

1 Patrick Gunn (*Pro Hac Vice*)
COOLEY LLP
2 101 California Street, 5th Floor
San Francisco, California 94111-5800
3 Telephone: (415) 693-2070
Facsimile: (415) 693-2222
4 Email: pgunn@cooley.com

5 Mary O’Grady (011434)
Colin Proksel (034133)
6 Payslie Bowman (035418)
OSBORN MALEDON, P.A.
7 2929 North Central Avenue, 21st Floor
Phoenix, Arizona 85012-2793
8 Telephone: (602) 640-9000
Facsimile: (602) 640-9050
9 Email: mogrady@omlaw.com
Email: cproksel@omlaw.com
10 Email: pbowman@omlaw.com

11 *Attorneys for Plaintiffs and Proposed Class*
Additional counsel listed on following page
12

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 though 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
22 Arizona Department of Health Services,
23

24 Defendant.
25
26
27
28

Case No. 4:20-cv-00484-JAS

**PLAINTIFFS’ STATUS REPORT ON
OUTSTANDING DISCOVERY DISPUTES**

1 Asaf Orr (*Pro Hac Vice*)
2 NATIONAL CENTER FOR LESBIAN RIGHTS
3 870 Market Street, Suite 370
4 San Francisco, California 94102
5 Telephone: (415) 392-6257
6 Facsimile: (415) 392-8442
7 Email: aorr@nclrights.org

8 Barrett J. Anderson (*Pro Hac Vice*)
9 COOLEY LLP
10 4401 Eastgate Mall
11 San Diego, California 92121-1909
12 Telephone: (858) 550-6000
13 Facsimile: (858) 550-6420
14 Email: banderson@cooley.com

15 Christopher L. Martin, Jr. (*Pro Hac Vice*)
16 COOLEY LLP
17 55 Hudson Yards
18 New York, New York 10001-2157
19 Telephone: (212) 479-6000
20 Facsimile: (212) 479-6275
21 Email: cmartin@cooley.com

22 *Attorneys for Plaintiffs and Proposed Class*

23
24
25
26
27
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1 Plaintiffs Helen Roe, James Poe, and Carl Voe (“Plaintiffs”) by and through their
2 respective counsel, hereby state as follows:

3 1. Following the July 13, 2022 hearing, counsel for Plaintiffs contacted counsel
4 for Defendant Don Herrington (together with Plaintiffs, the “Parties”) to continue
5 discussions concerning the Parties’ discovery disputes. The Parties conferred by telephone
6 on August 1, 2022, after which discussions continued by email (contained in **Exhibit A**
7 submitted with this report). Defendant’s counsel initially agreed to submit a joint status
8 report but, after Plaintiffs provided a first draft, his counsel indicated he would submit his
9 own separate report. (Ex. A at 2, 6.)

10 2. Plaintiffs regret to inform the Court that the Parties were unable to resolve
11 any of the outstanding disputes. This status report addresses those disputes in the following
12 three categories: (i) the search parameters for Defendant’s electronically stored information
13 (“ESI”) raised in Plaintiffs’ motion to compel, (ii) Defendant’s new position that he is not
14 obligated to produce *any* ESI, and (iii) Plaintiffs’ social media, medical, and school records.

15 ***Dispute over search parameters raised in Plaintiffs’ motion to compel***

16 3. As directed by the Court, Plaintiffs’ efforts chiefly focused on the possibility
17 of resolving the ESI search parameters issues arising from Plaintiffs’ motion to compel.
18 (See Dkt. 121 at 11–12.) On the evening of August 11—nearly one month after the July 13
19 hearing and only four days before the Court’s deadline for this status report—Defendant
20 finally provided the detailed hit-count information for the proposed ESI search parameters
21 described in Plaintiffs’ motion to compel. (Ex. A at 3.)

22 4. Defendant continues to assert that the volume of material returned by the ESI
23 search parameters—just over 18,000 unique documents—is disproportionate to the needs
24 of the case. Plaintiffs disagree that this volume is necessarily disproportionate because it is
25 not possible to assess proportionality using only the *number* of documents, given that a
26 number has no bearing on the *relevance* of the documents. Here, the ESI search parameters
27 are reasonably targeted at finding documents and information related to core issues in this
28 case; namely, Defendant’s justifications for A.R.S. § 36-337(A)(3) and related regulations,

1 as well as his implementation and enforcement of those provisions to test the genuineness
2 of Defendant's purported justifications. It is possible that Defendant simply possesses
3 18,000 documents relevant to this case, in which case he is obligated to produce those that
4 are responsive and nonprivileged. (*See* Dkt. 121 at 11–12.)

5 5. Setting aside those objections, Plaintiffs continued their efforts to address
6 Defendant's stated burden concerns. On August 12, less than twenty-four hours after
7 Defendant's counsel sent the hit-count information, Plaintiffs' counsel offered a proposal
8 to resolve the pending dispute regarding ESI discovery. (Ex. A at 2–3.) As the Court is
9 aware from the briefing and arguments at the July 13 hearing, the Parties have now agreed
10 on much of the ESI search parameters, including custodians, date ranges, and all but six
11 search terms. (*See, e.g.*, Dkt. 127 at 11; Dkt. 150 ("July 13 Hearing Tr.") at 7:14–8:19.)
12 Building on those areas of agreement, Plaintiffs made the following two-part proposal:

13 a) **Undisputed search terms:** Defendant will review and produce all
14 responsive, nonprivileged ESI associated with each of the search terms
15 already agreed to by the Parties.

16 b) **Disputed search terms:** Defendant will segregate and maintain all
17 responsive ESI associated with the disputed search terms pending the Court's
18 decision on Plaintiffs' motion to compel. If the Court orders Defendant to
19 disclose his governmental justification(s) for implementing and enforcing
20 A.R.S. § 36-337(A)(3) and related regulations, the Parties will meet and
21 confer within seven (7) days of that disclosure to discuss additional terms or
22 limits that could be applied to the results of the disputed search terms to
23 further target and narrow the volume of documents. Based on the results from
24 any added terms and limits, the Parties will negotiate in good faith regarding
25 the review and production of that ESI, reserving all arguments and objections
26 regarding the segregated portion of the ESI in the event further dispute arises.

27 6. Defendant declined the proposal. Defendant's response did not address
28 specifically the part of the proposal regarding the undisputed search terms. For the disputed

1 search terms, Defendant stated that he prefers to wait for the Court's decision on Plaintiffs'
2 motion to compel his justification(s) for implementing and enforcing the challenged
3 provisions before he would resume negotiations. (Ex. A at 1.) More alarmingly, Defendant
4 has now confirmed that he is renegeing on his agreement to produce *any* ESI in this case, a
5 brand-new position that he did not raise in opposition to Plaintiffs' motion to compel, which
6 Plaintiffs discuss in more detail in the section below. (*See* Paragraphs 8–11, *infra*.)

7 7. Plaintiffs therefore request that the Court order the following in its
8 forthcoming decision on Plaintiffs' motion to compel:

9 a) Within 30 days of the Court's order, Defendant shall review and produce all
10 responsive, nonprivileged ESI associated with each of the search terms
11 already agreed to by the Parties.

12 b) Within 14 days of the Court's order, Defendant shall disclose his
13 justification(s) for implementing and enforcing A.R.S. § 36-337(A)(3) and
14 related regulations and, within 30 days of the Court's order, the Parties shall
15 file new status reports explaining their further negotiations regarding the
16 disputed ESI search terms.

17 ***Defendant's new position that he is not obligated to produce any ESI***

18 8. During the August 1 meet-and-confer call, Defendant's counsel informed
19 Plaintiffs' counsel for the first time that Defendant intends to withhold *all* ESI regardless
20 of how the Court resolves the dispute regarding ESI search terms. Defendant's new position
21 is apparently that *all* ESI is irrelevant because Plaintiffs are making a facial challenge (as
22 opposed to an as-applied challenge, or both simultaneously) to A.R.S. § 36-337(A)(3) and
23 related regulations.

24 9. Plaintiffs object to Defendant's belated attempt to categorically withhold all
25 ESI on a specious and previously unasserted basis. (*See* Ex. A at 4–6, 7–8, 11.) The
26 discovery requests at issue in Plaintiffs' motion to compel, and the corresponding ESI
27 search parameters derived from those requests, seek documents and information related to
28 Defendant's implementation and enforcement of A.R.S. § 36-337(A)(3) and related

1 regulations. (*See* Dkt. 121 at 6–9.) Such material is plainly relevant to the claims and
2 defenses in the case challenging the constitutionality of those provisions, regardless of
3 whether it involves a facial or as-applied challenge. For example, Defendant alleged the
4 affirmative defense that he has a “legitimate government purpose” for enforcing the
5 challenged provisions. (Dkt. 102 at 23, ¶ 12.) Defendant is obligated to produce
6 responsive, nonprivileged material regardless of the format in which he maintains it.
7 Defendant’s new relevance argument is also untimely because Defendant could have raised
8 it during the Parties’ meet and confers, briefing, and arguments on Plaintiffs’ motion to
9 compel, but did not.

10 10. While maintaining those objections, Plaintiffs nevertheless attempted to
11 resolve Defendant’s new argument without the need to bring it to the Court. As referenced
12 in the Parties’ email correspondence, Plaintiffs requested Defendant provide any authority
13 he had to support this new position. (Ex. A at 11.) Defendant cited only two cases, neither
14 of which support his belated effort to withhold all ESI. (Ex. A at 9.) Rather, the cases
15 support the opposite conclusion: that documents and information about Defendant’s
16 implementation and enforcement of a challenged law is central to a constitutional case.
17 Plaintiffs identified to Defendant that his cases are inapt, (Ex. A at 8), and Defendant even
18 conceded as much, (Ex. at 6 (observing that Plaintiffs “pick[ed] apart [the] authority”)).
19 Defendant nevertheless confirms that he does not intend to produce *any* ESI. (Ex. A at 1.)

20 11. Plaintiffs believe that the Court may simply resolve this issue in its
21 forthcoming ruling on Plaintiffs’ motion to compel. Specifically, the Court need only order
22 Defendant to apply the ESI search parameters and produce any responsive, nonprivileged
23 ESI resulting from those parameters (as Plaintiffs outline above in Paragraph 7).
24 Alternatively, if the Court believes that Defendant’s new argument cannot be resolved
25 without further briefing, Plaintiffs are prepared to submit a supplemental response and
26 respectfully request that the Court set an expeditious supplemental briefing schedule to
27 resolve this new roadblock promptly and thereby avoid further delays to the case.
28

1 ***Plaintiffs’ social media, medical, and school records***

2 12. During the meet and confer and email discussions, counsel for Plaintiffs also
3 attempted to resolve outstanding issues arising from Defendant’s motion to compel,
4 including his requests for additional social media records from Plaintiffs’ mothers, as well
5 as Plaintiffs’ medical and school records. Following the July 13 hearing, counsel for
6 Plaintiffs asked Defendant’s counsel if Defendant would withdraw his request for these
7 records given his acknowledgment that these documents are not relevant in the context of a
8 facial challenge. (Ex. A at 11; *see also* Dkt. 140 at 7 n.7.) Defendant declined to withdraw
9 his requests, arguing that these additional records are still relevant to Plaintiffs’ standing.
10 (Ex. A at 3, 10.) Plaintiffs maintain that the Court already determined that Plaintiffs have
11 standing—including injury-in-fact—in its order denying Defendant’s motion to dismiss.
12 (Dkt. 83 at 15.) Plaintiffs also maintain that these documents are not proportional to the
13 needs of the case. Despite Plaintiffs’ repeated objections on relevance grounds, Plaintiffs
14 undertook substantial and expensive efforts to collect, review, and produce documents from
15 each of these categories to keep the case moving forward. The information Plaintiffs have
16 already produced is more than sufficient to satisfy any alleged need by Defendant to
17 evaluate Plaintiffs’ standing. Therefore, Plaintiffs continue to assert that Defendant has not
18 shown that production of these additional records is appropriate given the burden it would
19 take to conduct a second effort to collect, review, and produce them. (Dkt. 138 at 12–17;
20 July 13 Hearing Tr. at 40:20–48:8.)

21 13. With respect to Defendant’s request for an order that Plaintiffs’ mothers sign
22 releases so that Defendant may subpoena Plaintiffs’ schools for records, Plaintiffs’ counsel
23 provided Defendant’s counsel a more detailed explanation of the efforts by Plaintiffs’
24 mothers to request those records as promised during the July 13 hearing. That additional
25 information included approximately when the requests were submitted, which schools
26 indicated they did not have records, approximately when the schools that did have records
27 provided them to Plaintiffs’ mothers, and the form in which the schools provided those
28 records. (Ex. A at 7.) Plaintiffs also confirmed again that they had produced to Defendant

1 all documents Plaintiffs received from the schools that had records. Defendant's counsel
2 claims this explanation is insufficient. Plaintiffs' counsel requested what more information
3 Defendant requires to resolve this dispute, (Ex. A at 5–6), but Defendant has not explained
4 what more information he would want and has declined to withdraw his request for an order
5 that Plaintiffs' mothers sign releases, (Ex. A at 3). Plaintiffs maintain that subpoenas to
6 Plaintiffs' schools are both unnecessary (because Defendant already has all of Plaintiffs'
7 school records and those documents are not relevant to Plaintiffs' claims) and dangerous
8 (because subpoenas would risk exposing Plaintiffs' role in this case and their transgender
9 status to school staff for no reasonable purpose). (July 13 Hearing Tr. 43:22–44:4.)

10 14. With respect to Defendant's request for medical records, counsel for Plaintiffs
11 produced to Defendant a letter from Carl Voe's doctor attesting that he is undergoing
12 clinically appropriate treatment for his gender dysphoria. Defendant now has letters for
13 each of the three Plaintiffs' physicians attesting that they are receiving clinically appropriate
14 treatment for their gender dysphoria, which is more than sufficient to satisfy any purpose
15 that Defendant has identified for seeking Plaintiffs' medical records. (Dkt. 122 at 15;
16 July 13 Hearing Tr. at 36:20–37:4.) Defendant has nevertheless declined to withdraw his
17 request for those additional medical records. (Ex. A at 10.)

18 ***Conclusion***

19 15. Given the above, Plaintiffs believe that the Parties are still at an impasse on
20 all issues and would welcome a ruling from the Court on the Parties' motions to compel,
21 which will resolve many of the above disputes, guide the Parties' attempts to resolve any
22 remaining issues, start the timeline for Defendant to file his long-awaited opposition to
23 Plaintiffs' motion for class certification (which has been pending for almost a year now,
24 (Dkt. 89)), and otherwise get the case moving forward.

25 Dated: August 15, 2022

OSBORN MALEDON, P.A.

27 /s/ Colin M. Proksel
28 Mary O'Grady (011434)
Colin Proksel (034133)

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Payslie Bowman (035418)
OSBORN MALEDON, P.A.
2929 North Central Avenue, 21st Floor
Phoenix, Arizona 85012-2793
Telephone: (602) 640-9000
Facsimile: (602) 640-9050
Email: mogrady@omlaw.com
Email: cproksel@omlaw.com
Email: pbowman@omlaw.com

Asaf Orr (*Pro Hac Vice*)
NATIONAL CENTER FOR LESBIAN
RIGHTS
870 Market Street, Suite 370
San Francisco, California 94102
Telephone: (415) 392-6257
Facsimile: (415) 392-8442
Email: aorr@nclrights.org

Patrick Gunn (*Pro Hac Vice*)
COOLEY LLP
101 California Street, 5th Floor
San Francisco, California 94111-5800
Telephone: (415) 693-2070
Facsimile: (415) 693-2222
Email: pgunn@cooley.com

Barrett J. Anderson (*Pro Hac Vice*)
COOLEY LLP
4401 Eastgate Mall
San Diego, California 92121-1909
Telephone: (858) 550-6000
Facsimile: (858) 550-6420
Email: banderson@cooley.com

Christopher L. Martin, Jr. (*Pro Hac Vice*)
COOLEY LLP
55 Hudson Yards
New York, New York 10001-2157
Telephone: (212) 479-6000
Facsimile: (212) 479-6275
Email: cmartin@cooley.com

Attorneys for Plaintiffs and Proposed Class

EXHIBIT A

From: Dana Keene <dkeene@strucklove.com>
Sent: Monday, August 15, 2022 4:39 PM
To: Martin, Christopher L.; Anderson, Barrett; Dan Struck; Nick Acedo; Amanda Gramlich; Andrea Bartles; Brenna Bull; Patriaic Cracchiolo LaMagna; Aubrey Joy Corcoran
Cc: Asaf Orr; Erin Savoia; 'Colin Proksel'; Payslie Bowman; Gunn, Patrick; Taylor, Jessica L.; Ainbinder, Stephanie
Subject: RE: Roe v. Herrington - Clarifying Defendant's meet-and-confer statements

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Chris,

While we appreciate Plaintiffs' willingness to attempt to narrow the proposed search terms, we must decline Plaintiffs' proposal.

First, we do not believe that any ESI discovery is relevant to Plaintiffs' facial challenge.

Nonetheless, we believe that Plaintiffs' proposal is simply a quick fix. If Defendant is required to disclose his justifications then the parties are essentially back at square one. We will not agree to the at-issue search phrases as is, and we cannot adequately evaluate this proposal without knowing the "additional terms or limits to be applied to the results of the terms-and-connectors searches." Do Plaintiffs have an idea as to how they would propose to narrow and/or limit the results of the terms-and-connectors searches?

At this point, Defendant's counterproposal would be to simply remove the at-issue search phrases entirely. But, as stated above, this counterproposal is contingent on the Court finding that ESI discovery is relevant at all.

Dana

From: Martin, Christopher L. <cmartin@cooley.com>
Sent: Friday, August 12, 2022 4:13 PM
To: Dana Keene <dkeene@strucklove.com>; Anderson, Barrett <banderson@cooley.com>; Dan Struck <DStruck@strucklove.com>; Nick Acedo <NAcedo@strucklove.com>; Amanda Gramlich <AGramlich@strucklove.com>; Andrea Bartles <abartles@strucklove.com>; Brenna Bull <bbull@strucklove.com>; Patriaic Cracchiolo LaMagna <patricia.lamagna@azag.gov>; Aubrey Joy Corcoran <aubreyjoy.corcoran@azag.gov>
Cc: Asaf Orr <AOrr@nclrights.org>; Erin Savoia <ESavoia@nclrights.org>; 'Colin Proksel' <cproksel@omlaw.com>; Payslie Bowman <pbowman@omlaw.com>; Gunn, Patrick <pgunn@cooley.com>; Taylor, Jessica L. <jtaylor@cooley.com>; Ainbinder, Stephanie <sainbinder@cooley.com>
Subject: RE: Roe v. Herrington - Clarifying Defendant's meet-and-confer statements

Dana,

Thank you for letting us know that Defendant does not wish to submit a joint report. We will restyle our report to make clear that it is coming only from Plaintiffs.

We would appreciate a response to our latest ESI proposal, which was contained in the draft joint report we circulated this afternoon. Can you let us know by Monday at 2 PM whether that proposal is acceptable to Defendant or whether you have a counter? It would be helpful to know if the latest proposal addresses your burden concern and the issue is now simply whether any ESI should be produced in this case. Knowing that may assist the Court in narrowing the issues further.

Thanks,

Chris

Christopher L. Martin, Jr.

Cooley LLP
+1 212 479 6484 office
+1 917 318 4624 mobile

From: Dana Keene <dkeene@strucklove.com>

Sent: Friday, August 12, 2022 6:57 PM

To: Martin, Christopher L. <cmartin@cooley.com>; Anderson, Barrett <banderson@cooley.com>; Dan Struck <DStruck@strucklove.com>; Nick Acedo <NAcedo@strucklove.com>; Amanda Gramlich <AGramlich@strucklove.com>; Andrea Bartles <abartles@strucklove.com>; Brenna Bull <bbull@strucklove.com>; Patriaic Cracchiolo LaMagna <patricia.lamagna@azag.gov>; Aubrey Joy Corcoran <aubreyjoy.corcoran@azag.gov>

Cc: Asaf Orr <AOr@nclrights.org>; Erin Savoia <ESavoia@nclrights.org>; 'Colin Proksel' <cproksel@omlaw.com>; Payslie Bowman <pbowman@omlaw.com>; Gunn, Patrick <pgunn@cooley.com>; Taylor, Jessica L. <jtaylor@cooley.com>; Ainbinder, Stephanie <sainbinder@cooley.com>

Subject: RE: Roe v. Herrington - Clarifying Defendant's meet-and-confer statements

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Chris,

We have decided to submit a separate report outlining Defendant's position pursuant to the Court's Minute Entry Order (Dkt. 148).

Have a nice weekend.

Dana

From: Martin, Christopher L. <cmartin@cooley.com>

Sent: Friday, August 12, 2022 2:52 PM

To: Dana Keene <dkeene@strucklove.com>; Anderson, Barrett <banderson@cooley.com>; Dan Struck <DStruck@strucklove.com>; Nick Acedo <NAcedo@strucklove.com>; Amanda Gramlich <AGramlich@strucklove.com>; Andrea Bartles <abartles@strucklove.com>; Brenna Bull <bbull@strucklove.com>; Patriaic Cracchiolo LaMagna <patricia.lamagna@azag.gov>; Aubrey Joy Corcoran <aubreyjoy.corcoran@azag.gov>

Cc: Asaf Orr <AOr@nclrights.org>; Erin Savoia <ESavoia@nclrights.org>; 'Colin Proksel' <cproksel@omlaw.com>; Payslie Bowman <pbowman@omlaw.com>; Gunn, Patrick <pgunn@cooley.com>; Taylor, Jessica L. <jtaylor@cooley.com>; Ainbinder, Stephanie <sainbinder@cooley.com>

Subject: RE: Roe v. Herrington - Clarifying Defendant's meet-and-confer statements

Dana,

Attached is a draft of the joint status report that is due to the Court on Monday. As you will see, we have included a proposal to resolve the parties' dispute over ESI search parameters. We believe that this proposal addresses your proportionality and burden concerns about Plaintiffs' search parameters and allows discovery in this case to move forward. Please let us know if you would like to discuss the proposal either this afternoon or on Monday.

We look forward to receiving any additions, edits, or clarifications to the joint status report from Defendant by 2 PM PT on Monday so that we will have time to review and propose any additional language or edits before the end of the day.

Finally, I want to be clear that we have not questioned and do not question the diligence or competence of the Litigation Support Group at the Attorney General's Office. We have only asked why we are once again receiving a hit report right before we are due

to address the Court on ESI issues. We are trying to work cooperatively with you to resolve the parties' dispute over ESI, which has been ongoing for months now, and the timeline on which you are providing analytics to us is making that much harder than it could be.

Have a nice weekend.

Chris

Christopher L. Martin, Jr.

Cooley LLP
+1 212 479 6484 office
+1 917 318 4624 mobile

From: Dana Keene <dkeene@strucklove.com>

Sent: Thursday, August 11, 2022 10:30 PM

To: Anderson, Barrett <banderson@cooley.com>; Dan Struck <DStruck@strucklove.com>; Nick Acedo <NAcedo@strucklove.com>; Amanda Gramlich <AGramlich@strucklove.com>; Andrea Bartles <abartles@strucklove.com>; Brenna Bull <bbull@strucklove.com>; Patricia Cracchiolo LaMagna <patricia.lamagna@azag.gov>; Aubrey Joy Corcoran <aubreyjoy.corcoran@azag.gov>

Cc: Asaf Orr <AORr@nclrights.org>; Erin Savoia <ESavoia@nclrights.org>; 'Colin Proksel' <cproksel@omlaw.com>; Payslie Bowman <pbowman@omlaw.com>; Gunn, Patrick <pgunn@cooley.com>; Martin, Christopher L. <cmartin@cooley.com>; Taylor, Jessica L. <jtaylor@cooley.com>; Ainbinder, Stephanie <sainbinder@cooley.com>

Subject: RE: Roe v. Herrington - Clarifying Defendant's meet-and-confer statements

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Barrett,

We disagree with Plaintiffs' position on relevance and waiver for the reasons already stated. Aside from arguing that Defendant's "justifications" are relevant, Plaintiffs have not shown how *any* discovery is relevant to their facial challenge, let alone how ESI discovery is proportionate to their claims. In addition, Defendant became aware that Plaintiffs abandoned their as-applied challenge at the oral argument and could not have possibly asserted this particular relevance argument in response to Plaintiffs' motion to compel. Defendant has not waived any argument on this issue, particularly as to relevance.

With respect to Plaintiffs' school records, you are correct the parties are at an impasse. Plaintiffs' "explanations" as to their efforts to obtain these records continue to be non-specific and vague. It is unclear why Plaintiffs simply won't execute releases. These records are relevant to standing and the 70+ paragraphs of emotional harm allegations contained in Plaintiffs' operative complaint for the reasons already stated.

With respect to ESI, the Litigation Support Group at the Attorney General's Office supports over 600 attorneys and takes each project in the priority that it is received. It is a small group that has worked diligently and meticulously to unzip, process, deduplicate, analyze, and upload the voluminous amount of data received from ADHS. We have been in communication with individuals from this group almost daily, and they have continued to apprise us of the various timeframes it has taken them to complete processing and analytic tasks. To suggest that this team has not been diligent, or that it's software is in some way incompetent is utterly baseless. In our experience, ESI collection, processing, and production takes time, and the time it has taken here is by no means unusual. In addition, let us remind you that the Court did not order the parties to complete ESI discovery by August 15th. It ordered the parties to file a joint report explaining their various positions on ESI issues raised at the hearing.

With that being said and without waiving Defendant's relevance objections, we have attached three excel spreadsheets received from the Litigation Support Group. The first, "Disc_Proc_byCustodian", shows the breakdown of documents by custodian. The total number of items after processing/deduplication is 49,556, and the total number of families containing these items is 15,489. The second spreadsheet, "KWM_2" shows a "hit count" by search term. The "Total Hits" are the amount of times any search term appeared in any document, regardless of whether it appeared multiple times in the same document. The

“Documents” and “Docs with Family” tab show the number of distinct documents with one or more search terms (a total of 18,138) and distinct documents with their families (a total of 43,174), respectively.

The third spreadsheet, “Processing_Comprehensive_Discovery_All” contains data size and estimated page numbers. Page number is denoted in column D. You will see that the total page number for all documents is approximately 740,000. It is impossible to determine the total number of pages in excel spreadsheet attachments, and therefore this total figure accounts for only one page of each excel spreadsheet. It is estimated that there are at least 100,000+ pages of excel spreadsheets, which puts the total number of pages at well over 800,000.

You will see, however, that there is a discrepancy between the 49,556 documents that were pulled, and the 43,174 documents with their families that contain applicable search terms. For whatever reason, 6,382 documents did not contain any search term at all. The Litigation Support Group believes this is due to ADHS’s imprecise collection tool, but is analyzing further. If those 6,382 documents are removed, it is estimated that the total number of pages will be approximately 436,202, although this still does not account for excel spreadsheet pages. We can assume the estimated total number of pages is in the 500,000 range.

Regardless of whether the 6,382 documents are removed or not, this amount of data is overbroad, unduly burdensome, and not proportionate to the needs of this case.

If you look at the second spreadsheet, “KWM_2,” you will see that lines 17, 18, and 19 make up over 50% of all data hits. Defendant maintains his position that these terms are so broad, general, and common that they likely appear in thousands of documents that have absolutely no relevance to this case. These terms will continue to hit on an exorbitant amount of data if Plaintiffs do not narrow them significantly or remove them entirely. Until Plaintiffs do, the parties will continue to be at an impasse with respect to ESI discovery.

Dana

From: Anderson, Barrett <banderson@cooley.com>

Sent: Wednesday, August 10, 2022 10:32 PM

To: Dana Keene <dkeene@strucklove.com>; Dan Struck <DStruck@strucklove.com>; Nick Acedo <NAcedo@strucklove.com>; Amanda Gramlich <AGramlich@strucklove.com>; Andrea Bartles <abartles@strucklove.com>; Brenna Bull <bbull@strucklove.com>; Patriaic Cracchiolo LaMagna <patricia.lamagna@azag.gov>; Aubrey Joy Corcoran <aubreyjoy.corcoran@azag.gov>

Cc: Asaf Orr <AORr@nclrights.org>; Erin Savoia <ESavoia@nclrights.org>; 'Colin Proksel' <cproksel@omlaw.com>; Payslie Bowman <pbowman@omlaw.com>; Gunn, Patrick <pgunn@cooley.com>; Martin, Christopher L. <cmartin@cooley.com>; Taylor, Jessica L. <jtaylor@cooley.com>; Ainbinder, Stephanie <sainbinder@cooley.com>

Subject: RE: Roe v. Herrington - Clarifying Defendant's meet-and-confer statements

Dana:

Thank you for the update regarding the detailed hit reports. We will review them as soon as possible after receiving them and let Defendant know whether those reports give us the data we need to propose further limits on the ESI search criteria.

We must, however, note the unwarranted delay. Defendant has had nearly a month since the hearing on the motions to compel and has still failed to provide the hit-count information at issue. We would expect any standard litigation support software has the ability to run a hit-count report quickly—within minutes or (at the very most) a day—especially given the number of terms at issue and over the amount of documents that you’ve indicated Defendant possesses. Could you let us know what e-discovery platform your Litigation Support Group is using and explain why it has taken this long? Even assuming what you send us “by week’s end” is detailed hit-count information of the sort that we can use, the delay in providing it has effectively prevented the parties from addressing the ESI parameters issue before filing the joint status report, likely causing further unnecessary delay. Every day that passes is another day that our clients, and transgender people across Arizona, live in fear and suffer from bullying, harassment, and discrimination because they cannot change their birth certificates via the process available to non-transgender Arizonans.

As for the timeline for exchanging drafts of the joint report, Defendant's proposal is acceptable. We will send Defendant our draft by mid-day on Friday and look forward to receiving Defendant's draft by 2 PM Pacific on Monday, August 15.

Now to the substantive points made in your email. At the threshold, your response ignores a critical point: for the purpose of Plaintiffs' discovery requests, it *does not matter* whether this is a facial or as-applied challenge, because Defendant is required to provide his justifications regardless. *See, e.g., United States v. Virginia*, 518 U.S. 515, 533 (1996) ("The State must show at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." (cleaned up)). We take your silence on this point as an admission, which should resolve this dispute.

In any event, the novel standard for discovery that you construct is incorrect. Plaintiffs do not bear any sort of burden to demonstrate that Defendant's ESI is relevant to Defendant's purported justifications or legitimate governmental interests. Rather, all Plaintiffs are required to show is that the information we seek—regardless of how Defendant may maintain that information—is relevant, a burden we have certainly met. For example, our position that Defendant's justifications are relevant in this case could not be more clear. It is located in numerous instances of prior correspondence and our briefs, which you may find at Dkt. 121 at 6–9 and Dkt. 135 at 3–6. Thus, ESI relevant to Defendant's justifications is plainly discoverable under the broad standard of relevance in Rule 26. Your request for *more specific* authority that expressly refutes Defendant's new position is not well taken. The bare-minimum requirement that a defendant provide his justifications for enforcing a discriminatory law is so obvious that defendants in such cases do not ordinarily dispute it. The authority we have cited to you and the Court, and Rule 26 generally, are all the authority that is necessary. And, as you noted, Plaintiffs "pick[ed] apart" the cases cited by Defendant and thus Defendant has no basis for this new argument.

In any event, Defendant has waived his belated argument about the ESI because Plaintiffs moved to compel application of the ESI parameters. The parties discussed that argument and ESI discovery generally for weeks, then fully briefed and argued the ESI issue to the Court. Defendant never once argued (as he could have) that ESI discovery was unwarranted on relevance grounds. To the contrary, Defendant expressly stated "Director Herrington will agree to apply all search terms aside from 'sex,' 'surgical,' 'surgery,' 'operation,' '(A)(3),' and '(A)(4).'" (Dkt. 127 at 11.) Plaintiffs have been attempting to narrow those remaining terms, but (as noted above) Defendant has not provided the hit-count reports or other critical information to allow us to make that attempt. Thus, if the Court grants Plaintiffs' motion on ESI parameters, Defendant will be obligated to apply them and produce responsive documents, as he has stated he would. An attempt by Defendant to withhold all ESI material on the basis of this new, unsupported argument—months after the dispute over ESI crystallized for the Court—would be untimely. *See, e.g., Cramton v. Grabbagreen Franchising LLC*, 2020 WL 5880153, at *2 (D. Ariz. Oct. 2, 2020) (noting court denied prior motion because "Defendants are belatedly attempting to raise an argument they could have raised—but, for whatever reason, chose not to raise—in their summary judgment motion").

Turning next to the school, medical, and social media records that were the subject of Defendant's motion to compel. The source of Defendant's professed misunderstanding of the scope and nature of Plaintiffs' claims or the timing of Plaintiffs' statements that their claims constitute a facial challenge are irrelevant. It is now unmistakably clear that—as the Court recognized in its order denying Defendant's motion to dismiss—Plaintiffs bring a facial challenge to the surgical requirement in A.R.S. § 36-337(A)(3) and its implementing regulation. Defendant appears to be dodging the equally clear logical consequence: that Plaintiffs were correct that their school, medical, and social media records are irrelevant and not subject to discovery, as Defendant implicitly conceded in footnote 7 of his reply brief. (Dkt. 140 at 7 n.7.) Defendant's suggestion that these documents are relevant to Plaintiffs' standing argument is incorrect. As we have noted before, Court determined that Plaintiffs' complaint alleges a redressable injury, which necessarily incorporates a finding of injury-in-fact. Plaintiffs have yet to receive a satisfactory answer about why Defendant maintains his request for these documents. We await your response on that point so that we can provide the Court an informed assessment of the parties' respective positions on that issue in the joint status report.

With respect to the school records, in particular, Defendant's ever-changing position is exasperating. Plaintiffs strongly disagree that allowing Defendant to directly subpoena each Plaintiff's school records would not expose each of them to potential, if not actual, harm. That is why we have in good faith attempted to work with you to resolve this issue and, as a courtesy, offered to provide more information about Plaintiffs' Mothers' efforts to collect those records. Defendant indicated repeatedly at the

hearing and in correspondence that if he received such an explanation that he would be inclined to drop his request for those records—records that, and we cannot stress this enough, Defendant *already possesses in their entirety* because Plaintiffs *already produced all of them*. We have now provided that additional information regarding the Plaintiffs' Mothers' efforts to collect the school records. Defendant rejected it without explanation and without stating what more information might resolve this issue. We take Defendant's refusal to meaningfully engage as a sign that the parties remain at an impasse, and will so inform the court.

Finally, we note your comment that "this is not personal" does not specify what the "this" is. Our request for reciprocal courtesy refers to your repeated attacks on our integrity and motives, which is personal to us. We again ask, respectfully, that you refrain from baseless slights in the future.

Sincerely,
Barrett

From: Dana Keene <dkeene@strucklove.com>

Sent: Thursday, August 11, 2022 1:23 AM

To: Anderson, Barrett <banderson@cooley.com>; Dan Struck <DStruck@strucklove.com>; Nick Acedo <NAcedo@strucklove.com>; Amanda Gramlich <AGramlich@strucklove.com>; Andrea Bartles <abartles@strucklove.com>; Brenna Bull <bbull@strucklove.com>; Patriaia Cracchiolo LaMagna <patricia.lamagna@azag.gov>; Aubrey Joy Corcoran <aubreyjoy.corcoran@azag.gov>

Cc: Asaf Orr <AORr@nclrights.org>; Erin Savoia <ESavoia@nclrights.org>; 'Colin Proksel' <cproksel@omlaw.com>; Payslie Bowman <pbowman@omlaw.com>; Gunn, Patrick <pgunn@cooley.com>; Martin, Christopher L. <cmartin@cooley.com>; Taylor, Jessica L. <jtaylor@cooley.com>; Ainbinder, Stephanie <sainbinder@cooley.com>

Subject: RE: Roe v. Herrington - Clarifying Defendant's meet-and-confer statements

[External]

Barrett,

This is not personal. Plaintiffs have taken a position regarding their as-applied/ facial challenge that has no basis in fact. Please indicate where in Plaintiffs' January 10, correspondence it "clearly" states that Plaintiffs were withdrawing their as-applied challenge and were only asserting a facial challenge.

We again ask that Plaintiffs provide us with authority to support their position that ESI discovery is relevant to their *facial* challenge. It is interesting that Plaintiffs were able to pick apart our authority, but have not proffered any of their own. Please also provide us with authority that supports Plaintiffs' position that Defendant has "waived" his relevance argument. We are not familiar with this purported waiver.

With respect to the revised hit count report, we believe the Litigation Support Group will have completed the hit count report in the next day or so. We will provide you with the report by week's end.

Defendant is not withdrawing his request for school records, and we still wish to send releases to Plaintiffs' schools to obtain their records. We will ensure that these releases do not include any information as to the name or nature of this case. Sending releases is not unduly burdensome, and will in no way subject Plaintiffs to embarrassment and/or harassment.

With respect to the joint status report, if Plaintiffs are sending us their portion by "mid-day" on Friday, then Defendant will provide his portion by 2 p.m. PST on Monday 8/15. That should allow Plaintiffs more than enough time to prepare this joint report for filing.

Dana

From: Anderson, Barrett <banderson@cooley.com>

Sent: Monday, August 8, 2022 6:08 PM

To: Dana Keene <dkeene@strucklove.com>; Dan Struck <DStruck@strucklove.com>; Nick Acedo <NAcedo@strucklove.com>; Amanda Gramlich <AGramlich@strucklove.com>; Andrea Bartles <abartles@strucklove.com>; Brenna Bull <bbull@strucklove.com>; Patriaic Cracchiolo LaMagna <patricia.lamagna@azag.gov>; Aubrey Joy Corcoran <aubreyjoy.corcoran@azag.gov>

Cc: Asaf Orr <AORr@nclrights.org>; Erin Savoia <ESavoia@nclrights.org>; 'Colin Proksel' <cproksel@omlaw.com>; Payslie Bowman <pbowman@omlaw.com>; Gunn, Patrick <pgunn@cooley.com>; Martin, Christopher L. <cmartin@cooley.com>; Taylor, Jessica L. <jtaylor@cooley.com>; Ainbinder, Stephanie <sainbinder@cooley.com>

Subject: RE: Roe v. Herrington - Clarifying Defendant's meet-and-confer statements

Dana:

With respect to the school records, here are the explanations you requested:

- Megan Roe requested all school records for her daughter from [REDACTED] and [REDACTED] in late January 2022. She spoke to the Director of [REDACTED] and was informed that the school had no records for her daughter. At her request, [REDACTED] provided the requested records by email to counsel in early February 2022. Plaintiffs produced to Defendant all of those records.
- Laura Poe requested all school records for her son from [REDACTED] and [REDACTED] in late January 2022. She received copies of records from both schools in early February 2022, which she thereafter provided to counsel. Plaintiffs produced to Defendant all of those records.
- Rachel Voe requested all school records for her son from [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED] in late January 2022. She spoke with staff at [REDACTED], [REDACTED], and [REDACTED] and was informed that the schools had no records for her son. At her request, [REDACTED] provided the requested records by facsimile to counsel in late January 2022. She received copies of records from [REDACTED] in late January 2022, which she thereafter provided to counsel. Plaintiffs produced to Defendant all of the records from [REDACTED] and [REDACTED].

This should be more than adequate to resolve any outstanding issue regarding the school records. Please let us know if Defendant believes the school-records issue is now moot. Otherwise, we should inform the Court in the joint status report that Defendant will not withdraw his requests for school records, medical records, and social media.

With respect to the ESI parameters, we continue to await your more detailed report so that we can review and assess whether any more targeted terms are appropriate. Do you have an update on when you anticipate providing that hit report? As you know, we are only one week from the August 15 deadline for the joint status report set by the Court.

For preparing the joint status report, we propose to proceed how we did during the joint reports the parties filed when resolving the motion for preliminary injunction: we will draft our portion, send it to Defendant to insert his portion, you will send it back to us to add any reply, and Plaintiffs will file it. For timing, we propose to send you the draft by Friday mid-day. Could you please plan to send your response by 10 AM Pacific on Monday morning, August 15, to allow us time to prepare it for filing that afternoon?

With respect to the remainder of your email, we do not believe it is necessary to restate all of our positions and recite all of our authority showing why discovery into Defendant's justifications for enforcing A.R.S. § 337(a)(3) and its implementing regulation is relevant and discoverable, which are set forth clearly in numerous rounds of correspondence and the briefing that we have already filed. Documents and communications about how Defendant is enforcing the law and regulation at issue are beyond a doubt relevant in a lawsuit challenging Defendant's unconstitutional enforcement of that law and regulation. We are astonished that Defendant continues to suggest otherwise, especially given the extensive discussions during the parties' meet-and-confers and throughout Plaintiffs' briefing on the motions to compel.

The information that Plaintiffs have requested is relevant regardless of whether the case is a facial or as-applied challenge. Of course, we do not agree with your recollection of the history of this case and do not agree that we have been unclear that this is

a facial challenge, at least not since January 10, when we sent a letter clearly stating that it is. Defendant never once indicated any confusion on this point until now. But, we must stress, the distinction simply does not matter for purposes of the discovery that Plaintiffs seek here. Defendant is obligated to provide his justifications for enforcing the surgical requirement in the statute and regulation, and Plaintiffs are entitled to discovery on those justifications, *under either approach*. In addition, Defendant alleged as an affirmative defense that he acted with a legitimate government purpose; discovery of materials related to identifying that purpose and his enforcement of the surgical requirement (*i.e.*, whether the enforcement of the surgical requirement advances that purpose) is plainly relevant. Moreover, if Defendant believed the material that Plaintiffs have requested would be irrelevant to those justifications, he could have so argued in opposition to the motion to compel, but did not. He has thus waived any such argument.

Your new authority does not support your attempt to raise this new and belated relevance argument. The courts in those two cases addressed a quite different problem than the one at issue in this case; namely, they were concerned that lower courts might invalidate laws *before those laws had been enforced*. Neither case helps your position because both demonstrate that information about the defendant's actual enforcement of a law is central to an analysis of a facial challenge. In this case, Defendant has enforced A.R.S. § 337(a)(3) and its implementing regulation for years, as you concede, and discovery about those enforcement efforts is precisely what Plaintiffs seek. We also note that the court in *Washington State Grange* analyzed the defendant's asserted interest for enforcing the law, showing (yet again) that a defendant must put forward a justification for the challenged law or policy, and also that the standard by which such a justification is judged will differ depending on the constitutional right that law or policy allegedly burdens. These clear principles are aligned with the other authority Plaintiffs have cited both in correspondence and briefing, which we do not recount here but which establishes that Defendant must provide his justifications in this case.

Ultimately, it appears that Defendant is threatening to withhold plainly relevant material based on a new argument that is premised on authority unmistakably contrary to that new argument and that he has, in any event, waived. We strongly suggest that Defendant reconsider withholding any material based on this new argument.

Finally, Dana, we do not appreciate your repeated, baseless personal attacks on us. We have not and will not respond in kind. We know that it is easy to get upset and draft a mean-spirited email to opposing counsel, but we ask that you take a moment to consider how you address us before you hit send next time.

Sincerely,
Barrett

From: Dana Keene <dkeene@strucklove.com>

Sent: Saturday, August 6, 2022 2:31 AM

To: Anderson, Barrett <banderson@cooley.com>; Dan Struck <DStruck@strucklove.com>; Nick Acedo <NAcedo@strucklove.com>; Amanda Gramlich <AGramlich@strucklove.com>; Andrea Bartles <abartles@strucklove.com>; Brenna Bull <bbull@strucklove.com>; Patriaic Cracchiolo LaMagna <patricia.lamagna@azag.gov>; Aubrey Joy Corcoran <aubreyjoy.corcoran@azag.gov>

Cc: Asaf Orr <AORr@nclrights.org>; Erin Savoia <ESavoia@nclrights.org>; 'Colin Proksel' <cproksel@omlaw.com>; Payslie Bowman <pbowman@omlaw.com>; Gunn, Patrick <pgunn@cooley.com>; Martin, Christopher L. <cmartin@cooley.com>; Taylor, Jessica L. <jtaylor@cooley.com>; Ainbinder, Stephanie <sainbinder@cooley.com>

Subject: RE: Roe v. Herrington - Clarifying Defendant's meet-and-confer statements

[External]

Barrett,

We take issue with Plaintiffs' representations at the oral argument, the August 1st meet and confer, and in your August 2nd email, below, that they have asserted only a facial challenge to the statute since the commencement of this lawsuit, and that Defendant "now understands" that Plaintiffs are only asserting a facial challenge.

We have again reviewed Plaintiffs' Amended Complaint. Paragraph 116 of the Amended Complaint states as follows:

116. The Class satisfies the commonality requirements of Rule 23(a)(2) because there are questions of law and fact common to the Class. Pursuant to Subsection (A)(3), Defendants have acted or refused to act on grounds generally applicable to the Class. This action raises questions of law common to all members of the Class, including: (a) whether Subsection (A)(3), facially **and as applied** to members of the Class, violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution; (b) whether Subsection (A)(3), facially **and as applied** to members of the Class, violates the Substantive Due Process Right to Privacy secured by the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution; (c) whether Subsection (A)(3), facially **and as applied** to members of the Class, violates the Substantive Due Process Right to Individual Liberty and Autonomy of the Fourteenth Amendment to the U.S. Constitution; and (d) whether Subsection (A)(3), facially **and as applied** to members of the Class, violates the Substantive Due Process Right to Choose whether to undergo a particular medical treatment secured by the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. All members of the Class share at least one common question of fact: Whether the purported justification(s) for excluding transgender people who do not meet the surgical requirement for changing their birth certificate via the private administrative process created by Subsection (A)(3) are pretext(s) for impermissible discrimination?

It is therefore explicitly clear that Plaintiffs asserted *both* an as-applied and facial challenge to the relevant statute. Likewise, Plaintiffs' response to Defendant's Motion to Dismiss, and their briefing on the parties' motions to compel contain argument and analysis that can only pertain to an as-applied challenge. And, given the enormity of allegations Plaintiffs have asserted regarding each individual Plaintiff, it is by no means unreasonable to assume that the very crux of this case, as alleged, is that the relevant statute discriminates against Plaintiffs *as applied to them*.

To now claim that Plaintiffs have only asserted a facial challenge all along is patently false. To claim that Defendant was mistaken and/or misunderstood Plaintiffs' claims is disingenuous, and is, quite frankly, calculating and manipulative. As we have stated previously, we became aware that Plaintiffs were asserting a facial challenge only when Plaintiffs affirmatively abandoned their as-applied challenge at the oral argument on the motions to compel. What we "now understand" is that Plaintiffs are discarding their as-applied challenge.

Plaintiffs are correct that Defendant is now rethinking his position on ESI discovery due to Plaintiffs' abandonment of the as-applied challenge. As stated at the meet and confer, we do not believe ESI is relevant to any of Plaintiffs' claims given that they are only asserting a facial challenge, which considers whether a statute is discriminatory and/or violative in *all* applications by interpreting the statute *on its face*. See *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450–51 (2008) ("In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about hypothetical or imaginary cases.") (internal quotations omitted); see also *Sabri v. United States*, 541 U.S. 600, 609 (2004) ("Facial adjudication carries too much promise of premature interpretation of statutes on the basis of factually barebones records.") (internal quotations omitted).

When we asked Plaintiffs to explain how the ESI is relevant to their facial challenge, we were provided with reasoning only applicable to as-applied challenges. Plaintiffs, not Defendant, have the burden of showing that the discovery they seek is relevant. To that end, we requested that Plaintiffs provide us with authority to support their position that any ESI is relevant to Plaintiffs' facial challenge, and we are awaiting that authority to the extent it exists.

Plaintiffs are correct that Defendant will not produce any ESI relevant to Defendant's "justifications" unless and until the Court orders Defendant to provide those justifications. But even if the Court does order Defendant to produce justifications, Plaintiffs have still failed to offer sufficient reasoning as to how ESI from 2017 to present is relevant to the justification issue. We are sure you are aware that the first iteration of the statute at issue was passed into law in 1967. The "modern" version of the statute was promulgated in 2004. It remains unclear what Plaintiffs are looking for with respect to "justifications," or how a six-year span of ESI could contain information with respect to these justifications when the statute is essentially 55 years old. We again reiterate the fact that it is Plaintiffs' burden to prove relevance. Plaintiffs have yet to satisfy that burden. And wading through 23 GB of data to somehow uncover a "justification" does not satisfy Rule 26's proportionality test.

In any event, it appears that the parties are still at an impasse with respect to ESI. We have requested that the Litigation Support Group conduct a more thorough hit count of the data and will provide you with the results, but until Plaintiffs provide us with authority supporting their position that this ESI is relevant to their facial challenge, we do not see how it is.

Defendant is not withdrawing his requests for school records, medical records, or social media records as this information is relevant to Plaintiffs' standing to pursue their claims. In response to your August 4, 2022 correspondence, please send us an explanation of Plaintiffs' mothers' efforts to obtain all school records as requested in Defendant's Request for Production #6. We will consider these explanations and will evaluate whether a withdrawal of that request is appropriate.

Thank you,

Dana

From: Anderson, Barrett <banderson@cooley.com>

Sent: Thursday, August 4, 2022 2:22 PM

To: Dana Keene <dkeene@strucklove.com>; Dan Struck <DStruck@strucklove.com>; Nick Acedo <NAcedo@strucklove.com>; Amanda Gramlich <AGramlich@strucklove.com>; Andrea Bartles <abartles@strucklove.com>; Brenna Bull <bbull@strucklove.com>; Patriaic Cracchiolo LaMagna <patricia.lamagna@azag.gov>; Aubrey Joy Corcoran <aubreyjoy.corcoran@azag.gov>

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Subject: RE: Roe v. Herrington - Clarifying Defendant's meet-and-confer statements

Counsel:

Following up on the below email.

In addition, as you recall, Defendant represented during the hearing that he would consider withdrawing his request for school records if he received an explanation of Plaintiffs' Mothers' efforts to obtain the records we produced. Given that Defendant will not withdraw his school records request on the basis that those documents are irrelevant because this case involves a facial challenge, will he still consider withdrawing that request in exchange for such an explanation?

Barrett

From: Anderson, Barrett

Sent: Tuesday, August 2, 2022 3:12 PM

To: Dana Keene <dkeene@strucklove.com>; Dan Struck <DStruck@strucklove.com>; Nick Acedo <NAcedo@strucklove.com>; Amanda Gramlich <AGramlich@strucklove.com>; Andrea Bartles <abartles@strucklove.com>; Brenna Bull <bbull@strucklove.com>; Patriaic Cracchiolo LaMagna <patricia.lamagna@azag.gov>; Aubrey Joy Corcoran <aubreyjoy.corcoran@azag.gov>

Cc: Asaf Orr <AORr@nclrights.org>; Erin Savoia <ESavoia@nclrights.org>; 'Colin Proksel' <cproksel@omlaw.com>; Payslie Bowman <pbowman@omlaw.com>; Gunn, Patrick <pgunn@cooley.com>; Martin, Christopher L. <cmartin@cooley.com>; Taylor, Jessica L. <jtaylor@cooley.com>; Ainbinder, Stephanie <sainbinder@cooley.com>

Subject: Roe v. Herrington - Clarifying Defendant's meet-and-confer statements

Counsel:

We write to memorialize and clarify two issues from the meet and confer. Could you confirm that these are accurate representations of Defendant's positions?

1. Defendant now understands that Plaintiffs assert a facial challenge to A.R.S. § 36-337(A)(3), but Defendant nevertheless will not withdraw his requests for school records, medical records, or social media records as asserted in his motion to compel. The parties are still at an impasse on those requests.
2. Defendant will not produce any ESI relevant to Defendant's justifications for enforcing A.R.S. § 36-337(A)(3) and its implementing regulation, until and unless the Court orders Defendant to provide his justifications. Apart from those justifications, Defendant does not believe that there are any other relevant topics for discovery that would obligate him to produce ESI in this case.

With respect to the second issue, we appreciate that Defendant is obtaining a more detailed hit-count report, which may help the parties attempt to address any purported burden objection that Defendant may continue to assert. We look forward to receiving that information to better understand Defendant's position and hope that it will allow the parties to negotiate a resolution to this impasse at our next meet and confer sometime next week.

However, some of the comments you made during the meet and confer suggested that the parties may still be at an unresolvable impasse even with that additional hit-count data. Specifically, you seemed to suggest that Defendant may now argue (for the first time) that he is not obligated to produce any ESI, regardless of the alleged burden of review and production, because he believes that such discovery is not relevant. If that is indeed what you intend to argue, please let us know so we can plan accordingly. And, as we requested during the call, could you provide the authority that you mentioned on the meet and confer regarding discovery in cases involving a facial challenge? We would like to review those cases and any others Defendant believes are pertinent to better understand Defendant's new position. In the meantime, Plaintiffs reserve all rights.

Sincerely,
Barrett

Barrett J. Anderson

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

www.cooley.com/people/barrett-anderson

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