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13 **UNITED STATES DISTRICT COURT**
14 **FOR THE DISTRICT OF ARIZONA**

15 HELEN ROE, a minor, by and through her
parent and next friend MEGAN ROE;
16 JAMES POE, a minor, by and through his
parent and next friend LAURA POE; AND
17 CARL VOE, a minor, by and through his
parent and next friend RACHEL VOE,
18

19 Plaintiffs,

20 v.

21 DON HERRINGTON, in his official
capacity as Interim State Registrar of Vital
Records and Interim Director of the Arizona
22 Department of Health Services,
23

24 Defendant.
25
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27
28

Case No. 4:20-cv-484-JAS

**PLAINTIFFS’ REPLY IN
FURTHER SUPPORT OF MOTION
TO COMPEL RESPONSES TO
INTERROGATORIES AND
PRODUCTION OF DOCUMENTS**

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1 Defendant's opposition confirms that the Court's intervention is required to get
2 discovery in this case back on track.

3 *First*, Defendant's refusal to respond to discovery requests about the governmental
4 justifications for A.R.S. § 36-337(A)(3) should not be permitted. A central question in a case
5 brought under the Equal Protection and Due Process Clauses is whether there is an adequate
6 governmental justification for the challenged statute. If Defendant intends to proffer a
7 justification for A.R.S. § 36-337(A)(3) in this case, then Plaintiffs are entitled to know and
8 obtain discovery about that justification. Plaintiffs' discovery requests do not require
9 Defendant to concede the surgical requirement is discriminatory or disclose "legal arguments"
10 or privileged information. Nor are Plaintiffs seeking this information from "the wrong
11 person." Defendant is defending the constitutionality of A.R.S. § 36-337(A)(3) in this case
12 and has simply been asked to respond to interrogatories about his defenses.

13 *Second*, Defendant's objection to an interrogatory seeking the identification of all
14 policies about "corrections" to an Arizona birth certificate is meritless. These policies are
15 directly relevant to Plaintiffs' equal protection claim because they show that transgender
16 people have inferior avenues to change the sex marker on their birth certificates than non-
17 transgender people. Moreover, by creating a less burdensome means of changing the sex
18 marker on a birth certificate for non-transgender people, these policies will demonstrate that
19 there is not an exceedingly persuasive justification for the surgical requirement. Defendant's
20 claim that granting Plaintiffs' motion will open "a Pandora's Box of immaterial information"
21 cannot be squared with the text of Interrogatory No. 1, which is straightforward and narrow.

22 *Third*, Defendant's ever-changing positions on ESI search parameters have frustrated
23 prior attempts to negotiate those parameters over a period of six months. Nevertheless, given
24 that Defendant's opposition suggests that there may be a path forward, Plaintiffs are willing to
25 continue negotiating, but still believe the Court's intervention is necessary to ensure a timely
26 and efficient resolution of this issue.

1 **I. PLAINTIFFS’ MOTION TO COMPEL SHOULD BE GRANTED**

2 **A. Defendant Should Be Required to Provide Complete and Accurate Responses**
3 **to Discovery Requests about the Governmental Justification for A.R.S. § 36-337(A)(3)**

4 Defendant’s arguments for withholding or delaying his responses to Plaintiffs’
5 interrogatories and related requests for documents are meritless.¹

6 Defendant first argues that he cannot offer a governmental justification for A.R.S. § 36-
7 337(A)(3) without admitting that the statute is discriminatory. (Opp. at 2–3.) That is
8 nonsensical. The requests seek information about the government’s rationale (or lack thereof)
9 for enforcing A.R.S. § 36-337(A)(3). Providing such a rationale would not require Defendant
10 to admit that the statute discriminates. Governments routinely defend against constitutional
11 challenges by arguing both that no discrimination has occurred and that, even if it did, any
12 such discrimination is supported by an adequate governmental interest. Undoubtedly
13 Defendant intends to do exactly that, and Plaintiffs are entitled to discovery on both those
14 contentions. And even in cases challenging the constitutionality of a statute that does not
15 affect a fundamental right or draw distinctions between people based on a protected
16 characteristic, courts require governmental defendants to offer a rational basis for the
17 challenged statute. *See, e.g., Martinez v. Goddard*, 521 F. Supp. 2d 1002, 1009 (D. Ariz. 2007)
18 (agreeing with governmental defendant’s position that challenged licensing scheme serves a
19 legitimate state purpose). In short, information about the Defendant’s purported justifications
20 for A.R.S. § 36-337(A)(3) is discoverable because it is plainly relevant to Plaintiffs’ claims
21 under the Equal Protection and Due Process Clauses, and Defendant’s affirmative defenses.
22 *See, e.g., Hecox v. Little*, 479 F. Supp. 3d 930, 976 (D. Idaho 2020) (“The Court: (1) looks to
23 the Defendants to justify the [statute]; (2) must consider the [statute’s] actual purposes; (3)
24 need not accept hypothetical, *post hoc* justifications for the [statute]; and (4) must decide

25 _____
26 ¹ Despite repeatedly rebuffing Plaintiffs’ attempts to obtain responses to Interrogatory Nos. 9–
27 16, including opposing this motion, Defendant’s brief appears to concede that “no
28 governmental interest and/or justification exists for ‘denying’ transgender individuals who
have not undergone a sex change operation the opportunity to amend their birth certificates
under Subsection (A)(3).” (Opp. at 3.)

1 whether Defendants’ proffered justifications overcome the injury and indignity inflicted on
2 Plaintiffs....”).

3 Defendant also seems to suggest that the Court need not analyze the governmental
4 justification for A.R.S. § 36-337(A)(3) if Defendant can prevail on the threshold question of
5 whether the statute discriminates based on a protected characteristic. (Opp. at 2–3.) That is a
6 misstatement of the law. As noted above, governmental entities must provide *some*
7 justification for any law, regulation, or other government action that is alleged to have violated
8 the Constitution. In any event, the Court has already concluded that the statute *does* treat
9 transgender people differently from non-transgender people, and therefore Defendant’s
10 justifications must satisfy heightened scrutiny. (See Dkt. 83 at 9 (holding that heightened
11 scrutiny applies because “any logical reading of the statute and regulation reflects that it
12 applies nearly exclusively to transgender people”). Given that ruling, Defendant must offer
13 some governmental interest sufficient to uphold the statute. More generally, Defendant may
14 not refuse to respond to discovery requests about a plainly relevant issue simply because he
15 does not believe that issue ultimately will be dispositive.

16 Defendant next argues that he cannot offer a governmental justification for A.R.S. § 36-
17 337(A)(3) because neither he nor ADHS was responsible for its enactment.² (Opp. at 3.)
18 There is no support for Defendant’s claim. The interrogatory plainly asks for *Defendant’s*
19 justification for *enforcing* the surgical requirement in A.R.S. § 36-337(A)(3), not that of the
20 legislature (unless Defendant seeks to rely on that legislative history as evidence of the
21 governmental justifications in this case). In seeking to lay blame on the Arizona legislature,
22 Defendant suggests that he fundamentally misunderstands his role in this litigation. “When a
23 plaintiff is seeking a declaration that a particular state statute is unconstitutional, it is those
24 government officials who by virtue of their offices have some connection with the enforcement
25 of the challenged law that should be sued.” *Jones v. Becerra*, 2018 WL 6177253, at *4 (C.D.
26

27 ² In making this argument, Defendant elides ADHS’s promulgation of A.A.C. R9-19-208(O),
28 a regulation that mirrors the language of A.R.S. § 36-337(A)(3) and the constitutionality of
which is also at issue in this case.

1 Cal. Feb. 7, 2018) (cleaned up). The task of defending the challenged statute—which includes
 2 litigating the question of whether the government has an adequate justification for the statute—
 3 falls to those government officials. *See, e.g., Majors v. Jeanes*, 48 F. Supp. 3d 1310 (D. Ariz.
 4 2014) (ADHS and other state agency heads litigate governmental justifications for Arizona’s
 5 ban on same-sex marriage); *Arizona Dream Act Coalition v. Brewer*, 81 F. Supp. 3d 795
 6 (Arizona governor and director of Arizona Department of Transportation litigate governmental
 7 justifications for Arizona’s policy of denying driver’s licenses to Deferred Action for
 8 Childhood Arrivals (DACA) program recipients).³ If Defendant has no justification for A.R.S.
 9 § 36-337(A)(3), as he suggests in his opposition (*see* Opp. at 3), Plaintiffs are entitled to know
 10 that. *See, e.g., F.V. v. Barron*, 286 F. Supp. 3d 1131, 1134 (D. Idaho 2018) (finding policy of
 11 denying applications by transgender people to change the sex listed on their birth certificates
 12 unconstitutional and observing that defendant state officers “*admit* [the policy] is
 13 unconstitutional”).

14 Defendant also argues that Plaintiffs’ discovery requests impermissibly seek “legal
 15 argument.” (Opp. at 3–4.) Defendant is wrong. Plaintiffs are seeking information and
 16 documents about Defendant’s position on a central issue in this case. Based on his answer,
 17 Defendant intends to argue that there is an important rationale that justifies the statute’s
 18 discrimination and invasion of fundamental liberties; that rationale must be disclosed so that
 19 Plaintiffs can conduct discovery and prepare to litigate whether the proffered justifications
 20 pass constitutional muster. Because these discovery requests do not seek anything beyond
 21 factual information, it is appropriate under both Rule 26 and Rule 33. *See V5 Techs. v. Switch,*
 22 *Ltd.*, 334 F.R.D. 297, 305 (D. Nev. 2019) (contention interrogatories “can be targeted at
 23 obtaining notice of an opponent’s litigation position and the basis for that position”); *Lexington*
 24 *Ins. Co. v. Commonwealth Ins. Co.*, 1999 WL 33292943, at *7 (N.D. Cal. Sept. 17, 1999)
 25 (purpose of contention interrogatories is “to narrow the issues that will be addressed at trial
 26

27 ³ Defendant also argues that the Plaintiffs have not asked the relevant question, which is
 28 whether Defendant’s *classification* serves important governmental objectives. But that is
 precisely what Plaintiffs have asked in Interrogatory Nos. 9–16 and Document Request Nos.
 14–17.

1 and to enable the propounding party to determine the proof required to rebut the respondent’s
2 position”).⁴

3 Finally, Defendant suggests that the “positions” he intends to assert in this case are
4 protected by the attorney-client privilege or work product doctrine. (Opp. at 10.) They are
5 not. Neither the at-issue interrogatories nor requests for production seek communications (or
6 the contents of communications) protected by the attorney-client privilege. Moreover, the
7 work product doctrine cannot be used to justify a party’s refusal to answer contention
8 interrogatories. *See In re Convergent Techs. Sec. Litig.*, 108 F.R.D. 328, 335 n.20 (explaining
9 that the information sought by contention interrogatories is not “work product” under Rule 26,
10 which protects “documents and tangible things”); *Hernandez v. Best Buy Co., Inc.*, 2014 WL
11 5454505, at *6 (S.D. Cal. Oct. 27, 2014) (“Contrary to defendant’s argument, answering
12 contention interrogatories does not encroach upon an attorney’s work product.”) (cleaned up).
13 Here, Plaintiffs have not asked for defense counsel’s mental impressions or strategy. Rather,
14 the requests ask Defendant to state the justifications he intends to rely upon in his defense of
15 this case, identify facts that support those justifications, and produce relevant documents that
16 will allow the parties to litigate a key issue in this case.

17 For these reasons and those set forth in Plaintiffs’ opening brief, the Court should order
18 Defendant to respond completely and accurately to Interrogatory Nos. 9–16 and produce non-
19 privileged documents responsive to Document Request Nos. 14–17.

20 **B. Defendant Should Be Required to Provide A Complete and Accurate**
21 **Response to Interrogatory No. 1**

22 Defendant continues to object to Interrogatory No. 1, which is a straightforward and
23 narrow request that Defendant list and describe all ADHS and Bureau of Vital Records (BVR)
24 policies relating to a change or request to change to the sex marker listed on a birth record.
25 (Dkt. 121-1 at 1.) The thrust of Defendant’s objection is that Plaintiffs are challenging the

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28 ⁴ The district court’s decision in *Kendrick v. Sullivan*, 125 F.R.D. 1 (D.D.C. 1989), does not suggest otherwise. In fact, the court in that case compelled Plaintiffs to answer several contention interrogatories. *Id.* at 4 (compelling answer to interrogatory asking to identify the portions of the policy plaintiffs believe to be unlawful and describe the alleged illegality).

1 constitutionality of A.R.S. § 36-337(A)(3), which relates to birth certificate “amendments,” so
2 Plaintiffs should only be permitted to obtain discovery about policies relating to birth
3 certificate “amendments.” Based on that reasoning, Defendant maintains that Plaintiffs cannot
4 obtain discovery about ADHS or BVR policies relating to birth certificate “corrections,” which
5 are authorized by a different part of the statute. (Opp. at 4–5.)

6 There is no basis for Defendant’s strained relevance argument. Under Rule 26,
7 Plaintiffs “may obtain discovery regarding any nonprivileged matter that is relevant to any
8 party’s claim or defense and proportional to the needs of the case.” *See* Fed. R. Civ. P.
9 26(b)(1). Policies about birth certificate “corrections” are relevant in two ways. *First*, these
10 policies are evidence that transgender individuals seeking to change the sex listed on their birth
11 certificates are treated differently than non-transgender individuals, who can “correct” the sex
12 marker on their birth certificates—a far less burdensome process and one that does not require
13 proof of a “sex change operation.” *Second*, the very existence of a “corrections” policy that
14 allows a sex marker to be changed without proof of surgery, but rather with a simple doctor’s
15 letter, would undermine Defendant’s asserted justifications for the surgical requirement.
16 Simply put, Defendant’s own policies seem to show that ADHS has no conceivable
17 justification for the surgical requirement—let alone an exceedingly persuasive one. Plaintiffs
18 are therefore entitled to ask Defendant to identify and describe his policies that are relevant to
19 both “amendments” and “corrections.”

20 Defendant argues that Plaintiffs do not seek to change the sex marker on their birth
21 certificates based on “a typographical error,” and that an “amendment” and a “correction” are
22 “legally distinct.” (Opp. at 4–5.⁵) But neither response has any bearing on the discoverability
23 of Defendant’s policies about “corrections.” Plaintiffs do not seek information about
24 Defendant’s correction policy because they believe that “amendment” and “correction” have
25

26 ⁵ Moreover, the opposition overlooks that Plaintiffs allege in the amended complaint that they
27 seek to “*correct*[] their identity documents” and that Defendant’s enforcement of A.R.S. § 36-
28 337(A)(3) is unconstitutional because it “bar[s] Plaintiffs from *correcting* or amending their
birth certificates to be consistent with their gender identity.” (Dkt. 47 ¶¶ 6, 19–21 (emphasis
added); *see also id.* ¶¶ 52, 56, 69, 111.)

1 the same meaning under Arizona law. Rather, Plaintiffs seek information about Defendant’s
 2 “corrections” policy because it illustrates that transgender individuals are treated differently
 3 than non-transgender people and would negate Defendant’s justification for enforcing the
 4 surgical requirement.⁶

5 Finally, it is difficult to imagine that compelling Defendant to respond to this
 6 interrogatory will open “Pandora’s box,” as Defendant warns. (Opp. at 6.) Interrogatory No. 1
 7 merely asks Defendant to list and describe all ADHS and BVR policies relating to a correction
 8 or request to correct to the sex marker listed on a birth record. That is not an onerous request
 9 and otherwise falls squarely within the scope of Rule 26. The Court should order Defendant
 10 to fully respond to Interrogatory No. 1.

11 **C. Defendant’s Shifting Positions on ESI Collection and Review Necessitate**
 12 **Court Intervention**

13 Defendant’s opposition to Plaintiffs’ motion to compel regarding ESI search parameters
 14 encapsulates what has plagued the parties’ protracted negotiations: each time it appears the
 15 parties have made progress—or reached a clear impasse—Defendant moves the goalposts.
 16 While Plaintiffs understood that this issue was at an impasse when they filed this motion, with
 17 the new positions articulated in Defendant’s opposition, it once again appears that the parties
 18 may be close to an agreement on the scope of Defendant’s ESI search. Plaintiffs remain
 19 willing to return to those negotiations in good faith, but ask the Court to grant their motion to
 20 compel, as to Interrogatories Nos. 1, 9–16 and Requests for Production Nos. 14–17. Further,
 21 Plaintiffs request that the Court order Defendant to provide the following information within
 22 seven (7) days of the order: (1) a list of the justifications for the surgical requirement in (A)(3)
 23 they intend to offer in this litigation; (2) a “hit report” showing the number of documents that
 24

25 ⁶ The email produced by ADHS in response to a public records request, (*see* Proksel Decl. Ex.
 26 5 (Dkt. 121-2 at 100–01)), shows that there are at least some circumstances under which a
 27 letter from a doctor will suffice to “correct” the sex marker on a birth certificate. If the state
 28 will accept a physician’s letter to “correct” a birth certificate, Plaintiffs are entitled to explore
 that policy and its justifications, as well as why Defendant cannot accept a physician’s letter
 to “amend” the birth certificate of a transgender person.

1 hit on all of Plaintiffs’ proposed terms and custodians, broken out by search term and
2 custodian, (*see* Dkt. 121-2 at 103); (3) a report detailing how many of those documents are
3 unique and have not previously been produced in response to Lizette Trujillo’s public records
4 request; and (4) a written counterproposal with a list of custodians and search terms. Those
5 conditions will guard against further delay and ensure that Plaintiffs have the information
6 needed to meaningfully engage in those negotiations.

7 Requiring Defendant to provide that information is consistent with the rules governing
8 discovery. “If the movant meets its burden of establishing relevancy, ‘the party opposing
9 discovery has the burden to demonstrate that discovery should not be allowed due to burden
10 or cost and must explain and support its objections with competent evidence.’” *Andrich v.*
11 *Kostas*, 2021 WL 3410908, at *4 (D. Ariz. July 2, 2021) (quoting *Doe v. Swift Transp. Co.,*
12 *Inc.*, 2015 WL 4307800, at *1 (D. Ariz. July 15, 2015)). That requires Defendant to provide
13 information about his purported burden, which is far more than limited data about a few search
14 terms and a subset of the proposed custodians that he has thus far provided. Each of the terms
15 proposed by Plaintiffs are drawn from the language of the statute or are terms commonly
16 associated with the topic of (A)(3). Those terms are plainly relevant to Plaintiffs’ claims as
17 well as Defendant’s affirmative defenses. But despite repeated references to the “burden” that
18 Plaintiffs’ proposed ESI terms and custodians would apparently impose, Defendant has not,
19 by his own admission, fully investigated that issue. (Opp. at 12 (noting Defendant “will need
20 to analyze the breadth and burden of the application of these search terms to these 17
21 custodians” and reserving yet more objections.) Yet, Defendant also baldly (and incorrectly)
22 claims that Plaintiffs’ search terms amount to a “fishing expedition,” while at the same time
23 denying the information Plaintiffs requested to help sharpen their proposed search terms, if
24 possible.

25 The information requested above would place the parties on equal footing and provide
26 the information needed to intelligently discuss Defendant’s concerns and, where needed, reach
27 mutually agreed upon solutions. For example, Plaintiffs have consistently expressed a
28 willingness to revisit their proposed ESI terms, but knowing what Defendant will assert as a

1 justification for the surgical requirement in (A)(3) is essential information that will help guide
2 and focus those negotiations.

3 The parties have wasted far too much time negotiating ESI search parameters in this
4 case, and unless the Court intervenes, there is no guarantee that these negotiations will not
5 drag out for many more months. Thus, Plaintiffs request that the Court order Defendant to
6 produce the information and documents outlined above on the specified timeline.

7 **II. CONCLUSION**

8 For the reasons set forth above and in their opening brief, Plaintiffs respectfully request
9 that the Court grant their motion.

10
11 Respectfully submitted,

12 Dated: June 15, 2022

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