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9 UNITED STATES DISTRICT COURT
10 DISTRICT OF ARIZONA

11 Russell B. Toomey,

12 Plaintiff,

13 v.

14 State of Arizona, *et al.*

15 Defendants.

No. 4:19-cv-00035

**JOINT STIPULATION REGARDING
DEFENDANTS STATE OF
ARIZONA’S, ANDY TOBIN’S, AND
PAUL SHANNON’S MOTION FOR
CLARIFICATION AND THE USE OF
CERTAIN EVIDENCE IN
DISPOSITIVE MOTIONS**

16
17 The parties hereby submit the following Stipulation and state as follows:

18 1. On August 9, 2022, the Court granted Defendants State of Arizona’s, Andy
19 Tobin’s, and Paul Shannon’s (collectively, “State Defendants”) Motion for Reconsideration
20 (the “Reconsideration Order”) (Doc. 278). The Reconsideration Order precludes State
21 Defendants from “arguing in their defense that they had a good-faith subjective belief in the
22 legality of their decision to maintain the exclusion for gender reassignment surgery.” (Doc.
23 278 at 5.)

24 2. State Defendants intend to request clarification of the Reconsideration Order
25 without requesting a stay from the Court. Specifically, State Defendants may present the
26 following evidence in their dispositive motion and/or in response to Plaintiff’s dispositive

1 motion:

- 2 a. The factual state of the law at the time that State Defendants made their
3 decision regarding the exclusion for gender reassignment surgery (the
4 “Exclusion”);
- 5 b. Communications with non-attorneys regarding the legality of the
6 Exclusion that occurred prior to the time that legal counsel was consulted
7 regarding the Exclusion; and
- 8 c. Testimony from third-party witnesses, including the Governor’s Office,
9 regarding their consideration of the legality of the Exclusion in 2016.

10 3. State Defendants contend that they may present such evidence as objective
11 facts so long as it is not used to argue that State Defendants had a good-faith subjective
12 belief in the legality of the Exclusion.

13 4. Plaintiff and the certified classes contend that the foregoing evidence is
14 precluded by the Reconsideration Order and should not be considered at either summary
15 judgment or at trial.

16 5. Because the parties do not wish to delay the briefing of dispositive motions
17 in this matter, the parties stipulate and agree that Defendants may include any of the above
18 evidence in State Defendants’ dispositive motion briefing and/or in response to Plaintiff’s
19 dispositive motion, pending resolution of State Defendants’ motion for clarification.

20 6. If the Court determines that the above evidence is precluded by the
21 Reconsideration Order, the parties agree that the above evidence should not be considered
22 by the Court in resolving either party’s dispositive motion. For avoidance of doubt, by
23 agreeing to allow State Defendants to include the above-mentioned evidence in their
24 briefing, Plaintiff does not concede that such evidence should be considered by the Court
25 in resolving dispositive motions.

26 7. The parties further stipulate and agree that Plaintiff and the certified classes

1 will not move for sanctions or contempt based on State Defendants' inclusion of any of the
2 above evidence in their dispositive motion briefings.

3 DATED this 23rd day of August, 2022.

4
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