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14 *Attorneys for Defendant*

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

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

22 Plaintiffs,

23 vs.

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

27 Defendant.

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

**DEFENDANT’S MOTION TO
COMPEL PRODUCTION
PURSUANT TO SUBPOENA DUCES
TECUM**

(Assigned to the Honorable Scott H.
Rash)

28 Pursuant to Federal Rules of Civil Procedure 45(d)(2)(B)(i) and 34(c), Defendant
Jami Snyder, Director of the Arizona Health Care Cost Containment System (“AHCCCS”),
respectfully requests this Court compel non-party El Rio Health to produce the records
requested in Defendant’s May 6, 2021 subpoena duces tecum.

I. Background

Plaintiffs D. H and John Doe filed their Complaint and Motion for Preliminary
Injunction on August 6, 2020. *See* Docs. 1-5. In support of both filings, D.H. provided the

1 Declaration of Dr. Andrew Cronyn, a pediatrician who began treating D.H. for gender
2 dysphoria in January 2020. *See* Doc. 5-3, ¶ 13. Dr. Cronyn began practicing at El Rio
3 Health Center in Tucson, Arizona starting in November 2014, becoming the co-leader of
4 transgender health care within El Rio less than six months later. *Id* at ¶ 10. In his
5 Declaration, Dr. Cronyn attests:

6 “Over the past five years, the number of transgender patients
7 at El Rio has grown significantly and now treats approximately
8 250 transgender youth per year ranging in age from four to
9 twenty-one. Of those patients, more than forty of those
10 patients are transgender boys who receive their health
11 insurance coverage through AHCCCS and need male chest
12 reconstruction surgery.”

13 Later, in Plaintiffs’ motion for class certification, Dr. Cronyn’s allegation became
14 the cornerstone of Plaintiffs’ claim that the proposed class satisfied Fed. R. Civ. P.
15 23(a)(1)’s numerosity requirement. *See* Doc. 40, p. 5. Plaintiff’s argued:

16 ***“Plaintiffs satisfy the numerosity requirement based on***
17 ***Dr. Andrew Cronyn’s first-hand knowledge and personal***
18 ***experience.*** As co-leader of transgender health within El Rio,
19 Dr. Cronyn is aware that El Rio treats approximately 250
20 transgender youth per year ranging from ages 4 to 21, and
21 of those patients, more than 40 are transgender boys who
22 receive their health insurance through AHCCCS and need male
23 chest reconstruction surgery. Dr. Cronyn is therefore
24 personally aware of more than 40 individuals who fall within
25 the proposed class definition.” *Id.* (internal citations
26 omitted)(emphasis added).

27 On May 5, 2021, the Court directed the parties to “conduct discovery on both class
28 certification and the merits of Plaintiffs’ claims concurrently...[and to] focus first on

1 discovery related to class certification.” Doc. 74. Defendant served Dr. Cronyn with a
2 subpoena for records supporting his assertion on the number of transgender boys receiving
3 insurance through AHCCCS, to which he responded that he no longer had access to or
4 control over the records supporting his assertion because he is no longer employed by El
5 Rio. *See* Declaration of Custodian of Records Andrew Cronyn, attached hereto as **Exhibit**
6 **A**.

7 Given that this information is the sole evidence presented by Plaintiffs in support of
8 their claim of numerosity, Defendant next served El Rio Health with a subpoena for records
9 supporting Dr. Cronyn’s claim. *See* Subpoena to El Rio Health, attached hereto as **Exhibit**
10 **B**. El Rio provided a written response on June 3, 2021, that they are unable to identify
11 responsive documents or other evidence supporting the assertion that Dr. Cronyn treated
12 the alleged forty or more patients on AHCCCS. *See* El Rio Health’s Response to Subpoena,
13 attached hereto as **Exhibit C**. Pursuant to LRCiv 7.2(j), counsel for Defendant and El Rio
14 conferred over the phone on multiple occasions about El Rio’s access to the requested
15 information and willingness to disclose the records. *See* June Correspondence, attached
16 hereto as **Exhibit D**. El Rio simply asserts that its own records are not searchable as
17 requested. And despite multiple attempts by Defendant to propose solutions – such as
18 different, potentially searchable identifiers and methods of production that satisfy federal
19 privacy rules – El Rio maintains not only that it cannot search its own records for responsive
20 documents, but that the notion of “need” – i.e. medical necessity and injury in fact, upon
21 which Plaintiffs’ case is founded – is “subjective and not contained in any record.” *Id.*

22 Defendant is therefore left with a disappointing array of non-options. Plaintiffs have
23 propped up their Motion for Class Certification on the assertion by Dr. Cronyn that he
24 treated “at least forty” transgender boys on AHCCCS-provided insurance who “need” chest
25 reconstruction surgery. When pressed to submit evidence of his assertion, Dr. Cronyn now
26 states that he has no access to or control over the records. Effectively, he can no longer
27 back his assertion with evidence, leaving El Rio Health as the sole custodian of the records
28 supporting Plaintiffs’ numerosity argument. But El Rio Health also refuses to produce any

1 records, asserting that finding these records is impossible, despite the fact that Dr. Cronyn
2 has claimed these distinct patients have a specific diagnosis and subsequent medical need
3 they are being denied.

4 Without any documentation, Defendants are robbed of the opportunity to challenge
5 Plaintiffs bald assertion that they have satisfied a considerable legal burden. There are no
6 other paths to gathering this information – either El Rio Health produces the records or
7 Plaintiffs’ numerosity argument hangs solely on the assertions of a former custodian with
8 no access to his old records. It is because of this that Defendant respectfully asks this Court
9 to compel El Rio Health to either 1) provide the relevant records and comply with
10 Defendant’s subpoena; or 2) confirm that no such records exist.

11 **II. Legal Argument**

12 The Court is vested with broad discretion to compel discovery. *See Laub v. U.S.*
13 *Dep’t of Interior*, 342 F.3d 1080, 1093 (9th Cir. 2013). The Federal Rules specifically
14 permit the Court to compel the production of documents pursuant to a lawful subpoena. *See*
15 *Fed. R. Civ. P. 34(c)*. Subpoenas issued pursuant to Fed. R. Civ. P. 45 are subject to the
16 permissible scope of discovery set forth in Fed. R. Civ. P. 26. *See* Advisory Committee’s
17 Notes to Fed. R. Civ. P. 45 (1970 Amendments) (“The changes make it clear that the scope
18 of discovery through a subpoena is the same as that applicable to Rule 34 and other
19 discovery rules.”). While non-parties are “entitled to special consideration when it comes
20 to subpoena requests under Rule 45...the proper way to afford this special consideration is
21 to weight the burden to the subpoenaed party against the value of the information to the
22 serving party.” *Aquastar Pool Products Inc. v. Paramount Pool & Spa Systems*, 2019 WL
23 250429 at *5 (D. Ariz. 2019). This requires the Court to consider “the relevance of the
24 documents requested, the need of the party for the documents, the breadth of the document
25 request, the time period covered by it, the particularity with which the documents are
26 described and the burden imposed.” *Id.* (citing *Soto v. Castelrock Farming & Transport,*
27 *Inc.*, 282 F.R.D. 492, 504 (E.D. Cal. 2012) (citations and internal quotation marks omitted).

1 While “district courts have broad discretion in determining relevancy for discovery
2 purposes,” the inquiry here is simple. *Survivor Media, Inc. v. Survivor Productions*, 406
3 F.3d 625, 635 (9th Cir. 2005). “Relevant information for purposes of discovery is
4 information reasonably calculated to lead to the discovery of admissible evidence.” *Id.* The
5 Federal Rules allow discovery regarding “any matter, not privilege, that is relevant to the
6 claim or defense of any party.” Fed. R. Civ. P. 26(b)(); *see also Wells Fargo Bank NA v.*
7 *Wyo Tech Investment Group LLC*, 385 F.Supp.3d. 863 (D. Ariz. 2019)(“ the standard for
8 relevance does not require that the evidence sought conclusively prove any issue in the
9 case.”).

10 The documents Defendant has requested from El Rio Health are relevant to the issue
11 of class certification; indeed, Plaintiffs’ numerosity argument is based upon Dr. Cronyn’s
12 assertion. *See Soto*, 272 F.R.D. at 505 (“[B]ecause the discovery sought could assist in
13 determining whether the class is sufficiently numerous...the discovery will be allowed”).
14 Dr. Cronyn put the documents squarely at issue when he made his Declaration in support
15 of Plaintiffs’ Motion for Preliminary Injunction, an assertion which has since been used to
16 support Plaintiffs’ Motion for Class Certification.

17 Additionally, there is no possible way to construct Defendant’s request that would
18 be less broad, narrower in time, or more particularly described. As noted above, Dr. Cronyn
19 claims there are “more than 40 are transgender boys who receive their health insurance
20 through AHCCCS and need male chest reconstruction surgery” at El Rio Health.
21 Conceivably, these patients were either seen by or made known to Dr. Cronyn “in the past
22 five years,” as he notes in his Declaration. These are the goal posts that Dr. Cronyn and
23 Plaintiffs have established, and this is the exact information requested from El Rio Health
24 in Defendant’s subpoena. Defendant has even gone to lengths to provide El Rio Health
25 with different terms or methods of searching their records, each of which was met with flat
26 denial.

27 Finally, Defendant has taken every opportunity to gather the requested documents
28 without imposing undue burden or expense on El Rio Health. Undue burden in the context

1 of subpoenas is “limited to harms inflicted by complying with the subpoena.” *See Mount*
2 *Hope Church v. Bash Back!*, 705 F.3d 418, 427 (9th Cir. 2012)(“because the district court
3 found that the subpoena requesting information...was not a logistical burden or the result
4 of a failure to narrowly tailor requests, the scope of the subpoena did not cause an undue
5 burden.”) With Dr. Cronyn’s absence, there are no other custodians capable of providing
6 information. There is no way to gather this necessary information in a more efficient, less
7 burdensome way than asking the sole custodian to provide it.

8 **III. Conclusion**

9 The subpoena to El Rio Health presents Defendant last remaining opportunity to
10 assess and challenge the numerosity prong of Plaintiffs’ motion for class action
11 certification. Defendant has labored in good faith to obtain the relevant records through
12 every other avenue with no success. This leaves El Rio Health as the sole custodian able to
13 speak to the veracity of Plaintiffs’ claim. Because the parties have no other option to obtain
14 these records, Defendant respectfully requests this Court compel El Rio Health to either 1)
15 provide the relevant records and comply with Defendant’s subpoena; or 2) confirm that no
16 such records exist.

17
18 RESPECTFULLY SUBMITTED this 12th day of July, 2021.

19 **BURNSBARTON PLC**

20
21 By /s/ David T. Barton

22 David T. Barton
23 Kathryn Hackett King

24 **JOHNSTON LAW OFFICES, P.L.C.**
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28 *Attorneys for Defendant*

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Attorneys for Plaintiffs and the Class

A **COPY** of the foregoing document was mailed and emailed this 12th day of July, 2021 to:

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s/Betsy Hibbs

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

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

22 Plaintiffs,

23 vs.

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

27 Defendant.

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

**[PROPOSED] ORDER GRANTING
DEFENDANT’S MOTION TO
COMPEL PRODUCTION
PURUSANT TO SUBPOENA DUCES
TECUM**

(Assigned to the Honorable Scott H.
Rash)

28 The Court, having considered Defendant’s Motion to Compel Production Pursuant
to Subpoena Duces Tecum (“Motion”) and good cause appearing therefore,

IT IS ORDERED that Defendant’s Motion is GRANTED as follows:

1. Within 15 days from the date of this Order, El Rio Health must provide the relevant records requested in the Subpoena Duces Tecum, ensuring, as requested in the Subpoena, that identifiers are used that will allow for further discovery related to each

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individual while still protecting patient privacy; or,

2. Provide a declaration from a document custodian stating that no such records exist.

EXHIBIT A

DECLARATION OF CUSTODIAN OF RECORDS

Andrew Cronyn, being duly sworn upon oath, deposes and says:

1. I have authority to certify the records described in the subpoena duces tecum in connection with the case captioned: *D.H., by and through his mother, Janice Hennessy-Waller; and John Doe, by his guardian and next friend, Susan Doe, on behalf of themselves and all others similarly situated v. Jami Snyder, Director of the Arizona Health Care Cost Containment System, in her official capacity, Case No. 4:20-cv-335-SHR.*

2. I have caused a search to be completed for documents responsive to the subpoena duces tecum.

3. I no longer have possession of, access to, or control over the records requested in Paragraph 1, Exhibit A of the subpoena duces tecum (requesting “[a]ll documents or other evidence that support the assertion of Dr. Cronyn that El Rio Health Center is treating more than 40 transgender boys who receive their health insurance through AHCCCS and need male chest reconstruction surgery. In providing this information, please use identifiers that will allow for further discovery related to each individual while still protecting patient privacy”). I am no longer employed with El Rio Health Center and therefore have none of the records requested in Paragraph 1 of the subpoena duces tecum.

4. I provided true and correct copies of the records requested in Paragraph 2, Exhibit A of the subpoena duces tecum (requesting the “transcript of the talk ‘Creating a Primary Care Medical Home for Transgender Youth’”). These records provided were made, kept, or compiled by me or persons acting under my control, in the ordinary course of business at or near the time of the act, condition or event described therein.

5. I swear under the penalty of perjury the foregoing is true and correct to the best of my knowledge and belief.

By: 

Date: 7-6-2021

EXHIBIT B

AO 88B (Rev. 12/13) Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action

UNITED STATES DISTRICT COURT

for the
District of Arizona

D.H. and John Doe)	
<i>Plaintiff</i>)	
v.)	Civil Action No. 4:20-cv-00335-SHR
Jami Snyder, Director of AHCCCS)	
<i>Defendant</i>)	

**SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS
OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION**

To: El Rio Health

(Name of person to whom this subpoena is directed)

Production: YOU ARE COMMANDED to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection, copying, testing, or sampling of the material: See attached Exhibit A.

Place: BurnsBarton PLC 2201 East Camelback, Ste. 360 Phoenix, AZ 85016	Date and Time: <p style="text-align: center;">05/21/2021 9:00 am</p>
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Inspection of Premises: YOU ARE COMMANDED to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place:	Date and Time:
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The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 05/06/2021

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* Jami Snyder,
Director of AHCCCS, who issues or requests this subpoena, are:
Kathryn King, BurnsBarton, 2201 E. Camelback, Ste. 360 Phoenix, AZ 85016 kate@burnsbarton.com 602-753-4500

Notice to the person who issues or requests this subpoena

A notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. 4:20-cv-00335-SHR

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____
on *(date)* _____.

I served the subpoena by delivering a copy to the named person as follows: _____

_____ on *(date)* _____ ; or

I returned the subpoena unexecuted because: _____

_____.

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ _____.

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)**(c) Place of Compliance.**

(1) *For a Trial, Hearing, or Deposition.* A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
 - (i) is a party or a party's officer; or
 - (ii) is commanded to attend a trial and would not incur substantial expense.

(2) *For Other Discovery.* A subpoena may command:

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) *Avoiding Undue Burden or Expense; Sanctions.* A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) *Command to Produce Materials or Permit Inspection.*

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) *Quashing or Modifying a Subpoena.*

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

- (i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) *Producing Documents or Electronically Stored Information.* These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) *Claiming Privilege or Protection.*

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) *Contempt.*

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

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EXHIBIT A
ITEMS TO BE PRODUCED

1. All documents or other evidence that support the assertion of Dr. Andrew Cronyn that of the transgender patients at El Rio Health Center “ranging in age from four to twenty-one” years old, “more than forty of those patients are transgender boys who receive their health insurance coverage through AHCCCS and need male chest reconstruction surgery.” In providing this information, please use identifiers that will allow for further discovery related to each individual while still protecting patient privacy. (*See Declaration of Andrew Cronyn, M.D., attached as Exhibit 1, Paragraph 10*).
2. The transcript of the talk “Creating a Primary Care Medical Home for Transgender Youth,” which Dr. Andrew Cronyn has given at “multiple conferences.” (*See Exhibit 1, Paragraph 12*).

EXHIBIT 1

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2 Andrew J. Chinsky (*pro hac vice* forthcoming)
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11 *Counsel for Plaintiffs and the Class*

12 UNITED STATES DISTRICT COURT
13 DISTRICT OF ARIZONA

14 D.H., by and through his mother, Janice)
15 Hennessy-Waller; and John Doe, by his)
16 guardian and next friend, Susan Doe, on)
17 behalf of themselves and all others)
18 similarly situated,)
19 Plaintiffs,)
20 vs.)
21 Jami Snyder, Director of the Arizona)
22 Health Care Cost Containment System,)
23 in her official capacity,)
24 Defendant.)

No.
**DECLARATION OF DR.
ANDREW CRONYN IN
SUPPORT OF PLAINTIFFS'
MOTION FOR PRELIMINARY
INJUNCTION**

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1 I, Dr. Andrew Cronyn, hereby declare as follows:

- 2 1. I am a pediatrician based in Tucson, Arizona.
- 3 2. I am licensed to practice medicine in Arizona.
- 4 3. I specialize in providing health care to transgender and LGBTQ youth.
- 5 4. As detailed herein, I provide this declaration in support of Plaintiff D.H.'s request
- 6 that AHCCCS cover D.H.'s male chest reconstruction surgery as a medically necessary
- 7 procedure to treat his gender dysphoria.

8 5. My professional opinion of D.H. is based on my in-person assessments of his health

9 as well as a review of prior medical records, including notes from his previous primary care

10 doctor, Dr. Arianna Foster, who had been seeing him since 2016, and his pediatric

11 endocrinologist, Dr. Cindy Chin, who had been seeing him since 2017.

12 Education and Experience

- 13 6. I have a medical degree from the Albert Einstein College of Medicine.
- 14 7. I completed my residency in pediatric medicine at Montefiore Medical Center in
- 15 Bronx, New York in 2000.
- 16 8. Since completing my residency, I have worked as a pediatrician in Missouri and
- 17 Arizona.
- 18 9. In November 2014, after practicing in Missouri for several years, I returned to work
- 19 at El Rio Health Center in Tucson, Arizona. Shortly after my return, I started treating my first
- 20 transgender patient, a child whose pediatrician refused to continue seeing him because he is
- 21 transgender. I reached out to nationally recognized experts in the field to learn everything I could
- 22 about providing care to transgender youth. The number of transgender patients I saw grew
- 23 exponentially from there.

24 10. Around February 2015, I became co-leader of transgender health care within El

25 Rio. Over the past five years, the number of transgender patients at El Rio has grown significantly

26 and now treats approximately 250 transgender youth per year ranging in age from four to twenty-

27 one. Of those patients, more than forty of those patients are transgender boys who receive their

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1 health insurance coverage through AHCCCS and need male chest reconstruction surgery. El Rio
2 has a team of pediatricians, including myself, nurses, behavioral health professionals, and
3 pharmacists who treat transgender patients.

4 11. I personally treat approximately 120 transgender youth per year. I provide general
5 pediatric care in an affirming clinical setting and—when medically indicated—prescribe
6 treatments to alleviate their gender dysphoria. The treatments I prescribe for a patient are based
7 on my assessment of the patient and their unique needs and medical history, in consultation with
8 the prevailing standards of care, and cover the range of clinically indicated treatments for this
9 population. For patients who have not yet started puberty, I have prescribed and supported them
10 through social transition, including drafting letters to assist them in correcting their identity
11 documents. For those who have started puberty, I have prescribed puberty-delaying medications
12 and hormone-replacement therapy and monitored their progress on those treatments. Finally,
13 when medically necessary, I have also referred patients for gender-confirming surgeries, such as
14 male chest reconstruction surgery.

15 12. I have given lectures on health care for transgender youth on several occasions,
16 including a talk on “Creating a Primary Care Medical Home for Transgender Youth,” which I’ve
17 been invited to give at multiple conferences.

18 Assessment of D.H.

19 13. I began treating D.H. for gender dysphoria in January 2020. D.H. was assigned
20 female at birth but has identified as male for many years. When I first started treating D.H., he
21 was already living as male and had been prescribed hormone-replacement therapy (*i.e.*
22 testosterone).

23 14. I provide D.H. both primary care and specialty care. D.H.’s primary care needs
24 include general well-child care as well as ongoing care for his existing asthma. The specialty care
25 I provide D.H. is focused on treating his gender dysphoria and includes management of his social
26 transition and hormone-replacement therapy.

1 15. D.H. reports using a binder to minimize the contour of his chest since around
2 twelve-years old.

3 16. I am concerned about the consequences of his continued binding on his physical
4 health. D.H. started developing asthma in October 2019 after a bout of bronchitis. Prior to that
5 he had never had respiratory issues. This is quite uncommon at his age.

6 17. In order to be effective, a binder must sufficiently constrict the wearer's rib cage to
7 flatten the contour of their chest. That makes it difficult for the wearer to get full, deep breaths.
8 For D.H., his prolonged and extensive use of a binder contributed to his developing asthma, a
9 chronic lung condition. The deterioration of his lung capacity has resulted in him feeling short
10 of breath when he wakes up in the morning and requires him to use an inhaler when engaging in
11 increased physical activity.

12 18. Physical activity, however, is an important part of a child's development. Children
13 who don't exercise have higher rates of obesity and all the concomitant health problems. Lack of
14 exercise also contributes to mental health conditions such as depression and anxiety, conditions
15 that are already negatively affecting D.H.'s mental health.

16 19. D.H. also reports issues with back pain as a result of extended use of a binder. This
17 is a very common complaint among my patients who wear binders regularly. Although I have
18 many patients who complain about back pain, the pain caused by extended binder use is distinct
19 and located in the mid-back region. D.H. currently does stretches to relieve the pain, engages in
20 limited exercise and, when necessary, decreases binder wearing, but these steps are not sufficient
21 to alleviate the pain and other symptoms he experiences as result of wearing the binder.

22 20. Not wearing the binder, however, is not an effective solution as that will have
23 multiple negative effects on D.H.'s health. D.H. indicated that he doesn't leave his home when
24 he is not wearing his binder. The few times he recalls attempting to go outside without a binder,
25 his gender dysphoria causes severe anxiety, such that he must return home to get the binder and
26 put it on before he can leave again.

1 21. Although D.H. binds less when at home to avoid wearing the binder longer than
2 the recommended eight hours per day, he reports slouching to minimize the appearance of his
3 chest contour.

4 22. His mother has also informed me that when D.H. isn't binding, he is much moodier
5 and angrier than usual. This dates back as far as middle school, when he would miss school
6 rather than not bind. This is consistent with the experience of other patients I treat for gender
7 dysphoria.

8 23. It is my opinion that it is medically necessary for D.H. to receive chest
9 reconstructive surgery to treat his dysphoria. D.H.'s physical health will continue to decline if he
10 is not able to obtain this surgery immediately. For example, D.H.'s continued use of a binder
11 will exacerbate the symptoms of his asthma, especially if D.H. gets bronchitis or a respiratory
12 infection such as pneumonia, all of which could result in further chronic damage to his lungs.

13 24. In addition, without chest reconstruction surgery, his back pain will very likely
14 worsen. D.H. currently avoids taking any medication for the pain, but that might end up changing
15 in the future if his back pain continues to increase. Approximately fifty percent of the transgender
16 boys treated at El Rio report back pain as a result of persistent binder wearing that is significant
17 enough to warrant referrals to a physical therapist or an orthopedic surgeon. I am concerned that
18 D.H. will join that group of patients if does not undergo male chest reconstruction surgery soon.

19 25. Although he has not yet reported skin irritation with wearing the binder, that is
20 common complication in the transgender boys seen at El Rio, especially with extended, years-
21 long binder use. Most skin complications associated with extended binder use are treatable,
22 however, those conditions can have significant effects on a patient's daily life. For transgender
23 boys, skin conditions are both physically uncomfortable and exacerbate their gender dysphoria,
24 which can have many cascading effects, including poorer mental health, inability to focus in
25 school, among others. Given D.H.'s binder use, especially when wearing his binder for days at
26 time, it is highly likely that he will develop skin conditions, if he does not receive chest
27 reconstruction surgery.

1 26. In my opinion, D.H. requires male chest reconstruction surgery to treat his gender
2 dysphoria and prevent the numerous physical health consequences outlined above that will result
3 from his continued use of a binder. Given that D.H. has been wearing a binder for about five
4 years, which is much longer than I would recommend any patient continue binding, and it is not
5 sufficiently alleviating his gender dysphoria, his need for male chest reconstruction surgery is
6 urgent.

7 I declare under penalty of perjury pursuant to the laws of the State of Arizona that the
8 foregoing is true and correct.

9 Executed this 3rd th day of August, 2020 at Tucson, Arizona.

10
11 
12 _____
13 Andrew Cronyn, M.D.

EXHIBIT C

1 Anthony J. Fernandez (Bar No. 018342)
2 Pierce Sargeant (Bar No. 027457)
3 **QUINTAIROS, PRIETO, WOOD & BOYER, P.A.**
4 8800 East Raintree Drive, Suite 100
5 Scottsdale, Arizona 85260
6 Telephone: (602) 954-5605
7 Facsimile: (602) 954-5606
8 afernandez@qpwblaw.com
9 pierce.sargeant@qpwblaw.com
10 *Attorneys for Responding Party*

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

13 D.H. and John Doe,

14 Plaintiff,

15 v.

16 Jami Snyder, Director of AHCCCS

17 Defendants.

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

**RESPONDING PARTY EL RIO
HEALTH'S RESPONSE TO
SUBPOENA TO PRODUCE
DOCUMENTS, INFORMATION,
OR OBJECTS OR TO PERMIT
INSPECTION OF PREMISES IN A
CIVIL ACTION**

18 Responding party El Rio Health ("El Rio"), through undersigned counsel, hereby
19 responds to Serving Party, Burns Barton PLC, attorneys for Jami Snyder, Director of
20 AHCCCS, as follows:

21 **Response:** In response to Subpoena to Produce Documents, Information, or Objects
22 or to Permit Inspection of Premises in a Civil Action, U.S. District Court, District of
23 Arizona, Civil Action No. 4:20-cv-00335-SHR, served on El Rio Health on or about May 6,
24 2020, responding party El Rio Health ("El Rio") responds Items to be Produced #1 that it
25 is unable identify responsive documents or other evidence that support the assertion by Dr.
26 Andrew Cronyn that El Rio Health Center has transgender patients, identified as
27 transgender boys, ranging from four (4) to twenty-one (21) years of age, who receive health
28 insurance coverage through the Arizona Health Care Cost Containment System (AHCCCS)
and are in need of male chest reconstruction surgery. The request lacks any searchable
identifiers to filter El Rio's record database related to patients receiving care and is overly

1 compound. El Rio patient records are stored using specific patient identifiers which were
2 not provided at the time of service of the subpoena or at any time subsequent thereto. El
3 Rio record identifiers include: full legal name, date of birth, address, and social security
4 number. Use of multiple identifiers can assist with identification and verification. El Rio
5 refers serving party to Leah Sanchez, Health Information Management Manager and
6 Privacy Officer, for information related to any certification of responsive documents by the
7 custodian of record. El Rio provides this response in an attempt to provide a full and
8 complete response, to the fullest extent possible, however reserves the right to supplement
9 the response in the future to correct or amend any information contained herein. El Rio
10 does expressly object and assert protection pursuant to privilege and confidentiality of
11 medical information protected under state and federal Medical Right to Privacy laws,
12 including but not limited to Health Information Portability and Accountability Act
13 (HIPAA), and all corresponding privileges and confidentiality pertaining to patient's medical
14 chart, medical history, doctor-patient communications, and individual patient treatment and
15 examination, and asserts all protections afforded to patient's related to the right to notice,
16 object, and due process under the law.

17
18 With regard to Items to be Produced #2, the request has been identified as satisfied
19 by the serving party and thus no response is required.

20
21 RESPECTFULLY SUBMITTED this 4th day of June, 2021.

22 **QUINTAIROS, PRIETO, WOOD & BOYER, P.A.**

23
24 By: /s/ Pierce Sargeant
25 Anthony J. Fernandez
26 Pierce Sargeant
27 *Attorneys for Responding Party*
28

EXHIBIT D

From: William Pierce Sargeant pierce.sargeant@qpwbllaw.com 
Subject: RE: El Rio Health - Subpoena in D.H. and John Doe v. Jami Snyder, Director of AHCCCS
Date: July 1, 2021 at 4:49 PM
To: Kate King kate@burnsbarton.com
Cc: David T Barton david@burnsbarton.com, Michael Guillian michael@burnsbarton.com

Kate,

First, I have to disagree with your characterization of our conversation to the extent it assumes that the information requested is searchable. I will additionally note that the request, among other things, asks for subjective information which is not contained in patient records, namely requests for records related to patients with a “need” for male chest reconstruction surgery.

With regard to 45 CFR 164.512, I identify a couple of issues. The first option has issues as El Rio is not a party and thus the Court has limited jurisdiction over El Rio. As to notice, the request ignores the undertaking that would be required, the burdens being placed upon a non-party, and the potential liability El Rio would be assuming related to providing notice.

Lastly, as to a protective order I want to first note that that the section relates to permitted disclosures, stating that a provider may disclose, but does not obligate the provider to disclose the information, and assumes that the request can return a result. In addition, while a protective order is a floor, De-Identification and the Minimum Necessary Rules would still apply. The purpose for the Privacy Rule is to prevent disclosure of information when there is a reasonable basis to believe that the information can be used to identify the individual; based on your request as written, the number would be a sufficiently limited as to be statistically relevant and potentially possible to be combined with other information to identify the individual.

Thus, as to your first proposal, while a protective order would be required before any disclosure, the response remains no responsive documents for failure to identify any searchable data point in that the request lacks asks to identify those with a “need” which is subjective and not contained in any record. The request as written has too many variables to be identified as the request would require a subjective evaluations and opinions be expressed by any treating provider, a provider who may not have provided any treatment to said patient. As such the request is vague and subject to multiple interpretations.

And as to the second, it first suffers from the same flaw as outlined about the first proposal but adds the additional burdens identified in the preceding paragraphs related to notice.

Thus, I reiterate what I stated during our call, El Rio has responded to the subpoena and thus your comments about filing a motion to compel are groundless. El Rio maintains that it has and will continue to fulfill any legal obligation however none exists as it relates to the request being made and therefore responds with the same, no responsive documents.

If you want to discuss further, please let me know your availability tomorrow or next week.



William Pierce Sargeant | Attorney at Law

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Mississippi ♦ Nevada ♦ New Jersey ♦ New York ♦ Oklahoma ♦ Tennessee ♦ Texas ♦ USVI

From: Kate King <kate@burnsbarton.com>

Sent: Thursday, July 1, 2021 2:44 PM

To: William Pierce Sargeant <pierce.sargeant@qpwbllaw.com>

Cc: David T Barton <david@burnsbarton.com>; Michael Guillian
<michael@burnsbarton.com>

Subject: El Rio Health - Subpoena in D.H. and John Doe v. Jami Snyder, Director of AHCCCS

Hi Pierce,

I am following up from our conversation last Friday. Thank you for your time on Friday.

El Rio's subpoena response stated the "request lacks any searchable identifiers to filter El Rio's record database related to patients receiving care" (e.g., legal name, DOB, address, or SSN). When we spoke on the phone, you indicated that - although Dr. Cronyn is no longer with El Rio - there may be other providers at El Rio who are aware of the "more than forty" patients Dr. Cronyn references in his subpoena (who are 4 to 21 years old and are "transgender boys who receive their health insurance coverage through AHCCCS and need male chest reconstruction surgery").

I note that 45 CFR 164.512(e)(1) allows a covered entity to disclose protected health information without the written authorization of the individual in the course of a judicial proceeding under the following circumstances:

- In response to an order of the court (45 CFR 164.512(e)(1)(i)); or
- In response to a subpoena if the "covered entity receives satisfactory assurance . . . from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v) of this section" (45 CFR 164.512(e)(1)(ii)(B)); or
- If the covered entity makes reasonable efforts to provide notice to the individual. (45 CFR 164.512(e)(1)(vi)).

I am writing to suggest two options:

1. If my client requests a qualified protective order from the US District Court that complies with 45 CFR 164.512, would El Rio disclose responsive records known by its currently-employed providers who treat transgender patients?
2. Alternatively, would El Rio disclose responsive records known by its currently-employed providers who treat transgender patients after El Rio "makes reasonable efforts to provide notice to the individual" under 45 CFR 164.512(e)(1)(vi)?

I am offering these suggestions in an effort to work through these issues with El Rio (in an effort to avoid having to file a motion to enforce the subpoena). Please let me know if these options are amenable to El Rio.

Thank you,

Kate

Kathryn Hackett King
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O 602.753.4510 IC 602.614.9819

BurnsBarton

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