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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

D.H., by and through his mother, Janice  
Hennessy-Waller; and John Doe, by and  
through his guardian and next friend, Susan  
Doe, on behalf of themselves and all others  
similarly situated,

Plaintiffs,

vs.

Jami Snyder, Director of the Arizona Health  
Care Cost Containment System, in her  
official capacity,

Defendant.

Case No. 4:20-cv-00335-SHR

**DEFENDANT'S RESPONSE TO  
PLAINTIFF'S MOTION TO  
COMPEL DOCUMENTS AND  
TESTIMONY**

(Assigned to the Honorable Scott H.  
Rash)

Defendant Jami Snyder, the Director of Arizona's Health Care Cost Containment  
System, ("AHCCCS") provides this response to Plaintiff's Motion to Compel (the  
"Motion") (Doc. 133).<sup>1</sup>

<sup>1</sup> The Motion contains a detailed and comprehensive set of exhibits. AHCCCS will not reproduce those exhibits with this response but will refer to the exhibits assembled by Plaintiff utilizing the ECF document numbers assigned them, e.g. 133-1 at p.25. In addition, AHCCCS is providing supplemental information as Exhibits A – G to this response.

### **Factual Background**

During her November 9, 2021, deposition, AHCCCS chief medical officer, Dr. Sara Salek, testified that there was a meeting she attended with AHCCCS counsel, the AHCCCS Director, and a member of the Governor's Office.<sup>2</sup> Dr. Salek could not recall when the Meeting with Counsel occurred, but suggested it could have been between 2016 and 2018.<sup>3</sup> Dr. Salek recalled there had been "federal guidance...just in regards to treatment of gender dysphoria."<sup>4</sup> And the purpose of the Meeting with Counsel was to "consider opening a rulemaking proceeding to evaluate the challenged exclusion"<sup>5</sup> in response to the new federal guidance.<sup>6</sup> Whether to open a rulemaking process was "a **decision made between our legal services as well as [the] executive team** at AHCCCS" *Id.* Dr. Salek is a member of the executive team. *Id.* Based on Dr. Salek's memory of the purpose of the Meeting with Counsel, undersigned counsel instructed Dr. Salek not to answer any questions about what was discussed at the meeting because it was privileged under the attorney client and executive privileges.<sup>7</sup>

Undaunted, Plaintiff's counsel attempted to get at the Meeting with Counsel another way. He immediately asked Dr. Salek the following question: "But put the meeting aside, Dr. Salek. In 2016 to 2018, did you, as the medical director of AHCCCS, believe that a rulemaking proceeding to address the challenged exclusion was warranted?"<sup>8</sup> Again, undersigned counsel instructed Dr. Salek not to answer explaining: "I'm not going to let this witness provide an opinion about what she thought because I'm sure that same opinion was shared in the meeting, and we're not going to get into what was discussed at the meeting."<sup>9</sup> Dr. Salek later confirmed that, outside the Meeting with Counsel, she has not had reason or

<sup>2</sup> Pl. Exh. 1, Doc. 133-1 at pp. 6-7, 27:20 – 28:23 (the "Meeting with Counsel").

<sup>3</sup> *Id.* at 6, 27:23-25

<sup>4</sup> *Id.* at 7, 28:5-8.

<sup>5</sup> The "Rule" or "Challenged Exclusion" is found at Arizona Administrative Code, R9-22-205(B)(4).

<sup>6</sup> Exh. 1, Doc. 133-1 at 6-7, 27:20-22, 28:1-8.

<sup>7</sup> *Id.* at 9-10, 30:18 – 31:10.

<sup>8</sup> *Id.* at 11, 32:8-12.

<sup>9</sup> *Id.* at 12, 33:2-6.

1 opportunity to reconsider the challenged exclusion.<sup>10</sup>

2 In an effort to diffuse this dispute, AHCCCS had Dr. Salek search her email and  
3 calendar entries to discover more information about the Meeting with Counsel. In a letter  
4 dated December 10, 2021<sup>11</sup>, AHCCCS reported that Dr. Salek found email and a calendar  
5 appointment referencing a meeting with counsel and the Governor's Office which occurred  
6 on November 5, 2015 – shortly after the Obama Administration proposed new rules related  
7 to the nondiscrimination provisions of the Affordable Care Act.<sup>12</sup> The calendar entry for  
8 the meeting was entitled: "Meeting with Christina Corieri re: Section 1557 Proposed Rules  
9 Overview."<sup>13</sup> The meeting's 2015 date put it outside the parties agreed-upon limits on  
10 discovery – which is why the meeting, and information about it, was not included on prior  
11 AHCCCS discovery responses or privilege logs.

12 The current motion grew out of this dispute over Dr. Salek's testimony. Plaintiff  
13 would have this Court believe that AHCCCS has been dilatory in listing privileged  
14 communications or in asserting its privileges. But Plaintiff's first letter challenging  
15 AHCCCS assertion of any privilege was sent on November 16, 2021, after Dr. Salek's  
16 deposition.<sup>14</sup> As explained in Section II of this response, in the process of attempting to  
17 resolve this privilege dispute, AHCCCS has revised its privilege log and provided additional  
18 documents and information – including additional information about the Meeting with  
19 Counsel. Plaintiff now uses these attempts at compromise to argue AHCCCS has waived  
20 the privilege or engaged in an effort to hide relevant non-privileged information. As  
21 demonstrated in this Response, neither claim has merit.

## 22 **I. Plaintiff's Justification for the Motion Is Unfounded**

23 Plaintiff argues that discovery of the privileged communications between AHCCCS  
24 legal counsel and its executive team regarding potential rulemaking which happened in  
25 2015 "might shed light on why the Challenged Exclusion exists and whether Defendant has

26 <sup>10</sup> *Id* at 14-16. 35:16 – 37:14.

27 <sup>11</sup> Pl. Exh. 6, Doc. 133-1 pp. 75-78.

28 <sup>12</sup> <https://www.federalregister.gov/documents/2015/09/08/2015-22043/nondiscrimination-in-health-programs-and-activities>

<sup>13</sup> Pl. Exh. 6, Doc 133-1 at p. 76

<sup>14</sup> Pl. Exh. 5, Doc. 133-1 at pp. 68-73.

1 a legally adequate justification to continue enforcing it.”<sup>15</sup>

2 This argument is patently untenable. AHCCCS has been incredibly clear that it has  
3 no information or documents from 1982 that would explain why the Rule was adopted in  
4 the first place. There simply are not any records from 40 years ago, nor any AHCCCS  
5 employee with the sort of tenure necessary, to answer Plaintiff’s questions about the  
6 creation of the rule.<sup>16</sup> Moreover, Dr. Salek and AHCCCS witness Dr. Tack explained why  
7 the rule has not been reconsidered since 1982.<sup>17</sup> Undoubtedly, no information shared during  
8 the Meeting with Counsel, which occurred in 2015, is going to shed light on what happened  
9 in 1982, nor is the privileged information shared in the Meeting with Counsel necessary to  
10 answer the questions posed by Plaintiff.

11 This does not mean that there was or is no justification for the rule. As AHCCCS  
12 has maintained throughout this lawsuit, gender reassignment surgery is not safe and  
13 effective or medically necessary as a treatment for gender dysphoria in minors.

14 Moreover, Dr. Salek testified that she does not know why the rule was implemented  
15 in the first instance,<sup>18</sup> and she testified that the rule has not been reconsidered since 1982  
16 simply because the evidence for gender reassignment surgery is still inconclusive.<sup>19</sup> Dr.  
17 Tack provided similar answers during his deposition.<sup>20</sup> And Jakenna Lebsock, the  
18 AHCCCS 30(b)(6) witness, confirmed that AHCCCS does not know why the rule was first  
19 implemented in 1982,<sup>21</sup> and AHCCCS has not had reason to reconsider the rule since.<sup>22</sup>  
20 Clearly, Plaintiff does not need to delve into privileged communications to understand why  
21 the rule exists and whether AHCCCS has a legally adequate justification to continue

22 <sup>15</sup> Motion at 3-4.

23 <sup>16</sup> See, e.g., Defendant’s Response to Request for Production No. 6, quoted in  
24 PLAINTIFF’S LRCIV 7.2(J)-(K) ) AND 37.1 STATEMENT (Doc 133 at p. 22).

25 <sup>17</sup> See Supplemental Pages from the Deposition of Dr. Sara Salek, Nov. 12, 2021, 85:25-  
86:25, attached hereto as Defendant’s Exhibit A; Excerpts from Deposition of Dr. Erik  
26 Tack, January 27, 2022, at 17:9-17, attached hereto as Exhibit B.

27 <sup>18</sup> Def. Exh. A at 143:17-20.

28 <sup>19</sup> *Id* at 85:25-86:25.

<sup>20</sup> Def. Exh. B at 17:9-17.

<sup>21</sup> Excerpts from the Deposition of Jakenna Lebsock, Nov. 30, 2021, at 29:16-19, 32:18-  
33:7, attached hereto as Defendant’s Exhibit C.

<sup>22</sup> *Id* at 32:18-33:7.

enforcing it; AHCCCS has provided unambiguous answers to those questions through non-privileged means.

## **II. Plaintiff's Characterization of the Record Fails to Disclose Key Facts**

### **A. Discovery in this case has been limited by agreement, and Defendant's disclosures were consistent with the agreement.**

Plaintiff attempts to craft a narrative where AHCCCS has engaged in a complicated months-long scheme to hide documents and testimony. But in creating this narrative, Plaintiff has ignored the multiple discussions and concessions that have been made throughout discovery and how those led to the parties' current positions. The facts of the matter are much simpler than Plaintiff would have this Court believe.

On December 10, 2020, Plaintiff J.D. and former Plaintiff D.H. issued forty-one Requests for Production and seventeen Interrogatories, most of which targeted the creation, development, and enforcement of the Rule. On January 19, 2021, Defendant issued its first response, and among other things objected to many of Plaintiff's Requests for Production on the grounds that they were overly broad and unduly burdensome.<sup>23</sup> The basis for these objections was sound: for one thing, the Challenged Exclusion was instituted in 1982, and Plaintiff's Requests were unlimited in time. *Id.* Engaging in a 40-year search of records that pre-date electronic communications would pose undue burden and expense on AHCCCS. Nevertheless, in a good-faith effort to comply with Plaintiffs' requests, Defendant searched its records from January 1, 2016 to the date of its Responses. Responsive, non-privileged documents found under these search parameters were produced and privileged documents were listed on Defendant's original privilege log.<sup>24</sup>

Shortly thereafter, Plaintiff's counsel asked to meet and confer regarding Defendant's responses. After significant discussion, Defendant proposed she would perform two additional ESI searches.<sup>25</sup> Both searches utilized a set of eight unique search phrases proposed by Plaintiff, and a five-year search window from January 1, 2016 to

<sup>23</sup> Pls. Exhs. 2 & 3, Doc. 133-1 at 25-63.

<sup>24</sup> Pl. Exh. 4, Doc. 133-1 at 64-66.

<sup>25</sup> March 17, 2021 Letter from K. King to B. Ray regarding Discovery, attached hereto as Defendant's Exhibit D, at pp. 2, 5-6.

1 present. *Id.* One search targeted twenty-three AHCCCS custodians, and the other targeted  
 2 the ESI of AHCCCS's current health plans and the potential decision-makers employed by  
 3 these plans during the relevant timeframe. *Id.*

4 As discovery progressed, Defendant supplemented its discovery responses and  
 5 disclosure statements to identify and disclose documents gathered. On December 1, 2021,  
 6 Defendant submitted its Seventh Supplemental Disclosure statement, producing responsive  
 7 ESI in the form of emails.<sup>26</sup> Nine days later, on December 10, 2021, Defendant produced  
 8 a corresponding updated, seven-page log capturing the documents it had withheld from the  
 9 December 1, 2021 production on the grounds of various privileges.<sup>27</sup> This log identified  
 10 email chains by the start and end date of the chain, the individuals participating in the email  
 11 chain, a statement regarding the subject matter at issue in the email chain, and the privileges  
 12 asserted. *Id.*

13 After the holidays, Plaintiff's counsel initiated another meet and confer to challenge  
 14 the substance and specificity of Defendant's log.<sup>28</sup> In an attempt to resolve the dispute,  
 15 Defendant prepared and submitted a revised privilege log to specifically address each of  
 16 Plaintiff's identified concerns regarding the December 10 log.<sup>29</sup> In addition to providing  
 17 more detail, the revised log separated each email chain into its component parts and added  
 18 a line entry in the log for each email in the chain. The revised log also addressed the 2015  
 19 Meeting disclosed during Dr. Salek's deposition.<sup>30</sup> It is through this expansion of existing  
 20 log entries, published contemporaneously with Defendant's Seventh Supplemental  
 21 Disclosure Statement, and revised in response to Plaintiff's request, that Defendant's  
 22 privilege log went from seven to 32 pages. In short, Defendant has consistently produced  
 23 privilege logs contemporaneous with the supplemental productions and the agreements with  
 24 Plaintiff's counsel.

#### 25 **B. The Documents and Testimony Plaintiff Claims AHCCCS Withheld Fell**

26 <sup>26</sup> Def. Seventh Supp. Disc. Statement, attached hereto as Exhibit E.

27 <sup>27</sup> Pl. Exh. 7, Doc. 133-1 at pp. 80-86.

28 <sup>28</sup> January 3, 2022 email from A. Chinsky to D. Barton regarding Privilege Log, attached  
 27 hereto as Defendant's Exhibit F.

29 <sup>29</sup> Pl. Exh. 9, Doc. 133-2 at pp. 18-50.

30 <sup>30</sup> *Id.* at pp. 48.

### Outside of the Party's Agreed-Upon Search

Plaintiff identifies three communications it believes AHCCCS has improperly withheld: two communications between Director Snyder and Governor's Office Policy Advisor Christina Corieri, and a January 18, 2017 communication between former Chief Legislative Liaison Christopher Vineyard and Christine Corieri.<sup>31</sup> But these documents were not discovered in Defendant's ESI search because they fell outside of the search parameters the parties agreed upon.<sup>32</sup> Pursuant to the parties March 17 compromise, Defendant searched, among other things, all of Director Snyder and Chief Legislative Liaison Kyle Sawyer's email communications from January 1, 2016 to present using the eight search phrases provided by Plaintiff in his February 2, 2021 letter. *Id.* This search did not involve correspondence from or to Christopher Vineyard, as he was not a custodian the parties had agreed was relevant, nor did the search terms Plaintiff proposed reveal any responsive communications between Ms. Corieri and Director Snyder. Thus, because Defendant did not discover those items, they were neither produced nor withheld and noted on a privilege log.

Furthermore, Plaintiff points to Dr. Salek's testimony regarding the 2015 meeting as evidence that Defendant has hidden relevant communications. But as noted previously, Defendant conducted a good-faith search of all records from January 1, 2016 to present as agreed with Plaintiff's counsel. AHCCCS made a good faith effort to gather information necessary to answer Plaintiff's Interrogatories before providing its response. Jakenna Lebsock sent an email to the agreed-upon custodians likely to have discoverable information within AHCCCS (including Dr. Salek). Dr. Salek responded to the email and stated that she had completed a search and had not identified any responsive documents or information. Defendant had no reason to believe responsive communications or testimony existed until Dr. Salek testified about the Meeting with Counsel during her deposition. AHCCCS immediately thereafter worked to identify documents regarding the Meeting with

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<sup>31</sup> See Pl. Exh. 11-12, Doc. 133-2 at pp. 60-76.

<sup>32</sup> See Def. Exh. D.

Counsel and found them from 2015 – again, outside the parties agreed upon search dates. Nevertheless, in an effort to resolve the dispute, and provide Plaintiff with as much information as possible, AHCCCS provided a letter explaining its search<sup>33</sup>, and added the meeting with counsel and related email to its privilege log.<sup>34</sup> As can be seen, Defendant has made timely assertions of privilege over records as they were discovered and disclosed. Nothing in the rules or law requires AHCCCS to do anything more.

### **III. The Communications and Information in the Privilege Log Are Privileged**

Perhaps because of his reliance on *Burlington N. & Santa Fe Ry Co. v. U.S. Dist. Ct. for Dist. Of Mont.*, 408 F.3d 1142 (9th Cir. 2005), Plaintiff has constructed a narrative where Defendant hid responsive documents for months until it had no choice but disclose them. But the facts before this Court are inapposite to *Burlington*. Defendant produced responsive documents throughout the course of discovery by supplementing her discovery responses and disclosure statements as required by Fed. R. Civ. P. 26(e)(1)(A). In combination with this, Defendant satisfied her obligations under Rule 26(b)(5)(A) by producing updated privilege logs within a reasonable time following the disclosures related to those privileged items. A review of Defendant’s Seventh Supplemental Disclosure Statement and Revised Privilege Log, for example, reveals that Defendant produced emails she had discovered through the extensive ESI search of over thirty custodians – and Defendant then contemporaneously logged responsive yet privileged emails discovered through that same search.<sup>35</sup> While Plaintiff urges the Court to consider only the time that passed between Plaintiff’s issuance of discovery in December 2020 and the most recent logs, this willfully ignores the fact that Defendant has sought at all times to continue supplementing her disclosures and logging privileged documents to ensure a robust record for trial. As the *Burlington* Court noted, “a district court should make a case-by-case determination, taking into account...the degree to which the...assertion of privilege enables the litigant seeking discovery and the court to evaluate [the privilege]; the timeliness of the objection and

<sup>33</sup> Doc. 133-1 at pp. 76-77.

<sup>34</sup> Doc. 133-2 at 48.

<sup>35</sup> Compare Def. Exh. D and Pl. Exh. 7.

1 accompanying information...; the magnitude of the document production; and other  
2 particular circumstances of the litigation that make responding to discovery unusually  
3 easy[] or unusually hard.” 408 F.3d at 1149. And importantly, these factors “should not be  
4 applied as a mechanistic determination of whether the information is provided in a particular  
5 format.” Because this meritless allegation of intentional delay is the sole basis for Plaintiff’s  
6 argument that the privilege has been waived, and because the record instead demonstrates  
7 that Defendant’s logs were produced contemporaneous to associated supplemental  
8 productions, the argument that the privilege was waived under *Burlington* borders on the  
9 insincere.

10 Furthermore, AHCCCS notes that if delay is grounds for invading the privilege in  
11 this case, then JD has no basis for the privilege he has asserted related to all communications  
12 between his lawyers and each of his treating health care providers. Indeed, JD has refused  
13 to turn over documents, and has prohibited deposition questioning of his therapists Austin  
14 Ross and his counselor, Mischa Cohen Peck despite having never produced a privilege log  
15 related to communications with those providers.

16 Moreover, JD’s treating physician, Veenod Chulani, is represented by counsel for  
17 his employer, Phoenix Children’s Hospital. JD, nevertheless, has refused to allow the  
18 hospital to turn over declarations prepared by JD’s lawyers in July 2020. This, even though  
19 his privilege log (the only one he has prepared in this case) was submitted to undersigned  
20 counsel last Friday, March 18, 2022.<sup>36</sup> Despite this, Plaintiff now asks the Court to allow  
21 invasion into privileged communications between AHCCCS and its counsel on the  
22 unfounded basis of waiver.

23 The privileges timely-asserted by AHCCCS were not waived. They can be separated  
24 into three separate nexuses of communication: legal counsel to staff, staff to staff for  
25 purposes of seeking and disseminating legal advice, and intra-agency privileged  
26 communications. These are dealt with in turn below.

27 **A. Communications seeking or receiving legal advice between in-house counsel**

28 <sup>36</sup> See Email from Asaf Orr to David Barton, March 18, 2022, attaching privilege log,  
attached hereto as Defendant’s Exhibit G

1                   **and AHCCCS staff are privileged.**

2                   As Plaintiff sets out in his motion, the quintessential form of attorney-client privilege  
3 is that which exists over confidential communications between attorneys and their clients,  
4 which are made for the purpose of giving legal advice. *Upjohn Co. v. United States*, 449  
5 U.S. 383, 389, 101 S. Ct. 677 (1981). Therefore, communications are privileged when they  
6 are made to or by a lawyer for the purpose of securing or giving legal advice, are made in  
7 confidence, and are treated as confidential. *Id* at 394. This privilege is not waived when it  
8 is shared between the members of an agency who are authorized to speak or act on behalf  
9 of the organization in relation to the subject matter of the communication – indeed, this type  
10 of communication is absolutely necessary for agencies like AHCCCS to function  
11 efficiently. *See Melendres v. Arpaio*, CV-07-2513-PHX-GMS, 2015 WL 13649412, at \*4  
12 (D. Ariz. Apr. 2, 2015).

13                  The privilege log entries challenged by Plaintiff dealing with advice from counsel to  
14 employee fall into two distinct, protected categories for purposes of this analysis. Entries  
15 marked by Plaintiff as Nos. 2-4, 7, 11-13, 17, and 34-37 detail privileged communications  
16 between AHCCCS counsel and AHCCCS employees regarding the legal department's  
17 advice and counsel on the potential legal impact of various current events including federal  
18 law changes, medical provider changes, and other legal issues. In other words, these entries  
19 deal with the typical interactions between agency employees and their in-house counsel on  
20 routine legal matters.

21                  The entries Plaintiff has identified as Nos. 5-6, 19-22, 23-27, and 33 describe  
22 communications between AHCCCS counsel and AHCCCS employees regarding public  
23 inquiries into AHCCCS coverage – inquiries that required a response with input from  
24 AHCCCS legal counsel to ensure AHCCCS does not incur legal liability through its public  
25 statements. Similar to the entries discussed above, these claims of privilege reflect the  
26 regular provision of advice and counsel within AHCCCS that enjoys the protections of the  
attorney-client privilege. It is properly asserted and should be upheld.

27                  **B. Communications and information shared to seek or receive legal advice are**  
28

1                   **privileged.**

2                   The attorney-client privilege extends to communications between the ‘need to know’  
 3 employees regarding the advice sought and received from counsel. As noted above, the  
 4 circulation of information to individuals within an agency does not waive the privilege as  
 5 long as it is “circulated no further than among those members of the organization who are  
 6 authorized to speak or act for the organization in relation to the subject matter of the  
 7 communication. The purpose of the privilege is limited to protection of confidential facts.”  
 8 *Melendres v. Arpaio*, CV-07-2513-PHX-GMS, 2015 WL 13649412, at \*4 (D. Ariz. Apr. 2,  
 9 2015). Defendants log entries identified by Plaintiff as Nos. 1, 13, 15-16, 18, 38-39, 48,  
 10 and 63 each detail instances where a key agent of AHCCCS communicates the advice or  
 11 direction of counsel on a privileged matter to another employee who needs to know the  
 12 advice and counsel provided. This information is not widely disseminated among other  
 13 AHCCCS departments, and indeed was only circulated for the purposes of completing the  
 14 tasks detailed in those entries. In this case, the advice sought related to responses to public  
 15 inquiries about AHCCCS policies, a request that required AHCCCS counsel to determine  
 16 the breadth and depth of responses sufficient to satisfy AHCCCS’s legal duties to the public  
 17 and to ensure that AHCCCS’s employs were not triggering any legal liability through their  
 18 communications with the public. It is on this basis that Defendant asserted privilege in its  
 19 log submitted nine days after its supplemental production, and this basis stands.

20                   **C. When AHCCCS lawyers provide legal advice and analysis to the Governor’s**  
 21                   **Office, that is a privileged communication.**

22                   AHCCCS is an executive agency, a functional arm of the Governor’s Office serving  
 23 Arizona citizens. As Dr. Salek testified during her deposition, AHCCCS “report[s] in to  
 24 the Governor...[and] serve[s] on behalf of the Governor’s Office.”<sup>37</sup> Thus, when AHCCCS  
 25 and the Governor’s Office – and particularly their legal teams – coordinate to discuss  
 26 matters that have legal implications for both offices, those matters are covered by the  
 27 deliberative process and common interest privileges.

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28                   <sup>37</sup> Def. Exh. A, 26:15-17.

1           The deliberative process privilege “shields certain intra-agency communications  
 2 from disclosure to allow agencies freely to explore possibilities, engage in internal debates,  
 3 or play devil’s advocate without fear of public scrutiny.” *Lahr v. Nat’l Transp. Safety Bd.*,  
 4 569 F.3d 964, 979 (9th Cir. 2009). In particular, this privilege shields pre-decisional and  
 5 deliberative communications – communications that are “prepared in order to assist an  
 6 agency decisionmaker in arriving at his decision, and may include recommendations, draft  
 7 documents, proposals, suggestions, and other subjective documents **which reflect the**  
 8 **personal opinions of the writer**...[I]f the disclosure of the materials would expose an  
 9 agency’s decision-making process in such a way as to discourage candid discussion within  
 10 the agency and thereby undermine the agency’s ability to perform its functions,” it is part  
 11 of the deliberative process. *Id.* (emphasis added). “The ultimate purposes of the privilege  
 12 is to prevent injury to the quality of agency decisions.” *N.L.R.B. v. Sears, Roebuck & Co.*,  
 13 421 U.S. 132, 151, 95 S. Ct. 1504, 1516 (1975).

14           The common interest privilege protects the confidentiality of communications  
 15 between an individual or organization and their attorney, as well as the communications  
 16 between attorneys of separate individuals or organizations that share a joint defense or  
 17 strategy. *See Upjohn*, 449 U.S. at 389; *United States v. Henke*, 222 F.3d 633, 637 (9th Cir.  
 18 2000) (noting the privilege is an extension of the attorney-client privilege). This privilege  
 19 applies “when attorneys exchang[e] confidential communications from clients who are or  
 20 potentially may be codefendants or have common interests in litigation.” *United States v.*  
 21 *Gonzalez*, 669 F.3d 974, 978 (9th Cir. 2012); see also *Austin*, 416 F.3d at 1021 (the  
 22 protection applies to communications between attorneys, and between attorney and client).  
 23 It also applies when such clients communicate on behalf of counsel. *Sapphire Sales Sols.,*  
 24 *LLC v. Best W. Int’l, Inc.*, 2013 WL 12284534, at \*2 (D. Ariz. 2013)(extending the privilege  
 25 to communications between two clients at direction of separate counsels).

26           Communications between AHCCCS and the Governor’s Office – namely the  
 27 privilege log entries identified as Nos. 28-32 and 40-41 – fall squarely within both  
 28 privileges. Plaintiff asserts that these communications cannot be covered by the deliberative

process privilege because Defendant has asserted that the Challenged Exclusion has not been challenged since its inception. While this fact may be true, it ignores the breadth and scope of Plaintiff's suit, which implicates not only AHCCCS's treatment and response to the Challenged Exclusion, but also AHCCCS's overall treatment of Section 1557 of the ACA. This was the subject matter of the entries marked by Plaintiff as Nos. 40-41, which clearly implicates pre-decisional and deliberative communications based on AHCCCS's overall response to Section 1557 – not solely the Rule. Furthermore, Log Nos. 28-32 are covered by the common interest privilege, as they reflect coordinated efforts between AHCCCS and the Governor's office to provide a unified, legally sound response to high-profile public inquiries with the potential to spark legal liability. As such, Defendant's objections are and continue to be rooted in sound principles of privilege and must not be disturbed by this Court.

#### **IV. Dr. Salek Refused to Testify About Privileged Communications**

As noted above, the content of the meeting Dr. Salek described between AHCCCS' counsel and the governor's office is protected not only by the attorney-client and executive privileges but also the common interest privilege. *See United States v. Austin*, 416 F.3d 1016, 1021 (9th Cir. 2005); *United States v. Henke*, 222 F.3d 633, 637 (9th Cir. 2000)(noting the privilege is an extension of the attorney-client privilege).

As Dr. Salek testified, AHCCCS is an administrative agency of the State of Arizona that reports directly to the Governor's Office. The 2015 Meeting with Counsel was conducted at the request of counsel representing the shared interests of AHCCCS and the Governor's Office. The questions put to Dr. Salek sought information regarding the content of this meeting, including the "personal opinions" of a member of the AHCCCS executive team who attended the meeting. The follow-up questions merely served as an end-around to get at the content of the information shared at meeting. As noted during Dr. Salek's deposition, the line of questioning sought the opinions and impressions of Dr. Salek that were the opinions and impressions she would have shared at the meeting. Dr. Salek testified that outside the Meeting with Counsel, she has not had reason or opportunity to reconsider

1 the Challenged Exclusion.<sup>38</sup> If Dr. Salek had testified further in response to the questions  
 2 posed by counsel, she would have inevitably risked waiving the privilege. *See U.S. v.*  
 3 *Richey*, 632 F.3d 559 (9th Cir. 2011) (noting that “voluntary disclosure of privileged  
 4 communications constitutes waiver of the privilege for all other communications on the  
 5 same subject.”). It is on these grounds that counsel instructed Dr. Salek not to respond to  
 6 questions about the Meeting with Counsel.

7 Plaintiff argues that it is entitled to probe Dr. Salek’s opinions about the challenged  
 8 exclusion outside of the Meeting with Counsel. But as Dr. Salek testified, she has not had  
 9 reason to consider the rule outside of that meeting. Moreover, the questions put to Dr. Salek  
 10 immediately followed questions about the meeting. It was, and is, impossible to disentangle  
 11 Dr. Salek’s opinions from the Meeting with Counsel.

#### 12 **IV. Conclusion**

13 It is only by willfully ignoring critical events and agreements throughout discovery  
 14 that Plaintiff has constructed a narrative where Defendant has engaged in gamesmanship  
 15 and sought to conceal documents. The truth is simpler – Defendant has at all times worked  
 16 in good faith to collect responsive documents, disclose those which were not protected by  
 17 any privilege, and log those which were. For this, and the reasons above, Defendant  
 18 respectfully requests this Court deny Plaintiff’s Motion.

19 RESPECTFULLY SUBMITTED this 21<sup>st</sup> day of March, 2022.

20 **BURNSBARTON PLC**

21 *By /s/ David T. Barton*

22 David T. Barton  
 23 C. Christine Burns  
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28 <sup>38</sup> Pl. Exh. 1, Doc. 133-1 at pp. 16, 36:17-37:14.

**CERTIFICATE OF SERVICE**

I hereby certifies that on March 21, 2022, I electronically transmitted the foregoing document, using the ECF System for filing and transmittal of a Notice of Electronic Filing and to ECF registrants and e-mailed a copy of the foregoing to the following:

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s/Betsy Hibbs

# **EXHIBIT A**

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

D.H., by and through his mother, ) No. 4:20-cv-335-SHR  
Janice Hennessey-Waller; and John Doe, )  
by his guardian and next friend, Susan )  
Doe, on behalf of themselves and all )  
others similarly situated, )

Plaintiffs, )

vs. )

Jami Snyder, Director of the Arizona )  
Health Care Cost Containment System, )  
in her official capacity, )

Defendant. )

Certified Transcript

(Pages 1-201)

VIDEO-RECORDED VIDEOCONFERENCE DEPOSITION OF  
DR. SARA SALEK

November 12, 2021

PURSUANT TO WRITTEN NOTICE and the  
appropriate rules of civil procedure, the  
video-recorded videoconference deposition of Dr. Sara  
Salek, called for examination by the Plaintiffs, was  
taken remotely commencing at 9:08 a.m. on  
November 12, 2021, before Jennifer Bajwa Melius,  
Verbatim Stenographic Reporter and Registered  
Professional Reporter.

1 provided to treat gender dysphoria. And we do cover  
2 both therapeutic, like, psychotherapy, for example, as  
3 well as medication interventions.

4 And then along that continuum of  
5 treatment options to treat gender dysphoria also  
6 includes the issue at hand, which is that  
7 gender-affirming surgeries, which, as we mentioned  
8 earlier, is currently excluded based on our rule.

9 **Q. But AHCCCS has not undertaken a clinical**  
10 **evaluation as to whether gender-affirming surgeries**  
11 **are consistent with the standard of care to treat**  
12 **gender dysphoria?**

13 A. Correct. AHCCCS has not taken the  
14 formal review process to evaluate the current evidence  
15 for or against gender-affirming surgeries to treat  
16 gender dysphoria.

17 **Q. Do you know whether AHCCCS engaged in**  
18 **that sort of review when the challenged exclusion was**  
19 **first put into place?**

20 A. I do not know.

21 **Q. Do you consider any particular medical**  
22 **guidelines or standards of care to be appropriate**  
23 **standards of care for treating gender dysphoria?**  
24 **Like, what sort of guides or reference materials would**  
25 **you look to to understand the standard of care for**

**1 regulations, currently prevent Arizona from covering**  
**2 gender-affirming surgeries?**

**3 A.** It is my testimony that Arizona Medicaid  
**4 rule currently excludes coverage of gender-affirming**  
**5 surgeries.**

11:24:41AM

**6 Q.** But there's nothing on the federal level  
**7 that would prevent Arizona from changing that rule,**  
**8 correct?**

**9 MR. BARTON:** Objection. Foundation.

**10 A.** As far as would the Centers for  
**11 Medicare & Medicaid Services permit us to change that**  
**12 regulation to cover gender-affirming surgeries? That**  
**13 would be something that we would need to, you know,**  
**14 take up with CMS as our major funder.**

11:24:55AM

**15 Given that Medicaid is a federal-state**  
**16 partnership, we would have to request that change and**  
**17 get approval through CMS. I'm not aware of any**  
**18 absolute exclusions at the CMS level.**

11:25:16AM

**19 But as I noted previously, if you look**  
**20 at Medicare, there's not a national coverage**  
**21 determination specific to this, but we would have to**  
**22 consult with our federal regulators to just confirm**  
**23 that, you know, we could cover this under our current**  
**24 Medicaid package in Arizona.**

11:25:33AM

**25 Q.** Okay. I was just a little confused. I

11:25:47AM

1 wanted to make sure that we were referring to the  
2 Arizona Medicaid rule prohibiting coverage as opposed  
3 to some federal rule that would prohibit coverage, but  
4 I think that's what you were saying.

5 A. Yeah. Arizona Medicaid rule 11:26:03AM  
6 currently -- it's Arizona Medicaid rule that currently  
7 prevents coverage.

8 And I would just like to also add, you  
9 know, around -- switching back to my, you know,  
10 individual child and adolescent psychology hat, you 11:26:18AM  
11 know, I have reviewed the Hayes publication for  
12 gender-affirming surgeries for children and  
13 adolescents, and currently it's a rating of a D2, that  
14 there's insufficient evidence.

15 And so it's really critical that we 11:26:41AM  
16 continue to conduct research in regards to best  
17 understanding what the optimal interventions are for  
18 gender dysphoria presenting in children and  
19 adolescents as, you know, I think our common goal is  
20 going to be for that child to, you know, improve as 11:27:04AM  
21 far as quality of life and quantity of life.

22 And so, you know, with that insufficient  
23 evidence, what it really tells us is more studies are  
24 needed in order for us to better understand what the  
25 most effective interventions are. 11:27:19AM

1 you know, need for the legal department to consult  
2 with subject-matter experts such as one of a clinical  
3 nature, they would consult with me and other areas  
4 within our agency that are clinical in nature.

5 MR. CHINSKY: Okay. We've been going 02:21:55PM  
6 for about an hour, and I could use a restroom break  
7 post-lunch. So if you don't mind, let's take a quick  
8 ten-minute break and we'll come back.

9 MR. BARTON: Sounds good.

10 THE VIDEOGRAPHER: The time is 02:22:10PM  
11 2:22 p.m., and we are off the record. This marks the  
12 end of Media 3.

13 (Recess from 2:22 p.m. to 2:32 p.m.)

14 THE VIDEOGRAPHER: The time is  
15 2:32 p.m., and we are back on the record. This marks 02:32:42PM  
16 the beginning of Media 4.

17 **Q. (By Mr. Chinsky) Dr. Salek, do you know**  
18 **why the challenged exclusion was originally put into**  
19 **place?**

20 A. I do not. 02:32:53PM

21 **Q. Aside from conversations with your**  
22 **lawyers, have you ever had any discussions with anyone**  
23 **about this?**

24 A. I don't recall.

25 **Q. Have you ever looked for any documents** 02:33:11PM

**explaining the origins of the challenged exclusion?**

A. I have not.

MR. CHINSKY: Let's go to Tab 17,  
please.

Is this Exhibit 14 or 15?

THE STENOGRAPHER: 14.

MR. CHINSKY: We'll mark as Exhibit 14 a  
document that was produced to us beginning at  
SNYDER 288 going through SNYDER 303.

(Exhibit Number 14 was marked.)

MR. CHINSKY: And I'll also note for the  
record for all of these documents, they were produced  
to us as bulk PDFs. So we have done our best to guess  
where these documents start and end, but we were not  
provided any metadata and they were not provided to us  
in separate files, so we are doing our best to figure  
out which pages belong to which document.

**Q. (By Mr. Chinsky) So, Dr. Salek, we just  
marked as an exhibit a document titled "Gender  
Dysphoria Treatment" from the United Healthcare  
Community Plan. Do you see that?**

A. I do.

**Q. Do you recognize this document?**

A. I do.

**Q. What is it?**

1 MR. CHINSKY: That's fine right there.

2 Q. (By Mr. Chinsky) -- notes on the second  
3 full paragraph down "EPSDT services do not include  
4 services that are experimental, that are solely for  
5 cosmetic purposes, or that are not cost effective when  
6 compared to other interventions or treatments."

03:21:08PM

7 Do you see that?

8 A. I do.

9 Q. And is this what you were discussing  
10 immediately before I put this exhibit on the screen as  
11 to how AHCCCS determines what is medically necessary  
12 under EPSDT?

03:21:18PM

13 A. Yes.

14 Q. Has AHCCCS determined whether  
15 gender-affirming surgical care is considered  
16 experimental?

03:21:53PM

17 A. We have not.

18 Q. Has AHCCCS determined whether  
19 gender-affirming surgical care is solely for cosmetic  
20 purposes?

03:22:18PM

21 A. We have not.

22 Q. And has AHCCCS determined whether  
23 gender-affirming surgical care is cost effective when  
24 compared to other interventions or treatments?

25 A. We have not.

03:22:30PM

1 I, Jennifer Bajwa Melius, do hereby declare:

2 That, prior to being examined, the witness  
3 named in the foregoing deposition was by me duly sworn  
4 pursuant to Section 30(f)(1) of the Federal Rules of  
Civil Procedure and the deposition is a true record of  
the testimony given by the witness.

5 That said deposition was taken down by me in  
6 shorthand at the time and place therein named and  
thereafter reduced to text under my direction.

7  
8 \_\_\_\_\_ That the witness was requested to  
review the transcript and make any  
9 changes to the transcript as a result  
10 of that review pursuant to Section  
30(e) of the Federal Rules of Civil  
Procedure.

11 \_\_\_\_\_ Signature is Waived

12 \_\_\_\_\_ The changes made by the witness are  
13 appended to the transcript.

14 \_\_X\_\_ No request was made that the transcript  
15 be reviewed pursuant to Section 30(e)  
16 of the Federal Rules of Civil  
Procedure.

17 I further declare that I have no interest in  
18 the event or the action.

19 I declare under penalty of perjury under the  
20 laws of the United States of America that the  
foregoing is true and correct.

21 Witness my hand this 16th day of November, 2021.

22  
23   
24 \_\_\_\_\_  
25 DEPOSITION OFFICER

## **EXHIBIT B**

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

John Doe, by his guardian and next  
friend, Susan Doe,

Plaintiff,

vs.

Jami Snyder, Director of the Arizona  
Health Care Cost Containment System,  
in her official capacity,

Defendant.

) No. 4:20-cv-335-SHR

Certified Transcript

) (Pages 1-80)

VIDEOCONFERENCE DEPOSITION OF

DR. ERIC TACK

Friday, January 28, 2022

Reported by: John Fahrenwald, AZ CR 50901, RPR

1 particular exclusion, that a review as you talked about to  
2 look at literature and current practices, should be done?

12:41:23PM

3 A. My role in the review of services is such that I  
4 remain neutral. I don't push forward those requests. So at  
5 this point, I have to remain neutral on that point.

12:41:54PM

6 Q. Setting aside whether you need to remain neutral  
7 as a professional with the agency, I'm asking your personal  
8 opinion. Do you think that such a review should be done?

9 A. I would be open to -- to any review for increasing  
10 benefits that have been shown to be necessary, safe and  
11 effective to address issues being brought forward by a  
12 member.

12:42:28PM

13 Q. Is the surgical treatment that has been requested  
14 by the plaintiff in this matter necessary to treat gender  
15 dysphoria?

12:42:58PM

16 A. I can't answer that because we've not done the  
17 review to look at independent information and the evidence  
18 based literature.

19 Q. Why not?

20 MR. BARTON: Objection.

12:43:12PM

21 THE WITNESS: We haven't been asked to review  
22 that at this time.

23 Q. (BY MR. RAY:) Is there a particular person or  
24 group of people that has to ask for that to review to be  
25 done?

12:43:37PM

1 A. Requests for review can come in from a variety of  
2 ways -- individual members, outside stakeholders, there  
3 could be a change in CMS rules. There could be a change in  
4 Federal rule, there could be a change in the State rule that  
5 precipitate initiating a review.

12:43:37PM

6 Q. Can you initiate a review?

7 A. At times internally we can initiate it ourselves,  
8 that's correct.

12:43:56PM

9 Q. Why haven't you done so yet in this case?

10 MR. BARTON: Objection.

12:44:21PM

11 THE WITNESS: I believe because of the  
12 preclusion of covering the benefit, the utilization of  
13 resources to go through a thorough review has not been  
14 undertaken at this point.

15 Q. (BY MR. RAY:) I want to understand something,  
16 maybe I'm confused. You said that the agency undertakes  
17 reviews expanding benefits where the treatment is believed  
18 to be necessary, safe, and effective; is that right?

12:39:15PM

19 MR. BARTON: Objection.

20 THE WITNESS: That's only part of the review.  
21 But those are criteria that we would look at when evaluating  
22 whether or not to expand a benefit.

12:45:27PM

23 Q. (BY MR. RAY:) Okay. While on the topic, let's  
24 fill out the criteria. Other than necessary, safety and  
25 effectiveness, what else is considered when deciding to

12:45:48PM

1 undertake a review of whether or not, for example, an  
2 exclusion is justified?

12:45:53PM

3 MR. BARTON: Objection.

4 THE WITNESS: There would be several other  
5 factors that would go into that. Are there external  
6 barriers, i.e., legislative, statutory rule. There would  
7 also require -- be required a fiscal review, whether or not  
8 it would be something that we could incorporate into the  
9 mandate of providing in an effective and cost effective  
10 manner benefits. So there would be several, I think, issues  
11 that could factor into is the review process.

12:46:08PM

12 Q. (BY MR. RAY:) So when undertaking or deciding to  
13 undertake a review in view of current standards of care,  
14 evidence, and the like, to reassess whether, for example, an  
15 exclusion of surgical treatment is appropriate, the agency  
16 considers necessity, safety, effectiveness, external  
17 barriers, and a fiscal review.

12:46:37PM

18 Are there any other factors that the agency  
19 considers when deciding to review such an exclusion?

12:47:08PM

20 MR. BARTON: I object again.

12:47:34PM

21 THE WITNESS: There are multiple steps that  
22 have to be evaluated for any change in the benefit package,  
23 which include a variety of groups within the agency.

24 Fiscal being part of it. Setting a rate,  
25 making sure that there's appropriate billing codes, making

12:48:05PM

1 sure that the data logic in the system can be accommodated 12:48:08PM  
2 to make a change, making sure that there may be a need for a  
3 policy revision.

4 There could be some legal implications that  
5 would require legal review, several other options and steps 12:48:24PM  
6 that need to go through before -- before a benefit can be  
7 effectuated into the package.

8 **Q. (BY MR. RAY:) Okay. So now I'll list as to**  
9 **necessity, safety, effectiveness, external barriers, fiscal**  
10 **review. We'll call it administrative hurdles such billing 12:48:50PM**  
11 **codes and data formatting, other policy revision and legal**  
12 **review. Are there any other considerations that the agency**  
13 **undertakes when deciding whether to review to expand a**  
14 **benefit that is currently excluded?**

15 MR. BARTON: Objection. 12:49:08PM

16 THE WITNESS: There maybe be others that are  
17 not anticipated that I can't think of right now. But we  
18 have to be prepared for those -- those other consequences  
19 that we don't necessarily look at on the front end, but as  
20 we process through expanding the benefit and trying to 12:49:34PM  
21 effectuate the package, may arise.

22 **Q. (BY MR. RAY:) I want to go back to a question just**  
23 **a few minutes ago. Thank you for rounding out those**  
24 **factors. I appreciate that.**

25 I had asked you why you had not initiated 12:50:16PM

1           **Q. If the presence of the exclusion chills or**  
2 **altogether renders futile a review of the exclusion, how are**  
3 **they ever get lifted?**

12:53:07PM

4           MR. BARTON: Objection.

5           But go ahead.

12:53:36PM

6           THE WITNESS: A difficult question to answer.  
7 If we were to see evidence based literature that comes on  
8 board that this is necessary, safe and effective, that in  
9 and of itself might be enough to trigger the beginning of  
10 the review even in light of an external barrier as the rule  
11 precluding covering that benefit.

12:54:01PM

12           **Q. (BY MR. RAY:) Has the agency seen any evidence**  
13 **based resources showing that the surgery that is currently**  
14 **excluded is necessary for those suffering from gender**  
15 **dysphoria?**

12:54:29PM

16           A. I think that's very controversial now as it was  
17 when it was implemented so to answer I don't think that we  
18 have seen any evidence based literature to support that.

19           **Q. Your testimony is that the agency has not seen any**  
20 **evidence based resources showing how the excluded surgical**  
21 **treatment may be medically necessary to treat somebody with**  
22 **gender dysphoria.**

12:54:37PM

23           A. Again, we've not been asked the question to review  
24 this. I can give an example that sometimes outside  
25 stakeholders will bring to our attention recent evidence

12:54:37PM

1 based literature and/or articles and/or other support and  
2 ask us to do a benefit review, so that's another avenue that  
3 could be pursued.

12:54:37PM

4 Q. But no review has yet begun. Correct?

5 A. Correct.

12:55:47PM

6 Q. And the filing of this lawsuit did not cause  
7 anyone to request such a review; is that right?

8 A. Correct.

9 Q. You mention that the necessity of the surgical  
10 procedures excluded by the provision were controversial at  
11 the time that the regulation was promulgated; is that right?

12:56:09PM

12 A. That's correct.

13 Q. Upon what is that statement based?

14 A. I don't have the history of when the rule was  
15 promulgated.

12:56:34PM

16 Today, I believe that the -- the evidence is  
17 still controversial.

18 Q. We'll talk about today in just a moment. But I  
19 want to go back to the time that the rule was promulgated.  
20 What was your basis to state that the necessity of the  
21 treatment was controversial then?

12:57:03PM

22 A. I don't believe that there was significant  
23 evidence to support that at that time. I've not done the  
24 research myself so that is my impression.

25 Q. If you haven't done the research yourself, how did

12:57:39PM

1 Q. (BY MR. RAY:) Do you know whether gender affirming  
2 surgical care can ever be medically necessary to treat  
3 gender dysphoria?

12:58:29PM

4 MR. BARTON: Objection.

5 THE WITNESS: I don't.

1:06:36PM

6 Q. (BY MR. RAY:) Dr. Tack, do you know why the  
7 exclusion was originally put in place?

8 MR. BARTON: Asked and answered.

9 THE WITNESS: I do not.

10 Q. (BY MR. RAY:) Dr. Tack, since you have been at the  
11 agency starting in October of 2016, have you ever had any  
12 conversations with anybody about the exclusion?

12:58:29PM

13 A. Outside of the current litigation, no.

14 Q. Let me rephrase my question just a bit. We're  
15 probably on the same wavelength.

1:07:31PM

16 Apart from discussions with Counsel, have you  
17 ever had a conversation with somebody within the agency  
18 regarding the exclusion?

19 A. Aside from the media request in 2018, no.

20 Q. Suppose the agency undertakes a review of the  
21 exclusion and determines that it should be removed.

1:08:12PM

22 What is the process after such conclusion is  
23 reached of removing it?

24 A. I believe that would require internal discussions  
25 with our legal team in terms of how best to move forward

1:08:42PM

1 necessary, safe and effective. That's not in the statute,  
2 but I'm adding "safe and effective."

2:08:34PM

3 Q. (BY MR. RAY:) Why are you adding "safe and  
4 effective," if it's not in the statute?

5 A. Because some services could be deemed  
6 experimental, which would not necessarily be covered.

2:08:48PM

7 Q. Dr. Tack, you agree with me that the rule says  
8 that there will be coverage of a treatment identified during  
9 the screening, regardless of whether or not the services are  
10 covered by the plan?

2:09:23PM

11 MR. BARTON: Objection.

12 THE WITNESS: I guess I would agree with that  
13 statement.

14 Q. (BY MR. RAY:) And the last sentence here says:  
15 Limitations and exclusions other than the requirement for  
16 medical necessity and cost effectiveness do not apply to  
17 EPSDT services.

2:09:48PM

18 Do you see that sentence?

19 A. Yes.

20 Q. So by the black and white of the agency's own  
21 policies, unless there is a justification around medical  
22 necessity or cost effectiveness, you cannot rely upon an  
23 exclusion or limitation to deny the services identified  
24 during an EPSDT screening; is that correct?

2:10:03PM

25 MR. BARTON: Objection.

2:10:30PM

1 THE WITNESS: That's correct. But medical  
2 necessity and cost effectiveness are those two prongs that  
3 need to be reviewed.

2:10:36PM

4 Q. (BY MR. RAY:) And the agency has not undertaken  
5 any review of medical necessity or cost effectiveness of the  
6 services and treatment that are at issue in the exclusion in  
7 this case. Correct?

2:10:52PM

8 MR. BARTON: Objection.

9 THE WITNESS: Correct.

10 Q. (BY MR. RAY:) From the first page of this  
11 document, Dr. Tack, it appears that the most recent version  
12 of this manual is dated April 16, 2020; is that right?

1:50:44PM

13 A. Of this document? That's correct.

14 Q. Are you aware of any subsequent versions whether  
15 in draft form or final form?

2:11:45PM

16 A. Of this chapter, yes.

17 Q. What is that?

18 A. There will be -- if it's not already posted to the  
19 website, will be shortly posted to be published for a  
20 revision of this chapter.

2:12:03PM

21 Q. Are you aware of what revisions will appear?

22 A. There will be revisions of the inclusion of a  
23 30-month EPSDT visit. There will be revisions of  
24 developmental screening. There will be revisions of removal  
25 of reference to CPT codes will be going into a separate

2:12:34PM

## C E R T I F I C A T E

I, the undersigned, a Certified Shorthand Reporter of the State of Arizona, do hereby certify:

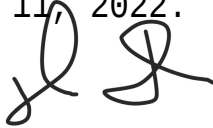
That the foregoing proceedings were taken before me via videoconferencing at the time and place herein set forth; that any witnesses in the foregoing proceedings, prior to testifying, were duly sworn; that a verbatim record of the proceedings was made by me using machine shorthand which was thereafter transcribed under my direction; that the foregoing transcript is a true record of the testimony given.

Further, that if the foregoing pertains to the original transcript of a deposition in a Federal Case, before completion of the proceedings, review of the transcript was requested.

I further certify I am neither financially interested in the action nor a relative or employee of any attorney or party to this action.

IN WITNESS WHEREOF, I have this date subscribed my name.

Dated: January 11, 2022.

  
JOHN FAHRENWALD

AZ CSR 50901

## **EXHIBIT C**

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

D.H., by and through his mother,  
Janice Hennessy-Waller; and John Doe,  
by his guardian and next friend,  
Susan Doe, on behalf of themselves  
and all others similarly situated,

Plaintiffs,

vs.

Jami Snyder, Director of the  
Arizona Health Care Cost Containment  
System, in her official capacity,

Defendant.

No. 4:20-cv-335-SHR

Certified Transcript

(Pages 1-152)

REMOTE VIDEOTAPED DEPOSITION OF JAKENNA LEB SOCK

via ZOOM VIDEOCONFERENCING

Tuesday, November 30, 2021  
at 9:11 a.m.  
Phoenix, Arizona

Reported by: John Fahrenwald, RPR, AZ CCR NO. 50901

1 the standards of care, if it's medically necessary, cost  
2 effective, there's a series of things that we have to  
3 consider? Our line of work.

09:48:45

4 MS. FULLER: Okay. Thank you. The  
5 videographer has asked me to make clear on the record when I  
6 call a tab whether there's going to be marked as an exhibit  
7 number and I would like to make clear that I did mean for  
8 them all to be marked as an exhibit. Okay.

09:49:01

9 Q. Is this exclusion that we're talking about,  
10 Ms. Lebsock, is it in a policy document at AHCCCS other than  
11 placed on the administrative code?

09:49:22

12 A. No.

13 Q. Is the was the challenged exclusion first enacted  
14 in 1982, Ms. Lebsock?

15 A. That is my understanding, yes.

09:49:48

16 Q. In 1982 what did AHCCCS do to evaluate whether  
17 gender affirming surgeries were medically necessary tephrate  
18 gender dysphoria prior to enacting the challenged exclusion?

19 A. We don't have any record of what was evaluated.

20 Q. And what did AHCCCS to do investigate what was  
21 evaluated in 1982 when the challenged exclusion was put into  
22 place?

09:50:16

23 A. I don't know.

24 Q. I mean, so asking from today's standpoint when  
25 AHCCCS was investigating this what AHCCCS did in 1982 what

09:50:38

1 phone after you sent your email?

09:54:34

2 A. No.

3 Q. And did you receive responses from every  
4 individual that you sent that email to?

5 A. All but one who left the agency within a day or so  
6 of the email being sent.

09:54:48

7 Q. And what were the responses that you received?

8 A. No one had any information.

9 Q. And did they -- did the people who responded to  
10 your email describe what searches they had done to look for  
11 the information?

09:55:05

12 A. Not in detail. They confirmed they had searched  
13 and did not have anything to provide.

14 Q. Thank you.

15 So since 1982 what has AHCCCS done to  
16 evaluate the standard of care to street gender dysphoria?

09:55:34

17 A. There has not been any formal evaluation.

18 Q. Okay. So in going back for a moment to 1982 just  
19 confirming that you're not aware that AHCCCS did anything to  
20 evaluate whether gender affirming surgeries are cosmetic  
21 when the challenged exclusion was put into place?

09:56:07

22 A. Correct. I cannot speak to what occurred in 1982.

23 Q. And just confirming you're not aware that AHCCCS  
24 did anything to evaluate the cost of gender affirming  
25 surgeries in 1982 when the exclusion was first put into

09:56:27

1 place?

09:56:31

2 A. Correct.

3 Q. Since 1982 has AHCCCS done anything to evaluate  
4 whether the exclusion of gender affirming surgeries, as  
5 opposed to nonsurgical treatment, is consistent with the  
6 standard of care to treat gender dysphoria?

09:56:56

7 A. To my knowledge, no.

8 Q. Have you had any oral discussions with other  
9 Medicaid programs about their coverage policy for treatments  
10 of gender dysphoria?

09:57:18

11 A. No.

12 Q. Have you exchanged any emails with other State  
13 Medicaid programs about their coverage for treatments of  
14 gender dysphoria or treatments for gender dysphoria?

15 A. Not to my knowledge.

09:57:40

16 Q. Have you reviewed any policies or by "you" here I  
17 do mean you and AHCCCS as a representative of AHCCCS.

18 Has your answer changed to the prior  
19 question?

20 A. No.

09:58:01

21 Q. Okay. And so have you either in your personal  
22 capacity or as your representative of AHCCCS, reviewed State  
23 Medicaid policies on coverage for the treatment of gender  
24 dysphoria?

25 MR. BARTON: Objection.

09:58:17

1 whether they are outdated?

10:18:26

2 MR. BARTON: Objection.

3 THE WITNESS: Not actively, no.

4 Q. (BY MS. FULLER:) And does AHCCCS conduct review of  
5 exclusions from coverage to determine whether the exclusions  
6 are consistent with prevailing standards of care.

10:18:53

7 MR. BARTON: Objection.

8 A. Not actively, no.

9 Q. (BY MS. FULLER:) And what do you mean when you say  
10 "not actively"?

10:19:10

11 A. In that it is not a standard process of review on  
12 any kind of predetermined schedule.

13 Q. Do you know if AHCCCS has considered requesting  
14 opening a rule to evaluate whether the challenge exclusion  
15 issue in this case should be reviewed?

10:18:13

16 MR. BARTON: Objection.

17 THE WITNESS: I'm not aware of any formal  
18 consideration where action's been taken to overrule.

19 Q. (BY MS. FULLER:) What about informal  
20 consideration?

10:20:28

21 A. My knowledge is that there has been a discussion  
22 about the possibility. Potentially. It was with our -- a  
23 legal team and medical director. However, there was no  
24 action that came out of that discussion to move forward with  
25 kind of formal activity.

10:20:54

|    |                                                                   |          |
|----|-------------------------------------------------------------------|----------|
| 1  | <b>Q. And when did that occur?</b>                                | 10:21:01 |
| 2  | A. I'm not sure.                                                  |          |
| 3  | <b>Q. Do you have any an idea? Was it in the last five</b>        |          |
| 4  | <b>years?</b>                                                     |          |
| 5  | A. Not sure.                                                      | 10:21:11 |
| 6  | <b>Q. Was it in the last ten years?</b>                           |          |
| 7  | A. I would say yes because other medical director has             |          |
| 8  | not been with the agency longer than ten years. So, that, I       |          |
| 9  | can feel comfortable saying yes to.                               |          |
| 10 | <b>Q. Do you know if this discussion was in response to</b>       | 10:21:35 |
| 11 | <b>a request by members to have surgical care for the</b>         |          |
| 12 | <b>treatments of gender dysphoria?</b>                            |          |
| 13 | A. Not sure.                                                      |          |
| 14 | <b>Q. Do you know why this discussion initiated? What</b>         |          |
| 15 | <b>prompted it?</b>                                               | 10:21:58 |
| 16 | A. I do not.                                                      |          |
| 17 | <b>Q. Were you a part of these discussions?</b>                   |          |
| 18 | A. I was not.                                                     |          |
| 19 | <b>Q. And other than the legal team and the medical</b>           |          |
| 20 | <b>director, do you know who was a part of these discussions?</b> | 10:22:10 |
| 21 | A. My understanding is the Governor's office.                     |          |
| 22 | <b>Q. Anyone else?</b>                                            |          |
| 23 | A. Not to my knowledge.                                           |          |
| 24 | <b>Q. And do you know whether these discussions were in</b>       |          |
| 25 | <b>person?</b>                                                    | 10:22:27 |

1 A. I'm not sure.

10:22:30

2 Q. How did you learn about this?

3 A. I was advised of it as preparing for my role as a  
4 30(b)(6) witness for the agency.

5 Q. And who were you advised of this meeting by?

10:22:51

6 A. My legal counsel.

7 Q. Anyone else?

8 A. No.

9 Q. Did you talk about this meeting with Dr. Salek?

10 A. No.

10:23:09

11 Q. Did you talk about this meeting with Dr. Tack?

12 A. No.

13 Q. Did you talk about this meeting with Jami Snyder?

14 A. No.

15 Q. Do you know how many discussions there may have  
16 been about considering opening the rule?

10:23:29

17 A. To my knowledge is this one discussion.

18 Q. Have you had any discussions with anyone outside  
19 the presence of attorney regarding this meeting?

20 A. No.

10:23:56

21 Q. Have you sent any emails other than to your  
22 attorney regarding this meeting?

23 A. No.

24 Q. In your role at AHCCCS have you had any  
25 discussions with anyone outside the presence of an attorney

10:24:21

1 that denial.

11:34:03

2 Q. (BY MS. FULLER:) And if the individual is under  
3 the age of 21, would they have to include language such as  
4 this, setting forth their decision with respect to EPSDT in  
5 particular?

11:34:18

6 A. They have to reference EPSDT regulation so that  
7 the member is aware of them, yes.

8 Q. It looks like I might be transitioning to a new  
9 topic. It make sense for another break now, about another  
10 hour or so.

11:35:16

11 MR. BARTON: Maybe we could go to noon and  
12 break for lunch if that works for you.

13 MS. FULLER: Okay.

14 MR. BARTON: Okay.

15 MS. FULLER: I don't think I have any further  
16 questions on this policy. So you can put that aside, if you  
17 would like.

11:35:37

18 Q. (BY MS. FULLER:) Earlier, I asked you some  
19 questions about what AHCCCS did in 1982 regarding the  
20 challenged exclusion and the investigation you've done  
21 around that.

11:35:54

22 And now I kind of want to ask more broadly  
23 has AHCCCS ever determined whether gender affirming surgical  
24 care -- I'm using the term gender affirming, but I  
25 understand the exclusion uses the term gender reassignment

11:36:12

1 surgery -- whether gender affirming surgical care is ever  
2 considered experimental? Has AHCCCS ever made that  
3 determination since 1982?

11:36:16

4 MR. BARTON: Since 19782.

5 THE WITNESS: So I can't speak to anything  
6 that was outside of the time period that I was asked to be  
7 prepared to speak to, but I am not aware that we've made a  
8 determination that it's experimental in recent years.

11:36:30

9 Q. (BY MS. FULLER:) And what's your understanding of  
10 the time period you've been asked to speak to today?

11:36:49

11 A. Initially went back to 2016. And then we did look  
12 for some documentation prior to that. I believe to 2011 in  
13 regards for most documentations. And then of course 1982.

14 Q. And did you find anything when you were searching  
15 for information between 2011 and 2016, regarding the  
16 challenged exclusion?

11:37:11

17 A. No.

18 Q. No. So similar question. You know, since 1982 --  
19 but understanding that you're more focused on 2011 to the  
20 current -- has AHCCCS determined whether gender affirming  
21 surgical care is considered cosmetic?

11:37:34

22 A. Not to my knowledge, no.

23 Q. And has AHCCCS determined since the exclusion was  
24 implemented whether gender affirming surgical care is  
25 considered cost effective?

11:37:55

1 A. So my knowledge, no. 11:37:59

2 MS. FULLER: Okay. And I would ask the  
3 videographer to upload into the chat Tab No. 5, which I  
4 would mark as Exhibit 5.

5 (Exhibit No. 5 was marked for identification.) 11:38:19

6 MS. FULLER: Okay. For the record, this is a  
7 copy of Arizona House Bill 2294.

8 **Q. (BY MS. FULLER:) And, Ms. Lebsock, I will give you**  
9 **a chance to review the document.**

10 MR. BARTON: Also, for the record this is 11:39:08  
11 Topic 8 of the 30(b)(6) deposition.

12 THE WITNESS: Okay.

13 **Q. (BY MS. FULLER:) Ms. Lebsock, are you familiar**  
14 **with this document. Maybe not necessarily this version of**  
15 **this document, but the information contained in it?** 11:39:25

16 A. Yes.

17 **Q. And what's your understanding of what this**  
18 **document is?**

19 A. It was a House bill put forward for consideration  
20 by the Legislature regarding a number of services as 11:39:35  
21 outlined in the document.

22 **Q. And what's your understanding of why this House**  
23 **bill was introduced? And I believe it was 2017.**

24 MR. BARTON: Objection.

25 THE WITNESS: I can't speak to the rationale 11:39:54

1  
2 REPORTER'S CERTIFICATE I, JOHN FAHRENWALD, a  
3 Certified Shorthand

4 Reporter of the State of Arizona, do  
5 hereby certify: That the foregoing proceedings were taken  
6 before me at the time and place therein set forth, at which  
7 time the witness was put under oath by me;

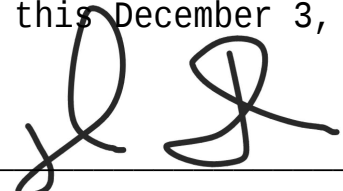
8 That a recording of the proceedings was made  
9 by me stenographically which was thereafter transcribed  
10 under my direction; that the foregoing transcript is a true  
11 record of the testimony given.

12 Further, that if the foregoing pertains to  
13 the original transcript of a deposition in a Federal Case,  
14 before completion of the proceedings, review of the  
15 transcript [X] was [ ] was not requested.

16 I further certify I am neither financially  
17 interested in the action nor a relative or employee of any  
18 attorney or any party to this action.

19 IN WITNESS WHEREOF, I have this date  
20 subscribed my name.

21 Dated this December 3, 2021.

22   
23 \_\_\_\_\_  
24 JOHN FAHRENWALD, AZ CSR No. 50901  
25

## **EXHIBIT D**

# BurnsBarton

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Labor and Employment Lawyers

March 17, 2021

**VIA ELECTRONIC MAIL**

Brent P. Ray, Esq.  
King & Spalding LLP  
110 N. Wacker Drive  
Suite 3800  
Chicago, IL 60606  
bray@kslaw.com

Re: *D.H. and John Doe v. Snyder* – Response to February 2, 2021 Letter

Dear Brent:

Thank you for your letter of March 4, 2021. We are writing in response to your letter. We are making several compromises in this letter. In doing so, we are not waiving the objections we set forth in our responses or prior correspondence.

**Defendant's Answers to Plaintiffs' First Set of Interrogatories**

***Interrogatories 5-6.*** You have requested information about efforts undertaken to obtain information responsive to Interrogatories 5-6 which seek information about the process by which the Challenged Exclusion was drafted, promulgated, or implemented in 1982 (and who was involved in the process). Defendant declines to share attorney-client and attorney-work product privileged information about communications that have occurred to date pertaining to Plaintiffs' Interrogatories 5-6. However, to demonstrate Defendant's good faith and extensive efforts to locate information responsive to Interrogatories 5-6, Jakenna Lebsock will reach out to several units within AHCCCS (specifically, the names listed immediately below) to ask whether they have information or documents that could be responsive to Interrogatories 5-6. In addition, and as you already know, Plaintiffs have the ability to search publicly available information about the Challenged Exclusion through public sources, such as through the Arizona public library, Westlaw, LexisNexis, and/or the AHCCCS website (at <https://www.azahcccs.gov/Resources/GovernmentalOversight/lra.html> and <https://archive.azahcccs.gov>).

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Page 2

1. Division of Community Advocacy and Intergovernmental Relations (Dana Flannery)
  - a. Federal Relations Administrator (Mohamed Arif)
  - b. Public Information Officer (Heidi Capriotti)
2. Division of Fee-For-Service Management (Markay Adams)
  - a. Clinical Operations (Karen Grady, Satya Sarma )
    - i. Clinical Administration (Ewaryst Jedrasik)
3. Division of Health Care Management (Matthew Isiogu & Jakenna Lebsock)
  - a. Rates Analysis & Incentives (Bret Cloninger)
  - b. Office of Data Analytics (Lori Petre)
  - c. Operations Administrator (Christina Quast)
  - d. Contracts & Policy Administrator (Julie Ambur)
  - e. Clinical Administrator (Eric Tack)
4. Information Services Division (Dan Lippert)
  - a. Data Warehouse Management (Mike Sission)
5. Office of Administrative Legal Services (Matt Devlin)
  - a. Rules (Nicole Fries)
  - b. Informal Resolution Unit (Joseph Ruiz)
6. Office of the Director (Jami Snyder)
  - a. Chief Medical Officer (Dr. Sara Salek)
  - b. Deputy Director, Health Care Operations (Shelli Silver)
  - c. Legislative Liaison (Kyle Sawyer)

***Interrogatory 7 and Interrogatories 3-4.*** In your letter, you indicate that Plaintiffs’ proposal is to “request that Defendant identify the policies or procedures that govern AHCCCS’s evaluation of medical necessity for all gender dysphoria treatments. A complete response would include a description of all processes and documents, as described in Interrogatory 7 related to approved gender dysphoria treatments or AHCCCS’s evaluation of medical necessity for gender dysphoria treatments.” In response to this question, AHCCCS does not have AHCCCS guides, manuals, bulletins, or coverage policies that address procedures, treatments, or services to treat gender dysphoria, apart from the Challenged Exclusion set forth in A.A.C. R9-22-205-B.4(a). This is not unusual; AHCCCS does not have policies on medical necessity for every single medical condition – for example, there would also be no responsive documents for leukemia, prostate cancer, and other conditions. Nonetheless, as a compromise and without waiving our prior objections, AHCCCS will ask the health plans whether the health plans have policies or procedures that govern evaluation of medical necessity for gender dysphoria treatments covered by AHCCCS (e.g., hormone treatments and counseling) from January 1, 2016 to present. In addition, and as you may recall, Defendant obtained and produced responsive UnitedHealthcare documents at SNYDER.000285-303.

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 March 17, 2021  
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**Interrogatories 8-9.** The chart we produced on February 23, 2021 for Interrogatories 8 and 9 included information about the relevant procedures Plaintiffs specifically identified and requested in Interrogatory No. 8 – namely, “Breast Reconstruction,” “Mastectomy,” and “Reduction Mammoplasty.” Your letter asked that we update the chart to include procedures that could potentially be relevant to Plaintiffs based on our response to Interrogatory 10. We have done so.

**Interrogatory 10.** In your letter, you note that Plaintiffs have “requested an identification of *all* types of breast- or chest-related surgeries covered by Arizona Medicaid.” But this request seeks information that is not relevant to Plaintiffs’ claims and not proportional to the needs of the case. There are several types of “breast- or chest-related surgeries” that are completely irrelevant to the claims in this case – for example, lumpectomies, removal of ruptured breast implants, removal of lymph nodes as part of breast surgery, insertion of breast implants after mastectomy, etc., all of which are not in any way relevant to Plaintiffs’ claims. Therefore, the chart produced on February 23, 2021 does not contain a full and complete list of all breast-or chest-related surgeries covered by Medicaid, since many of those procedures are irrelevant to this case. Accordingly, as noted in the chart, Defendant undertook efforts to identify breast- or chest-related surgical procedures covered by AHCCCS that may potentially be relevant to Plaintiffs’ claims, and those are noted in the chart. Furthermore, because we do not have Plaintiffs’ medical records and do not know the specific breast/chest related surgical procedures/codes that would apply to Plaintiffs, we invited Plaintiffs to identify specific surgical procedures/codes that would apply to Plaintiffs for the completion of male chest reconstruction surgery. If Plaintiffs provide that information to Defendant, we will review AHCCCS’s system and update the charts provided if necessary.

**Interrogatory 11.** Plaintiffs have asked that Defendant “include an identification of every role or position that oversaw a decision to deny coverage based on the Challenged Exclusion” pursuant to Interrogatory No. 11, which requested identification of “all persons involved in implementing and/or enforcing the Challenged Exclusion from January 1, 2010 to present, including each person’s role(s).” In response to your request and without waiving our prior objections, AHCCCS provides the following additional information:

AHCCCS has no evidence that John Doe filed a request for prior authorization, and thus there was no “decision to deny coverage” for John Doe. With respect to D.H., the Complaint alleges (1) D.H. “requested prior authorization for the surgery from UnitedHealthcare” and “UnitedHealthcare denied prior authorization for the surgery,” and then (2) “D.H. appealed the denial of the surgery, and . . . UnitedHealthcare upheld its denial of coverage pursuant to the Challenged Exclusion.” (Doc. 1, ¶87). Thus, for D.H., the “decision to deny coverage” was not made by AHCCCS and no one at AHCCCS would have been involved in the “decision to deny coverage”; instead, the “decision to deny coverage” was made at the health plan level. Therefore, in response to

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your question, AHCCCS would not have tracked the processing of D.H.'s claim, because D.H.'s claim did not reach AHCCCS. Moreover, Plaintiffs have not disclosed to Defendant the name of D.H.; therefore, Defendant cannot verify who at the health plan would have been involved in a decision to deny prior authorization or decision on the appeal for D.H.

The AHCCCS administrative appeal process has been previously defined and discussed in detail in this case, including in documents filed with the Court. (Doc. 62, 64) Based on our review of records, AHCCCS was unable to locate AHCCCS records of denials of coverage or prior authorization under the Challenged Exclusion for male chest reconstruction surgery of individuals under age 21 since 2016. However, as noted below, AHCCCS will expand its search for relevant information responsive to Interrogatories 12-13 to the time period 2011 to the present, and we will supplement our response to Interrogatory 11 if it is discovered that an employee at AHCCCS was involved in an AHCCCS decision to deny coverage for male chest reconstruction surgery to an individual under age 21 based on the Challenged Exclusion from 2011 to present.

***Interrogatories 12-13.*** You have requested additional clarification regarding Defendant's continuing search of records. Interrogatories 12-13 seek information about denials of coverage or prior authorization for coverage. Based on the search conducted to date of AHCCCS's records since 2016, AHCCCS was unable to locate AHCCCS records of denials of coverage or prior authorization under the Challenged Exclusion for male chest reconstruction surgery of individuals under age 21. As a compromise and without waiving our prior objections, AHCCCS will expand its search for relevant information responsive to Interrogatories 12-13 to the time period 2011 to the present.

We have received and reviewed information from the health plans from January 1, 2016 to present, but it is unclear to us whether the information contains "instance[s] of denial[s] of coverage or prior authorization for coverage" under the Challenged Exclusion for male chest reconstruction surgery of individuals under age 21 – and therefore it is not clear if the information is responsive to Interrogatories 12-13. We are working with the health plans to get clarification on these issues.

***Interrogatory 14.*** As noted in our February 23, 2020 letter, we will ask the health plans to search their documents for grievance and appeal records based on denials of coverage or prior authorization under the Challenged Exclusion for male chest reconstruction surgery of individuals under age 21 going back to 2011. We do not have an expected date of completion at this time, nor do we know what records have been preserved by the health plans (as AHCCCS's requirement of the health plans is to retain documents for five years), but we will work with the health plans in good faith. If and when we receive documents from the health plans, we will review and produce relevant and responsive documents in accordance with our obligations under Fed.R.Civ.P. 26.

Brent P. Ray, Esq.  
March 17, 2021  
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***Interrogatories 15-17.*** You have requested information about efforts undertaken to obtain information responsive to Interrogatories 15-17. Defendant declines to share attorney-client and attorney-work product privileged information about communications that have occurred to date pertaining to Plaintiffs' Interrogatories 15-17. However, without waiving our prior objections, in order to demonstrate Defendant's good faith and extensive efforts to locate responsive information, Jakenna Lebsock will contact several individuals within AHCCCS (those identified on page 2 above) to inquire into whether they have information responsive to Interrogatories 15-17 (meetings in which the Challenged Exclusion or gender dysphoria treatments/services were discussed, documents or other information AHCCCS has considered or reviewed relating to the Challenged Exclusion, and instances where AHCCCS considered amending or eliminating the Challenged Exclusion).

### **Electronically Stored Information**

In response to your letter, Defendant will (1) ask the health plans to search their records again using your proposed search terms from January 1, 2016 to the present (as AHCCCS's requirement of the health plans is to retain documents for five years), and (2) conduct an ESI search using your proposed search terms of the AHCCCS custodians identified on page 2 above from January 1, 2016 to the present. However, given the number of custodians and scope of what Defendant has agreed to search at this time, Defendant will not agree to a search using the term "mastectomy," as this search term by itself will undoubtedly result in an excessive number of irrelevant documents (mastectomies are frequently performed on natal females for reasons completely irrelevant to Plaintiffs' claims – e.g., breast cancer). Defendant will conduct this search, and if a reasonable number of responsive records are found, Defendant will review and produce those that are relevant to the claims and defenses in this case. If our record search turns up a large number of records that are irrelevant, we will work with you to narrow the search.

We respectfully decline your request to specifically identify custodians in a supplemental Disclosure Statement. We have agreed to search these custodians as a compromise – but we do not presently know if these individuals "have discoverable information . . . that [Defendant] may use to support its claims or defenses" in this case. *See* Fed.R.Civ.P. 26(a)(1). Merely agreeing to inquire of a custodian does not mean that the custodian has information that Defendant "may use to support its claims or defenses."

### **Non-Custodial Documents and ESI**

We have reviewed your letter as it pertains to non-custodial sources and ESI. Without waiving our prior objections, in order to demonstrate Defendant's good faith and extensive efforts to locate relevant non-custodian documents and ESI, Jakenna Lebsock will contact several individuals within AHCCCS (those identified on page 2 above) to

Brent P. Ray, Esq.  
March 17, 2021  
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inquire into whether they are aware of any relevant non-custodial documents and ESI, such as network folders, shared files, or paper files.

Respectfully,

**BURNSBARTON PLC**

*Kathryn H. King*

Kathryn H. King

|                                                | <b>ANSWERS TO INTERROGATORIES 8 AND 9</b>                                                                              |                                                                                                 |                                                                                                        |
|------------------------------------------------|------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------|
| <b>Procedure</b>                               | <b>Excluded from coverage under Arizona Medicaid when requested or intended for the treatment of gender dysphoria?</b> | <b>Does the Challenged Exclusion apply differently for beneficiaries under 21 years of age?</b> | <b>Is coverage provided when medically necessary to treat a condition other than gender dysphoria?</b> |
| Breast Reconstruction                          | Yes                                                                                                                    | No                                                                                              | Yes                                                                                                    |
| Mastectomy                                     | Yes                                                                                                                    | No                                                                                              | Yes                                                                                                    |
| Reduction Mammoplasty                          | Yes                                                                                                                    | No                                                                                              | Yes                                                                                                    |
| Removal of extra breast tissue                 | Yes                                                                                                                    | No                                                                                              | Yes                                                                                                    |
| Partial removal of breast                      | Yes                                                                                                                    | No                                                                                              | Yes                                                                                                    |
| Total removal of breast                        | Yes                                                                                                                    | No                                                                                              | Yes                                                                                                    |
| Breast reduction                               | Yes                                                                                                                    | No                                                                                              | Yes                                                                                                    |
| Removal of intact breast implant               | Yes                                                                                                                    | No                                                                                              | Yes                                                                                                    |
| Reconstruction of nipple or area around nipple | Yes                                                                                                                    | No                                                                                              | Yes                                                                                                    |
| Correction of inverted nipples of breast       | Yes                                                                                                                    | No                                                                                              | Yes                                                                                                    |
| Reconstruction of breast using tissue expander | Yes                                                                                                                    | No                                                                                              | Yes                                                                                                    |
| Reconstruction of breast with back muscle flap | Yes                                                                                                                    | No                                                                                              | Yes                                                                                                    |

## **EXHIBIT E**

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[michael@burnsbarton.com](mailto:michael@burnsbarton.com)

*Attorneys for Defendant*

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

D.H., by and through his mother, Janice  
Hennessy-Waller; and John Doe, by his  
guardian and next friend, Susan Doe, on  
behalf of themselves and all others similarly  
situated,

Plaintiffs,

v.

Jami Snyder, Director of the Arizona Health  
Care Cost Containment System, in her  
official capacity,

Defendant.

Case No. 4:20-cv-00335-SHR

**DEFENDANT SNYDER'S *SEVENTH*  
*SUPPLEMENTAL DISCLOSURE*  
STATEMENT**

(Assigned to the Honorable Scott H.  
Rash)

Pursuant to Rule 26(a)(1), Defendant Jami Snyder, Director of the Arizona Health Care Cost Containment System ("AHCCCS"), in her official capacity ("Defendant"), provides her seventh supplemental disclosures. Additions are in ***bold italics***. This seventh supplemental disclosure is based upon information available to Director Snyder after reasonable inquiry under the circumstances. Director Snyder's factual investigation is ongoing and will result in the identification of additional relevant information that will be

made available to all parties through supplemental disclosures in accordance with the Federal Rules of Civil Procedure. Director Snyder reserves the right to supplement, amend or otherwise modify the identification of persons who may have discoverable information that she may use to support her defenses. This disclosure is not intended to be and shall not be construed as a waiver, express or implied, of any applicable privileges, including without limitation, the attorney-client privilege or the attorney work-product doctrine. Supplemental disclosures are provided below in **bold**.

A(i). Individuals known at this time to be likely to have discoverable information that Defendant Snyder may use to support her defenses to the Complaint herein:

Plaintiff John Doe  
c/o Asaf Orr, Esq.  
870 Market Street, Suite 370  
San Francisco, CA 94102  
(415) 392-6257

Defendant is informed and believes Plaintiff John Doe possesses relevant, discoverable information about John Doe's claims in this lawsuit, including the nature of those claims, the alleged evidentiary basis of those claims, and any facts alleged in support thereof. Defendant also expects Plaintiff John Doe to possess information regarding John Doe's medical background and diagnoses, alleged damages, and efforts to mitigate those damages.

AHCCCS EMPLOYEES.

Each individual listed below may have information relevant to Defendant Snyder's defenses as the Plaintiffs' claims. We reserve the right to supplement or amend the following lists and descriptions as Plaintiffs' claims become more clearly articulated. Unless otherwise indicated, each of the following persons is an AHCCCS employee, who can be contacted in care of:

JOHNSTON LAW OFFICES, P.L.C.  
14040 N. Cave Creek Rd., Suite 309  
Phoenix, Arizona 85022  
Telephone: (602) 435-0050

Jami Snyder

1 Director Jami Snyder has information and knowledge generally regarding  
 2 Arizona's participation in Arizona's Medicaid program; oversight of AHCCCS operations;  
 3 and interactions between AHCCCS and the Centers for Medicare and Medicaid Services  
 (CMS) regarding the provision of EPSDT services.

4 Dr. Sara Salek

5 Dr. Salek is the Chief Medical Officer of AHCCCS and has information and  
 6 knowledge as to the EPSDT program at AHCCCS, its requirements, and the requirements  
 7 of medical necessity of services provided by AHCCCS.

8 Dr. Erik Tack

9 Dr. Tack is the Deputy Assistant Director for Managed Care Clinical Compliance  
 10 Division of Health Care Management and has information and knowledge as to the  
 11 EPSDT program at AHCCCS, its requirements, and the requirements of medical necessity  
 12 of services provided by AHCCCS. *Dr. Tack has had a wide array of work and*  
*educational experiences that will allow him to testify about the factors that public health*  
*agencies must consider when making funding decisions about what treatments to provide.*  
*He will also testify about the requirements that govern the treatments provided by*  
*AHCCCS and will describe how AHCCCS complies with those requirements. Dr. Tack*  
*will also testify about how new/experimental medical treatments/services are reviewed by*  
*AHCCCS before AHCCCS approves those procedures and he will testify that, in his*  
*experience since October, 2016, AHCCCS has not been asked to review expanded*  
*services for the surgery Plaintiffs seek by way of this lawsuit. Dr. Tack will also explain*  
*the cost-benefit analysis applicable to AHCCCS's decisions to fund certain medical*  
*treatments. Dr. Tack may also testify about any other topic or issue raised during his*  
 18 *deposition.*

19 Jakenna Lebsock

20 Jakenna Lebsock is the Assistant Director for the Division of Health Care  
 21 Management and has information and knowledge regarding health plan compliance with  
 22 AHCCCS legal and contractual requirements. Ms. Lebsock will also testify on behalf of  
 23 AHCCCS to the topics identified in Plaintiffs 30(b)(6) notice of deposition to AHCCCS  
 dated June 8, 2021.

24 Other Persons:

25 Dr. Michael D. Laidlaw, M.D.  
 26 c/o BurnsBarton  
 27 2201 East Camelback Road, Suite 360  
 28 Phoenix, AZ 85016

1 Dr. Laidlaw is a board-certified endocrinologist who has provided the opinions and  
2 bases therefore on behalf of Defendant as set forth in Doc. 18-1.

3 Dr. Stephen B. Levine, M.D.  
4 c/o BurnsBarton  
5 2201 East Camelback Road, Suite 360  
6 Phoenix, AZ 85016

7 Dr. Levine is a Psychiatrist who is a Clinical Professor of Psychiatry and also  
8 maintains an active private clinical practice. Dr. Levine has provided the opinions and  
9 bases therefore on behalf of Defendant as set forth in Doc. 18-2.

10 Anthony J. Fernandez  
11 c/o Quintairos Prieto, Wood & Boyer, P.A.  
12 8800 E. Raintree Drive, Ste. 100  
13 Scottsdale, AZ 85260

14 Anthony Fernandez authored Non-Party El Rio Health's Response to Defendant's  
15 Motion to Compel.

16 Any witness or knowledgeable person identified by Plaintiffs.

17 Any necessary foundational or authentication witness.

18 Any necessary rebuttal witnesses.

19 Any and all individuals or entities subpoenaed.

20 Plaintiff John Doe's Medical Providers.

21 A(ii). Copies of Documents, Electronically Stored Information, and Tangible Things in  
22 the Possession, Custody, and Control of AHCCCS that Defendant Snyder May Use to  
23 Support Her Defenses to the Complaint.

24 Documents recognized as of this date to be relevant to Defendant Snyder's defense  
25 include the following that are produced herewith or by indication of internet address  
26 where the document is available on-line:

- 27 1. AHCCCS policies regarding EPSDT services are available found in the  
28 AHCCCS Medical Policy Manual, which is available at:  
[https://www.azahcccs.gov/shared/Downloads/MedicalPolicyManual/Chap300.p](https://www.azahcccs.gov/shared/Downloads/MedicalPolicyManual/Chap300.pdf)  
[df](https://www.azahcccs.gov/shared/Downloads/MedicalPolicyManual/Chap300.pdf) et seq.

2. All of the declarations disclosed by Plaintiffs in their briefing pertaining to Plaintiffs' Motion for Preliminary Injunction.
3. The expert declarations of Dr. Michael Laidlaw and Dr. Stephen Levine, disclosed in response to Plaintiffs' Motion for Preliminary Injunction.
4. Documents listed or disclosed by Plaintiffs.
5. Any statements made by Plaintiffs D.H. or John Doe.
6. The healthcare records of Plaintiffs D.H. and John Doe.
7. Posts on social media, text messages, and other correspondence to and from Plaintiffs and their guardians regarding their claims in this lawsuit.
8. Documents bates-labeled SNYDER.000304-738.
9. Documents bates-labeled SNYDER.000739-782.
10. Documents bates-labeled CRONYN.000001-81.
11. Documents bates-labeled SNYDER.000783-915.
12. DKT 103 El Rio's Response to Motion to Compel.
13. Documents bates-labeled SNYDER.000916-926, produced July 12, 2021 with Defendant's Response to Plaintiffs' Requests for Production, Set Two
14. Rate and fee schedules available at:

<https://www.azahcccs.gov/PlansProviders/RatesAndBilling/FFS/>

**15. SNYDER.000927-1264.**

**2. A(iii)** – Not applicable.

**2. A(iv)** – Not applicable.



1 T: +1 310 204 6010  
2 Email: [coursolle@healthlaw.org](mailto:coursolle@healthlaw.org)  
3 [mckee@healthlaw.org](mailto:mckee@healthlaw.org)

4 *Attorneys for Plaintiffs*

5 *s/Michael B. Guillian*  
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## **EXHIBIT F**

**From:** Andrew Chinsky <[achinsky@kslaw.com](mailto:achinsky@kslaw.com)>

**Subject: RE: Document Disclosure**

**Date:** January 3, 2022 at 1:24:39 PM MST

**To:** David Barton <[david@burnsbarton.com](mailto:david@burnsbarton.com)>

**Cc:** AOrr <[AOrr@nclrights.org](mailto:AOrr@nclrights.org)>, "C. Christine Burns" <[christine@burnsbarton.com](mailto:christine@burnsbarton.com)>, Logan Johnston <[ltjohnston@live.com](mailto:ltjohnston@live.com)>, Brent Ray <[bray@kslaw.com](mailto:bray@kslaw.com)>, mckee <[mckee@healthlaw.org](mailto:mckee@healthlaw.org)>, coursolle <[coursolle@healthlaw.org](mailto:coursolle@healthlaw.org)>, DBarr <[DBarr@perkinscoie.com](mailto:DBarr@perkinscoie.com)>, JHowe <[JHowe@perkinscoie.com](mailto:JHowe@perkinscoie.com)>, Ariana Fuller <[AFuller@KSLAW.com](mailto:AFuller@KSLAW.com)>

David,

Happy new year. We write to follow up on your letter of December 10 and the updated privilege log you provided. Putting aside the issue of waiver, on which we disagree and continue to reserve the right to file a motion as appropriate, the privilege log itself does not provide enough information to allow us to evaluate defendant's claims of privilege. As you know, it is defendant's burden to show that a privilege applies. To that end, we request that you amend the privilege log to break out each document individually over which defendant claims privilege rather than group the entries together, which is confusing. In so doing, we ask that you include the following information, all of which is basic information that, in our view, should have been included on the log at the outset:

1. A sequential number associated with each privilege log record
2. Document type
3. The date of the document (i.e., the date a document was created/modified, or the date an email was sent/received)
4. The author of the document or the sender, recipient(s), copyee(s), and blind copyee(s) of the

email

5. The file name of the document or the subject line of the email
6. The identity of the attorneys who sent or received the document/email, if any, including whether or not they are outside counsel
7. Document description
8. Privilege asserted
9. For redacted documents, the Bates numbers corresponding to the pages redacted

Most of this information can be automatically generated from the metadata of the documents, which should eliminate most of the burden involved. Further, two points of clarification.

First, for #s 4-7, we are specifically asking that you revise your existing descriptions and list of people who authored/received the document and provide the file name of the document or subject line of the email. We are entitled to know which AHCCCS employees and which counsel received the document. Moreover, some of the descriptions are very non-specific, such as "Email correspondence between AHCCCS employees and AHCCCS counsel re AHCCCS rule regarding gender reassignment surgery." This description does not give us sufficient information to evaluate the privilege, as the mere presence of an attorney on an email does not make something privileged.

Second, for #9, we are asking for Bates numbers because it is impossible for us to match many of the entries on the log to the entries redacted in your production. Most of the redactions cover the to/from/cc/subject lines. Thus, the redactions do not allow us to properly evaluate privilege.

All of this information should be readily identifiable based on the face of the document and/or from the metadata of the file. Therefore, amending the log should not require you to confer with any witnesses, and we ask that you provide this to us by **January 10** so that we can review in advance of our status hearing. We need to make sure any disputes are ripe for the Court's consideration by that time.

Thanks,  
Andrew

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**Andrew Chinsky**

*Senior Associate*

T: +1 404 572 2812 | E: [achinsky@kslaw.com](mailto:achinsky@kslaw.com) | [www.kslaw.com](http://www.kslaw.com)

[BIO](#) | [vCARD](#)

King & Spalding LLP  
1180 Peachtree Street, NE  
Suite 1600  
Atlanta, GA 30309

**KING & SPALDING**

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**From:** David Barton <[david@burnsbarton.com](mailto:david@burnsbarton.com)>

**Sent:** Friday, December 10, 2021 4:13 PM

**To:** Andrew Chinsky <[achinsky@kslaw.com](mailto:achinsky@kslaw.com)>

**Cc:** AOrr <[AOrr@nclrights.org](mailto:AOrr@nclrights.org)>; C. Christine Burns <[christine@burnsbarton.com](mailto:christine@burnsbarton.com)>; Logan Johnston <[ltjohnston@live.com](mailto:ltjohnston@live.com)>; Brent Ray <[bray@kslaw.com](mailto:bray@kslaw.com)>; mckee <[mckee@healthlaw.org](mailto:mckee@healthlaw.org)>; coursolle <[coursolle@healthlaw.org](mailto:coursolle@healthlaw.org)>; DBarr <[DBarr@perkinscoie.com](mailto:DBarr@perkinscoie.com)>; JHowe <[JHowe@perkinscoie.com](mailto:JHowe@perkinscoie.com)>;

**Subject:** Re: Document Disclosure

**CAUTION: MAIL FROM OUTSIDE THE FIRM**

Hello Andrew,

Thank you for your patience as we gathered the information necessary to respond to your letter of November 16. I am attaching to this email my letter response along with:

Defendant's 8th Supplemental Disclosure Statement

Defendant's Revised and Updated Privilege Log

Defendant's Second Amended Supplemental Responses to Plaintiff's First Set of Interrogatories.

**David Barton**

O 602.753.4504 | C 602.510.2994

2201 E. Camelback Rd., Ste. 360

Phoenix, AZ 85016

**BurnsBarton**

This email and its attachment(s) are confidential and may be privileged

This email was sent for the sole use of its intended recipient(s). If you received this email in error, please immediately notify the sender and delete this email from your system without copying, disclosing, or using it.

## **EXHIBIT G**



Michael Guillian <michael@burnsbarton.com>

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## Privilege log for Chulani Production

1 message

Asaf Orr <AOrr@nclrights.org>

Fri, Mar 18, 2022 at 3:15 PM

To: "C. Christine Burns" <christine@burnsbarton.com>, David Barton <david@burnsbarton.com>, "Michael B. Guillian" <michael@burnsbarton.com>

Cc: Brent Ray <bray@kslaw.com>, "Chinsky, Andrew" <achinsky@kslaw.com>, "Howe, Janet M. (Perkins Coie)" <JHowe@perkinscoie.com>

Hi David and Christine,

Attached please find a privilege log for the documents Phoenix Children's Hospital and Dr. Chulani withheld from their production at Plaintiff's request because those documents are protected from discovery as attorney work product.

Very truly yours,

Asaf

**Asaf Orr, Esq.** | Senior Staff Attorney & Transgender Youth Project Director

*(Pronouns: He, him)*

**National Center for Lesbian Rights** | [www.NCLRights.org](http://www.NCLRights.org)

870 Market Street, Suite 370, San Francisco, CA 94102

415.365.1326 office | 415.392.8442 fax

[AOrr@NCLRights.org](mailto:AOrr@NCLRights.org)

[Facebook](#) | [Twitter](#) | [Instagram](#) | [YouTube](#)

**Feminist Founded, Advocates for All**



**2022.03.15. Chulani PCH Priv Log.pdf**

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