that you did not know because you had not yet investigated the underlying factual basis for Defendant's objections to the Plaintiffs' dates, custodians, and search terms as proposed on January 25." (April 28, letter at 2.)**
    - These assertions misrepresent what was stated at the April 19, meet and confer. And, if we were unclear at the April 19, meet and confer regarding this issue, we will clarify Defendant's position now. You (Barrett Anderson) submitted an expansive Public Records Request ("PRR") to ADHS on behalf of former Plaintiff Lizette Trujillo on July 27, 2020, prior to filing Plaintiffs' initial Complaint. It is our understanding that numerous letters were exchanged between you and Robert Lane, Administrative Counsel for ADHS, regarding the scope of the PRR until a scope was agreed upon and documents and ESI responsive to the PRR were produced by the Department in August and October of 2020.

      Plaintiffs have never affirmatively disclosed this information in this litigation. It was not until Plaintiffs submitted their proposed custodians and search terms on January 25, 2022 did we begin to look into the breadth and scope of the PRR production. It has remained Defendant's position that ADHS should not have to waste resources by duplicating what was already produced in response to the PRR.

      We discovered that the proposed custodians and search terms submitted by Plaintiffs on January 25th were almost identical to those submitted by Plaintiffs' counsel on behalf of Lizette Trujillo to Robert Lane in correspondence dated August 4, 2020. We believed in error that the terms agreed upon in the PRR were identical to those included in Defendant's counterproposal on April 6th. We discovered 30 minutes before the meet and confer that this was indeed not the case, and that the PRR's agreed-upon search terms had been significantly narrowed based on breadth and burden. Defendant withdrew the search terms contained in the counterproposal at the meet and confer so that the search terms were identical to what was ultimately agreed to in the PRR.

      As stated on the April 19, call, at that time, Defendant had not conducted a formal "hit count" report for the custodians and search terms on January 25th. In order to prevent duplication, we relied on information provided to us regarding ADHS's response to the PRR, as ADHS had already assessed and determined that Ms. Trujillo's proposed search terms were overbroad and unduly burdensome. The

"hit count" report merely solidified what was already determined by ADHS in responding to the PRR—that Plaintiffs' proposed search terms are overbroad and unduly burdensome.

- **"Prior to that call, Defendant would not even respond to Plaintiffs' request to agree upon the technical parameters of ESI productions in this matter." (April 28, letter at 1.)**
    - This is incorrect and is directly contradicted by the sentences that immediately follow. Defendant responded to Plaintiffs' request to agree upon the ESI agreement numerous times. Defendant repeatedly made clear that entering into this agreement was premature, and that it would not enter into this agreement prior to agreeing to ESI custodians, search terms, and a date range. Defendant provided proposed revisions to this agreement on April 25th. At this point, Plaintiffs are not agreeing to the reduction of search terms and have added six additional custodians to their proposed list. Because the parties have not finalized ESI custodians and search terms, the extent of Defendant's document production is not clear. The terms included in the ESI agreement could potentially change. Defendant does not want to have to amend this agreement after-the-fact. Defendant has repeatedly stated that he will enter into the agreement as soon as the parties determine the custodians and search terms. Any delay in entering into this agreement has had no prejudicial effect on Plaintiffs, who were apparently able to produce their "rolling" productions without issue.

- **"Relatedly, Plaintiffs—in an effort to move this litigation forward—noticed a Rule 30(b)(6) deposition on January 21, 2022, for topics related to Defendant's opposition to the pending class certification motion. (Dkt. 108.) The parties met and conferred on February 22 about that deposition and went so far as to schedule it for March 9. Then, on February 24—two days *after* the meet-and-confer call—Defendant abruptly withdrew from that deposition. Strangely, Defendant's reason for withdrawing was that counsel needed more time to prepare the witness, despite having received the deposition topics over a month earlier and negotiating narrowed deposition topics that, among were other things, Defendant asserted were necessary to reduce the burden of deposition preparation. Defendant's about-face is yet another example of needless delay and waste of time." (April 28, letter at 1, n.1.)**
    - Plaintiffs' contentions regarding the noticed 30(b)(6) deposition are inaccurate and misleading. Plaintiffs noticed a 30(b)(6) deposition on January 21, 2022. Defendant provided numerous objections to the 30(b)(6) topics set forth in the deposition notice in correspondence dated February 11, to which Plaintiffs responded via correspondence dated February 13. Defendant reiterated its objections in correspondence dated February 15. The parties held a telephonic meet and confer regarding the disputed 30(b)(6) topics on February 22, at which time Plaintiffs agreed to narrow and/or re-word their proposed topics. The parties tentatively scheduled the deposition for March 9 on the contingency that Plaintiffs

amend their deposition topics. After discussing these issues internally and with our client, we determined that the March 9, date was neither realistic nor manageable given the breadth of Plaintiffs' topics and because the Department had experienced some employee turnover and would have trouble obtaining some of the requested information in that timeframe. On February 23, we sent correspondence indicating that the March 9 date was no longer manageable. We suggested a short telephonic meet and confer to discuss the rescheduling of the 30(b)(6) deposition. On February 24, we again objected to Plaintiffs taking multiple 30(b)(6) depositions on merits and class discovery issues. We requested that a single 30(b)(6) deposition be taken to cover topics regarding class certification and merits issues, and we suggested that the deposition be rescheduled to allow the parties time to consider Plaintiffs' amended deposition topics, which we believed were forthcoming. Plaintiffs responded on the same date, indicating that they would "consider how best to proceed" and would "reach back out" when they were "ready to put the 30(b)(6) back on the calendar." Plaintiffs never contacted Defendant about the 30(b)(6) deposition again. Nor did they serve an amended 30(b)(6) notice with amended topics. Plaintiffs had every opportunity to re-notice this deposition for a later date but have not done so. Plaintiffs cannot accuse Defendant of "needless delay and waste of time" when it is Plaintiffs who have done nothing to re-notice this deposition.

2. **Defendant's April 25 emails**

It defies logic that Defendant would be required to provide Plaintiffs with any legal arguments or "positions" he intends to assert in this case—either on the merits or in opposition to the pending class certification motion—in exchange for Plaintiffs' reduction of their proposed ESI search terms. As previously stated, Plaintiffs are seeking legal arguments and the mental impressions of counsel that are protected by the work-product privilege and will not be provided.

Moreover, there is no quid pro quo arrangement where a party bargains for discovery in exchange for a "preview" of the legal arguments another party intends to assert. Nor is there any correlation between the breadth and scope of Plaintiffs' ESI discovery and Defendant's "positions" in this case. Indeed, Plaintiffs' proposed search terms yielded over 68,000 emails for only five custodians. Plaintiffs' unwillingness to narrow their proposed search terms unless "Defendant identifies and explains the basis for his positions" does not withstand the discovery limitations imposed by Rule 26. Producing all of these emails, plus all emails for Plaintiffs' additional proposed custodians, is overbroad, unduly burdensome, and grossly disproportionate to the needs of the case. Defendant is not agreeing to these search terms, and requests that Plaintiffs narrow these search terms for the reasons stated in Defendant's April 25 correspondence.

With respect to Plaintiffs' proposed custodians, Plaintiffs provided Defendant with a proposed date range for ESI discovery from January 1, 2017 to present. Defendant confirmed that eight of Plaintiffs' proposed custodians (Will Humble, Cory Nelson, Patricia Adams, Valerie Grina,

Khaleel Hussaini, Jeffrey Bloomberg, Kathleen Phillips, and Donald Schmid) were not employed by ADHS during the relevant timeframe, and thus there would be no ESI available for this time period. Similarly, Defendant informed Plaintiffs that Rosalva Friend was employed by ADHS during at least some of the relevant ESI time period, but would not have information independent of those custodians already on the proposed custodians list. Any insinuation that Defendant's unwillingness to include these individuals as custodians was somehow conducted in bad faith is incorrect and misleading.

Defendant is not entering into a specific stipulation that it will not use or otherwise offer as evidence in this litigation any document or information created by these nine individuals. Defendant cannot rely on documents in its opposition to Plaintiffs' Motion for Class Certification, its motion for summary judgment, or at trial that have not been disclosed. It logically follows that there will be no ESI from these nine individuals upon which Defendants can rely. There may, however, be non-ESI documents that these individuals have "created" prior to the relevant ESI timeframe upon which Defendant can rely. Defendant is also entitled to rely on their declarations and is entitled to call any of these people as witnesses at trial. Thus, a broad stipulation seeking to exclude any documents or information "created" by these nine individuals does not make logical sense and Defendant will not agree to it.

Moreover, Defendant supplemented his disclosure statement on March 10 and April 6 and disclosed additional individuals who may have relevant information with respect to this lawsuit. Doing so does not mean that Defendant is withholding the names of individuals who could serve as potential ESI custodians. Plaintiffs were able to update their proposed list of custodians at any time after Defendant's served these supplemental disclosure statements but have not. Plaintiffs are now requesting that six additional custodians be added to their list of proposed custodians (Jenissa Lucio, Ann Ramirez, Amber Poteet, Jessica Neely, Alan Paul, and perhaps Cecilia Vargas).

We have confirmed that all of these individuals were employed by ADHS during at least some of the relevant timeframe. We have also confirmed that Cecilia Vargas was a Customer Service Representative, and was only employed from October 9, 2021 to January 7, 2022. It is unlikely that she possesses any unique, responsive information. Based on Plaintiffs' representations in their April 28, correspondence, the parties can agree that Ms. Vargas should not be included on the custodian list.

Regardless, Plaintiffs' proposal regarding the addition of five custodians puts the cart before the proverbial horse. As stated in our April 25, correspondence, Plaintiffs' proposed search terms are overbroad, unduly burdensome, and disproportionate to the needs of this case. Defendant is not willing to agree to Plaintiffs' proposed search terms as they stand currently. Adding five custodians will only add to the already-voluminous production. Thus, if Plaintiffs agree to narrow their search terms to what was proposed in Defendant's April 25, correspondence, then Defendant will assess the breadth and burden of these five additional custodians.

3. **Plaintiffs' Discovery Requests**

- **Interrogatory No. 1**

For the reasons stated in Defendant's responses and supplemental responses to Plaintiffs' First Set of Interrogatories, information regarding "corrections" to registered birth certificates as defined in A.R.S. § 36-301(6) is not at issue in this case and is therefore irrelevant. As already stated, the Arizona Legislature has defined "correction" as a "change made to a registered birth certificate because of a **typographical error, including misspellings and missing or transposed letters or numbers."** A.R.S. § 36-301(6). Plaintiffs have not asserted any claims or allegations regarding "corrections" to birth certificates as defined in § 36-301(6). There are no allegations that any of the named Plaintiffs or members of the putative class possess Arizona birth certificates with typographical errors. Plaintiffs have failed to demonstrate how information regarding corrections as defined in § 36-301(6) is relevant to any of their claims in this case. It is not.

To be clear, Defendant only produced documentation and/or information with respect to amendments to Arizona birth certificates as defined in A.R.S. § 36-301(2). Defendant withheld information and documents regarding "corrections" to birth certificates as defined in § 36-301(6). Defendant has repeatedly stated that an individual with an Arizona birth certificate may only correct or amend their birth certificates. "Change" is not a word used by the Department and has no legal meaning. Thus, Plaintiffs' use of the word "change" is vague, confusing, overboard, and incorrect, and Defendant appropriately objected to the use of this word. Defendant will not be supplementing this Interrogatory.

- **Interrogatory Nos. 9-16 and Request for Production No. 14-17.**

As indicated in both Defendant's discovery responses and objections, and during various meet and confers between the parties, these requests seek legal conclusions and mental impressions of counsel that are protected by the work-product doctrine and will not be provided. Moreover, and as previously stated, these discovery requests are based on a false premise in that they presume that Plaintiffs' rights have been violated when they have not. Defendant is not responding to these requests as worded.

Most importantly, Defendant has made it abundantly clear that it objects to these interrogatories and requests for production because they seek information and documentation regarding legislative history and intent that can only be obtained from the Arizona Legislature. Have Plaintiffs complied with the requirements in A.R.S. § 12-1841 by serving the Speaker of the Arizona House of Representatives or the President of the Senate with the Amended Complaint? Do they intend to?

Plaintiffs are aware that ADHS did not draft, create, construct, or adopt A.R.S. § 36-337. Drafting, creating, constructing, and/or adopting legislation is not a function of ADHS, and

neither ADHS, nor Defendant, were involved in or have ever been involved in this process. ADHS is simply tasked with implementing and enforcing the statute as written.

Plaintiffs' discovery requests are directed to Defendant in his official capacity as Interim Director of ADHS, *not* the Arizona Legislature. Defendant does not have information responsive to any of these discovery requests in his control or possession, and it is, at best, unclear as to whether he is required to proactively obtain this information from the Arizona Legislature. Should you continue to disagree, please provide us with authority which supports your position that a director of a state entity, being sued in his official capacity, must produce documentation and/or information in possession of a state legislature.

Moreover, the authority cited by Plaintiffs (*Avila v. Mohave County*, 2015 WL 6660187, at *6-7 (D. Ariz. Nov. 2, 2015) and *Firetrace USA, LLC v. Jesclard*, 2009 WL 73671, at *2-3 (D. Ariz. Jan. 8, 2009)) pertains only to affirmative defenses. Defendant has listed as an affirmative defense that his actions were made pursuant to legitimate government purpose. Plaintiffs claim that Defendant has the burden of proving an "exceedingly persuasive justification" for enforcing a statute that draws a distinction on the basis of sex. Defendant's affirmative defense and his purported burden of proof are not one in the same. Please provide us with authority to support your position that Defendant's purported burden in this case constitutes an affirmative defense that is subject to discovery.

Defendant has requested that these discovery requests be re-worded in a way that Defendant can respond to them. Plaintiffs have refused to do so. Defendant stands by his various objections to these requests and will not be providing a substantive response to any of these requests.

- **Request for Production No. 4**

Plaintiffs' Request No. 4 is almost unlimited in scope. Defendant is still in the process of searching for responsive, non-privileged documents and will produce these documents if they exist.

- **Request for Production No. 6**

As stated in Defendant's response to Plaintiffs' Request for Production No. 6, aside from information that may be contained in ESI, Defendant is not in possession of any documents responsive to this Request because no policies or procedures exist. Defendant cannot produce something that does not exist.

- **ESI**

As stated above, Defendant will not explain the arguments he intends to assert in opposition to Plaintiffs' Motion for Class Certification or in a summary judgment motion. In addition, Defendant will not agree to Plaintiffs' proposed search terms given the exorbitant amount of ESI

hits these terms have yielded for only five custodians. Defendant cannot agree to Plaintiffs' additional proposed custodians if Plaintiffs are unwilling to narrow their search terms.

Please let me know if you have any questions, or would like to discuss further.

Sincerely,

Dana Keene

Dana M. Keene

DMK:cm
4023275

EXHIBIT 4

From:	Dana Keene
To:	Anderson, Barrett; Patriaic Cracchiolo LaMagna; Aubrey Joy Corcoran; Dan Struck; Nick Acedo; Andrea Bartles; Sherri Burns; Christie Marsh
Cc:	Asaf Orr; "Colin Proksel"; Payslie Bowman; Gunn, Patrick; Martin, Christopher L.; Taylor, Jessica L.; Shriya Bhindwale
Subject:	RE: Roe v. Herrington - ESI
Date:	Monday, April 25, 2022 9:06:00 AM
Attachments:	image002.png

Counsel:

As discussed at the parties' meet and confer last week, and in an attempt to reach an agreement on Plaintiffs' proposed custodians for purposes of ESI discovery, below is the list of custodians used by ADHS in responding to Ms. Trujillo's public records request in 2020. There were 19 custodians ultimately used, not 14 as previously indicated.

1. Cara Christ
2. Will Humble
3. Cory Nelson
4. Thomas Salow
5. Krystal Colburn
6. Patricia Adams
7. Toni Miller
8. Robin Rodriguez
9. Nicole Heath
10. Bianca Soto
11. Mercellina Lopez
12. Luis Valdez-Ramos
13. Rosalva Friend
14. Julia Mora
15. Ruthann Smejkal
16. Valerie Grina
17. Robert Lane
18. Khaleel Hussaini
19. Jeffrey Bloomberg

Comparing Plaintiffs' proposed custodians with this list, Plaintiffs have added Don Herrington, Colby Bower, Katina Lugo, Kathleen Phillips, and Donald Schmid. The only custodian not included on Plaintiffs' list is Rosalva Friend.

As indicated in our April 6th email, Will Humble, Cory Nelson, Patricia Adams, Valerie Grina, Khaleel Hussaini, Jeffrey Bloomberg, Kathleen Phillips, and Donald Schmid were not employed by the Department during the relevant timeframe of January 1, 2017 to present, and we removed them from Defendant's proposed custodian list.

Rosalva Friend was a Program Project Specialist II during at least some of the relevant timeframe. She is no longer with the Department. Defendant is in the process of disclosing her as someone who

may have relevant information; however, we do not believe she should be included as a custodian given her title, and because Plaintiffs have not listed any other individual with a similar title. It is unlikely that she would possess relevant information independent of the other custodians on this list.

Therefore, we believe Defendant's proposed custodian list (totaling 15) sufficiently captures the breadth of custodians with relevant information. That list is as follows:

1. Don Herrington
2. Krystal Colburn
3. Cara Christ
4. Colby Bower
5. Thomas Salow
6. Nicole Heath
7. Bianca Soto
8. Toni Miller
9. Robert Lane
10. Katina Lugo
11. Ruthann Smejkal
12. Robin Rodriguez
13. Marcellina Lopez
14. Luis Valdez-Ramos
15. Julia Mora

Please let us know if you agree.

Dana

From: Dana Keene
Sent: Monday, April 25, 2022 7:52 AM
To: Anderson, Barrett <banderson@cooley.com>; Patriaic Cracchiolo LaMagna <patricia.lamagna@azag.gov>; Aubrey Joy Corcoran <aubreyjoy.corcoran@azag.gov>; Dan Struck <DStruck@strucklove.com>; Nick Acedo <NAcedo@strucklove.com>; Andrea Bartles <abartles@strucklove.com>; Sherri Wolford <SWolford@strucklove.com>; Christie Marsh <CMarsh@strucklove.com>
Cc: Asaf Orr <AOrr@nclrights.org>; 'Colin Proksel' <cproksel@omlaw.com>; Payslie Bowman <pbowman@omlaw.com>; Gunn, Patrick <pgunn@cooley.com>; Martin, Christopher L. <cmartin@cooley.com>; Taylor, Jessica L. <jtaylor@cooley.com>; Shriya Bhindwale <sbhindwale@nclrights.org>
Subject: RE: Roe v. Herrington - ESI

Counsel:

We provided Plaintiffs' proposed custodians, search terms, and date range to IT for ADHS, and requested that they perform a "hit count" report of all search terms for five of the proposed

custodians who we believe would generate the most email traffic: Cara Christ, Thomas Salow, Krystal Colburn, Colby Bower, and Nicole Heath. This "hit count" report encompasses the number of times each search term appeared in the five custodians' saved emails from January 1, 2017 to present. It should be noted that only email messages were able to be searched, *not* attachments. Unfortunately, there is no way for ADHS's software system to determine whether any of these emails have attachments or not, and the system cannot independently search attachments to emails.

A total of **68,021** emails appeared on the "hit count" report for just these five custodians. The number of emails containing these search terms is not proportional to the needs of this case. This is particularly true because the 68,021 emails do not include page counts. Defendant would potentially be tasked with obtaining and reviewing hundreds of thousands of pages of ESI, most of which likely do not contain any relevant information. Thus, Plaintiffs' proposed search terms are overbroad and unduly burdensome, and Defendant requests that they be narrowed significantly.

For all five custodians, the terms "sex," "surgical," "surgery," "operation," "(A)(3)," and "(A)(4)" generated the most hits by far. For example, of the 22,765 emails for Cara Christ alone, 5,411 contained the term "surgical," 3,794 contained the term "surgery," 5,310 contained the term "operation," 3,145 contained the term "sex," 1,621 contained the term "(A)(3)," and 1,314 contained the term "(A)(4)." These numbers were similar for the other four custodians.

The terms "sex," "surgical," "surgery," and "operation" are general words that could be used in almost unlimited contexts at ADHS. It is likely that most, if not all, of the emails that contain these words are entirely irrelevant to the issues in this lawsuit. Similarly, the terms "(A)(3)" and "(A)(4)" likely relate to other policies, statutes, or regulations that in no way relate to the statute at issue. Based on the disproportionate hits between these search terms and others, we do not believe they would allow for fruitful or meaningful ESI discovery, and that applying them would needlessly waste time and resources.

Given the enormous and disproportionate amount of hits generated for the search terms sex, surgical, surgery, operation, (A)(3), and (A)(4), Defendant is requesting that those terms be removed from Plaintiffs' search terms list. Doing so will drastically reduce the burden on Defendants to obtain, review, and produce ESI. Defendant is amenable to the application of all other search terms, but reserves the right to reassess the breadth and burden once the number of custodians are solidified. Defendant is drafting a separate email regarding custodians.

Please let us know if Plaintiffs are in agreement.

Dana

From: Dana Keene
Sent: Monday, April 18, 2022 8:44 AM
To: Anderson, Barrett <banderson@cooley.com>; Patriaic Cracchiolo LaMagna <patricia.lamagna@azag.gov>; Aubrey Joy Corcoran <aubreyjoy.corcoran@azag.gov>; Dan Struck <DStruck@strucklove.com>; Nick Acedo <NAcedo@strucklove.com>; Andrea Bartles

<abartles@strucklove.com>; Sherri Wolford <SWolford@strucklove.com>; Christie Marsh <CMarsh@strucklove.com>
Cc: Asaf Orr <AOrr@nclrights.org>; 'Colin Proksel' <cproksel@omlaw.com>; Payslie Bowman <pbowman@omlaw.com>; Gunn, Patrick <pgunn@cooley.com>; Martin, Christopher L. <cmartin@cooley.com>; Taylor, Jessica L. <jtaylor@cooley.com>; Shriya Bhindwale <sbhindwale@nclrights.org>
Subject: RE: Roe v. Herrington - ESI

All:

Please use the below dial-in information for the call on Tuesday at 3 p.m.

480-420-1651
Password: 7591#

Thank you,
Dana

From: Anderson, Barrett <banderson@cooley.com>
Sent: Friday, April 15, 2022 5:18 PM
To: Dana Keene <dkeene@strucklove.com>; Patriaic Cracchiolo LaMagna <patricia.lamagna@azag.gov>; Aubrey Joy Corcoran <aubreyjoy.corcoran@azag.gov>; Dan Struck <DStruck@strucklove.com>; Nick Acedo <NAcedo@strucklove.com>; Andrea Bartles <abartles@strucklove.com>; Sherri Wolford <SWolford@strucklove.com>; Christie Marsh <CMarsh@strucklove.com>
Cc: Asaf Orr <AOrr@nclrights.org>; 'Colin Proksel' <cproksel@omlaw.com>; Payslie Bowman <pbowman@omlaw.com>; Gunn, Patrick <pgunn@cooley.com>; Martin, Christopher L. <cmartin@cooley.com>; Taylor, Jessica L. <jtaylor@cooley.com>; Shriya Bhindwale <sbhindwale@nclrights.org>
Subject: RE: Roe v. Herrington - ESI

Dana:

We are available for a call on Tuesday, April 19 at 3 PM.

Have a nice weekend,
Barrett

From: Dana Keene <dkeene@strucklove.com>
Sent: Saturday, April 16, 2022 6:27 AM
To: Anderson, Barrett <banderson@cooley.com>; Patriaic Cracchiolo LaMagna <patricia.lamagna@azag.gov>; Aubrey Joy Corcoran <aubreyjoy.corcoran@azag.gov>; Dan Struck <DStruck@strucklove.com>; Nick Acedo <NAcedo@strucklove.com>; Andrea Bartles <abartles@strucklove.com>; Sherri Wolford <SWolford@strucklove.com>; Christie Marsh <CMarsh@strucklove.com>

Cc: Asaf Orr <AOrr@nclrights.org>; 'Colin Proksel' <cproksel@omlaw.com>; Payslie Bowman <pbowman@omlaw.com>; Gunn, Patrick <pgunn@cooley.com>; Martin, Christopher L. <cmartin@cooley.com>; Taylor, Jessica L. <jtaylor@cooley.com>; Shriya Bhindwale <sbhindwale@nclrights.org>
Subject: RE: Roe v. Herrington - ESI

[External]

Barrett,

We would like to schedule a telephonic meet and confer to discuss these issues.

Please advise whether you are available during the afternoon of Tuesday, April 19th or on Wednesday, April 20th from 9-11 a.m. or after 3 p.m.

Thanks,
Dana

From: Anderson, Barrett <banderson@cooley.com>
Sent: Monday, April 11, 2022 1:29 PM
To: Dana Keene <dkeene@strucklove.com>; Patriaic Cracchiolo LaMagna <patricia.lamagna@azag.gov>; Aubrey Joy Corcoran <aubreyjoy.corcoran@azag.gov>; Dan Struck <DStruck@strucklove.com>; Nick Acedo <NAcedo@strucklove.com>; Andrea Bartles <abartles@strucklove.com>; Sherri Wolford <SWolford@strucklove.com>; Christie Marsh <CMarsh@strucklove.com>
Cc: Asaf Orr <AOrr@nclrights.org>; 'Colin Proksel' <cproksel@omlaw.com>; Payslie Bowman <pbowman@omlaw.com>; Gunn, Patrick <pgunn@cooley.com>; Martin, Christopher L. <cmartin@cooley.com>; Taylor, Jessica L. <jtaylor@cooley.com>; Shriya Bhindwale <sbhindwale@nclrights.org>
Subject: RE: Roe v. Herrington - ESI

Counsel:

Plaintiffs disagree with your position regarding Defendant's discovery obligations in this case vis-à-vis Lizette Trujillo's public records request. There are many differences between them. First, Ms. Trujillo's public records request was directed to the Arizona Department of Health Services, not Defendant; neither Ms. Trujillo nor ADHS are parties to this case. Second, the public records request was submitted in July 2020, nearly four months before this action was filed in court and sixth months before the current Plaintiffs filed the operative amended complaint. Third, a public records request under state public records law is different from a discovery request in litigation and imposes different obligations on the receiving party. At this time, Plaintiffs are not aware that ADHS undertook the same search, collection, and review in response to the public records request that Defendant would be required to conduct in response to Plaintiffs' discovery requests.

On top of all of that, we do not agree that the scope of Ms. Trujillo's public records request overlaps

with Plaintiffs' discovery requests such that Defendant is not obligated to conduct his own search, collection, and review. For example, on July 27, 2020, Ms. Trujillo requested six categories of public records. On July 28, ADHS responded to request that Ms. Trujillo narrow her request, citing concerns involving "administrative burden" and "privacy interests and information that is made confidential by state law," neither of which would apply in this litigation. On August 8, Ms. Trujillo did narrow her request, proposing a list of 25 search terms over a narrowed date range from 2004-2020. On September 4, ADHS responded that those terms had returned 4,100 documents "within the files of fourteen past and present ADHS employees," but still declined to review these records for the same administrative burden and privacy/confidentiality reasons as before. Thus, on September 14, Ms. Trujillo narrowed her request even further, proposing 15 search terms across nine years (2011-2020). ADHS then finally agreed to produce email records. Given the narrowed scope of the public records request on grounds not applicable to this litigation, plus the fact that there at least appear to be additional responsive emails from the set of 4,100 that ADHS referenced on September 4 that Defendant has *not* reviewed, Plaintiffs cannot agree that ADHS's response to the public records request entirely satisfies Defendant's discovery obligations in this case.

There are also critical differences between the scope of Ms. Trujillo's public records request and Plaintiffs' discovery requests, including in the custodians, search terms, and dates. For custodians, Plaintiffs are not aware whether the 14 ADHS employees whose emails ADHS searched in response to Ms. Trujillo's public records request overlap with the 23 individuals in Plaintiffs' proposed list or the 15 individuals listed in your email below. And given that Ms. Trujillo submitted her public records request *before* this case was filed, ADHS could not (by definition) have selected those 14 employees on the basis that they possessed records relevant *to this case*, which as you know is the touchstone of document production in a litigation. For search terms, the 15 terms in Ms. Trujillo's public records request do not include several of the 30 terms that are in Plaintiffs' proposed terms from our January 25, 2022 letter, which have been refined over the course of this litigation to seek documents responsive to the claims and defenses (which, again, ADHS could not have known when it responded to Ms. Trujillo's public records request). Thus, those terms now include shorthand versions of the statutes and regulations at issue and terms such as "surgical" or "surgery" or "operation," which are critical to ensuring that Defendant finds and produces all responsive documents concerning his application of the challenged laws. And the 15 terms from Ms. Trujillo's public records request do not include another nine terms that Defendant now agrees to apply in this case, further showing that any "overlap" is not precise. Finally, for dates, Ms. Trujillo's public records request extended from 2011-2020, while Plaintiffs have offered a date range on some of your searches of January 1, 2017 to the present. Your proposal to start on August 7, 2020, excludes only about three and a half years of communications from the date range of the public records request, yet you do not explain how many responsive documents fall within that time frame.

(Please also note that Plaintiffs' proposed date range would *not* apply to any documents or information related to Defendant's alleged justifications for the challenged statute, because as you know those justifications must not be invented *post hoc* and are Defendant's burden to prove in this litigation. Thus, any documents that concern any alleged justification that Defendant intends to assert in this litigation must be produced.)

Despite all of that, to reduce the burden, Plaintiffs are willing to agree that, to the extent the

proposed scope—measured by custodians, search terms, and date range—in our January 25, 2020 letter include *actual* copies of ADHS documents that Plaintiffs recently produced in response to Defendant's Second Set of Requests for Production, Defendant need not produce them on his own behalf. However, Plaintiffs insist that (1) any *additional* responsive documents possessed by Defendant that are *not* included in that set—such as those responsive to the additional search terms or different custodians, or those that ADHS did not review and produce from the at least 4,100 emails it admitted exist—be produced, along with (2) a verification from Defendant that the remaining responsive documents in his possession, which he would not be producing, are exact duplicates of those already in Plaintiffs' possession.

Finally, Plaintiffs request that Defendant immediately respond regarding the proposed stipulation on the production of documents and ESI ("ESI order") that Plaintiffs sent on January 12, 2022. Defendant does not need custodians, terms, or date ranges to agree to purely technical provisions governing the production of documents, as those that are proposed in the draft ESI order. Defendant's unwarranted and continued delay—a delay lasting three months now—in even *proposing* edits to the proposed ESI order has unreasonably held up this litigation.

We are available for a meet and confer, if you would like.

Sincerely,
Barrett

Barrett J. Anderson
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From: Dana Keene <dkeene@strucklove.com>
Sent: Wednesday, April 6, 2022 12:30 AM
To: Anderson, Barrett <banderson@cooley.com>; Asaf Orr <AOrr@nclrights.org>; 'Colin Proksel' <cproksel@omlaw.com>; Payslie Bowman <pbowman@omlaw.com>; Gunn, Patrick <pgunn@cooley.com>; Martin, Christopher L. <cmartin@cooley.com>; Taylor, Jessica L. <jtaylor@cooley.com>; Shriya Bhindwale <sbhindwale@nclrights.org>
Cc: Patriaic Cracchiolo LaMagna <patricia.lamagna@azag.gov>; Aubrey Joy Corcoran <aubreyjoy.corcoran@azag.gov>; Dan Struck <DStruck@strucklove.com>; Nick Acedo <NAcedo@strucklove.com>; Andrea Bartles <abartles@strucklove.com>; Sherri Wolford <SWolford@strucklove.com>; Christie Marsh <CMarsh@strucklove.com>
Subject: Roe v. Herrington - ESI

[External]

Counsel:

Please allow this correspondence to serve as a response to Plaintiffs' January 25, 2022 correspondence, specifically as it relates to ESI discovery and Plaintiffs' proposed custodians, search terms, and time period set forth in Exhibit A.

Because Plaintiffs' ESI proposal overlaps in both time and scope with the public records request sent by you on behalf of Lizette Trujillo on July 27, 2020, we have narrowed Plaintiffs' request to include all emails sent or received on or after August 7, 2020, and to the custodians and search terms, below. Defendant does not intend to duplicate his efforts by producing ESI that has already been produced pursuant to the July 27, 2020 public records request.

Accordingly, Defendant provides the following counterproposal:

Defendant's Proposed Custodians:

1. Don Herrington
2. Krystal Colburn
3. Cara Christ
4. Colby Bower
5. Thomas Salow
6. Nicole Heath
7. Bianca Soto
8. Toni Miller
9. Robert Lane
10. Katina Lugo
11. Ruthann Smejkal
12. Robin Rodriguez
13. Marcellina Lopez
14. Luis Valdez-Ramos
15. Julia Mora

Please note that Will Humble, Cory Nelson, Patricia Adams, Valerie Grina, Khaleel Hussaini, Jeffrey Bloomberg, Kathleen Phillips, and Donald Schmid were not employed at the Department during the relevant timeframe.

Defendant's Proposed Search Terms:

- "36-337(A)(3)"
- "36-337(A)(4)"
- "R9-19-208(O)"
- "R9-19-208(P)"
- "sex change"
- "chromosomal count"

"transgender"
- "transsexual"
- "intersex" or "DSD"
- "gender dysphoria"
- "gender identity" or "GID"
- "gender marker"
- "gender reassignment" or "sex reassignment" or "sexual reassignment" or "SRS"
- "gender confirming" or "gender confirming" or "gender confirmation" or "GCS"
- "gender affirming" or "gender affirmation"

Defendant's Proposed Time Period:
Emails sent or received on or after August 7, 2020 to present.

Please let us know if you are agreeable to these parameters. If so, we will incorporate them into the proposed ESI agreement Plaintiffs' previously circulated, along with Defendant's edits to that agreement.

Thank you,

Dana

Dana M. Keene
Attorney

STRUCK LOVE BOJANOWSKI & ACEDO, PLC
3100 West Ray Road | Suite 300 | Chandler AZ 85226
480.420.1620 | dkeene@strucklove.com | STRUCKLOVE.COM

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EXHIBIT 5

Cooley

Barrett Anderson
T: +1 858 550 6161
banderson@cooley.com

CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER
Via Email

April 28, 2022

Dana Keene
Struck, Love, Bojanowski, & Acedo PLC
3100 West Ray Road, Suite 300
Chandler, AZ 85226

Re: Plaintiffs' discovery requests in *Roe, et al. v. Herrington*, No. CV-20-00484-TUC-JAS

Dear Dana:

We write to (1) memorialize the parties' meet-and-confer call on April 19, 2022; (2) respond to Defendant's emails regarding search terms and custodians dated April 25, 2022; and (3) confirm that the parties are at an impasse with respect to certain of Plaintiffs' discovery requests.

1. **April 19 meet-and-confer call**

Before memorializing the call, we must describe the events leading up to it. Plaintiffs filed their amended complaint on January 8, 2021. (Dkt. 47.) The Court denied Defendant's motion to dismiss on July 21, 2021, (Dkt. 78), with the formal order following on August 5, 2021, (Dkt. 83). Plaintiffs filed their motion for class certification on August 25, 2021. The Court issued the Case Management Order on September 15, 2021. (Dkt. 89.) That was all over seven months ago.

During those seven months, despite Plaintiffs' continued belief that there are no grounds on which to oppose their pending motion for class certification, or that discovery would aid in any such opposition, Plaintiffs have in good faith collected, reviewed, and produced thousands of documents from multiple sources on a rolling basis. Plaintiffs have now completed their production and are prepared to offer the witnesses Defendant claimed he would need to depose in order to oppose the class certification motion.

As you stated on the call on April 19, 2022, Defendant had as of that date not even assessed the burden of reviewing or producing responsive electronically stored information ("ESI"), despite having months to do so. Prior to that call, Defendant would not even respond to Plaintiffs' request to agree upon the technical parameters of ESI productions in this matter. Plaintiffs sent Defendant a draft proposed order concerning the production of documents and ESI ("ESI Order") on January 11, 2022. In response, Defendant requested that Plaintiffs provide proposed date ranges and lists of custodians and terms. Even though those items are not necessary to negotiate the ESI Order, Plaintiffs nevertheless provided them on January 25. Plaintiffs requested the status of Defendant's revisions to the ESI Order, including during a meet-and-confer call on February 22,[1] but despite assurances that a response was forthcoming, Defendant did not send

[1] Relatedly, Plaintiffs—in an effort to move this litigation forward—noticed a Rule 30(b)(6) deposition on January 21, 2022, for topics related to Defendant's opposition to the pending class certification motion. (Dkt. 108.) The parties met and conferred on February 22 about that deposition and went so far as to schedule it for March 9. Then, on February 24—two days *after* the meet-and-confer call—Defendant abruptly withdrew from that deposition. Strangely, Defendant's reason for withdrawing was that counsel needed more time to prepare the witness, despite having received the deposition topics over a month earlier

Cooley

one. In the meantime, despite Defendant declining to agree on technical parameters, Plaintiffs provided rolling productions under the terms of the proposed ESI Order to keep the case moving forward.

Defendant's first response on this issue came in the form of a counterproposal on dates, custodians, and search terms, which Defendant sent on April 6—*over ten weeks after Plaintiffs' proposal*. Plaintiffs responded on April 11 to explain why they could not accept the counterproposal and to offer a compromise; we will not repeat the details of that April 11 email here. Defendant requested a meet and confer, which occurred on April 19.

On that call, instead of discussing the compromise offer, you instead stated that, because you had not fully investigated the basis for Defendant's April 6 counterproposal before sending it, you were withdrawing it. You then informed Plaintiffs that Defendant's intended to agree to *even fewer* search terms than offered in the April 6 counterproposal that you had now withdrawn. Plaintiffs requested that you explain the basis of Defendant's refusal to use the search terms that Plaintiffs proposed on January 25. You stated the objection was based on burden and overbreadth. However, when asked what that burden could be, you stated that you did not know because you had not yet investigated the underlying factual basis for Defendant's objection to the Plaintiffs' dates, custodians, and search terms as proposed on January 25.

As of April 19, the only basis Defendant could provide for asserting its burden and overbreadth objections was his unwarranted belief that the scope of discovery in this action must be coextensive with the scope of a public records request that Lizette Trujillo submitted to ADHS, and for which she received the documents, months before this action was filed. Defendant provided Plaintiffs' counsel no citation to relevant legal authority to support this position. In any event, Defendant's claim fails to account for significant differences in the relationship between the parties and the governing rules in discovery versus a public records request, as explained in our April 11 email. Moreover, Defendant again appears to not appreciate that he bears the burden of proof on Plaintiffs' claims.

2. <u>Defendant's April 25 emails</u>

On April 25, Defendant sent two email responses regarding search terms and custodians. In the first email, Defendant finally provided the number of documents returned by applying the dates and search terms in Plaintiffs' January 25 proposal, but only for five of the custodians. You requested in that email that Plaintiffs narrow the proposed search terms. Plaintiffs are unable to agree to any narrowed search terms at this time because, since the Court's ruling denying Defendant's motion to dismiss, Defendant has been unwilling to identify or explain the arguments or defenses that he intends to assert in this case, either on the merits or in opposition to the pending class certification motion. As discussed below, Plaintiffs have been requesting Defendant's positions since our first set of discovery requests dated October 10, 2021—*which Plaintiffs served over sixth months ago*. Only when Defendant identifies and explains the basis for his positions would it be possible for Plaintiffs to consider how any search terms could be narrowed or otherwise revised (such as by applying connectors) in order to obtain information relevant to those positions. If Defendant responds to Plaintiffs' interrogatories requesting that information, as discussed in the section below, Plaintiffs would be able to—and would gladly—engage in an informed dialogue with Defendant regarding search terms in hopes of reaching an agreement without the need for a motion to compel.

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and negotiating narrowed deposition topics that, among were other things, Defendant asserted were necessary to reduce the burden of deposition preparation. Defendant's about-face is yet another example of needless delay and waste of time.

Cooley

In the second email, Defendant finally disclosed the list of 19 custodians used by ADHS when responding to Ms. Trujillo's public records request in July 2020 and proposed a list of 15 custodians[2] for this litigation (which is eight individuals fewer than the 23 in Plaintiffs' January 25 proposal).[3] Defendant's only basis for excluding those eight custodians is that they have not worked at ADHS since January 1, 2017.[4] Defendant also proposes removing an individual—Rosalva Friend—from ADHS's custodian list because she likewise is no longer employed at ADHS. Because Defendant bears the burden of proof in this case, it would be manifestly unjust for Defendant to refuse to search for information from these nine custodians (let alone review and produce it) in response to Plaintiffs' discovery requests, but then later rely on information from them to support Defendant's positions. Thus, Plaintiffs are willing to agree to exclude these nine individuals from the custodians list on the condition that Defendant agrees that Defendant shall not use or otherwise offer as evidence in this litigation any document or information created by them. Please confirm whether Defendant will stipulate to this condition for excluding the above-listed custodians.

Since January 25, when Plaintiffs proposed the list of custodians, Defendant has twice served updated disclosures: on March 10 and April 6. Those disclosures identified many new individuals who appear to possess information relevant to this case. Five of those individuals hold managerial or specialist positions under Defendant's supervision, and thus should be added to the list of custodians: (1) Jenissa Lucio, the "Registry Operations Manager" at ADHS; (2) Ann Ramirez, a "Program Manager" with the BVR registry team; (3) Amber Poteet, a "Program Manager II" with the BVR registry team; and (4 & 5) Jessica Neely and Alan Paul, who are both "Program and Project Specialists" with the BVR registry team. A sixth individual, Cecilia Vargas, apparently works with the BVR registry team, but Defendant did not provide her position or title. Adding those six to Defendant's list results in 21 custodians, which is two less than Plaintiffs' January 25 proposal. If Defendant agrees with this list of 21 custodians for future ESI searches, Plaintiffs will consider the issue of custodians to be resolved.[5]

3. Plaintiffs' discovery requests

Plaintiffs sent a letter on January 25, 2022, explaining why Defendant's responses to Plaintiffs' discovery requests were deficient. Defendant served supplemental responses on February 28, indicating among other things that he would not produce any ESI until the parties reached agreement on an ESI order. As detailed above, Plaintiffs waited in good faith for Defendant's response on the ESI Order until April 6, only to have that counterproposal withdrawn on April 19. Defendant responded on April 25, but, as discussed above, Plaintiffs are unable to agree to any narrowed or revised terms until and unless Defendant identifies and explains his arguments and defenses in this case. Defendant has thus far stated that he is unwilling to do so. For that reason, as described below, Plaintiffs understand that the parties are at an impasse with respect to the following discovery requests and intend to move to compel production.

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[2] These 15 individuals are Don Herrington, Krystal Colburn, Cara Christ, Colby Bower, Thomas Salow, Nicole Heath, Bianca Soto, Toni Miller, Robert Lane, Katina Lugo, Ruthann Smejkal, Robin Rodriguez, Marcellina Lopez, Luis Valdez-Ramos, and Julia Mora.

[3] These eight individuals are Will Humble, Cory Nelson, Patricia Adams, Valerie Grina, Khaleel Hussaini, Jeffrey Bloomberg, Kathleen Phillips, and Donald Schmid.

[4] Plaintiffs were only willing to agree to a start date of January 1, 2017, for relevant discovery based on Defendant's representation that no documents exist prior to that date because of ADHS's document retention policies. If that understanding is incorrect, please respond immediately to clarify.

[5] If Ms. Vargas was a customer service representative and Defendant confirms that she otherwise does not possess unique responsive information, Plaintiffs are willing to agree that she not be added to the custodian list. Please confirm.

Cooley

Interrogatory No. 1. Defendant did not supplement his response. Plaintiff's position is explained in our January 25 letter. On those grounds, Plaintiff will move to compel Defendant to supplement his response to Interrogatory No. 1 to identify any ADHS policies that govern corrections or any other kinds of changes to the sex listed on birth records, or to confirm that none exist.

It is also unclear whether Defendant has withheld information in response to any other discovery request on the basis of his objection to definition of the word "CHANGE." Thus, Plaintiffs will also move to compel Defendant to supplement his response to any Interrogatory and his production in response to any Request for Production in which he failed to search for, or withheld information, on the basis of that objection.

Interrogatory Nos. 9–16 and Request for Production Nos. 14–17. Defendant supplemented his responses to each of these Interrogatories and Requests for Production with some form of the following: "Defendant will consider supplementing this response should Plaintiffs rephrase this Interrogatory so that it does not seek a legal conclusion." Such a response is not a proper basis on which to refuse to respond to a discovery request. As you know, the burden of proving that A.R.S. § 36-337(A)(3) survives constitutional scrutiny rests on Defendant, as confirmed by the Court in its order denying Defendant's motion to dismiss. (*See* Dkt. 83 at 11–12 ("Based on the current record before the Court, Defendants do not have any legitimate basis to require a 'sex change operation' for these kids to obtain a proper birth certificate.").) Nevertheless, following that ruling, Defendant still alleged in his Answer that the challenged law was "made pursuant to a legitimate purpose." (Dkt. 102 ¶ 23.)

Defendant now must disclose that purported legitimate purpose and any facts supporting it. Interrogatory Nos. 9–16 seek that information, and Defendant cannot refuse to respond. *See, e.g.*, *Avila v. Mohave County*, 2015 WL 6660187, at *6–7 (D. Ariz. Nov. 2, 2015) (rejecting objections that interrogatories *inter alia* "call[ed] for a legal conclusion" when they sought "facts supporting [defendant's] affirmative defenses" and ordering defendant to supplement responses); *Firetrace USA, LLC v. Jesclard*, 2009 WL 73671, at *2–3 (D. Ariz. Jan. 9, 2009) (ordering defendants to respond to interrogatory seeking information about their affirmative defenses). Plaintiffs will thus move to compel Defendant to supplement his responses to Interrogatory Nos. 9–16 and produce documents and information responsive to Request for Production Nos. 14–17 regarding the state's alleged justifications for the challenged statute.

Request for Production No. 4. Plaintiffs requested that Defendant produce any additional "rule-making documents" or confirm that none exist. Defendant did not supplement his response. Plaintiffs will thus move to compel production of all responsive "rule-making documents."

Request for Production No. 6. Plaintiffs requested clarification on the following question: What policies, procedures, or practices does ADHS have to guide and make case-by-case determinations on requests to amend the sex on registered birth certificates? Defendant did not supplement his response. Plaintiffs will thus move to compel production of all such ADHS policies, procedures, or practices.

ESI. Defendant responded to nearly all of Plaintiffs' discovery requests with some form of the following: "Defendant has not conducted a search of available ESI but will do so once the parties have agreed to a search protocol." Unless Defendant agrees to fully respond to Interrogatory Nos. 9–16 and Request for Production Nos. 14–17 and agree to the proposed list of 21 custodians discussed above, Plaintiffs will move to compel Defendant to collect, review, and produce ESI using the date ranges and search terms listed in Exhibit A to our January 25 letter and the list of 23 custodians in Plaintiffs' January 25 proposal plus the six new custodians from Defendant's since-updated disclosures.[6]

[6] Plaintiffs understand from Defendant's April 25 emails that he does not object to Plaintiffs' proposed date range. As stated in our April 11 email, that date range would not apply to any documents or information

Cooley

Please respond to the above proposals no later than May 11, 2022. Plaintiffs also restate their request that Defendant provide a privilege log with respect to any responsive documents he has withheld.

Sincerely,

Barrett Anderson

cc: Counsel of Record

related to Defendant's alleged justifications for the challenged statute. Any information that concerns any alleged justification that Defendant intends to assert must be produced, regardless of date.

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Helen Roe, a minor, by and through her parent and next friend Megan Roe; James Poe, a minor, by and through his parent and next friend Laura Poe; and Carl Voe, a minor, by and through his parent and next friend, Rachel Voe,

Plaintiffs,

v.

Don Herrington, in his official capacity as Interim State Registrar of Vital Records and Interim Director of the Arizona Department of Health Services,

Defendant.

NO. 4:20-cv-00484-JAS

[PROPOSED] ORDER DENYING PLAINTIFFS' CORRECTED MOTION TO COMPEL RESPONSES TO INTERROGATORIES AND PRODUCTION OF DOCUMENTS

Upon consideration of Plaintiffs' Corrected Motion to Compel Responses to Interrogatories and Production of Documents (Dkt. 121) and Defendant's Response thereto, and good cause appearing,

IT IS HEREBY ORDERED that Plaintiffs' Motion is denied.