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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Russell B. Toomey,

Plaintiff,

v.

State of Arizona; Arizona Board of Regents, d/b/a University of Arizona, a governmental body of the State of Arizona; **Ron Shoopman**, in his official capacity as chair of the Arizona Board of Regents; **Larry Penley**, in his official capacity as Member of the Arizona Board of Regents; **Ram Krishna**, in his official capacity as Secretary of the Arizona Board of Regents; **Bill Ridenour**, in his official capacity as Treasurer of the Arizona Board of Regents; **Lyndel Manson**, in her official capacity as Member of the Arizona Board of Regents; **Karrin Taylor Robson**, in her official capacity as Member of the Arizona Board of Regents; **Jay Heiler**, in his official capacity as Member of the Arizona Board of Regents; **Fred Duval**, in his official capacity as Member of the Arizona Board of Regents; **Andy Tobin**, in his official capacity as Director of the Arizona Department of Administration; **Paul Shannon**, in his official capacity as Acting Assistant Director of the Benefits Services Division of the Arizona Department of Administration,

Defendants.

4:19-cv-00035-TUC-RM (LAB)

RESPONSE TO STATE DEFENDANTS' MOTION FOR CLARIFICATION

Plaintiff, Dr. Russell B. Toomey, on behalf of himself and the certified classes ("Plaintiff"), by and through the undersigned counsel, hereby submits this response to State Defendants' Motion for Clarification (the "Motion for Clarification" or "MFC") (Doc. 283).

On August 9, 2022, the Court issued an order granting State Defendants' Motion for Reconsideration (Doc. 278) (the "Reconsideration Order"). The Reconsideration Order vacated the Court's prior directive that State Defendants produce attorney-client documents relating to their decision to maintain the challenged healthcare exclusion (the "Exclusion"), and in exchange, precluded State Defendants from "arguing that they held a good-faith subjective belief that their decision to maintain the exclusion for gender reassignment surgery was legal." (Reconsideration Order at 5-6). In issuing this preclusive order, the Court recognized that "Plaintiffs would be unfairly prejudiced if Defendants were allowed to argue that they had a good-faith subjective belief in the legality of the exclusion while ***presenting only evidence favoring that conclusion*** and withholding potentially adverse advice-of-counsel evidence." (*Id*. at 5.) (emphasis added)

The Motion for Clarification seeks approval of exactly what the preclusive provision of the Reconsideration Order was designed to prohibit: arguing and "presenting evidence" that supports State Defendant's alleged "good-faith subjective belief in the legality of the exclusion[.]" See *id*. Because Dr. Toomey does not have access to the full universe of documents that underlie (and which might refute) State Defendants' alleged subjective understanding of the Exclusion's legality, State Defendant cannot selectively present evidence that bolsters it. The Motion for Clarification attempts to circumvent the Reconsideration Order by characterizing the evidence State Defendants wish to present—which includes "communications about the legality of the Exclusion" and "testimony from third-party witnesses regarding their interpretation of § 1557"—as "objective facts." MFC at 2-4. But however "objective" these "facts" might be, their only relevance is that they bare on a factual question that was mooted by the Reconsideration Order: the State Defendants'

understanding of the law when they decided to maintain the Exclusion.[1]

The ultimate question presented by this lawsuit is whether the Exclusion is lawful today, not whether the State Defendants believed that it was when they decided to maintain it in 2016.[2] And the Reconsideration Order straightforwardly precludes State Defendants from defending their decision-making by pointing to their subjective understanding of the law. Thus, State Defendants' proffered evidence is wholly irrelevant to any live claim or defense. To the extent State Defendants' proffered evidence has any probative value at all, that probative value is substantially outweighed by the prejudicial effect it would have on the fact finder, as it necessarily implies a non-discriminatory motivation (good faith subjective belief in legality) that Dr. Toomey cannot adequately dispute.

The Court should deny State Defendants' Motion for Clarification because the terms of the Reconsideration Order clearly preclude State Defendants from introducing the evidence at issue.

I. STATE DEFENDANTS SHOULD NOT BE PERMITTED TO PRESENT EVIDENCE OF THEIR SUBJECTIVE UNDERSTANDING OF THE EXCLUSION'S LEGALITY

The Reconsideration Order brokered an equitable compromise: State Defendants can continue to withhold legal advice they received regarding the Exclusion in 2016, but in exchange, are precluded from "arguing that they held a good-faith subjective belief that their decision to maintain the exclusion for gender reassignment surgery was legal."

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[1] The Court should not accept, ex-ante, that the evidence State Defendants seek to put forward will be "objective." The proffered "objective facts" will necessarily be selective, and will not provide a full picture of the State Defendants' understanding of the law. The Reconsideration Order bars State Defendants from selectively presenting favorable evidence regarding their understanding of the law, because Dr. Toomey does not have access to the full universe of documents that bare on the issue.

[2] Dr. Toomey intends to challenge both the facial validity of the Exclusion, and the State's motivation for maintaining it in 2016. But the Reconsideration Order precludes State Defendants from defending their 2016 decision-making by reference to their subjective understanding of the law. State Defendants can argue that the Exclusion is legal today without reference to their subjective understanding of legality in 2016. And to defend their decision-making in 2016, State Defendants can still put forward evidence of their other asserted rationale for the Exclusion: cost control.

(Reconsideration Order at 5-6). In light of both (i) the Court's rationale for issuance of the preclusion order and (ii) elementary principles of evidence, the Reconsideration Order impacts not only the formal arguments that State Defendants can make in their dispositive briefing and at trial, but also the evidence they can adduce in their defense.

First, the Court's express reasoning in issuing the Reconsideration Order forbids State Defendants from presenting evidence that goes to their subjective state of mind regarding the legality of the Exclusion. In issuing the preclusive provision of the Reconsideration Order, the Court observed that "Plaintiffs would be unfairly prejudiced if Defendants were allowed to argue that they had a good-faith subjective belief in the legality of the exclusion while ***presenting only evidence favoring that conclusion*** and withholding potentially adverse advice-of-counsel evidence." (*Id*. at 5) (emphasis added). In other words, so long as Dr. Toomey does not have access to the State's legal advice regarding the Exclusion, the Reconsideration Order recognized that State Defendants in fairness must be precluded both from (i) arguing about the State's subjective understanding the Exclusion's legality *and* (ii) presenting evidence that (selectively) bolsters it. This is consistent with the Ninth Circuit *Bittaker* standard, which requires a party who withholds legal advice after a finding of implied waiver to completely "abandon the claim that gives rise to the waiver condition." *Bittaker v. Woodford*, 331 F.3d 715, 721 (9th Cir. 2003); Opposition to State Defendants' Motion for Reconsideration (Doc. 264) at 2-13. State Defendants cannot say they have "abandoned" their defense of subjective good faith belief if they insist on selectively presenting evidence that bolsters it.

Second, basic evidentiary principles prevent a party from presenting evidence of their subjective understanding of the law when that subjective understanding is not at issue. Under the Federal Rules of Evidence, "[i]rrelevant evidence is not admissible." Fed. R. Evid. 402. And even if evidence has some potential relevance, it should be excluded when its probative value is substantially outweighed by the danger of unfair prejudice or confusing the issues. Fed. R. Evid. 403; *Loveday v. Allen*, CV-16-00246-TUC-DTF, 2017

WL 7087176, at *1 (D. Ariz. July 25, 2017) (precluding evidence where any probative value was "substantially outweighed by the dangers of confusing the issues and misleading" the factfinder.) Applying these evidentiary principles, courts preclude evidence of a party's subjective belief where the party's state of mind is not at issue. *Webb v. City of Waterloo*, 17-CV-2001-CJW-MAR, 2020 WL 1159755, at *12 (N.D. Iowa Mar. 10, 2020) (precluding evidence that was probative of defendant's state of mind, where defendant's "subjective beliefs and motivations [were] irrelevant."); *LaPorta v. BMW of N.A., LLC*, 2:17-CV-5145-KS, 2019 WL 988675, at *3-4 (C.D. Cal. Jan. 24, 2019) (precluding evidence of party's "subjective expectations" for product performance where such subjective expectations were irrelevant to either party's claims or defenses.) Here, because the Reconsideration Order moots the State Defendants' subjective understanding of the law as a defense to Dr. Toomey's claims of discrimination, the evidence described in the Motion for Clarification is wholly irrelevant. And to the extent it has any probative value, the probative value is substantially outweighed by the danger of its prejudicial implication: that State Defendants' motivation was non-discriminatory because of a good faith legal belief—something that Dr. Toomey cannot adequately respond to given the continued withholding of attorney client documents.

The Motion for Clarification requests permission to present three categories of evidence: (1) evidence of the "factual state of the law for health plans as it was in 2016," (2) communications regarding "the legality of the Exclusion which ADOA received prior to the time that it consulted legal counsel" and (3) testimony from so-called "third party witnesses" including representatives of the Governor's Office, "regarding their interpretation of the § 1557." MFC. at 2-5. Each of these categories of evidence are necessarily precluded by the terms of the Reconsideration Order, and the evidentiary principles outlined above.

A. <u>The State of The Law in 2016</u>

The State Defendants seek to present evidence regarding the "background and application" of § 1557, the non-discrimination provision of the Affordable Care Act (the

"ACA"), as well as their interpretation of non-discrimination rules promulgated by the Department of Health and Human Services "in their defense of Plaintiff's claims." MFC at 3. But this evidence is only relevant to the State Defendants' state of mind at the time of decision-making, which they have been precluded from using as a defense to Dr. Toomey's discrimination claims. Indeed, the Motion for Clarification does not even purport to have another purpose for this evidence besides establishing what the State's understanding of the law was in 2016.[3] In light of the Reconsideration Order, this evidence is wholly irrelevant, and should be precluded. *See United States v. Davalos*, 80 F. App'x 9 (9th Cir. 2003) (holding that "[b]ecause the district court correctly precluded this [duress] defense, . . . evidence [of duress] is no longer relevant").

To the extent the proffered evidence regarding the State of the law in 2016 has any probative value, that probative value would be outweighed by the danger of unfair prejudice and confusing the issues in this lawsuit. What State Defendants seek to do with the proffered evidence is clear: create an impression that the legal landscape in 2016 was complicated, making more likely the proposition that State Defendants acted out of good-faith understanding of the law. But this is unfairly prejudicial, as Dr. Toomey cannot adequately rebut this impression without access to the withheld attorney client documents. Moreover, the evidence would confuse the issues presented by this litigation. The ultimate issue in this case is whether the Exclusion is lawful *today*, not whether the State Defendants believed that it was in 2016. And Dr. Toomey brings claims under Title VII of the Civil Rights Act of 1964 and the Equal Protection Clause, not Section 1557 of the ACA. Thus, evidence of State Defendants' interpretation of the ACA and related regulations in 2016 is not only irrelevant—it would also create confusion, and have an unduly prejudicial effect on the fact

[3] Dr. Toomey acknowledges that one narrow, allowable purpose for evidence of "the state of the law in 2016" is to establish the historical background regarding what initially prompted State Defendants to evaluate the Exclusion in the 2015/2016 timeframe. But the Motion for Clarifications seeks to go much farther than that. State Defendants ask to put forward their own "interpretations of § 1557[,]" (MFC at 3) which is plainly for the purpose of bolstering the precluded good faith understanding defense.

finder.

B. Communications Pre-Dating Consultation With Legal Counsel

State Defendants also seek to present "communications [related to] the legality of the Exclusion which ADOA received prior to the time that it consulted legal counsel." MTC at 3-4. These communications, like evidence regarding the state of the law in 2016, are barred by the preclusive order, as they are only relevant to the State Defendants' subjective understanding of the law in 2016. To the extent these communications have any other relevance (the Motion for Clarification does not provide any), their probative value would be substantially outweighed by their prejudicial effect—creating a (false) perception that State Defendants acted out of a subjective good faith understanding of the law, a factual proposition that Dr. Toomey cannot adequately dispute. State Defendants cannot say that they "abandoned" their subjective good faith defense (as the Ninth Circuit *Bittaker* standard requires them to do) if they are permitted to selectively present communications that bare on that defense, while withholding their attorney client documents.

The fact that the proffered communications might have come from non-legal sources, or might have been "received prior to the time that [State Defendants] consulted legal counsel" (MFC at 3) is irrelevant, and State Defendants' belaboring of this point reveals that they fundamentally misunderstand the Reconsideration Order. The Reconsideration Order does not just forbid State Defendants from putting forward *legal advice* to support their subjective understanding of the law; it broadly precludes them from "arguing that they held a good-faith subjective belief that their decision to maintain the [Exclusion] was legal." Reconsideration Order at 6. That includes arguing by reference to advice of counsel, advice from non-legal sources, or anything else.[4] And nothing in the Reconsideration Order says there is a temporal limit on what is precluded.

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[4] As Dr. Toomey explained in his Response to State Defendants' Motion for Reconsideration, Dr. Toomey would be prejudiced even if State Defendants relied only on non-legal sources to support their alleged understanding of the law in 2016. "Where the [State Defendants] assert their subjective good faith with respect to a matter of legal compliance, as the [State Defendants] do here, a determination of such subjective good

As the Court recognized in issuing the preclusive order, even though State Defendants "aver they did not rely solely on the advice of counsel[,]" and consulted non-privileged sources regarding the Exclusion, "[t]he advice that Defendants received from counsel may have complicated Defendants' understanding of the legality of the exclusion or otherwise pointed to a different conclusion regarding the exclusion's legality." Reconsideration Order at 5. So, as long as State Defendants withhold the legal advice they received, they cannot selectively present evidence—whether from privileged or non-privileged sources—that bolsters their purported understanding. *See id*. Because the proffered communications go to the State Defendants' legal state of mind in 2016, they are precluded.

C. Testimony from Third-Party Witnesses

Finally, State Defendants seek to introduce testimony from third party witnesses—namely Christina Corieri, a representative of the Governor's Office[5]—regarding "their interpretation of § 1557." MFC at 4. As explained above, this lawsuit asserts violation of Title VII and the Equal Protection Clause, not Section 1557 of the ACA. The State Defendants' or the Governor's Office's subjective understanding of Section 1557 of the ACA in 2016 is irrelevant. And to the extent that there is any probative value to what the Governor's Office subjectively understood about Section 1557 in 2016, that probative value would be substantially outweighed by prejudicial effects, *e.g.*, selective characterization of

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faith may depend on the advice given the Defendants by their counsel, *even if they do not seek to establish their good faith based on such advice*." (Doc. 264) (citing *Hamilton v. Yavapai Cmty. Col. Dist.*, CV-12-08193-PCT-GMS, 2016 WL 8199695, at *2 (D. Ariz. June 29, 2016)).

[5] State Defendants' characterization of Ms. Corieri and the Governor's Office as "third party" witnesses is, at best, an artificial distinction that Dr. Toomey does not agree with. The State of Arizona is a named defendant in this lawsuit, which encompasses the Arizona Governor's Office and its representatives. State Defendants have held Ms. Corieri out as a State witness, insisting that "[c]ommunications between Ms. Corieri and other State of Arizona representatives are covered by the attorney-client privilege." (Doc 146 at 6). And the Motion for Clarification makes clear that State Defendants intend to affirmatively cite Ms. Corieri's testimony (in her State representative capacity) to their advantage.

the State's legal understanding at the time the Exclusion was maintained, which Dr. Toomey cannot adequately dispute, and could confuse the issues for the fact finder.

State Defendants suggest that they can use Ms. Corieri's testimony about her 2016 review of Section 1557 to their advantage because her review allegedly pre-dated, and can be "cleanly separated from" legal advice received by State Defendants on the Exclusion. MFC at 4-5. As discussed above, this suggestion fundamentally misconstrues the Reconsideration Order, which precludes *any* argumentation regarding the State Defendants' purported understanding of the law, not just argumentation that expressly relies on legal advice. *See supra* at 6-7. State Defendants also insist that "Ms. Corieri is not and was never an employee or agent of the ADOA[,]" (MFC at 5), but provide no explanation for why that matters. The Reconsideration Order does not preclude argument about the State Defendants' understanding of the law only when such argument is based on testimony of party witnesses. It expressly precludes *any* argument that Defendants held a good-faith subjective belief that the Exclusion was lawful. And in any case, if not an agent of the ADOA, Ms. Corieri is certainly an agent of the State of Arizona, which is a named Defendant in this case. Indeed, ADOA witnesses pointed to Ms. Corieri as the State's ultimate decision-maker regarding the Exclusion in 2016, and as the Motion for Clarification makes clear, State Defendant intend to use Ms. Corieri's testimony in her capacity as a State agent in their defense against Dr. Toomey's claims.[6]

Last, State Defendants say that ought to be able to present Ms. Corieri's testimony regarding her 2016 analysis of Section 1557 because it relates to the "legality of the exclusion—which is the very issue in this case." MFC. at 5. Again, the issue in this case is whether the Exclusion violates Title VII or the Equal Protection Clause today, not whether the State Defendants or the Governor's Office believe that it did in 2016 when they made their decision to maintain it. Even farther afield is the Governor's Office understanding of

[6] By State Defendants' logic, Ms. Corieri is a State agent when she says things that State Defendants' view as advantageous to them, and a "third party" when it is convenient for her to be labeled as such. This is untenable.

Section 1557 of the ACA 2016. This lawsuit does not present claims based on Section 1557, and in light of the Reconsideration Order, any evidence regarding the State's understanding of the Exclusion's legality should be off the table.

CONCLUSION

The Court should deny State Defendants' Motion for Clarification, because the terms of the Reconsideration Order clearly preclude State Defendants from introducing the evidence at issue.[7]

Dated: September 6, 2022

ACLU FOUNDATION OF ARIZONA

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[7] To the extent that the Court permits presentation of any of the proffered evidence outlined in the Motion for Clarification, it should do so with clear instruction—permitting only evidence of the state of the law in 2016 (Category A), and solely for the limited purpose of establishing what prompted State Defendants to evaluate the Exclusion in 2015/2016. Under no circumstances should State Defendants be permitted to present communications about the legality of the Exclusion, or testimony of third party witnesses regarding their interpretations of § 1557 (Categories B & C). This evidence is not necessary to establish the historical background for why State Defendants evaluated the Exclusion in 2015/2016. And as outlined herein, any probative value of this evidence would be far outweighed by prejudicial effect.

CERTIFICATE OF SERVICE

I, Christine K. Wee, hereby certify that on September 6, 2022, I electronically transmitted the attached document to the Clerk's office using the CM/ECF System for filing. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system.

/s/ Christine K. Wee
Christine K. Wee