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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Russell B. Toomey,

Plaintiff,

v.

State of Arizona; Arizona Board of Regents, d/b/a University of Arizona, a governmental body of the State of Arizona; **Ron Shoopman**, in his official capacity as chair of the Arizona Board of Regents; **Larry Penley**, in his official capacity as Member of the Arizona Board of Regents; **Ram Krishna**, in his official capacity as Secretary of the Arizona Board of Regents; **Bill Ridenour**, in his official capacity as Treasurer of the Arizona Board of Regents; **Lyndel Manson**, in her official capacity as Member of the Arizona Board of Regents; **Karrin Taylor Robson**, in her official capacity as Member of the Arizona Board of Regents; **Jay Heiler**, in his official capacity as Member of the Arizona Board of Regents; **Fred Duval**, in his official capacity as Member of the Arizona Board of Regents; **Andy Tobin**, in his official capacity as Director of the Arizona Department of Administration; **Paul Shannon**, in his official capacity as Acting Assistant Director of the Benefits Services Division of the Arizona Department of Administration,

Defendants.

4:19-cv-00035-TUC-RM (LAB)

**MEMORANDUM OF LAW
IN OPPOSITION TO STATE
DEFENDANTS' MOTION
FOR RECONSIDERATION
AND MOTION TO STAY
ORDER**

1 Plaintiff, Dr. Russell B. Toomey, on behalf of himself and the certified Classes
2 (“Plaintiff”), by and through the undersigned counsel, pursuant to Arizona Local Rule
3 7.2(g) and this Court’s April 26, 2022 order (Doc. 262), hereby submits this memorandum
4 of law in opposition to State Defendants’ Motion for Reconsideration (the “Motion for
5 Reconsideration” or “Motion” or “MFR”) (Doc. 261), which asks this Court to reconsider
6 its September 21, 2021 order compelling the production of documents withheld by State
7 Defendants on the basis of attorney-client privilege (the “Order”) (Doc. 241).

8 **INTRODUCTION**

9 This Court’s Order affirmed Magistrate Judge Bowman’s finding that, despite State
10 Defendants’ repeated disclaimer of an “advice of counsel” defense, State Defendants had
11 impliedly placed the legal advice they received regarding the Exclusion at issue.¹ Both
12 Magistrate Judge Bowman and this Court agreed that the at-issue waiver did not depend on
13 State Defendants’ formal assertion of an “advice of counsel” defense, but instead on State
14 Defendants’ substantive claim that the Exclusion was motivated in part by its conclusion
15 regarding the legality of the Exclusion.

16 State Defendants petitioned the Ninth Circuit for a writ of mandamus. During oral
17 argument before the Ninth Circuit, State Defendants surprised the panel by offering a far
18 broader concession than made in any of their legal filings. (*See* Declaration of Jordan C.
19 Wall (the “Wall Decl.”) at Ex. D at 31:22-25 ([Hon. Richard Paez] “I was not expecting the
20 concession that Counsel offered during his argument.”)) For the first time, State Defendants
21 stated that they would forgo any arguments that put the withheld document at-issue, such
22 that “there’d be no reason for [Dr. Toomey] to get access to” them. (*Id.* at 11:2-21.) The
23 Ninth Circuit denied the petition for a writ of mandamus and told State Defendants to offer
24 their new concession to this Court in the first instance. (*See* Doc. 262.)

25 State Defendants have now reneged on that concession and instead ask this Court to
26 unravel the Order on the basis of an evasive, hollow “concession” that State Defendants

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28 ¹ Unless otherwise indicated, capitalized terms used herein have the same definition as
those included in Dr. Toomey’s Motion to Compel (Doc 195).

1 will not assert an “advice of counsel” defense in the future. (MFR. at 5.) This concession
2 is utterly meaningless because State Defendants’ at-issue waiver was never based on its
3 formal assertion of an “advice of counsel” defense. State Defendants have indicated that
4 they intend to continue arguing that the Exclusion was maintained based on their conclusion
5 that it was legal—the precise conduct that led Dr. Toomey to file his Motion to Compel,
6 and this Court to issue the Order.

7 The Motion should be denied. A party that has impliedly waived the attorney-client
8 privilege can avoid disclosure only if it chooses to “abandon the claim that gives rise to the
9 waiver condition.” *Bittaker v. Woodford*, 331 F.3d 715, 721 (9th Cir. 2003). State
10 Defendants still refuse to do so. The Court should, therefore, either (a) issue an order
11 broadly precluding State Defendants from defending against Dr. Toomey’s claims of
12 discriminatory intent by reference to any subjective legal conclusion or belief about the
13 legality of the Exclusion, or (b) order State Defendants to produce the implicated documents
14 immediately. *See Hamilton v. Yavapai Cmty. Coll. Dist.*, CV-12-08193-PCT-GMS, 2016
15 WL 8199695, at *2 (D. Ariz. June 29, 2016) (holding that party seeking to avoid disclosure
16 must withdraw any arguments or claims putting documents at issue).²

17 BACKGROUND

18 **A. THE ORDER AND ITS FINDING OF IMPLIED WAIVER**

19 On May 20, 2021, Dr. Toomey moved to compel the production of certain documents
20 that State Defendants had withheld on the basis of attorney-client privilege. (Doc. 195.)
21 The Motion to Compel argued that State Defendants had placed the legal advice they
22 received regarding the Exclusion at issue, not by formally pleading an “advice of counsel”
23 defense, but by claiming their intent was non-discriminatory because their decision-making
24 was informed by a legal conclusion. (*Id.* at 9-12.) The Motion to Compel noted that “a
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27 ² Because the State Defendants made their concession for the first time at oral argument,
28 the Ninth Circuit did not have the benefit of any briefing on *Bittaker* and the scope of
abandonment required to reverse an at-issue waiver and to avoid disclosure.

1 party need not formally plead an advice of counsel defense in order to affirmatively place
2 legal advice at issue.” (*Id.* at 10 (citing *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156,
3 1162-63 (9th Cir. 1992)).)

4 On June 28, 2021, Magistrate Judge Bowman granted Dr. Toomey’s motion, finding
5 that Dr. Toomey “cannot adequately dispute” State Defendants’ alleged understanding that
6 the Exclusion was lawful “without access to the legal advice that the State Defendants
7 received” and that “[f]airness’ dictates that [State Defendants] disclose that advice to him.”
8 (Doc. 213 (the “Magistrate Order”) at 4-6.) The Magistrate Order also rejected State
9 Defendants’ contention that “[t]heir understanding . . . was not necessarily based on advice
10 of counsel” and concluded that “State Defendants’ understanding of the law was based in
11 large part on advice from counsel.” (*Id.* at 5-6.)

12 State Defendants filed objections to the Magistrate Order, arguing among other
13 things that “State Defendants . . . never asserted that they relied on advice of counsel.”
14 (Doc. 223 at 2.) On September 21, 2021, this Court rejected that contention and affirmed
15 the Magistrate Order. (*See* Order at 7 (“[D]espite the State Defendants’ protestations to the
16 contrary, the State Defendants’ Interrogatory Responses indicate that they relied on the
17 advice of legal counsel in deciding to maintain the exclusion of coverage for gender
18 reassignment surgery.”)) This Court agreed with Magistrate Judge Bowman’s
19 determination that “[Dr. Toomey] is unable to adequately respond” to State Defendants’
20 defense that they were motivated by a legal conclusion “without viewing the withheld
21 documents.” (*Id.*) State Defendants were ordered to “produce all documents related to
22 Defendants’ decision-making regarding the exclusion of coverage for gender reassignment
23 surgery . . . including [the] legal advice that may have informed that decision-making”
24 within fourteen days, *i.e.*, by October 5, 2021. (*Id.* at 8.)

25 **B. THE PETITION FOR MANDAMUS AND THE STAY**

26 On October 1, 2021, State Defendants filed a motion to stay the Order while they
27 petitioned the United States Court of Appeals for the Ninth Circuit for a writ of mandamus.
28

1 (Doc. 242.) On October 4, 2021, State Defendants filed the petition for a writ of mandamus
2 (the “Petition”) challenging the Order. On October 21, 2021, the Court granted State
3 Defendants’ motion for stay pending resolution of State Defendants’ Petition. (Doc. 251.)

4 **C. NINTH CIRCUIT ORAL ARGUMENT AND RULING**

5 On March 10, 2022, the Ninth Circuit Court of Appeals heard oral argument
6 regarding State Defendants’ Petition.³ During State Defendants’ remarks, the Ninth Circuit
7 panel asked State Defendants’ counsel if they were “prepared to disclaim raising advice of
8 counsel as a defense.” (Wall Decl. Ex. D at 10:13-15.) Counsel responded: “Yes, your
9 honor. We are.” (*Id.* at 10:16.) Seeking to clarify the scope of State Defendants’
10 concession, the panel proceeded with further questioning:

11 “And you’re saying now, to the extent that any of you all thought that we were trying
12 to raise some kind of advice of counsel defense, we are not doing so. We are, you
13 know, assuming this case were to go to a jury or whatever, *we are not going to be*
14 *arguing that. And I guess if the if we or the District Court were to hold you to that,*
15 *then there would be no reason for them to get access to these documents.* Is that what
16 you're saying?”

17 (*Id.* at 11:9-18 (emphasis added).) Counsel responded: “Correct, your honor. Exactly.
18 That’s precisely the argument we’re making.” (*Id.* at 11:19-21.)

19 The panel then asked, “Did you tell the District Court you were not going to rely on
20 an advice of counsel defense?” (*Id.* at 12:1-3.) State Defendants’ counsel responded “I
21 don’t know the answer to that question.” (*Id.* at 12:4-5.) The panel then sought clarity as
22 to what State witnesses would testify to in light of the concession. (*See id.* at 16:12 – 17:15.)
23 State Defendants’ counsel responded that “I think what my concession means is no witness
24

25
26 ³ For the Court’s convenience, an unofficial certified transcription of oral argument is
27 attached to the Wall Declaration as Exhibit D. Audio and video of the March 10, 2022
28 oral argument is available on the Ninth Circuit Court of Appeals website at
<https://www.ca9.uscourts.gov/media/video/?20220310/21-71312/> (last visited May 9,
2022).

1 is going to get up there and say because we had legal advice that we could do this, we didn't
2 have intent." (*Id.* at 17:16-19.)

3 Subsequently, a panel member stated "I was not expecting the concession that
4 Counsel offered during his argument. That wasn't in my, you know, on my radar screen at
5 the time." (*Id.* at 31:23-25.)

6 On April 14, 2022, the Ninth Circuit denied State Defendants' Petition and held that
7 "[t]here is no evidence that the district court clearly erred in determining that the State
8 [D]efendants implicitly waived the attorney-client privileged." (Doc. 260 at 5.)

9 **D. MEET AND CONFER RE: THE SCOPE OF THE STATE'S CONCESSION**

10 On April 20, 2022, the parties agreed to meet and confer on April 22 to discuss the
11 resumption of the case before this Court. (Wall Decl. ¶ 4.) On April 21, without informing
12 Dr. Toomey or his counsel that they intended to do so, State Defendants filed the instant
13 Motion. (*See* MFR; Wall Decl. ¶5.) During the meet and confer the next day, Dr. Toomey
14 asked if the "concession" described in the Motion meant that State Defendants would revise
15 their response to Interrogatory No. 1, and refrain from asserting that State Defendants
16 maintained the Exclusion because of a legal conclusion. (Wall. Decl. ¶6.) Dr. Toomey
17 offered to negotiate a stipulation whereby State Defendants could avoid disclosure in
18 exchange for an unambiguous agreement to abandon any claims of a legal rationale for the
19 Exclusion. (*Id.*) Dr. Toomey understood State Defendants' response to be that they would
20 not revise their response to Interrogatory No. 1, and that they would continue to argue that
21 State Defendants' maintained the Exclusion because they concluded that it was lawful to
22 do so. (*Id.*)

23 On April 28, 2022, Dr. Toomey's counsel sent State Defendants' counsel a draft of
24 the stipulation previewed during the parties' April 22 meet and confer, which would permit
25 State Defendants to avoid production by agreeing to abandon their legal rationale defense.
26 (*Id.* ¶7; *id.* Ex. A.) State Defendants rejected that offer, counter-proposing that they
27 stipulate only to the same hollow concession they have presented to this Court—that they
28

1 will not “put forward as a defense—through written pleadings, testimony, documents, or
2 any other form of evidence—that [they] relied upon legal advice.” (*Id.* Ex. B.) Dr. Toomey
3 responded, informing State Defendants that the narrowly revised stipulation did not address
4 the at-issue concerns raised in Dr. Toomey’s Motion to Compel, and that it was inconsistent
5 with what they had represented to the Ninth Circuit. (*Id.* Ex. C.)

6 **STANDARD FOR RECONSIDERATION**

7 Motions for reconsideration should be granted only in rare circumstances. *Defenders*
8 *of Wildlife v. Browner*, 909 F. Supp. 1342, 1351 (D. Ariz. 1995). A motion for
9 reconsideration ordinarily will be denied “absent a showing of manifest error or a showing
10 of new facts or legal authority that could not have been brought to its attention earlier with
11 reasonable diligence.” LRCiv 7.2(g)(1). Further, the motion must “point out with
12 specificity the matters that the movant believes were overlooked or misapprehended by the
13 Court, any new matters being brought to the Court’s attention for the first time and the
14 reasons they were not presented earlier, and any specific modifications being sought in the
15 Court’s Order.” *Id.*

16 **ARGUMENT**

17 **I. THE COURT SHOULD DENY THE MOTION FOR RECONSIDERATION**

18 State Defendants’ Motion asks this Court to “reconsider its Order and deny [Dr.
19 Toomey’s] Motion to Compel” based on a meager, narrowly framed concession that (i) does
20 not resolve State Defendants’ at-issue waiver, or the fairness considerations contemplated
21 in the Order, (ii) is inconsistent with the representations State Defendants’ counsel made
22 before the Ninth Circuit at oral argument and (iii) could have been raised (and easily
23 dispensed with) earlier. The Motion should be denied.

24 **1. *The Concession Does Not Resolve the State Defendants’ At-Issue Waiver***

25 First, the so-called “concession” offered by State Defendants does not resolve the
26 “at-issue” waiver underlying Dr. Toomey’s Motion to Compel (Doc. 195), or this Court’s
27 Order. State Defendants say that they have “irrevocably disclaimed and waived any advice
28

1 of counsel defense,” and agreed that they will not assert a formal “advice of counsel
2 defense” in the future. (MFR at 5.) However, Dr. Toomey understands that State
3 Defendants intend to continue defending the Exclusion by reference to their purported legal
4 rationale for the Exclusion. *Supra* at 5. Specifically, Dr. Toomey understands that State
5 Defendants intend to continue asserting, as they do in their response to Dr. Toomey’s
6 Interrogatory No. 1, that one of the two “reasons why” the State maintained the Exclusion
7 was “because the State concluded, under the law, that it was not legally required to change
8 its health plan to provide” gender reaffirming care. *Supra* at 5. In short, State Defendants’
9 “concession” is simply that they will agree not to formally plead or admit an “advice of
10 counsel” defense in the future.

11 This concession is irrelevant because Dr. Toomey’s Motion to Compel, and the
12 Order, are not premised on State Defendants’ pleading of an “advice of counsel” defense.
13 Indeed, both Magistrate Judge Bowman and this Court recognized that State Defendants
14 had implicated the at-issue doctrine *despite* State Defendants’ repeated contention that they
15 were not asserting an “advice of counsel” defense. (Magistrate Order at 5 (finding implied
16 waiver despite “State Defendants argu[ment] that they never asserted an ‘advice of counsel
17 defense’”); Order at 7 (agreeing that “despite the State Defendants’ protestations to the
18 contrary” they had impliedly placed “privileged material at issue.”)) Because this Court’s
19 finding of an at-issue waiver was not based on the magic words “advice of counsel,” State
20 Defendants’ agreement not to utter those words in the future is of no import.⁴

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23 ⁴ The implied waiver doctrine does not require the waiving party to formally raise an
24 advice of counsel defense or ceremoniously admit that it is relying on advice of counsel.
25 (Doc. 195 at 10 (citing *Chevron*, 974 F.2d at 1162-63; *Melendres v. Arpaio*, CV-07-
26 2513-PHX-GMS, 2015 WL 12911719, at *4 (D. Ariz. May 14, 2015)); Doc. 205 at 5-
27 6; Doc. 232 at 6.) Rather, courts analyze the substance of the parties’ claims and have
28 based findings of waiver on acts taken during discovery that imply a reliance on advice
of counsel, even where a party explicitly disclaims such reliance. (Reply at 5-6 (citing
Melendres v. Penzone, No. 2:07-cv-02513, Doc. 1045-3, Ex. N, at Resp. to Interrog. No.
9).)

1 Instead, this Court found that waiver occurred because State Defendants impliedly
2 relied on privileged documents to support their argument that the Exclusion was non-
3 discriminatory because they determined it was legal. (Magistrate Order at 5-6; Order at 7.)
4 Noting that “[Dr. Toomey] cannot fully respond” to this argument “without viewing the
5 withheld documents[,]” the Court held that “fairness mandates that the documents be
6 disclosed.” (Order at 7.) The Court properly rejected State Defendant’s attempt to shield
7 any scrutiny of their alleged legal conclusion by suggesting that it might not have come
8 from legal counsel. (Magistrate Order at 4-6 (rejecting State Defendants’ contention that
9 “[t]heir understanding. . .was not necessarily based on advice of counsel”); Order at 7). So
10 long as State Defendants defend the rationale for the Exclusion by reference to their
11 subjective understanding of the law, the withheld documents remain at issue. This is true
12 even if State Defendants continue to maintain—falsely⁵—that their subjective
13 understanding was not influenced by advice of counsel. “Where the [State Defendants]
14 assert their subjective good faith with respect to a matter of legal compliance, as the [State
15 Defendants] do here, a determination of such subjective good faith may depend on the
16 advice given the Defendants by their counsel, *even if they do not seek to establish their good
17 faith based on such advice.*” *Hamilton v. Yavapai Cmty. Col. Dist.*, CV-12-08193-PCT-
18 GMS, 2016 WL 8199695, at *2 (D. Ariz. June 29, 2016) (emphasis added).

19 A party that has impliedly waived the attorney-client privilege can avoid disclosure
20 if it chooses to “abandon the claim that gives rise to the waiver condition.” *Bittaker v.*
21 *Woodford*, 331 F.3d 715, 721 (9th Cir. 2003). *Bittaker*’s abandonment rule has been applied
22 strictly, with courts requiring the waiving party to withdraw any and all arguments that
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25 ⁵ It is unclear how, short of directing State witnesses to perjure themselves, the State
26 Defendants could maintain this defense without conceding that their legal conclusion
27 was influenced by advice of counsel. During her deposition, the former director of the
28 State’s Benefits Service Division testified that “[w]e sought legal counsel and that – *with
the legal counsel’s recommendation* and meeting with the governor’s office there was a
decision made – a conclusion made. . .” (Doc. 195-3, p. 65, depo. p. 19, lns.8-15; Doc
213 at 5.)

1 substantively gave rise to the implied waiver. *See Hamilton*, 2016 WL 8199695 at *2
2 (defendant wishing to abandon its “subjective good faith” defense to avoid disclosure of
3 privileged documents was required to “immediately inform the Court that they withdraw
4 that portion of their summary judgment motion that is based on a subjective good faith
5 defense.”) Where a defendant has “already gone forward with a defense implicating
6 attorney client privilege[,]” for example, through deposition testimony, its subsequent
7 disclaimer of an advice of counsel defense is insufficient to avoid disclosure. *U.S. ex rel.*
8 *Barko v. Halliburton Co.*, 1:05-CV-1276, 2014 WL 12774003, at *2 (D.D.C. Dec. 17, 2014)
9 (finding that defendant’s “amendments and disavowals do not change the Court’s
10 conclusion that justice requires the disclosure of the documents” because “[w]hile
11 [defendant] may seek leave to amend its pleadings, it cannot undo a deposition.”)

12 Here, State Defendants have already proceeded with their legal rationale defense—
13 in discovery responses and affirmative State witness testimony—which cannot be undone
14 by the token “concession” offered in the Motion. More to the point, State Defendants have
15 declined to abandon the very substantive argument that implicated the at-issue doctrine (*i.e.*
16 that the State maintained the Exclusion because it believed it was lawful to do so). To the
17 contrary, Dr. Toomey understands that State Defendants will continue making this
18 argument as the case proceeds, including during summary judgment and/or at trial, to
19 defend against Dr. Toomey’s claim of discriminatory intent, and to bolster their own
20 affirmative defense that the Exclusion was maintained “for legitimate, non-discriminatory,
21 and non-pretextual reasons.” (Doc. 89 at Affirmative Defense J.) In other words, State
22 Defendants intend to double down on, rather than abandon, the “claim that g[ave] rise to”
23 the at-issue waiver described in the Order. *Bittaker*, 331 F.3d at 721; *see also Arizona ex*
24 *rel. Goddard v. Frito-Lay, Inc.*, 273 F.R.D. 545, 557 (D. Ariz. 2011) (a government agency
25 cannot “bolster” a determination it makes by citing a legal conclusion, “and at the same
26 time claim the attorney-client privilege in how it arrived at the conclusion.”)

1 **2. *The Concession Is Inconsistent with State Defendants’ Representation to***
2 ***the Ninth Circuit***

3 During oral argument, the Ninth Circuit panel asked State Defendants’ counsel to
4 clarify the scope of the concession they may be willing to make. Specifically, the panel
5 asked if State Defendants were conceding that, “assuming the case were to go to a jury,”
6 the State Defendants would not make any arguments that implicated the at-issue doctrine,
7 such that if the District Court “were to hold you to that . . . there would be no reason for
8 [Dr. Toomey] to get access to these documents.” *Supra* at 4. State Defendants’ counsel
9 responded: “correct . . . that’s precisely the argument we’re making.” *Supra* at 4. State
10 Defendants further represented that “no witness is going to get up there and say because we
11 had legal advice that we could do this, we didn’t have intent.” *Supra* at 4.

12 As represented to the Ninth Circuit, State Defendants’ purported concession
13 approximates the *Bittaker* abandonment rule. But the concession offered in their Motion
14 for Reconsideration is a far cry from State Defendants’ representation to the Ninth Circuit,
15 the concession the panel suggested as an alternative to producing the privileged documents,
16 or the abandonment rule in *Bittaker*. Now, the State Defendants insist they are entitled to
17 the relief they have sought all along – absolution from producing the withheld documents –
18 solely in exchange for conceding a narrow “advice of counsel” defense that was not even
19 the basis for Dr. Toomey’s at-issue challenge. This sleight of hand should be rejected.

20 **3. *The Concession Is Untimely***

21 State Defendants’ concession is also untimely because it could have “been brought
22 to [this Court’s] attention earlier with reasonable diligence.” LRCiv 7.2(g)(1). A motion
23 for reconsideration “may not be used to raise arguments or present evidence for the first
24 time when they could reasonably have been raised earlier in the litigation.” *Kona Enters.,*
25 *Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). If State Defendants believed
26 that merely disclaiming any *future* assertion of an advice of counsel defense would have
27 changed the outcome Dr. Toomey’s Motion to Compel, they could have raised that
28 argument in their multiple opportunities for briefing before both Magistrate Judge Bowman

1 and this Court. The Motion offers no explanation for why this argument could not have
2 been raised until now.⁶

3 **II. THE COURT SHOULD ISSUE AN ORDER BROADLY PRECLUDING THE**
4 **STATE FROM DEFENDING THE EXCLUSION BY REFERENCE TO A**
5 **LEGAL CONCLUSION**

6 As described above, a party who has impliedly waived the attorney-client privilege
7 can avoid disclosure if it “abandon[s] the claim that gives rise to the waiver condition.”
8 *Bittaker*, 331 F.3d at 721. The abandonment rule is construed strictly against the party who
9 has impliedly waived privilege, requiring it to withdraw any substantive affirmations or
10 arguments that gave rise to the waiver. *See Hamilton*, 2016 WL 8199695, at *2.

11 Instead of requiring disclosure of the documents implicated by the Order, this Court
12 could issue an order broadly precluding the State Defendants from presenting any evidence
13 or arguments bearing State Defendants’ purported understanding of the legality of the
14 Exclusion. “The district court is given broad discretion in supervising the pretrial phase of
15 litigation,” *Zivkovic v. Southern California Edison Co.*, 302 F.3d 1080, 1087 (9th Cir.
16 2002), and can “make discovery and evidentiary rulings conducive to the conduct of a fair
17 and orderly trial.” *S. Union Co. v. Sw. Gas Corp.*, 180 F. Supp. 2d 1021, 1060 (D. Ariz.
18 2002) (internal quotations omitted). If State Defendants are to continue to resist producing
19 the withheld documents, fairness dictates that they be precluded from maintaining any and
20 all defenses that put those privileged records at issue. A preclusive order is also warranted
21 given State Defendants’ affirmative representation before the Ninth Circuit that they would
22 forego the conduct that gave rise to their at-issue waiver, so that there would be “*no reason*
23 for [Dr. Toomey] to get access to” the withheld documents (Wall Decl. Ex. D at 11:2-19
24 (emphasis added)). *See ACLU of Nevada v. Masto*, 670 F.3d 1046, 1064–65 (9th Cir. 2012)

25
26 ⁶ State Defendants cannot genuinely suggest that their concession was only possible after
27 the Ninth Circuit’s oral argument. If this was the case, a party could seek
28 reconsideration any time questioning at oral argument prompted it to think of another
argument. In any event, as explained above, the concession outlined in the Motion does
not track with what actually occurred before the Ninth Circuit panel.

1 (finding that State of Nevada’s affirmative statement at oral argument that it would refrain
2 from certain conduct in the future was a judicial admission, and that the doctrine of judicial
3 estoppel barred the state from “changing positions according to the exigencies of the
4 moment”).

5 Dr. Toomey’s Proposed Order⁷ proposes precluding State Defendants from *putting*
6 *forward any defense*—via argument, disclosure,⁸ witness testimony, documents, or other
7 evidence—of the purported legal rationale for the Exclusion in order to alleviate the need
8 for disclosure. As both Magistrate Judge Bowman and this Court recognized, State
9 Defendants’ legal rationale for the Exclusion, whether they admit it or not, is tied to advice
10 received from counsel. (Magistrate Order at 5-6 (concluding that “the State Defendants’
11 understanding of the law was based in large part on advice from counsel”); Order at 7.)

12 Dr. Toomey’s Proposed Order would include precluding State Defendants from,
13 among other things, referencing “newspapers” or other non-privileged sources that
14 allegedly informed the legal rationale of the Exclusion. State Defendants’ good faith legal
15 understanding could be supported by newspaper and other non-privileged sources, but
16 seriously undermined by the withheld documents. It would prejudice Dr. Toomey to allow
17 State Defendants to use the former to its advantage without disclosing the latter for a full
18 examination of their defense. *Hamilton*, 2016 WL 8199695, at *2 (explaining that
19 “[b]ecause Defendants’ motion asserts their subjective good faith in their compliance with
20
21

22 ⁷ Without access to the withheld documents, Dr. Toomey cannot fully assess their
23 evidentiary import and whether the preclusive order it seeks in light of the Ninth
24 Circuit’s guidance fully redresses the loss of this potential evidence. For example, as
25 Dr. Toomey’s counsel stated to the Ninth Circuit, the withheld documents could indicate
26 that State Defendants were advised the Exclusion was illegal, which would directly
27 undermine the State Defendant’s alleged legal conclusion. (Wall Decl. Ex. D at 25:7-
28 11.) However, by precluding State Defendants from putting forward any defense
premised on the alleged legal rationale for the Exclusion, the basis for State Defendants’
at-issue waiver may be extinguished.

⁸ If State Defendants are abandoning their legal state of mind defense, they should be
required to revise their interrogatory responses accordingly. Fed. R. Civ. P. 26(e)(1).

1 the law, it implicates advice they received . . . from their counsel, *even if they wish to*
2 *establish their good faith legal compliance through other acts*”) (emphasis added)).

3 If State Defendants will not produce the withheld documents, they must completely
4 abandon their defense that the Exclusion was maintained because of a legal conclusion.
5 Alternatively, State Defendants should be ordered to produce the withheld documents
6 immediately.

7 **CONCLUSION**

8 For the reasons stated above, State Defendants’ Motion should be denied, and the
9 Court should (i) issue an order precluding State Defendants from putting forward in any
10 form a defense to Dr. Toomey’s claims premised upon the purported legal rationale for the
11 Exclusion or, in the alternative, (ii) order the immediate production of the withheld
12 documents.

13
14 Dated: May 09, 2022

15 ACLU FOUNDATION OF ARIZONA

16 By /s/ Christine K. Wee

17 Victoria Lopez
18 Christine K Wee

19 AMERICAN CIVIL LIBERTIES UNION
20 FOUNDATION

21 Joshua A. Block*
Leslie Cooper*

22 WILLKIE FARR & GALLAGHER LLP

23 Wesley R. Powell*
24 Matthew S. Freimuth*
25 Jordan C. Wall*
Victoria A. Sheets*
26 Justin Garbacz*

27 *Admitted pro hac vice

28 *Attorneys for Plaintiff Russell B. Toomey*

CERTIFICATE OF SERVICE

I, Christine K. Wee, hereby certify that on May 9, 2022, I electronically transmitted the attached document to the Clerk’s office using the CM/ECF System for filing. Notice of this filing will be sent by email to all parties by operation of the Court’s electronic filing system.

/s/ Christine K. Wee
Christine K. Wee

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26 *Attorneys for Plaintiff Russell B. Toomey*
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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Russell B. Toomey,

Plaintiff,

v.

State Of Arizona; Arizona Board Of Regents, D/B/A University of Arizona, a governmental body of the State of Arizona; **Ron Shoopman**, in his official capacity as chair of the Arizona Board Of Regents; **Larry Penley**, in his official capacity as Member of the Arizona Board of Regents; **Ram Krishna**, in his official capacity as Secretary of the Arizona Board of Regents; **Bill Ridenour**, in his official capacity as Treasurer of the Arizona Board of Regents; **Lyndel Manson**, in her official capacity as Member of the Arizona Board of Regents; **Karrin Taylor Robson**, in her official capacity as Member of the Arizona Board of Regents; **Jay Heiler**, in his official capacity as Member of the Arizona Board of Regents; **Fred Duval**, in his official capacity as Member of the Arizona Board of Regents; **Andy Tobin**, in his official capacity as Director of the Arizona Department of Administration; **Paul Shannon**, in his official capacity as Acting Assistant Director of the Benefits Services Division of the Arizona Department of Administration,

Defendants.

No. 4:19-cv-00035

**DECLARATION OF
JORDAN C. WALL IN
SUPPORT OF PLAINTIFF'S
OPPOSITION TO STATE
DEFENDANTS' MOTION
FOR RECONSIDERATION
AND MOTION TO STAY
ORDER**

1 I, JORDAN C. WALL, declare as follows:

2 1. I am a Senior Associate at Willkie Farr & Gallagher LLP, and represent
3 Plaintiff Russell B. Toomey.

4 2. I submit this declaration in support of Dr. Toomey's Opposition to State
5 Defendants' Motion For Reconsideration and Motion to Stay Order, filed with this Court
6 on May 9, 2022, together with this declaration.

7 3. I base this declaration on my own personal knowledge and on information
8 obtained in the course of the above-captioned matter.

9 4. On April 19, 2022, following the Ninth Circuit's April 14, 2022 denial of the
10 State Defendants' Petition for Mandamus, Dr. Toomey sent Defendants an e-mail
11 requesting to meet and confer regarding next steps. On April 20, the parties agreed to meet
12 and confer on Friday, April 22.

13 5. On Thursday, April 21, 2022, State Defendants filed their Motion for
14 Reconsideration (Doc. 261) without informing Dr. Toomey that they intended to do so.

15 6. During the parties' April 22, 2022 meet and confer, Dr. Toomey inquired
16 about the scope of the concession described in the Motion for Reconsideration, and
17 proposed resolving the Motion through a joint stipulation among the parties. The parties
18 could not come to an agreement on the scope of such a stipulation during that meet and
19 confer.

20 7. On April 28, 2022, Dr. Toomey sent State Defendants a proposed stipulation,
21 attached hereto as **Exhibit A**. This stipulation contemplated that State Defendants would
22 (i) abandon their claim that the Exclusion was non-discriminatory because it was based on
23 a legal conclusion in exchange for (ii) Dr. Toomey's agreement to forgo review of the
24 withheld documents implicated by the Court's September 21, 2021 Order.

25 8. On May 3, 2022, State Defendants rejected Dr. Toomey's proposed
26 stipulation, making a counterproposal. A copy of State Defendants' response, along with
27 their counterproposal, is attached hereto as **Exhibit B**.

1 9. On May 6, 2022, Dr. Toomey informed State Defendants that he could not
2 agree with their counterproposal, as the stipulation neither adequately addressed the issues
3 raised by his motion to compel, nor did it accurately reflect the concessions State
4 Defendants made on this matter before the Ninth Circuit at oral argument on March 10,
5 2022. A copy of Dr. Toomey’s e-mail is attached hereto as **Exhibit C**.

6 10. For the Court’s convenience, Dr. Toomey’s counsel have had a certified
7 unofficial transcription of the parties’ Ninth Circuit oral argument prepared by a court
8 reporting service, which is attached hereto as **Exhibit D**.

9 I certify under penalty of perjury, in accordance with 28 U.S.C. § 1746, that the
10 foregoing is true and correct.

11 Dated: May 9, 2022

12
13 /s/ Jordan C. Wall
14 Jordan C. Wall

EXHIBIT A

From: Sheets, Victoria <VSheets@willkie.com>
Sent: Thursday, April 28, 2022 9:52 PM
To: 'Curtis, Ryan'; 'Cohan, Shannon'; 'Yost, Austin C. (Perkins Coie)'; 'Eckstein, Paul (Perkins Coie)'; 'Joshua Block'; 'Christine Wee'; Powell, Wesley; Wall, Jordan; Garbacz, Justin
Subject: Toomey v State of Arizona - Proposed Stipulation
Attachments: 2022.04.[] Draft Stipulation re ACP Documents.DOCX

Counsel,

Please find attached the draft stipulation as previously discussed.

Best,
Victoria

Victoria A. Sheets
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17 **Wesley R. Powell***
18 **Matthew S. Friemuth***
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*Admitted pro hac vice

Attorneys for Plaintiff Russell B. Toomey

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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Russell B. Toomey,

Plaintiff,

v.
**State of Arizona; Arizona Board of Regents,
D/B/A University of Arizona,** a governmental
body of the State of Arizona; et al.,

Defendants.

Case No.19-cv-00035-TUC-RM (LAB)

**[PROPOSED] JOINT
STIPULATION RE PLAINTIFF’S
MOTION TO COMPEL
PRODUCTION OF DOCUMENTS**

Plaintiff, Dr. Russell B. Toomey, on behalf of himself and the certified Classes (“Plaintiff”) and the State Of Arizona, Andy Tobin, and Paul Shannon (collectively, the “State Defendants”), through their undersigned counsel, stipulate and agree as follows:

State Defendants will not put forward—through written pleadings, testimony, documents, or any other form of evidence—as a reason it decided to maintain the Exclusion or as a reason why it did not have discriminatory intent that the State concluded that it was not legally required to change its health plan to provide such coverage. Instead, Defendants will move forward on the other reason cited in response to Interrogatory No. 1: cost containment and reducing health care costs. This stipulation includes any evidence or reference to a legal requirement to cover the health coverage at issue.

Defendant will also amend its interrogatory response Nos. 1 and 7 to read as follows:

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1 **INTERROGATORY NO. 1:** Identify and describe all reasons why the State of
2 Arizona’s self-funded health plan controlled by the Arizona Department of Administration
3 (the “Plan”) excludes coverage for “[g]ender reassignment surgery” (the “Challenged
4 Exclusion”) including, but not limited to, (a) each and every State or governmental interest
5 that you contend is advanced by the exclusion, (b) a detailed explanation for why you
6 contend that the exclusion furthers that state interest, and (c) all facts in support of your
7 explanation.
8

9
10 **ANSWER:** The State of Arizona’s self-funded health plan excludes coverage
11 for gender reassignment surgery because ~~the State concluded, under the law, that it~~
12 ~~was not legally required to change its health plan to provide such coverage under~~
13 ~~either Title VII of the Civil Rights Act or under the Equal Protection Clause of the~~
14 ~~Fourteenth Amendment to the United States Constitution. Specifically, prior to the~~
15 ~~Supreme Court’s ruling in Bostock v. Clayton County, Title VII protections on the~~
16 ~~basis of sex had not been applied to individuals based on their sexual orientation or~~
17 ~~transgender status. Further, rules promulgated by the Department of Health and~~
18 ~~Human Services (“HHS”) regarding nondiscrimination provisions under Section~~
19 ~~1557 of the Affordable Care Act prohibited blanket exclusions of all treatments of~~
20 ~~gender dysphoria, but did not require plans subject to the law to cover all treatments~~
21 ~~for gender dysphoria or gender transition services. The legal advice that the State~~
22 ~~received regarding this issue is covered by the attorney-client privilege.~~
23
24
25

26 **F[t]he State or governmental interests advanced by the exclusion are cost**
27 **containment and reducing health care costs. The State gathered information from**
28

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1 private insurers and public entities who did provide coverage for gender
2 reassignment surgery in an effort to determine how its own health care costs would
3 be impacted. Although the cost estimates varied, they unquestionably showed that
4 removing the exclusion for gender reassignment surgery would increase costs and
5 that such increases could be significant.

7 **INTERROGATORY NO. 7:** Identify all research, studies, data, reports,
8 publications, testimony, or other documents considered, reviewed, or relied on by
9 Defendants relating to the Challenged Exclusion, including identifying the date or
10 approximate date of consideration, review, or reliance by the Arizona Board of Regents
11 (“ABOR”) and the Arizona Department of Administration (the “ADOA”); and the ADOA
12 and ABOR employee(s) who considered, reviewed, or relied on such documents and their
13 role(s). A complete answer to this interrogatory should include documents relating to the
14 medical necessity, safety, and efficacy (including whether a procedure is deemed
15 experimental) of excluded treatments and services; the public health effects of enforcing,
16 amending, or eliminating the Challenged Exclusion; and the cost/fiscal impact to ADOA
17 or ABOR of enforcing, amending, or eliminating the Challenged Exclusion.

21 **ANSWER:** ~~Defendants considered a Memorandum from Marie Isaacson to~~
22 ~~Mike Liburdi, General Counsel at the Governor’s Office dated August 3, 2016,~~
23 ~~regarding Affordable Care Act § 1557, and a Memorandum regarding Non-~~
24 ~~discrimination—Transgender Coverage and a Memorandum from outside legal~~
25 ~~counsel at Fennemore Craig to Marie Isaacson dated July 20, 2016, regarding~~
26 ~~Summary and Implications of § 1557 and Transgender Coverage Requirements. Both~~
27

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1 ~~of these documents are covered by the attorney-client privilege.~~ Defendants also
2 gathered information and data from insurers and other entities regarding their
3 experience providing transgender benefits, including reassignment surgery. Plaintiffs
4 may ascertain the non-privileged information requested in this Interrogatory from
5 the documents that Defendants have produced in this action.
6

7 Plaintiff stipulates to this motion and agrees to withdraw as moot Plaintiff's Motion
8 to Compel Production of Documents (Dkt. No. 195), the subject of Order (Dkt. No. 241).
9

10
11 Respectfully submitted this [Xth] day of April, 2022.

12 ACLU FOUNDATION OF ARIZONA

13 By /s/ DRAFT

14 Victoria Lopez

Christine K. Wee

15 AMERICAN CIVIL LIBERTIES UNION
16 FOUNDATION

17 Joshua A. Block*

Leslie Cooper*

18 WILLKIE FARR & GALLAGHER LLP

19 Wesley R. Powell*

20 Matthew S. Friemuth*

Jordan C. Wall*

21 Victoria A. Sheets*

**admitted pro hac vice*

22
23 *Attorneys for Plaintiff*

24 /s/ DRAFT (with permission)

25 Timothy J. Berg

Amy Abdo

26 Ryan Curtis

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*Attorneys for Defendants State of Arizona,
Andy Tobin, and Paul Shannon
/s/ DRAFT (with permission)*

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d/b/a University of Arizona; Ron Shoopman; Larry
Penley; Ram Krishna; Bill Ridenour; Lyndel Manson;
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CERTIFICATE OF SERVICE

I hereby certify that on [DATE], I electronically transmitted the attached document to the Clerk’s office using the CM/ECF System for filing. Notice of this filing will be sent by email to all parties by operation of the Court’s electronic filing system.

/s/ Christine K. Wee
Christine K. Wee

EXHIBIT B

From: Curtis, Ryan <RCurtis@fennemorelaw.com>
Sent: Tuesday, May 3, 2022 7:44 PM
To: Wall, Jordan
Cc: Powell, Wesley; Sheets, Victoria; Garbacz, Justin; 'Joshua Block'; 'Christine Wee'; 'Eckstein, Paul (Perkins Coie)'; 'Yost, Austin C. (Perkins Coie)'; Cohan, Shannon
Subject: RE: Toomey v State of Arizona - Proposed Stipulation [FC-Email.FID11439673]
Attachments: 2022-05-03 State Defendants Proposed Stipulation re Atty-Client Priv Documents.docx

*** **EXTERNAL EMAIL** ***

Jordan,

Thank you for sending the revised stipulation. Plaintiff's proposed stipulation differs greatly from what was clarified at oral argument and from what we indicated State Defendants' could agree to during our meet and confer on April 22. Accordingly, State Defendants propose a different stipulation.

The attached proposed stipulation reflects State Defendants' clarification made at oral argument on March 10, 2022, that they are not asserting an advice of counsel defense in this case and will not put forward such a defense in this case through written pleadings, testimony, documents, or any other form of evidence. State Defendants discussed this concession at 7:24 to 7:56 of the video-recorded oral argument. The Ninth Circuit found State Defendants' concession at oral argument to be significant. Further, that concession was the basis for the Ninth Circuit's statement at the end of its April 14 Order that should State Defendants ask the District Court to reconsider its ruling on the attorney-client privileged documents, that the District Court would give such a request full consideration. That is the primary basis of State Defendants' Motion for Reconsideration pending before the District Court and the terms of the concession is what State Defendants are proposing be memorialized in a stipulation.

Please let us know if you would like to discuss this issue.

Ryan C. Curtis, Chair - ERISA & Employee Benefits Practice Group

FENNEMORE.

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Admitted in Arizona and Nevada



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From: Curtis, Ryan

Sent: Monday, May 2, 2022 5:37 PM

To: Wall, Jordan <JWall@willkie.com>; Cohan, Shannon <scohan@fennemorelaw.com>

Cc: Powell, Wesley <wpowell@willkie.com>; Sheets, Victoria <VSheets@willkie.com>; Garbacz, Justin <JGarbacz@willkie.com>; 'Joshua Block' <jblock@aclu.org>; 'Christine Wee' <CWee@acluaz.org>; 'Eckstein, Paul (Perkins Coie)' <PEckstein@perkinscoie.com>; 'Yost, Austin C. (Perkins Coie)' <AYost@perkinscoie.com>

Subject: RE: Toomey v State of Arizona - Proposed Stipulation [FC-Email.FID11439673]

Thank you Jordan. Understanding Plaintiff's deadline to respond to the motion for reconsideration, we do expect to have a response to the proposed stipulation tomorrow.

From: Wall, Jordan <JWall@willkie.com>

Sent: Monday, May 2, 2022 5:26 PM

To: Curtis, Ryan <RCurtis@fennemorelaw.com>; Cohan, Shannon <scohan@fennemorelaw.com>

Cc: Powell, Wesley <wpowell@willkie.com>; Sheets, Victoria <VSheets@willkie.com>; Garbacz, Justin <JGarbacz@willkie.com>; 'Joshua Block' <jblock@aclu.org>; 'Christine Wee' <CWee@acluaz.org>; 'Eckstein, Paul (Perkins Coie)' <PEckstein@perkinscoie.com>; 'Yost, Austin C. (Perkins Coie)' <AYost@perkinscoie.com>

Subject: RE: Toomey v State of Arizona - Proposed Stipulation

Ryan, Shannon—

Attached is a revised draft of the proposed stipulation, correcting a few typos.

In light of the court's request that we respond to State Defendants' motion for reconsideration, would you let us know if State Defendants will agree to the terms of the proposed stipulation by tomorrow, May 3.

Thanks,

Jordan

Jordan C. Wall

Willkie Farr & Gallagher LLP

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jwall@willkie.com | [vCard](#) | [www.willkie.com bio](http://www.willkie.com/bio)

Pronouns: he, him, his

From: Sheets, Victoria <VSheets@willkie.com>

Sent: Thursday, April 28, 2022 9:52 PM

To: 'Curtis, Ryan' <RCurtis@fennemorelaw.com>; 'Cohan, Shannon' <scohan@fennemorelaw.com>; 'Yost, Austin C. (Perkins Coie)' <AYost@perkinscoie.com>; 'Eckstein, Paul (Perkins Coie)' <PEckstein@perkinscoie.com>; 'Joshua Block' <jblock@aclu.org>; 'Christine Wee' <CWee@acluaz.org>; Powell, Wesley <wpowell@willkie.com>; Wall, Jordan <JWall@willkie.com>; Garbacz, Justin <JGarbacz@willkie.com>

Subject: Toomey v State of Arizona - Proposed Stipulation

Counsel,

Please find attached the draft stipulation as previously discussed.

Best,

Victoria

Victoria A. Sheets

Willkie Farr & Gallagher LLP

787 Seventh Avenue | New York, NY 10019-6099

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*Admitted pro hac vice

Attorneys for Plaintiff Russell B. Toomey

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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Russell B. Toomey,
Plaintiff,

v.
**State of Arizona; Arizona Board of Regents,
D/B/A University of Arizona,** a governmental
body of the State of Arizona; et al.,

Defendants.

Case No.19-cv-00035-TUC-RM (LAB)

**[PROPOSED] JOINT
STIPULATION RE PLAINTIFF’S
MOTION TO COMPEL
PRODUCTION OF DOCUMENTS**

Plaintiff, Dr. Russell B. Toomey, on behalf of himself and the certified Classes (“Plaintiff”) and Defendants the State Of Arizona, Andy Tobin, and Paul Shannon (collectively, the “State Defendants”), through their undersigned counsel, stipulate and agree as follows:

State Defendants will not put forward as a defense—through written pleadings, testimony, documents, or any other form of evidence—that it relied upon legal advice.

Further, Plaintiff agrees to withdraw as moot Plaintiff’s Motion to Compel Production of Documents (Dkt. No. 195), the subject of Order (Dkt. No. 241). This Stipulation renders as moot the State Defendants’ Motion for Reconsideration (Dkt. No. 261).

///
///
///
///

1 Respectfully submitted this [] day of May, 2022.

2 ACLU FOUNDATION OF ARIZONA

3 By /s/ DRAFT

4 Victoria Lopez

Christine K. Wee

5 AMERICAN CIVIL LIBERTIES UNION

6 FOUNDATION

7 Joshua A. Block*

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8 WILLKIE FARR & GALLAGHER LLP

9 Wesley R. Powell*

10 Matthew S. Friemuth*

Jordan C. Wall*

11 Victoria A. Sheets*

12 *admitted pro hac vice

13 *Attorneys for Plaintiff*

14 /s/ DRAFT (with permission)

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21 *Attorneys for Defendants State of Arizona,*

22 *Andy Tobin, and Paul Shannon*

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/s/ DRAFT (with permission)

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*Attorneys for Defendants Arizona Board of Regents,
d/b/a University of Arizona; Ron Shoopman; Larry
Penley; Ram Krishna; Bill Ridenour; Lyndel Manson;
Karrin Taylor Robson; Jay Heiler; and Fred Duval*

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CERTIFICATE OF SERVICE

I hereby certify that on [DATE], I electronically transmitted the attached document to the Clerk’s office using the CM/ECF System for filing. Notice of this filing will be sent by email to all parties by operation of the Court’s electronic filing system.

/s/ Christine K. Wee
Christine K. Wee

21187232

EXHIBIT C

From: Wall, Jordan <JWall@willkie.com>
Sent: Friday, May 6, 2022 8:48 AM
To: 'Curtis, Ryan'
Cc: Powell, Wesley; Sheets, Victoria; Garbacz, Justin; 'Joshua Block'; 'Christine Wee'; 'Eckstein, Paul (Perkins Coie)'; 'Yost, Austin C. (Perkins Coie)'; Cohan, Shannon
Subject: RE: Toomey v State of Arizona - Proposed Stipulation [FC-Email.FID11439673]

Ryan,

Thank you for getting back to us. We have reviewed your counterproposal, and we cannot agree. State Defendants' stipulation does not adequately address the issues raised in Dr. Toomey's motion to compel, namely his need for the withheld documents in order to fully assess State Defendants' defense based on their purported legal rationale for the Exclusion, which you indicated during our April 22 meet and confer. State Defendants intend to continue asserting. We also do not think your stipulation or your explanation below accurately reflects the concessions State Defendants made on this matter before the Ninth Circuit at oral argument.

We will respond to your motion as invited by the court.

Thanks,
Jordan

Jordan C. Wall
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Pronouns: he, him, his

From: Curtis, Ryan <RCurtis@fennemorelaw.com>
Sent: Tuesday, May 3, 2022 7:44 PM
To: Wall, Jordan <JWall@willkie.com>
Cc: Powell, Wesley <wpowell@willkie.com>; Sheets, Victoria <VSheets@willkie.com>; Garbacz, Justin <JGarbacz@willkie.com>; 'Joshua Block' <jblock@aclu.org>; 'Christine Wee' <CWee@acluaz.org>; 'Eckstein, Paul (Perkins Coie)' <PEckstein@perkinscoie.com>; 'Yost, Austin C. (Perkins Coie)' <AYost@perkinscoie.com>; Cohan, Shannon <scohan@fennemorelaw.com>
Subject: RE: Toomey v State of Arizona - Proposed Stipulation [FC-Email.FID11439673]

*** EXTERNAL EMAIL ***

Jordan,

Thank you for sending the revised stipulation. Plaintiff's proposed stipulation differs greatly from what was clarified at oral argument and from what we indicated State Defendants' could agree to during our meet and confer on April 22. Accordingly, State Defendants propose a different stipulation.

The attached proposed stipulation reflects State Defendants' clarification made at oral argument on March 10, 2022, that they are not asserting an advice of counsel defense in this case and will not put forward such a defense in this case through written pleadings, testimony, documents, or any other form of evidence. State Defendants discussed this concession at 7:24 to 7:56 of the video-recorded oral argument. The Ninth Circuit found State Defendants' concession at oral argument to be significant. Further, that concession was the basis for the Ninth Circuit's statement at the end of its April 14 Order that should State Defendants ask the District Court to reconsider its ruling on the attorney-client privileged documents, that the District Court would give such a request full consideration. That is the primary basis of State Defendants' Motion for Reconsideration pending before the District Court and the terms of the concession is what State Defendants are proposing be memorialized in a stipulation.

Please let us know if you would like to discuss this issue.

Ryan C. Curtis, Chair - ERISA & Employee Benefits Practice Group

FENNEMORE.

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From: Curtis, Ryan

Sent: Monday, May 2, 2022 5:37 PM

To: Wall, Jordan <JWall@willkie.com>; Cohan, Shannon <scohan@fennemorelaw.com>

Cc: Powell, Wesley <wpowell@willkie.com>; Sheets, Victoria <VSheets@willkie.com>; Garbacz, Justin <JGarbacz@willkie.com>; 'Joshua Block' <jblock@aclu.org>; 'Christine Wee' <CWee@acluaz.org>; 'Eckstein, Paul (Perkins Coie)' <PEckstein@perkinscoie.com>; 'Yost, Austin C. (Perkins Coie)' <AYost@perkinscoie.com>

Subject: RE: Toomey v State of Arizona - Proposed Stipulation [FC-Email.FID11439673]

Thank you Jordan. Understanding Plaintiff's deadline to respond to the motion for reconsideration, we do expect to have a response to the proposed stipulation tomorrow.

From: Wall, Jordan <JWall@willkie.com>

Sent: Monday, May 2, 2022 5:26 PM

To: Curtis, Ryan <RCurtis@fennemorelaw.com>; Cohan, Shannon <scohan@fennemorelaw.com>

Cc: Powell, Wesley <wpowell@willkie.com>; Sheets, Victoria <VSheets@willkie.com>; Garbacz, Justin <JGarbacz@willkie.com>; 'Joshua Block' <jblock@aclu.org>; 'Christine Wee' <CWee@acluaz.org>; 'Eckstein, Paul (Perkins Coie)' <PEckstein@perkinscoie.com>; 'Yost, Austin C. (Perkins Coie)' <AYost@perkinscoie.com>

Subject: RE: Toomey v State of Arizona - Proposed Stipulation

Ryan, Shannon—

Attached is a revised draft of the proposed stipulation, correcting a few typos.

In light of the court's request that we respond to State Defendants' motion for reconsideration, would you let us know if State Defendants will agree to the terms of the proposed stipulation by tomorrow, May 3.

Thanks,
Jordan

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Pronouns: he, him, his

From: Sheets, Victoria <VSheets@willkie.com>
Sent: Thursday, April 28, 2022 9:52 PM
To: 'Curtis, Ryan' <RCurtis@fennemorelaw.com>; 'Cohan, Shannon' <scohan@fennemorelaw.com>; 'Yost, Austin C. (Perkins Coie)' <AYost@perkinscoie.com>; 'Eckstein, Paul (Perkins Coie)' <PEckstein@perkinscoie.com>; 'Joshua Block' <jblock@aclu.org>; 'Christine Wee' <CWee@acluaz.org>; Powell, Wesley <wpowell@willkie.com>; Wall, Jordan <JWall@willkie.com>; Garbacz, Justin <JGarbacz@willkie.com>
Subject: Toomey v State of Arizona - Proposed Stipulation

Counsel,

Please find attached the draft stipulation as previously discussed.

Best,
Victoria

Victoria A. Sheets
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EXHIBIT D

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

-----x

No. 21-71312

-----x

In re: STATE OF ARIZONA; et al.,

STATE OF ARIZONA; et al.,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR

THE DISTRICT OF ARIZONA, TUCSON,

Respondent,

RUSSELL B. TOOMEY; et al.,

Real Parties in Interest.

-----x

Oral Argument

March 10, 2022

B E F O R E :

HON. PAUL J. WATFORD

HON. RICHARD A. PAEZ

HON. RICHARD CLIFTON

1 MR. BERG: May it please the Court.
2 I'm Timothy Berg of Fennemore Craig, representing
3 Petitioner, State of Arizona, Andy Tobin, and
4 Paul Shannon.

5 The issue presented here is whether the
6 Petitioners waived their attorney/client
7 privilege by stating in answers to
8 interrogatories that they consulted Counsel with
9 respect to the policy at issue here, by
10 identifying those Counsel, and by identifying
11 attorney/client privileged documents, but not
12 disclosing the contents of the communications or
13 documents, or raising an advice of counsel
14 defense. The answer has to be no, there has been
15 no waiver here, and the District Court committed
16 clear error.

17 As then-Judge, later Justice Ginsburg
18 stated in United States versus White, implied
19 waiver in sum is not appropriately invoked when a
20 client has gone to an attorney in good faith,
21 seeking an opinion as to the legality of certain
22 conduct in an area where legal boundaries may be
23 difficult for the layman to discern. I think the
24 clear lesson of the White case is, simply because
25 someone says, I didn't have intent to commit a

1 crime, or I didn't have intent to discriminate,
2 and as part of the discovery they reveal that
3 they talked to their lawyer, that isn't a waiver
4 of the attorney/client privilege. It takes
5 something more. Again, as Justice Ginsburg said,
6 it has to be specific -- then-Judge Ginsburg,
7 pardon me said it has to be specific in a
8 positive waiver, and that hasn't happened here.

9 HON. MIDDLE: Can I change the facts
10 here just -- only slightly? What if the
11 Plaintiff sues, says, you know, we've
12 discriminated against us in not providing this
13 coverage, and you -- your clients say, well, the
14 reason we didn't provide the coverage has nothing
15 to do with discrimination? We consulted with our
16 lawyers, and they told us the law prohibited us
17 from offering that coverage.

18 MR. BERG: Well, I think, Your Honors,
19 if what we say is, we didn't have bad intent here
20 because we relied on the advice of our lawyers in
21 deciding we didn't have bad intent, that is a
22 waiver. But that isn't what happened here.

23 HON. PAUL WATFORD: Okay. And, just to
24 stop --

25 MR. BERG: Okay.

1 HON. PAUL WATFORD: -- that is, though,
2 what the District Court thought you had done. Is
3 that right?

4 MR. BERG: Yes. But I think the
5 District Court is in error, and I think --

6 HON. PAUL WATFORD: Okay.

7 MR. BERG: -- this is something this
8 Court can decide itself de novo, because you have
9 in front of you the materials the District Court
10 looked at, the interrogatory answers.

11 HON. PAUL WATFORD: Right.

12 MR. BERG: Unlike a typical case, where
13 we might put a witness on and there's a
14 credibility issue, this Court has in front of it
15 the specific interrogatory answers the District
16 Court relied on --

17 HON. PAUL WATFORD: Right.

18 MR. BERG: -- in concluding there was a
19 waive. So, it seems to me, what you have in
20 front of you isn't a fact question. You have a
21 legal question of whether those interrogatory
22 answers are sufficient to create a waiver.

23 HON. PAUL WATFORD: Okay. So, why is
24 what happened here different from the
25 hypothetical I posed?

1 MR. BERG: Because we didn't say, we
2 had no intent here. Our lawyers told us we could
3 do this legally, and therefore, we thought it was
4 legal. What we said is, we had no intent. We
5 were asked, what are the reasons that you did
6 this? We said, well, we talked to our lawyers,
7 and we also had cost concern and cost containment
8 issues. It is different.

9 I think that the attorney/client
10 privilege is important, and drawing this line is
11 really important. And it may seem subtle, but I
12 think there's a significant difference between
13 saying, I talked to my lawyer. I had no intent
14 to discriminate. I looked at other things, which
15 is true here -- again, the record reflects that
16 our client went out to its insurance brokers, it
17 gathered legal opinions from legal periodicals,
18 it did all sorts of other things other than just
19 talk to its lawyers -- and say, we had no
20 malintent, and saying, the reason I can prove I
21 didn't have discriminatory intent here is that I
22 talked to my lawyer, and my lawyer told me it was
23 legal to do this. And that isn't what happened
24 here.

25 And that's the kind of defense that I

1 think, if you found in the White, case would be a
2 waiver. Just, again, Judge Ginsburg in that case
3 makes the distinction between saying, generally,
4 I had no -- I think in that case, it was intent
5 to commit a crime rather than discriminatory, but
6 I had no mis intent, and oh, by the way, part of
7 what I did was walk to my lawyer, and saying, the
8 reason I can defend and I didn't have mis intent
9 is I relied on the advice of my Counsel in making
10 this decision. And because I relied on advice of
11 counsel, the Court can't find that I had bad
12 intent.

13 HON. PAUL WATFORD: So, the reason I
14 put the hypothetical the way I did is that I'm
15 not sure I see a huge difference between what you
16 actually said. So, instead of saying, we
17 consulted with our lawyers, and we were told it's
18 prohibited to offer this coverage, when asked,
19 give us the reasons why you didn't offer the
20 coverage, you say, well, we consulted with our
21 lawyers, and they told us we didn't have to. And
22 that's our reason, and that's why there's no
23 discrimination, because they told us we didn't
24 have to offer it. And it seems to me, isn't it
25 just half-dozen of one and six of the other?

1 MR. BERG: Your Honor, Your Honor,
2 you've taken it a step further than I think the
3 interrogatory answer does.

4 HON. PAUL WATFORD: Okay.

5 MR. BERG: We have not said -- the
6 interrogatory answers said, what considerations
7 did you take into account in deciding not to
8 offer this?

9 HON. PAUL WATFORD: It said, what are
10 the reasons why you didn't. Okay?

11 MR. BERG: Right.

12 HON. PAUL WATFORD: So, and one of the
13 reasons given --

14 MR. BERG: One of them was, we talked
15 to our -- we talked to our lawyers --

16 HON. PAUL WATFORD: -- and they told us
17 we didn't have to do it.

18 MR. BERG: Okay. That isn't what the -
19 - I don't think that's what the interrogatory
20 answer says, Your Honor.

21 HON. PAUL WATFORD: Okay. Well, let's
22 look at the interrogatory. Pull it up and you
23 can quote it to me.

24 MR. BERG: Let me -- I don't think I
25 have the exact words of the interrogatory answer

1 in front of me. I have it back over there. But
2 I don't believe we said, and therefore, we didn't
3 do it. I think we said, we talked to our lawyer,
4 we -- and we were told -- you're right -- we were
5 told it was not legally required. We also looked
6 at cost containment and cost (indiscernible).

7 HON. PAUL WATFORD: Right. Two
8 reasons.

9 MR. BERG: Again -- okay.

10 HON. PAUL WATFORD: You gave two
11 reasons, and that's why you said there was no
12 discrimination.

13 MR. BERG: But -- but no, that -- there
14 is -- you're making a -- you're making a step
15 we're not making.

16 HON. PAUL WATFORD: Okay.

17 MR. BERG: What we said is, this is why
18 we did it. We haven't said, those reasons in and
19 of themselves aren't discriminatory. Again, we
20 relied on our lawyer's advice in deciding we
21 could legally do this, and therefore, we had no
22 malintent. Plaintiff is still entitled to prove
23 that our intent was bad or that -- or if they can
24 prove without intent that we've discriminated in
25 some way, they can do that.

1 The defense -- because the
2 attorney/client privilege is so important, I
3 think the Court has to be careful in how broadly
4 you read waivers. And to me, if you read the
5 White case, if you read the other cases in the
6 circuit, the -- what a client does to waive the
7 defense is to say, you can't find me guilty, or
8 you can't find me liable, because I relied on my
9 lawyer's advice. And that isn't what --

10 HON. RICHARD CLIFTON: Are you saying
11 that there was no reliance on the Counsel's
12 advice?

13 MR. BERG: What I'm saying, Your Honor,
14 is that the interrogatory response doesn't
15 reflect --

16 HON. RICHARD CLIFTON: Other question.

17 MR. BERG: Okay.

18 HON. RICHARD CLIFTON: What is the
19 State's position as to whether or not it relied
20 upon advice of counsel? Would it disclaim
21 reliance upon advice of counsel as a defense?

22 MR. BERG: I think it would disclaim
23 reliance on advice of counsel as a defense, Your
24 Honor, yes. If you're asking me, what did the
25 State consider, I think the interrogatory

1 reflects that we talked to our lawyers, we talked
2 to insurance brokers --

3 HON. RICHARD CLIFTON: Let me be more
4 focused --

5 MR. BERG: Okay. I'm sorry.

6 HON. RICHARD CLIFTON: -- because I
7 don't want to lose all your time. What role does
8 advice of counsel play in this case, from your
9 perspective?

10 MR. BERG: I don't think it plays any
11 role unless we raise advice of counsel as a
12 defense, and we haven't done that. So --

13 HON. RICHARD CLIFTON: And are you
14 prepared to disclaim raising advice of counsel as
15 a defense?

16 MR. BERG: Yes, Your Honor, we are. We
17 are not sitting here, saying -- we are not saying
18 to the Court -- obviously, the issue before this
19 Court is privilege and not liability for whether
20 or not the plan is invalid. But I think what we
21 are saying is, no one is claiming we -- that
22 advice of counsel is a defense to the underlying
23 claim here, which is of course what is not in
24 front of the Court today. What's in front of the
25 Court today is a privilege question and a

1 mandamus question.

2 HON. PAUL WATFORD: Okay. So, I think
3 that's helpful, but let me -- and we'll have to
4 ask your opponents and see what they say about
5 this. But as I understand, what you're saying is
6 that you've provided these interrogatory
7 responses. You're saying that the District Court
8 and the Plaintiffs misinterpreted what you were
9 trying to say there. And you're saying now, to
10 the extent that any of you all thought that we
11 were trying to raise some kind of an advice of
12 counsel defense, we are not doing so. We are,
13 you know, assuming this case were to go to a jury
14 or whatever, we are not going to be arguing that.
15 And I guess, if we or the District Court were to
16 hold you to that, then there'd be no reason for
17 them to get access to these documents? Is that
18 what you're saying?

19 MR. BERG: Correct, Your Honor.
20 Exactly. That's precisely the argument we're
21 making.

22 HON. RICHARD PAEZ: Is that what you
23 told the District Court?

24 MR. BERG: Your Honor, I believe so. I
25 was not --

1 HON. RICHARD PAEZ: But did you tell
2 the District Court you were not going to rely on
3 a advice of counsel defense?

4 MR. BERG: I don't -- I do not believe
5 -- I don't know the answer to that question.

6 HON. RICHARD PAEZ: So, why -- how can
7 we say that the District Court clearly erred?

8 MR. BERG: Because --

9 HON. RICHARD PAEZ: This is a -- you
10 know, mandamus, we don't go around issuing writs
11 of mandamus against the District Court very
12 often. They have to -- there has to be clear
13 error. There has to be, you know, a case that
14 they've just disregarded. It's pretty tough.

15 MR. BERG: It would be my position,
16 Your Honor, that the interrogatory answers, even
17 without the concession I just made -- and I'm
18 sorry I hit the microphone; I know I'm not
19 supposed to touch it. Even if -- even without
20 the concession that I just made in response to
21 Judge Clifton, it is still clear we were not
22 raising an advice of counsel defense, and the
23 Court's finding that we were is a clear legal
24 error, based on what's in the interrogatories.

25 HON. RICHARD PAEZ: It's a legal error,

1 or a factual error?

2 MR. BERG: Legal error. I think it's -
3 - I think the question here is whether what is in
4 these interrogatory answers is sufficient as a
5 legal matter --

6 HON. RICHARD PAEZ: I thought you -- I
7 thought one of the bases for the District Court's
8 ruling was that they found a waiver by
9 implication.

10 MR. BERG: Yes, Your Honor. And the
11 waiver by implication would be if we'd raised an
12 advice of counsel defense. That is -- that is
13 waiver by implication.

14 HON. RICHARD PAEZ: Well, I mean, you
15 didn't raise it in your answer.

16 MR. BERG: Well, Your Honor, if we
17 raised it in these interrogatory answers, that
18 would be a waiver by -- I think an explicit
19 waiver would say, we're waiving our
20 attorney/client privilege. Nobody suggests we
21 did that. Nobody suggests we disclosed the
22 content of attorney -- or at least the District
23 Court didn't find we disclosed the content.

24 What it found was an implied waiver,
25 based on its interpretation of these

1 interrogatory answers as legally meeting the
2 provisions of an advice of counsel defense. And
3 our position is, they do not do that, that if you
4 read the interrogatory answers, we are not
5 saying, we are relying on advice of counsel as a
6 defense in this case, and we're waiving our
7 attorney/client privilege by doing so. It simply
8 isn't here.

9 HON. PAUL WATFORD: Well, it took me a
10 little while, but I have it in front of me.

11 MR. BERG: Okay.

12 HON. PAUL WATFORD: So let me just
13 quote it and make sure you're on board with this.
14 So, Interrogatory Number 1 -- let's forget about
15 4 and 7. Those other ones didn't seem --

16 MR. BERG: Okay. I agree with Your
17 Honor, the key one is 1.

18 HON. PAUL WATFORD: Okay. So,
19 Interrogatory 1 asks you to identify and describe
20 all reasons why the plan excludes coverage for
21 gender reassignment surgery. And then, what your
22 clients say is, the State of Arizona's self-
23 funded health plan excludes coverage for gender
24 reassignment surgery because the State concluded
25 under the law that it was not legally required to

1 change its health plan to provide such coverage
2 under Title 7, blah, blah, blah. And then,
3 later, you say, hey, by the way, that legal
4 advice we got is privileged.

5 MR. BERG: Yeah.

6 HON. PAUL WATFORD: So, that seems to
7 be -- okay, well, you respond to that, then.
8 That's what you said.

9 MR. BERG: Okay. To me, that is not
10 saying, we are defending based on that advice of
11 counsel, and we're arguing we didn't have intent,
12 based on the fact we got advice from our counsel
13 on that. And that is what I'm suggesting to you
14 in light of the United States versus White would
15 be required to be a waiver here. It takes
16 something more than us saying, we talked to our
17 lawyers about this, and one of the reasons we
18 took into account in making our decision was that
19 we talked to our lawyers.

20 If we had said, you cannot prove we had
21 intent here because we went and talked to our
22 lawyers, and they told us it was legal, and we
23 went ahead and did it anyway, that would be an
24 advice of counsel defense. That would be
25 sufficient to be an implied waiver. That would

1 permit the discovery order here.

2 HON. RICHARD PAEZ: To prevail, do the
3 Plaintiffs have to prove intent?

4 MR. BERG: I think, Your Honor, that
5 certainly, on at least some of their theories,
6 they do. I do think intent is an issue here. I
7 wouldn't quarrel with that proposition. But I
8 don't think that what we -- I don't think that
9 that interrogatory answer says we have a defense
10 to intent based on advice of counsel, and I think
11 that's what it would need to do.

12 HON. RICHARD PAEZ: So, what would one
13 of your witnesses say, just that they determined
14 that it wasn't -- it wasn't illegal?

15 MR. BERG: Deposition testimony was
16 taken, Your Honor. In this case, it was
17 deposition testimony of people who did not have
18 the ability to waive the privilege. They don't
19 have the authority to waive the privilege. I
20 think frankly, one of the reasons the District
21 Court focused on the interrogatory responses is
22 that, if you get into the deposition testimony,
23 you have to worry about whether a former employee
24 can, at a time of a deposition when she no longer
25 works for our client, waive their privilege. And

1 so, I think that's why the focus here was on the
2 interrogatory answers, Your Honor.

3 HON. RICHARD PAEZ: I don't think that
4 answers my question.

5 MR. BERG: Okay. I believe if you look
6 at the -- if you look at --

7 HON. RICHARD PAEZ: What would a
8 witness say on the stand about intent or about
9 counsel? Would they --

10 MR. BERG: Oh, I --

11 HON. RICHARD PAEZ: Is it your -- does
12 your concession mean that no witness is going to
13 get up there and say, we consulted with a lawyer?
14 That's not going to be -- you're not going to do
15 that.

16 MR. BERG: I think what my concession
17 means is no witness is going to get up there and
18 said, because we had legal advice that we could
19 do this, we didn't have the intent. What they're
20 going to get up and say is, we looked at a whole
21 bunch of things, and here was what we decided to
22 do, and one of the reasons was cost containment.
23 And one of the reasons is, when we looked at all
24 this stuff, including stuff from our insurance
25 company and outside periodicals, we didn't think

1 we had to cover them, and we didn't think we had
2 bad intent.

3 But that's not, in my -- again, I think
4 if you read the White case, a waiver, even an
5 implied waiver, has to be positive and specific,
6 and we don't get there here.

7 HON. RICHARD PAEZ: Okay.

8 MR. BERG: I'd like to save a little
9 bit of time for rebuttal, if I may, Your Honor.
10 Thank you.

11 HON. PAUL WATFORD: We'll make sure you
12 have time for rebuttal.

13 MR. BERG: Okay.

14 HON. PAUL WATFORD: Okay. Let's hear
15 from Counsel for the Respondent.

16 MR. BERG: I'll just get out of your
17 way here.

18 MR. WALL: Good morning, Your Honors.
19 May it please the Court, Jordan Wall, Wilkie Farr
20 & Gallagher, on behalf of the real party in
21 interest, Dr. Russell B. Toomey. Thank you for
22 this opportunity to be heard.

23 As the Court has noted, a petition for
24 a writ of mandamus is indisputably a drastic and
25 extraordinary remedy that is granted in the case

1 of extraordinary causes involving exceptional
2 circumstances. As this Court has consistently
3 recognized, and including in in re Van Dusen,
4 this is not an instance where the mandamus is
5 warranted because it is not a case of
6 extraordinary circumstances. Yes, Your Honor?

7 HON. PAUL WATFORD: Yeah, yeah, and you
8 -- I don't want to cut off the rest of your
9 argument, but maybe can you just respond, like,
10 the concession you just heard on -- from the
11 lectern today? That's good enough, not good
12 enough? Tell us your response to that.

13 MR. WALL: Your Honor, it's not good
14 enough, and it was not an argument that was
15 presented to the District Court, and I think
16 there are several reasons for that. Backing out,
17 the Petitioners claim that it is all focused on
18 Interrogatory Number 1 is plainly incorrect. The
19 record is replete with instances in which the
20 Petitioners put forward affirmatively the advice
21 of counsel. You can look -- we've already
22 discussed Interrogatory Number 1, which they were
23 responding to the question as to, why do you
24 maintain the exclusion? And the answer, that we
25 reached a legal conclusion that we were not

1 required to provide such care, and the legal
2 advice we received on this --

3 HON. PAUL WATFORD: Okay. Right, we
4 just went through that. And so, then, your
5 opponent stands up and says, to the extent there
6 was any confusion on that, I'm going to clear it
7 up right now. We were not trying to interject
8 the advice we got from our lawyers, and we are
9 not going to interject, going forward, the advice
10 of our lawyers as a defense to the -- you know,
11 the intent element of your claims. Why doesn't
12 that eliminate the need for you now -- as a
13 matter of fairness, because that's the basis on
14 which the District Court ruled -- why doesn't
15 that eliminate the need for you to get access to
16 these privileged documents?

17 MR. WALL: Well, Your Honor, because
18 the involvement of Counsel here has now become a
19 factual point in the case. And so, even though
20 Petitioners have disclaimed that they will rely
21 on this, it is the burden of Dr. Toomey to
22 establish an evidentiary record refuting their
23 defense. For instance, in response to
24 Interrogatory Number 4 and Number 7, which I
25 heard Your Honor say you didn't think mattered, I

1 would point to Petitioner's own cases, Hernandez
2 versus Canyon. They have miscited those for
3 different reasons about, you know, a blanket
4 waiver of --

5 HON. PAUL WATFORD: Can I tell you why
6 I don't think those are relevant? It's because
7 they're just -- you asked them questions that
8 they have to give truthful answers to. Tell us
9 all the people you consulted with. Okay, well, I
10 can't lie and not mention my lawyer, so you can't
11 possibly predicate a waiver of attorney/client
12 privilege on a truthful -- you're just asking for
13 truthful factual information. If the person
14 doesn't intend in the litigation to interject
15 advice of counsel as any kind of defense, the
16 mere answering your question truthfully can't be
17 a waiver. That's why I just think you've got to
18 put everything on the response to Interrogatory
19 Number 1, right?

20 MR. WALL: And I understand your point,
21 Your Honor. And what I would say is that the
22 Petitioners fundamentally misunderstand the
23 nature of an implied waiver in the at-issue
24 doctrine. As the Court established in Chevron
25 Corp v. Pennzoil, what undergirds the at-issue

1 doctrine is the fairness principle. By putting
2 forward the advice of counsel both in
3 Interrogatory Number 1, but also noting the
4 involvement of counsel in the decision making
5 here at Interrogatory Number 4, these are issues
6 of fact that now Dr. Toomey needs to establish an
7 evidentiary record on. In Hernandez, what the
8 Court noted was that the involvement of counsel -
9 -

10 HON. RICHARD CLIFTON: Well, let me --
11 why? I mean, if the question of whether this
12 constitutes discrimination is a legal question as
13 to which advice of counsel you have to assume
14 happened. If they thought that they had to, they
15 presumably would have provided the coverage
16 that's being sought. But the Court's going to
17 decide whether the law requires the provision of
18 that coverage, and the Court, to be polite about
19 it, really doesn't care very much about what the
20 advice of counsel some years before was. So, why
21 does it matter? Is the advice of counsel really
22 an issue in the underlying case?

23 MR. WALL: Your Honor, I think it
24 matters for two reasons. The first is because
25 the advice of counsel is the stated reason why

1 the government has maintained this --

2 HON. RICHARD CLIFTON: You have to
3 assume that's the case. I mean, even if they had
4 never mentioned lawyer, I think you would accept
5 that if they'd been told by their lawyers, you
6 don't have a prayer, this is clearly covered as -
7 - this would be discriminatory not to cover this.
8 So, I just take as a given that's out there. I
9 don't think it's going to be passionately
10 disputed. On your point, you don't think you
11 have to persuade the Court that the State's
12 lawyers gave them advice that they didn't follow.
13 You're interested in what the state of the law
14 is, which the Court will decide. So, why is it
15 you have to prove something about advice of
16 counsel if it's not offered as a defense beyond
17 this interpretation of the law?

18 MR. WALL: Well, Your Honor, because
19 t's been offered as a defense both by the witness
20 -- by numerous witnesses that the Petitioners
21 have put forward as persons with knowledge about
22 the decision making here. And so, we have to
23 establish a record to be able to refute this
24 defense.

25 HON. RICHARD CLIFTON: Well, but what

1 are you going to refute?

2 MR. WALL: Well, that's what we're
3 looking for the discovery, Your Honor. We want
4 to be able to examine the advice that was
5 provided, because one of the reasons Petitioners
6 have claimed that they have -- they decided to
7 main the exclusion is because of the legal
8 reasoning.

9 HON. RICHARD CLIFTON: But well, but
10 still, the Court's not going to be persuaded by
11 whatever legal reasoning was offered by counsel
12 to the State some years before. You're not going
13 to argue to the Court that it has to accept
14 whatever the Arizona lawyer said to the State.
15 You're going to argue to the Court the law
16 requires these services to be provided;
17 otherwise, you're violating -- it constitutes sex
18 discrimination. So, why is advice of counsel
19 relevant?

20 MR. WALL: Well, Your Honor, because
21 intent is a factor in this case.

22 HON. RICHARD CLIFTON: How is intent a
23 factor?

24 MR. WALL: Well, Your Honor, Dr.
25 Toomey's alleged claims under both it's a

1 violation of the Equal Protection Clause of the
2 14th Amendment and Title VII. Under Title VII,
3 Dr. Toomey is pleading a case based on disparate
4 treatment or disparate impact, of which this may
5 be supporting evidence as to animus or
6 discriminatory intent on the part of the
7 government. For instance, if the documents
8 corroborate that the Petitioners were informed
9 that, yes, this exclusion is illegal, we think
10 that would be a relevant fact as part of the
11 record to present before the District Court.

12 We also think the involvement of
13 counsel in the actual decision making here puts
14 their involvement as a factual point in the
15 record to be developed. We cannot simply accept
16 Petitioner's representation that we received
17 legal advice and everything is, you know, okay.
18 Dr. Toomey, again, has the burden of establishing
19 that evidentiary record.

20 What I would also say is, the Court
21 asks fairly, you know, when we get to trial, what
22 will witnesses say? And I think, as you look
23 through the record -- and it's established in all
24 of our papers, as we had cited the deposition
25 testimony itself -- that all the witnesses have

1 repudiated, now, that cost was a significant
2 factor in the Court -- in the Petitioner's
3 decision making. They have all uniformly pointed
4 to the legal advice they received about his
5 decision making, and that was the basis for the
6 Petitioner's decision to maintain the exclusion.

7 HON. RICHARD CLIFTON: Okay, but I
8 don't really understand that. I mean, the fact
9 that the -- a lawyer says you don't have to do it
10 doesn't explain why you don't do it. It just
11 says that's a permissible course. And if they
12 disclaim cost, is there any other reason offered
13 for not providing the service that your client
14 seeks to obtain?

15 MR. WALL: Well, yes, Your Honor,
16 because I believe Dr. Toomey -- it's incumbent
17 upon him to be able to examine that record if
18 that is now, as we believe through discovery, the
19 only reason why they maintained the exclusion.

20 HON. RICHARD CLIFTON: But that's not a
21 reason to maintain the exclusion. To say that
22 you don't have to do something doesn't mean you
23 don't do something. It just says it's an option
24 available. You can do it or you can not do it
25 for whatever reason. But that you don't have to

1 do it isn't, by itself, an explanation for why
2 you don't do it. Cost is what I anticipated the
3 response to be, and that's what I'd understood
4 until you just said they disclaimed cost, so...

5 MR. WALL: Well, Your Honor, I would
6 say that we have to think in the context of how
7 this response from Petitioners came about. And
8 the answer, Petitioners averred that there are
9 legitimate nondiscriminatory and non-pretextual
10 reasons why they maintain the exclusion. When
11 they were asked what those reasons were, the very
12 first thing they pointed to was, we are -- the
13 legal conclusion was that we are not required to
14 do so. It is their explanation as to -- and they
15 have affirmatively (indiscernible) into this case
16 that the legitimate reason why they do not have
17 to cover it -- they can maintain the exclusion is
18 legal advice.

19 HON. PAUL WATFORD: I mean, I think I
20 understand your argument if they said in response
21 to your assertion that you acted with
22 discriminatory intent, and they said, no, no, no.
23 We weren't trying to discriminate. Our policy is
24 always to do the bare minimum that the law, you
25 know, requires, and we went to our lawyers, and

1 they told us, no, the law doesn't require it.
2 And so, we said, okay, well, that settles it. I
3 mean, that wouldn't negate intent, I suppose. It
4 would be a nondiscriminatory, you know, neutral
5 reason for why they took the course of action
6 they did.

7 But I guess my problem still, and I
8 wanted to come back to your response on this, if
9 they now come forward and say that is not -- that
10 is most definitely not the defense we are going
11 to assert, the advice we got from Counsel is
12 never going to be interjected as a basis to
13 defend against the intent element of your claims,
14 I guess I'm still struggling to understand why
15 you need, and as a matter of fairness, access to
16 these documents. I just -- maybe if there's
17 another -- you can take another run at answering
18 that, because I'm still not clear on how this
19 concession doesn't eliminate this problem.

20 MR. WALL: True, Your Honor. And I
21 think the reason for that is because the Court
22 understood that even if Petitioners will sit here
23 and disclaim that they're going to rely on the
24 advice of counsel, it's not so much that there
25 are magic words as to the assertion of that

1 defense. It's not that you have to say, we're
2 asserting advice of counsel defense or that we
3 relied on certain evidence. The Court
4 established in Chevron Corp v. Pennzoil that once
5 a party has placed its knowledge of the law at
6 issue, it also places the basis of its
7 understanding of what the law requires at issue.

8 And so, everything is relevant to our
9 ability to develop the record. That includes the
10 newspaper articles; that includes consultation
11 with other governmental entities, as well as the
12 legal advice they relied upon on forming that
13 understanding of the law, which they cite as
14 their chief reason for maintaining the exclusion.
15 We need all of that evidence to be able to refute
16 this defense that there were legitimate reasons
17 to maintaining the exclusion.

18 HON. PAUL WATFORD: And is it your
19 understanding from our cases that once you've put
20 at issue legal advice you got from counsel, it's
21 kind of -- it's just a one-way street? You can
22 never take that back? Do you know what I mean?
23 Because they're kind of saying, this was all a
24 mistake. To the extent that the way we drafted
25 the interrogatory response that led you and the

1 District Court to think that we were trying to
2 put at issue the legal advice, that was just --
3 it was all a big misunderstanding, we're ready to
4 step back from that; you're basically saying, as
5 I hear you, nope, that's not an option. Once
6 you've kind of, you know, gone down that road,
7 you're stuck, and we now get access to all these
8 documents, whether you like it or not. So --

9 MR. WALL: Well, Your Honor, I think
10 this goes to your question of whether this is a
11 legal question for determination or a factual
12 question. And that's my point in saying that
13 it's not just Interrogatory Number 1. It's the
14 involvement of counsel which is the factual point
15 in this case in that decision making.

16 HON. RICHARD CLIFTON: How could
17 counsel not be involved? I mean, just by nature,
18 your argument is that the law requires. Anybody
19 looking at it would say, well, the first
20 question, does the law require? So, the fact
21 that they consulted with counsel doesn't strike
22 me as very meaningful here. If they hadn't
23 consulted with counsel, that might be meaningful.
24 But that's the -- this is the dog that barked.

25 MR. WALL: Well, Your Honor, I would

1 say that it's not the mere consultation with
2 counsel. And that's why I think Petitioner's
3 concerns that somehow, allowing the District
4 Court's order to stand will entail a parade of
5 horribles for every instance in which the
6 Government says it consulted counsel, is that the
7 specific reason they explained for maintaining
8 this exclusion is the legal rationale. You can
9 imagine that the Government might have other
10 legitimate bases for maintaining exclusion, such
11 as costs, such as a facially neutral policy that
12 they only was the bare minimum, which discovery
13 has now repudiated as the case. They did not
14 have that policy, and they do treat -- cover
15 other policies that -- or other benefits that are
16 not legally required.

17 But the reason the -- the reason the
18 Petitioners asserted for maintaining the
19 exclusion is the advice of counsel. And so, that
20 is an entirely relevant fact that we need to be
21 able to explore.

22 HON. RICHARD PAEZ: Let me ask you
23 this. I was not expecting the concession that
24 Counsel offered during his argument. That wasn't
25 in my, you know, on my radar screen at the time.

1 It seems to me, though, that it's significant
2 enough that the District Court should be able to
3 consider that and maybe rethink whether or not
4 she -- ordering disclosure is the appropriate
5 thing.

6 MR. WALL: Well, Your Honor, I would --
7 I would say that, you know, the club of mandamus,
8 as we've all noted, is extraordinary, and the
9 fact that --

10 HON. RICHARD PAEZ: I'm reluctant --
11 you know, the concession was made in front of us,
12 and I'm just reluctant to say, you know, the
13 concession, and therefore, District Court, you
14 clearly erred. Mandamus; set aside that order.
15 I'm not sure that that -- well, I'm not sure that
16 I'm prepared to do that just because we got a
17 concession here today.

18 It seems like the District Court should
19 be able to consider that and to think through
20 some of the questions that I was asking, because,
21 you know, when I asked him about what would a
22 witness testify to, and he said, well, we can --
23 you know, we determined that it was lawful or
24 whatever, and we considered this -- we consulted
25 with people. Well, the first thing the cross-

1 examination is going to be, who did you consult
2 with?

3 MR. WALL: You're right, Your Honor,
4 and I would say that --

5 HON. RICHARD PAEZ: And it seems to me
6 that those kinds of issues that relate to the
7 litigation itself ought to be explored by the
8 District Court, not by -- I mean, this is -- I
9 wasn't expecting this.

10 MR. WALL: Well, Your Honor, that's
11 exactly why I would say the petition of mandamus
12 should not warn here. If you consider the other
13 Bauman factors, particularly the first factor
14 about the availability of other adequate means of
15 relief, Petitioners certainly could have failed
16 to comply with the Court's discovery order, and
17 they would have had available to them post-
18 judgment relief, where a court could have
19 reviewed this and said, you know, they didn't
20 actually put this at issue, that, you know, could
21 remand it for a new trial and have this evidence
22 excluded. But they didn't do that. They --

23 HON. RICHARD PAEZ: Well, they could
24 file a motion for reconsideration and say, hey,
25 look, Judge, you got it all wrong. We're not

1 going to raise this as a defense.

2 MR. WALL: Well, Your Honor, they
3 didn't file a motion for reconsideration.

4 HON. RICHARD PAEZ: Oh, I know. I'm
5 saying, but there's ways they could have brought
6 this to the District Court's attention, and they
7 didn't do it.

8 MR. WALL: Exactly, and that's why the
9 petition does not lie. Because they could have
10 failed to comply with the order, and the District
11 Court could have entered a discovery sanction
12 saying that you cannot assert this defense,
13 exactly what Petitioners have conceded here
14 before. And that's why the petition should lie.
15 None of the Bauman factors, specifically the
16 clear error that we've discussed already, support
17 granting this petition. The District Court did
18 not err. It certainly got this right. And it
19 certainly did not commit clear error.

20 HON. PAUL WATFORD: Okay.

21 MR. WALL: Thank you, Your Honors.

22 HON. PAUL WATFORD: Thank you very much
23 for your argument. Let's put two minutes on the
24 clock for rebuttal.

25 MR. BERG: Let me start with the last

1 point. To argue that the State of Arizona should
2 have disobeyed an order of the District Court,
3 permitted itself to be found in contempt, and
4 then proceed to litigate this issue is something
5 this Court has rejected in a couple -- in several
6 cases we've cited in our reply, but also, I
7 think, ignores the reality that to say it's an
8 adequate remedy to violate a court order seems to
9 me to be inappropriate.

10 HON. RICHARD PAEZ: Well, you could
11 have gone back and filed a motion for
12 reconsideration, saying, hey, Judge, you know,
13 there's been a -- there's been a mistake here.

14 MR. BERG: Well, what we did do is,
15 first we were in front of the magistrate judge.
16 We made our argument. Then we went to the
17 District Court, and we made our argument. I
18 don't think --

19 HON. RICHARD PAEZ: You didn't make
20 this concession in front of the District Court,
21 did you?

22 MR. BERG: Your Honor, I didn't argue
23 this. I don't know exactly what was said in
24 front of the District Court on oral --

25 HON. RICHARD PAEZ: Right, but

1 something --

2 MR. BERG: There wasn't any oral
3 argument --

4 HON. RICHARD PAEZ: But wait a minute.
5 Something clicked along the way, and you decided,
6 well, you know, I've got to make it clear. I'm
7 going to make it clear to the Ninth Circuit that
8 this is not -- that the District Court
9 misunderstood, and I'm going to concede in front
10 of the District Court that we will not raise an
11 advice of counsel defense. It's all a
12 misconception. And now you're asking us, on
13 that basis, to issue a writ of mandamus against
14 the District Court.

15 MR. BERG: Yes, because we think it was
16 clear from the interrogatory answer that we
17 weren't raising that defense, Your Honor. I
18 mean, it may be clearer because I got asked the
19 specific question today and I answered it
20 specifically. But remember, in this case,
21 neither the magistrate judge nor the district
22 judge had oral argument. We didn't have a
23 dialogue like we've had here today. We filed
24 papers. We took our position, which we still
25 stand by, which is that the interrogatory answer

1 to Interrogatory Number 1, which is the only one
2 I think that is even close, isn't sufficient to
3 raise an advice of counsel defense, and
4 therefore, there wasn't a waiver.

5 Now, had we had oral argument, and had
6 we had a chance to have the kind of exchange
7 we've had here, it may have -- it may have been
8 clear. The attorney/client privilege is an
9 incredibly important privilege. It is the oldest
10 privilege known to the law, and --

11 HON. RICHARD CLIFTON: Let me ask you
12 about that.

13 MR. BERG: Yes.

14 HON. RICHARD CLIFTON: And we're --

15 MR. BERG: Sure, Your Honor.

16 HON. RICHARD CLIFTON: -- I'm going to
17 beg your indulgence and my colleagues'. We've
18 all lived with the attorney/client privilege. We
19 understand its importance. In this particular
20 case, how does it really matter? I mean, unless,
21 in fact, it turns out that, as your colleague
22 suggested, maybe the advice was, you can't do
23 this, and they decided to disregard it. I don't
24 expect that's the case. I expect you have your
25 usual lawyer qualifications and so forth, but --

1 I used to write those letters myself.

2 But in practical terms, okay, suppose
3 those documents are produced. How does it
4 matter?

5 MR. BERG: Well, I think -- first of
6 all, I think going forward, it may chill the
7 State in how it uses its lawyers. And that's a
8 harm that revises -- I think when the
9 attorney/client privilege for government agencies
10 is undermined.

11 Secondly, without -- without -- there
12 may well be information in those attorney/client
13 confidences about, like for example, future
14 litigation strategy, I don't know -- I am
15 speculating -- that you would not want to turn
16 over to the other side in litigation. I mean,
17 there are lots of reasons why there's an
18 attorney/client privilege and a work product
19 privilege, and one of them is to prevent one side
20 from going to school in their case on the other
21 side's legal theories and legal thought, Your
22 Honor.

23 HON. PAUL WATFORD: Okay. Thank you
24 very much.

25 MR. BERG: Thank you very much, Your

1 Honors.

2 HON. PAUL WATFORD: We appropriate it.
3 The case just argued is submitted, and we are
4 adjourned for the day.

5 CLERK: All rise.

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certify that the foregoing transcript is a true and accurate record of the proceedings.

Sonya M. Ledanski Hyde

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Date: May 2, 2022

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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

Russell B. Toomey,
Plaintiff,

Case No.19-cv-00035-TUC-RM (LAB)

v.

[PROPOSED] ORDER

**State of Arizona; Arizona Board of Regents,
D/B/A University of Arizona,** a governmental
body of the State of Arizona; et al.,

Defendants.

The Court having reviewed the State Of Arizona’s, Andy Tobin’s, and Paul Shannon’s (collectively, the “State Defendants”) Motion for Reconsideration (Doc. 261) and finding good cause,

IT IS ORDERED:

The State Defendants are hereby ordered to not put forward—through written pleadings, testimony, documents, or any other form of evidence—as a reason it decided to maintain the Exclusion or as a reason why it did not have discriminatory intent, that the State concluded that it was not legally required to cover gender affirming surgery.

Dated this _____ day of _____ 2022.

Honorable Rosemary Márquez
United States District Judge