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8 *State of Arizona, Andy Tobin, and Paul Shannon*

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.

CV-19-00035-TUC-RM

**DEFENDANTS STATE OF
ARIZONA’S, ANDY TOBIN’S, AND
PAUL SHANNON’S MOTION FOR
CLARIFICATION**

(ORAL ARGUMENT REQUESTED)

16
17 Defendants State of Arizona, Andy Tobin, and Paul Shannon (collectively, “State
18 Defendants”) respectfully request clarification of the Court’s August 9, 2022 Order granting
19 State Defendants’ Motion for Reconsideration (the “Order”) (Doc. 278). In the Order, the
20 Court precluded State Defendants from “arguing in their defense that they had a good-faith
21 subjective belief in the legality of their decision to maintain the exclusion for gender
22 reassignment surgery.” (Doc. 278 at 5.) State Defendants believe that the Court’s Order
23 does not preclude State Defendants from referring to specific factual evidence but they seek
24 confirmation and clarification from the Court.

25 In order to comply with the Order and in an abundance of caution, State Defendants
26 request that the Court confirm that State Defendants are not precluded from introducing the

1 following evidence and arguments:

- 2 1. 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 2. Communications with non-attorneys regarding the legality of the Exclusion
6 that occurred prior to the time that legal counsel was consulted regarding the
7 Exclusion; and
- 8 3. Testimony from third-party witnesses regarding their consideration of the
9 legality of the Exclusion in 2016.

10 State Defendants contend that they may present such evidence as objective facts so
11 long as it is not used to argue that State Defendants had a good-faith subjective believe in
12 the legality of excluding transgender surgery from the State’s health plan. Without
13 clarification of the Order, State Defendants do not know whether the above-listed evidence
14 and arguments are permissible. State Defendants do not want to unintentionally use
15 evidence that would violate the Order in drafting or responding to a dispositive motion. For
16 these reasons, State Defendants seek clarification.

17 **I. STATE DEFENDANTS REQUEST CLARIFICATION OF THE ORDER.**

18 **A. The State of The Law in 2016**

19 First, State Defendants want clarification that presenting the factual state of the law
20 for health plans as it was in 2016 would not violate the Court’s Order.

21 As brief background, on May 18, 2016, the Office of Civil Rights (“OCR”) of the
22 United States Department of Health and Human Services (“HHS”) issued a final rule
23 implementing non-discrimination provisions under Section 1557 of the Affordable Care
24 Act (the “2016 Rules”).¹ The 2016 Rules prohibited entities subject to the rules from

25 _____
26 ¹ See, Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 96, 31376 (May 18, 2016) (codified at 45 C.F.R. pt. 92).

1 including categorical exclusions or limitations for health services related to “gender
2 transition.” 45 CFR § 92.207(b)(4) (2016). However, the 2016 Rules did not affirmatively
3 require coverage of any particular procedure or treatment for gender transition-related care.
4 *Id.* at § 92.207(d). Regarding discrimination on different bases, § 1557 incorporates
5 different federal discrimination laws. *See* 42 U.S.C. § 18116 (A). For discrimination on the
6 basis of sex, § 1557 incorporates Title IX of the Education Amendments of 1972 (20 U.S.C.
7 § 1681 et seq.). *Id.*

8 The 2016 Rules were challenged in court to determine if they were valid or whether
9 they exceeded what is meant by “on the basis of sex” under the law. *See Franciscan All.,*
10 *Inc. v. Burwell*, 227 F. Supp. 3d 660, 696 (N.D. Tex. 2016); *Texas v. United States*, 201 F.
11 Supp. 3d 810, 836 (N.D. Tex. 2016). This case and related motions were pending when the
12 ADOA was evaluating how it would address § 1557. These are objective facts—not State
13 Defendants’ subjective belief.

14 State Defendants request confirmation that they are not precluded from discussing
15 the background and application of § 1557 or the 2016 Rules in their defense of Plaintiff’s
16 claim. This would include the current interpretations of § 1557 (which has still not been
17 conclusively determined) and is pertinent to the matter of whether the surgery exclusion
18 was then and/or is now unlawful.

19 **B. Communications Pre-Dating Consultation with Legal Counsel**

20 Second, State Defendants seek clarification that the Order would not prohibit State
21 Defendants from presenting communications of the legality of the Exclusion which ADOA
22 received prior to the time that it consulted legal counsel.

23 Throughout this litigation, State Defendants have maintained that their
24 understanding of the law was based on several sources—both legal and non-legal. For
25 example, ADOA received interpretations of § 1557, and the legal impact of the 2016 Rules,
26 from each of its insurance vendors, medical consultants, news sources, and public

1 presentations. Many of these communications occurred prior to the date that ADOA
2 consulted legal counsel regarding the legality of the Exclusion. (*See, e.g.*, Doc. 223,
3 Declaration of Ryan Curtis in Support of Objection to Order Compelling Production
4 (“Curtis Decl.”), at Exhibits 1–5 (discussions with insurance vendors and consultants
5 occurring from October 2015 through June 2016.) Any communications pre-dating a
6 consultation with legal counsel could not be colored by legal advice. As a result, such
7 communications would not appear to trigger the same concerns addressed in the Order.
8 State Defendants seek clarification whether the Order would preclude State Defendants
9 from discussing or introducing such evidence. Notably, deposition transcripts are replete
10 with questions, answers, and references to such documents that occurred well before State
11 Defendants engaged outside legal counsel and before the communications in the privilege
12 log that Plaintiff sought through the Motion to Compel. If Plaintiff can use such evidence
13 against State Defendants, it is wholly unfair if State Defendants cannot likewise use those
14 same objective facts.

15 **C. Testimony from Third-Party Witnesses**

16 Third, State Defendants seek clarification whether the Order prohibits State
17 Defendants from introducing testimony from third-party witnesses regarding their
18 interpretation of § 1557.

19 For example, Christina Corieri (a representative from the Governor’s Office)
20 testified in her deposition regarding her independent review and interpretation of § 1557.²
21 As with the above-mentioned documents, Ms. Corieri’s review and interpretation occurred
22 prior to any legal advice that was part of Plaintiff’s Motion to Compel and can be cleanly
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25 ² Ms. Corieri’s deposition occurred on July 13, 2022. The transcript of her deposition was
26 not available at the time of briefing the Motion for Reconsideration or at oral argument of
the same.

1 separated from any legal advice received.³ Moreover, Ms. Corieri is not and was never an
2 employee or agent of ADOA. State Defendants seek confirmation that the Order would not
3 preclude State Defendants from calling Ms. Corieri as a witness or permitting her to testify
4 regarding her interpretation of § 1557 and the 2016 Rules. Importantly, Ms. Corieri testified
5 that she independently determined that under the rules addressing § 1557, a plan cannot
6 have a categorical exclusion for treatment for gender dysphoria and needed to cover
7 something. (*See* Exhibit 1 (Excerpts of Christina Corieri’s July 13, 2022, deposition
8 transcript) at 103:21–111:2.)

9 Accordingly, State Defendants seek clarification as to whether they may use factual
10 statements in deposition testimony offered by Ms. Corieri and any other third-party
11 witnesses regarding the legality of the exclusion—which is the very issue in this case.

12 **II. CONCLUSION**

13 State Defendants believe they can use the evidence described above, which are
14 objective facts and not the subjective belief of State Defendants. However, State Defendants
15 do not want to risk unintentionally violating the Court’s Order precluding them from
16 “arguing in their defense that they had a good-faith subjective belief in the legality of their
17 decision to maintain the exclusion for gender reassignment surgery.” For these reasons,
18 State Defendants request that the Court clarify its Order granting the Motion for
19 Reconsideration.

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³ Ms. Corieri attended law school but did not sit for the bar exam and has not practiced law.
26 Her communications are not considered attorney-client privileged based on her status as an
unlicensed lawyer, except to the extent she was communicating with other legal counsel.

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DATED this 23rd day of August, 2022.

FENNEMORE CRAIG, P.C.

By: s/ Ryan Curtis
Timothy J. Berg
Amy Abdo
Ryan Curtis
Shannon Cohan
Attorneys for Defendants State of
Arizona, Andy Tobin, and Paul
Shannon

27986191

Exhibit 1

Christina Corieri - 07/13/2022

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

RUSSELL B. TOOMEY,)
)
 Plaintiff,)
)
 vs.) 4:19-CV-00035
)
 STATE OF ARIZONA; ARIZONA BOARD)
 OF REGENTS, d/b/a UNIVERSITY OF)
 ARIZONA, a governmental body of)
 the State of Arizona; et al.,)
)
 Defendants.)
 _____)

VIDEOTAPED DEPOSITION OF CHRISTINA CORIERI

(Via Zoom Videoconference)
July 13, 2022
8:30 a.m.
Phoenix, Arizona

Glennie Reporting Services, LLC
1555 East Oranwood Avenue
Phoenix, Arizona 85020
602.266.6535
www.glenne-reporting.com

Prepared by:
Robin L. B. Osterode
CSR, RPR
CA CSR No. 7750
AZ CR No. 50695

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1 Q. Do you recall sending any other e-mail to
2 Ms. Isaacson or anyone else at the AD -- AD -- ADOA of
3 the decision of the governor's office on that?

4 A. I don't recall if anyone else was copied on
5 that e-mail, but that was the only e-mail I recall
6 sending.

7 Q. Did you ever have a phone conversation with her
8 about the governor -- governor's office's decision on
9 that?

10 MS. LAMM: Object to the form.

11 THE WITNESS: I don't recall having a phone
12 conversation.

13 BY MR. POWELL:

14 Q. And did you ever have an in-person meeting with
15 Ms. Isaacson or anyone else at the ADOA about the
16 governor's office's decision with respect to the
17 amendment of the plan?

18 MS. LAMM: Object to the form of the question.

19 THE WITNESS: I don't recall any other
20 meetings, other than the one we've already discussed.

21 BY MR. POWELL:

22 Q. To go back briefly to the what you've described
23 as the August meeting among you and -- drawing a blank on
24 your general counsel's name, Liburdi -- Liburdi, excuse
25 me, you and Mr. Liburdi, met with others from ADOA in

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1 August of 2016, in which you sought legal advice on this
2 issue of what the ACA 1557 provision and the new
3 rulemaking would require in terms of the amendment of the
4 plan.

5 Do you recall that discussion?

6 A. Yes.

7 Q. Apart from that discussion, had you done your
8 own review analysis of what were the implications of
9 Section 1557 of the ACA and at that time recent changes
10 to -- or recent rulemaking with respect to the
11 discrimination provision?

12 MS. LAMM: Object to the form of the question.

13 THE WITNESS: Yes.

14 BY MR. POWELL:

15 Q. Tell me about what you had done in that regard.

16 A. I read the rules and regulations that had come
17 out and that included the comments and responses to and
18 from HHS in that publication of their final rulemaking.

19 Q. And why did you do that, review all of that?

20 A. Because we were going to be discussing it.

21 Q. And when did you do that review?

22 A. The -- I'm not sure if I did it the day before,
23 two days before. I did it before that meeting.

24 Q. Oh, so you did it in preparation for that
25 meeting?

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1 A. Yes.

2 Q. And -- and based on your review of that
3 material, did you reach your own conclusion as to what,
4 if anything, the new rulemaking would require in terms of
5 an amendment of the plan with respect to gender
6 reassignment services?

7 MS. COHAN: Form.

8 THE WITNESS: Yes.

9 BY MR. POWELL:

10 Q. And what was your conclusion?

11 MS. COHAN: Form.

12 THE WITNESS: That the current plan was not in
13 compliance, because it had a complete bar on all services
14 for gender dysphoria.

15 BY MR. POWELL:

16 Q. Had you reached a conclusion as to what changes
17 would be required in order to come into compliance with
18 the rulemaking?

19 A. I understood that the plain language of the --
20 of the rules stated that a plan may not have a bar on all
21 services for gender dysphoria. And that to come into
22 compliance, they had to provide some services to treat
23 gender dysphoria.

24 Q. And did you reach a conclusion as to which
25 gender dysphoria services would need to be included in

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1 the plan?

2 A. The rules were not specific as to which
3 services needed to be provided.

4 Q. Did you go to that meeting with your own view
5 of how the plan should be amended to come into
6 compliance?

7 A. I don't know what you mean by my own view.

8 Q. I mean, had -- based on your own review and
9 analysis of the materials you've described shortly ago,
10 did you go to the meeting with ADOA and Mr. Liburdi
11 having reached your own conclusion about how the plan
12 would need to be amended in order to comply with the
13 rulemaking?

14 A. Not specifically how, but that it would need to
15 be amended to cover at least some services for gender
16 dysphoria.

17 Q. Had you at that point reached a conclusion that
18 it would not be necessary to cover gender reassignment
19 surgeries in order to become in compliance?

20 A. I believe by the plain reading of the statutes
21 and the comments from HHS, that there were no specific
22 services that were required to be covered, simply that a
23 plan must cover some.

24 Q. And as to that some, had you reached a view as
25 to what the State of Arizona should be covering in order

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1 to get into compliance?

2 A. Not specifically which ones, that's when you
3 look at, okay, we have to cover some, which ones would
4 place less money on -- on the plan.

5 Q. But did you do any analysis of which of
6 the -- let me back up.

7 At that time the plan, in the August 2016 time
8 frame, the plan excluded essentially all care for gender
9 dysphoria. Did you do any of your own analysis to
10 determine the cost implications of electing to cover some
11 of those previously excluded services versus others, in
12 order to get into compliance?

13 MS. COHAN: Form.

14 THE WITNESS: I did not do cost analysis, but
15 from a long history of seeing costs related to coverage
16 and coverage mandates, inpatient hospitalizations and
17 surgeries are always among the very most expensive.

18 BY MR. POWELL:

19 Q. But you did nothing to try to quantify that at
20 the time?

21 A. I did not.

22 Q. Correct. And you've never received from any of
23 your colleagues in the governor's office or from ADOA or
24 anyone else any sort of quantification of what any of
25 those services that would be potentially restored would

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1 cost. Correct?

2 A. Well, first, you said "restored." They were
3 never there. We did not take anything out.

4 Q. So -- so I'm happy to amend the question. As
5 part of your pre-meeting with Mr. Liburdi, analysis of
6 the rulemaking and the need to come into compliance, did
7 you do any form of calculation quantification of the
8 likely costs of amending the plan to cover any of the
9 previously excluded services?

10 A. I did not. And that is not my job. I am not
11 an actuary.

12 Q. And -- and you did not, as part of your own
13 analysis ask anyone -- anyone else to supply you with
14 calculations as to the cost implications of choosing, you
15 know, one -- one of those previously excluded services
16 versus the other to amend?

17 A. I think that everyone is aware that therapy and
18 pharmaceuticals are always cheaper than surgeries and
19 hospitalizations. I -- I don't know of a situation where
20 that wasn't true, other than maybe some new specialty
21 drug that was just approved by the FDA that has an
22 outrageously high price, which is not the case here.

23 Q. But -- but my question was whether you asked
24 anyone to help you quantify that for these purposes?

25 A. I did not ask anyone, but I know from

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1 experience that hospitalizations and surgeries cost more
2 than therapies and pharmaceuticals.

3 Q. But you didn't -- that's fine. Did you discuss
4 your own -- after preparing or in conjunction with
5 preparing for the meeting in which you read the thing you
6 described earlier, did you discuss it with anyone -- the
7 subject matter with anyone in the governor's office or
8 elsewhere as part of your preparation for the meeting?

9 A. I did not have any discussions in preparation
10 for that meeting, except for the discussion with Mike,
11 when he asked me to come to the meeting and provided
12 the -- the background on what the meeting was for.

13 Q. During the meeting, did you share with the
14 participants your own view of what the ACA rulemaking
15 required in terms of an amendment of the plan?

16 MS. LAMM: Objection to the extent Ms. Corieri
17 shared her view for the purposes of seeking legal advice,
18 then I would instruct her not to answer that question.

19 THE WITNESS: I shared my interpretation for
20 the purpose of receiving legal advice.

21 BY MR. POWELL:

22 Q. You had formed your -- your interpretation
23 prior to the meeting. Correct?

24 A. I prepared for the meeting by reading the
25 documents, so I could ask an appropriate question. And I

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1 had to form an opinion in order to ask if that was
2 correct and their legal interpretation of that.

3 Q. And is the opinion that you formed what you
4 described to me earlier as to what the ACA, the language
5 of the ACA did or didn't provide?

6 A. I'm sorry, was there a question?

7 Q. Yes, I'm asking you if -- what I'm asking you
8 is if, when you referred to an opinion that you reached
9 prior to the meeting, and what I'm asking you is, is that
10 opinion that you referred to in that answer essentially
11 what you just described to me earlier as to how you read
12 the contents of the ACA with respect to this issue?

13 A. Yes, I read the rules and understood that two
14 things were required. The first, which is not at issue
15 here, is that if a plan covers treatment for something,
16 say, ovarian cancer or testicular cancer, then it can't
17 deny coverage for that treatment based on somebody's
18 gender identity. And then the second requirement was
19 that a plan cannot have a categorical exclusion for
20 treatment of gender dysphoria. And so I understood that
21 we needed to -- to make an amendment to the plan.

22 Q. And that was the opinion -- the only opinion
23 that you reached --

24 A. Yes.

25 Q. -- on the basis of the preparation you

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1 described?

2 A. Yes.

3 Q. As of the time of this meeting with Mr. Liburdi
4 and others in August of 2016, there were other
5 State-affiliated health plans that had exclusions for
6 certain categories of gender dysphoria and care; is that
7 correct?

8 A. What do you mean "other State-affiliated health
9 plans"?

10 Q. Fair enough. I had two in mind, one is the
11 Medicaid policy of the State of Arizona had -- it
12 included a certain coverage with respect to gender
13 dysphoria care. Correct?

14 A. Correct. And that exclusion went back to the
15 1980s.

16 Q. And what is -- what was the exclusion?

17 A. My understanding is that it excluded gender
18 reassignment surgery for Medicaid beneficiaries.

19 Q. And am I correct that it did not exclude
20 hormones or other types of ancillary treatment for gender
21 dysphoria?

22 A. It did not. I don't know when that -- I don't
23 know the history of amending that. I was not part of
24 that.

25 Q. And am I also correct that the Department of

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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Russell B. Toomey,
Plaintiff,

v.

State of Arizona, *et al.*
Defendants.

CV-19-00035-TUC-RM

**[PROPOSED] ORDER REGARDING
DEFENDANTS STATE OF
ARIZONA’S, ANDY TOBIN’S, AND
PAUL SHANNON’S MOTION FOR
CLARIFICATION**

Having reviewed Defendants State of Arizona’s, Andy Tobin’s, and Paul Shannon’s Motion To For Clarification of this Court’s Order dated August 9, 2022 (Doc. 278), and finding good cause,

IT IS HEREBY ORDERED that State Defendants may present the following evidence in their dispositive motion briefings as objective facts so long as it is not used to argue that State Defendants had a good-faith subjective belief in the legality of the State Plan’s exclusion for gender reassignment surgery (the “Exclusion”):

- a. The factual state of the law at the time that State Defendants made their decision regarding the Exclusion;
- b. Communications with non-attorneys regarding the legality of the Exclusion that occurred prior to the time that legal counsel was consulted regarding the Exclusion; and

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c. Testimony from third-party witnesses, including the Governor’s Office, regarding their consideration of the legality of the Exclusion in 2016.

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