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*Attorneys for Plaintiff Russell B. Toomey*

**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; et al.,  
  
Defendants.

No. 4:19-cv-00035

**DECLARATION OF CHRISTINE  
K WEE IN SUPPORT OF  
PLAINTIFF’S RESPONSE IN  
OPPOSITION TO STATE  
DEFENDANTS’ MOTION FOR  
SUMMARY JUDGMENT**

1 I, Christine K. Wee, submit this declaration under penalty of perjury pursuant to 28  
2 U.S.C. § 1746 and declare as follows:

3 1. I am a Senior Staff Attorney at ACLU Foundation of Arizona, licensed to  
4 practice law in the State of Arizona, and represent Plaintiff Russell B. Toomey and the  
5 certified classes (“Dr. Toomey” or “Plaintiff”).

6 2. I submit this declaration in support of Plaintiff’s Response in Response to State  
7 Defendants’ Motion for Summary Judgment (the “Response”), filed concurrently.

8 3. I base this declaration on my personal knowledge and on information obtained  
9 in the course of the above-captioned matter.

10 4. I incorporate and rely on my declaration submitted in support of Russell B.  
11 Toomey’s Motion for Summary Judgment (Doc. 300), which refers to Exhibits 1-28. I  
12 supplement as follows:

13 5. **Exhibit 29** as attached to Plaintiff’s Response is a true and correct copy of  
14 excerpts of the Russel B. Toomey Deposition Transcript, dated May 26, 2021.

15 6. **Exhibit 30** as attached to Plaintiff’s Response is a true and correct copy of  
16 excerpts of WPATH Standard of Care Version 7.

17 7. **Exhibit 31** as attached to Plaintiff’s Response is a true and correct copy of  
18 excerpts of the Marie Isaacson Deposition Transcript, dated March 26, 2021.

19 8. **Exhibit 32** as attached to Plaintiff’s Response is a true and correct copy of  
20 excerpts of the Elizabeth Schafer Deposition Transcript, dated April 28, 2021.

21 9. **Exhibit 33** as attached to Plaintiff’s Response is a true and correct copy of  
22 email correspondence produced by State Defendants bearing bates AZSTATE.004283 to  
23 AZSTATE.004284.

24 10. **Exhibit 34** as attached to Plaintiff’s Response is a true and correct copy of  
25 excerpts of the Paul Shannon Deposition Transcript, dated June 25, 2021.

26 11. **Exhibit 35** as attached to Plaintiff’s Response is a true and correct copy of  
27 email correspondence produced by State Defendants bearing bates AZSTATE.005658 to  
28 AZSTATE.005659.

1           12. **Exhibit 36** as attached to Plaintiff's Response is a true and correct copy of  
2 excerpts of the Christina Corieri Deposition Transcript, dated July 13, 2022.

3           13. **Exhibit 37** as attached to Plaintiff's Response is a true and correct copy of  
4 excerpts of the Michael Meisner Deposition Transcript, dated March 16, 2021.

5           14. **Exhibit 38** as attached to Plaintiff's Response is a true and correct copy of  
6 excerpts of the Scott Bender Deposition Transcript, dated March 31, 2021.

7           15. **Exhibit 39** as attached to Plaintiff's Response is a true and correct copy of  
8 excerpts of the Yvette Medina Deposition Transcript, dated February 18, 2021.

9           16. **Exhibit 40** as attached to Plaintiff's Response is a true and correct copy of  
10 excerpts of the Kelly Sharritts Deposition Transcript, dated April 22, 2021.

11           17. **Exhibit 41** as attached to Plaintiff's Response is a true and correct copy of  
12 email correspondence produced by State Defendants bearing bates AZSTATE.005664 to  
13 AZSTATE.005665.

14           18. **Exhibit 42** as attached to Plaintiff's Response is a true and correct copy of  
15 email correspondence produced by State Defendants bearing bates AZSTATE.009634 to  
16 AZSTATE.009636.

17           19. **Exhibit 43** as attached to Plaintiff's Response is a true and correct copy of  
18 email correspondence produced by State Defendants bearing bates AZSTATE.000586.

19           20. **Exhibit 44** as attached to Plaintiff's Response is a true and correct copy of  
20 excerpts of the Craig Brown Deposition Transcript, dated June 22, 2021.

21           21. **Exhibit 45** as attached to Plaintiff's Response is a true and correct copy of a  
22 public media post made by Christina Corieri, dated April 29, 2013. This social media post  
23 was introduced and stamped as Exhibit 06 during the deposition of Christina Corieri, which  
24 took place on July 13, 2022 in connection with this litigation.

25           22. **Exhibit 46** as attached to Plaintiff's Response is a true and correct copy of  
26 email correspondence produced by the Governor's Office bearing bates  
27 AZ\_GOV\_00000022 to AZ\_GOV\_00000025.

28           23. **Exhibit 47** as attached to Plaintiff's Response is a true and correct copy of

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email correspondence produced by the Governor’s Office bearing bates AZ\_GOV\_00001706 to AZ\_GOV\_00001709.

24. **Exhibit 48** (filed under seal) as attached to Plaintiff’s Response is a true and correct copy of email correspondence produced by the Governor’s Office bearing bates AZ\_GOV\_00003190 to AZ\_GOV\_00003192.

25. **Exhibit 49** as attached to Plaintiff’s Response is a true and correct copy of a certified unofficial transcription of the parties’ Ninth Circuit oral argument in *In re: State of Arizona*, No. 21-71312, held on March 10, 2022.

I declare under penalty of perjury that the foregoing is true is and correct.

Dated this 26<sup>th</sup> day of October, 2022.

/s/ Christine K. Wee  
Christine K. Wee

# Exhibit 29

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Russell B. Toomey,                    ) Case No. CV19-0035-TUC-RM (LAB)  
  ) )  
                  Plaintiff,            ) )  
  ) )  
                                  vs.     ) )  
  ) )  
State of Arizona, et al.,            ) )  
  ) )  
                                  Defendants.    ) )  
\_\_\_\_\_ )

DEPOSITION OF RUSSELL B. TOOMEY, Ph.D.

Phoenix, Arizona  
May 26, 2021  
9:00 a.m.

REPORTED BY:  
JENNIFER HANSSEN, RPR  
Certified Reporter  
Certificate No. 50165

PREPARED FOR:  
CONDENSED/ASCII

(Certified Copy)

1 around gender -- transgender-related care.

2 Q. Did Kent State provide any benefits for  
3 transgender-related care?

4 A. I cannot recall.

5 Q. But you do recall that it prohibited any gender  
6 reassignment surgery?

7 A. Yes.

8 Q. When you went to see Dr. Karsten and she  
9 recommended a hysterectomy for you, did she schedule you  
10 for a hysterectomy?

11 A. I did receive a call for scheduling, yes.

12 Q. And did you schedule?

13 A. No.

14 Q. Why not?

15 A. The correspondence I received suggested that I  
16 would only have a \$100 co-pay and so I decided to call  
17 the insurance company to confirm that prior to  
18 scheduling.

19 Q. So was it your understanding that Dr. Karsten's  
20 office reached out to your carrier for precertification  
21 on your behalf?

22 A. Yes.

23 Q. And was that BlueCross/BlueShield?

24 A. Yes.

25 Q. And did Dr. Karsten's office inform you that

1 you had been approved for coverage for the hysterectomy  
2 and you would be required to pay out of pocket a \$100  
3 co-pay?

4 A. They stated that my insurance company did not  
5 require preauthorization.

6 Q. And they informed you that they were informed  
7 you would be required to only pay a \$100 co-pay;  
8 correct?

9 A. Yes.

10 Q. Were you surprised when you received that  
11 information?

12 A. Yes.

13 Q. Were you happy?

14 A. Yes.

15 Q. Yet you didn't go forward to schedule the  
16 hysterectomy?

17 A. No.

18 Q. And was that because you were expecting a  
19 denial of coverage?

20 A. Yes.

21 Q. And you thought the denial of coverage would be  
22 helpful for your lawsuit?

23 A. No.

24 Q. Did you think it was necessary for your  
25 lawsuit?

1 A. Yes.

2 Q. And you wanted to move forward with the  
3 lawsuit, didn't you?

4 A. I don't feel like I can answer a yes or no  
5 answer to that because I knew that I would be getting a  
6 bill down the road for the hysterectomy if I proceeded.

7 Q. And how did you know that?

8 A. Because it's listed as an exclusion.

9 Q. You called BlueCross/BlueShield; correct?

10 A. I did.

11 Q. When you first called, they told you that you  
12 were approved for the procedure, didn't they?

13 A. I can't recall the specifics of that  
14 conversation.

15 Q. You're the one that brought to  
16 BlueCross/BlueShield's attention that you were getting a  
17 hysterectomy for purposes of gender dysphoria; right?

18 A. I believe that my doctor had sent over the  
19 code.

20 Q. You believe your doctor sent the code over for  
21 gender dysphoria?

22 A. Yes.

23 Q. And why do you believe that?

24 A. Because that was the reason for the procedure.

25 Q. Do you recall you providing that information to

1 BlueCross/BlueShield?

2 A. I recall asking them to check that.

3 Q. And why did you ask them to check it?

4 A. Because I was very fearful of, in the end,  
5 getting a very, very large medical bill at the end of  
6 surgery.

7 Q. Did you also ask them to check it because you  
8 wanted to have in hand a denial of benefits letter?

9 A. No.

10 Q. Did you request such a letter from  
11 BlueCross/BlueShield?

12 A. I cannot recall.

13 Q. Did anyone instruct you to contact  
14 BlueCross/BlueShield after your doctor's office told you  
15 that the pay would simply be \$100 out of pocket?

16 A. I cannot recall.

17 Q. You don't remember?

18 A. (Shakes head.)

19 Q. So you don't remember if it was your idea or  
20 someone else's?

21 A. I believe it was mine.

22 Q. You recorded the conversation with BlueCross;  
23 correct?

24 A. I did.

25 Q. Did anyone recommend that you do that?

1 A. No.

2 Q. Why did you record it?

3 A. I wanted to have proof for myself going forward  
4 that it would be denied.

5 Q. And when you say proof for yourself, do you  
6 mean for purposes of the lawsuit that brings us here  
7 today?

8 A. Yes.

9 Q. How did you do the recording?

10 A. I recorded on my cellphone.

11 Q. Through an app or how did you do it?

12 A. Through an app.

13 Q. What app did you use?

14 A. I think it was the basic, like, recording app  
15 that was on all phones at that time.

16 Q. Okay. And have you provided that recording to  
17 anyone?

18 A. Yes.

19 Q. Who?

20 A. My legal team.

21 Q. And when did you provide it to them?

22 A. In the past few weeks.

23 Q. So you had it on your -- did you have it on  
24 your phone or somewhere else?

25 A. I had it saved somewhere else.

1 cost analysis of removing the exclusion that's at issue  
2 in this case?

3 A. I cannot recall from this conversation.

4 Q. Okay. Do you know whether there's been a cost  
5 analysis performed if the exclusion were removed under  
6 the plan?

7 A. No.

8 Q. So as you sit here today, you don't have any  
9 knowledge of whether a cost analysis has been performed  
10 and what the results were. Is that a fair statement?

11 A. Yes.

12 Q. I'm finished with that exhibit.

13 Is it your understanding that at the  
14 present time, you could get a hysterectomy paid for  
15 under the plan for reasons other than gender dysphoria,  
16 for example, risk of cancer?

17 MR. BLOCK: Objection to form.

18 A. Can you rephrase the question?

19 Q. BY MS. ABDO: Sure. Is it your understanding  
20 at the present time that you could get a hysterectomy  
21 that would be paid for by your plan for reasons other  
22 than gender dysphoria such as risk of cancer?

23 A. With a formal diagnosis of precancerous cells,  
24 yes.

25 Q. And on your examination, did they find

1 precancerous cells?

2 A. No.

3 Q. So if I understand, they did a biopsy. And did  
4 it come back negative for precancerous cells?

5 A. Yes.

6 Q. And do you know what was the reason the biopsy  
7 was performed?

8 A. Yes.

9 Q. What was the reason?

10 A. I had an abnormal Pap smear result.

11 Q. And was there any more detail to the abnormal  
12 Pap smear result, in other words, presence of  
13 precancerous cells or anything else?

14 A. No.

15 MS. ABDO: I know we've been going a  
16 little over an hour. Do you need a break?

17 A. Yes.

18 MS. ABDO: Okay. Why don't we go ahead  
19 and take 10 minutes.

20 (Recessed from 10:17 a.m. until  
21 10:32 a.m.)

22 Q. BY MS. ABDO: Dr. Toomey, is it your  
23 understanding that a hysterectomy would be covered under  
24 the plan for things such as uterine prolapse?

25 A. I do not know.

1 Q. Is it your understanding that with certain  
2 indications -- well, let me just ask this. And I  
3 apologize if I asked this before. I'm not trying to ask  
4 you again. Is it your understanding that a hysterectomy  
5 would be covered under the plan, for example, if you had  
6 cancer in some of the organs involved with a  
7 hysterectomy?

8 A. Yes.

9 Q. And is it your understanding that there are  
10 other indications for which a hysterectomy would be  
11 covered under the plan if they were present for you?  
12 What I'm referring to is other medical indications, for  
13 example, perhaps excessive bleeding or other problems  
14 that were being experienced with the organs involved in  
15 a hysterectomy.

16 A. Yes.

17 Q. And as I understand, you've had a physician  
18 tell you that you're at higher risk for cervical cancer  
19 due to the hormones that you have been taking; correct?

20 A. No.

21 Q. Have you had a physician tell you that one of  
22 the potential risks of the hormones that you take is a  
23 higher incidence of cervical cancer?

24 A. It was not specified which type of cancer.

25 Q. Was it your understanding, though, that it was

1 Pap smear; correct?

2 A. Yes.

3 Q. Have you sought a second opinion as to whether  
4 those indicators I'll call them, the potential risk of  
5 cancer due to hormones and an abnormal Pap and a biopsy,  
6 would entitle you to a hysterectomy under your BlueCross  
7 benefit plan?

8 A. I'm not sure I understand your question.

9 Q. Have you sought an opinion from any physician  
10 as to whether your current health status, which includes  
11 the potential risk of cancer due to hormone therapy,  
12 history of an abnormal Pap and your recent biopsy, would  
13 indicate that a hysterectomy would be appropriate for  
14 you?

15 MR. BLOCK: Objection to form.

16 A. Is the question about the second opinion or the  
17 physician that I saw?

18 Q. BY MS. ABDO: Well, it was about a second  
19 opinion, but we can start with the physician that you  
20 saw. Did you discuss with that physician whether the  
21 history that I've just described would indicate that  
22 you're a candidate for a hysterectomy?

23 A. She discussed that when she was discussing the  
24 options that would come back with a diagnosis.

25 Q. And since you received the results of your

1 biopsy, have you had any discussion with the physician  
2 about whether you would be a candidate for a  
3 hysterectomy at this time?

4 A. The results of my test did not warrant a  
5 hysterectomy based on her medical opinion.

6 Q. Was that based on -- is that what you concluded  
7 based on what she told you in advance of your results or  
8 did you have a follow-up conversation?

9 A. I had a follow-up conversation with her.

10 Q. And have you sought a second opinion as to  
11 whether your history would make you a candidate for a  
12 hysterectomy?

13 A. I have not.

14 Q. Do you intend to?

15 A. Not at this time.

16 Q. Why not?

17 A. Because I trust the judgment of my medical  
18 provider.

19 Q. Have you been told affirmatively by a physician  
20 that you are not at higher risk for cancer due to the  
21 hormone therapy that you're on?

22 A. Can you clarify what you mean by  
23 "affirmatively"?

24 Q. Has any physician told you that hormone therapy  
25 does not put you at higher risk for cancer?

# Exhibit 30



**WPATH** WORLD PROFESSIONAL  
ASSOCIATION for  
TRANSGENDER HEALTH

# Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People

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The World Professional Association for Transgender Health





# Standards of Care

## for the Health of Transsexual, Transgender, and Gender Nonconforming People

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The World Professional Association for Transgender Health

7th Version<sup>1</sup> | [www.wpath.org](http://www.wpath.org)

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<sup>1</sup> This is the seventh version of the Standards of Care. The original SOC were published in 1979. Previous revisions were in 1980, 1981, 1990, 1998, and 2001.



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## Risks of Hormone Therapy

All medical interventions carry risks. The likelihood of a serious adverse event is dependent on numerous factors: the medication itself, dose, route of administration, and a patient's clinical characteristics (age, co-morbidities, family history, health habits). It is thus impossible to predict whether a given adverse effect will happen in an individual patient.

The risks associated with feminizing/masculinizing hormone therapy for the transsexual, transgender, and gender nonconforming population as a whole are summarized in Table 2. Based on the level of evidence, risks are categorized as follows: (i) likely increased risk with hormone therapy, (ii) possibly increased risk with hormone therapy, or (iii) inconclusive or no increased risk. Items in the last category include those that may present risk, but for which the evidence is so minimal that no clear conclusion can be reached.

Additional detail about these risks can be found in Appendix B, which is based on two comprehensive, evidence-based literature reviews of masculinizing/feminizing hormone therapy (Feldman & Safer, 2009; Hembree et al., 2009), along with a large cohort study (Asscheman et al., 2011). These reviews can serve as detailed references for providers, along with other widely recognized, published clinical materials (Dahl, Feldman, Goldberg, & Jaber, 2006; Ettner, Monstrey, & Eyler, 2007).

TABLE 2: RISKS ASSOCIATED WITH HORMONE THERAPY. BOLDDED ITEMS ARE CLINICALLY SIGNIFICANT

<b>Risk Level</b>	<b>Feminizing hormones</b>	<b>Masculinizing hormones</b>
Likely increased risk	<b>Venous thromboembolic disease<sup>A</sup></b> Gallstones Elevated liver enzymes Weight gain <b>Hypertriglyceridemia</b>	Polycythemia Weight gain Acne Androgenic alopecia (balding) Sleep apnea
Likely increased risk with presence of additional risk factors <sup>B</sup>	Cardiovascular disease	
Possible increased risk	<b>Hypertension</b> Hyperprolactinemia or prolactinoma <sup>A</sup>	Elevated liver enzymes <b>Hyperlipidemia</b>
Possible increased risk with presence of additional risk factors <sup>B</sup>	<b>Type 2 diabetes<sup>A</sup></b>	<b>Destabilization of certain psychiatric disorders<sup>C</sup></b> Cardiovascular disease Hypertension Type 2 diabetes
No increased risk or inconclusive	<b>Breast cancer</b>	Loss of bone density <b>Breast cancer</b> <b>Cervical cancer</b> <b>Ovarian cancer</b> <b>Uterine cancer</b>

<sup>A</sup> Risk is greater with oral estrogen administration than with transdermal estrogen administration.

<sup>B</sup> Additional risk factors include age.

<sup>C</sup> Includes bipolar, schizoaffective, and other disorders that may include manic or psychotic symptoms. This adverse event appears to be associated with higher doses or supraphysiologic blood levels of testosterone.

# Exhibit 31

IN THE 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 MARIE FRANCES ISAACSON

Via Zoom videoconference  
March 26, 2021  
8:21 a.m.

Glennie Reporting Services, LLC  
1555 East Oranewood Avenue  
Phoenix, Arizona 85020

602.266.6535  
www.glenne-reporting.com

Prepared by:

Jill Marnell, RPR  
Arizona Certified  
Reporter No. 50021

Marie Frances Isaacson - 03/26/2021

19

1 Q. And am I correct in assuming that if it wasn't  
2 required the Arizona Department of Administration and  
3 others making the decision weren't going to implement  
4 those other services?

5 A. I don't know that to be true. I don't know.

6 Q. Did you determine that it was required to add the  
7 services that were added in 2015?

8 A. We sought legal counsel and that -- with the  
9 legal counsel's recommendation and meeting with the  
10 governor's office there was a decision made -- a  
11 conclusion made to cover some services.

12 Q. What services were covered and what services were  
13 not covered?

14 A. The counseling and hormone therapy were covered.  
15 And surgery was not covered.

16 Q. Was there an explanation given as to why surgery  
17 was not covered?

18 A. The -- the discussion -- the discussion was that  
19 the requirement was that some services are going -- are  
20 required to be covered, and the services that we are going  
21 to cover are hormone therapy and counseling.

22 Q. Was it determined by anyone that surgery was not  
23 required to be covered?

24 A. Yes.

25 Q. And who determined that? Your counsel?

Marie Frances Isaacson - 03/26/2021

24

1 A. Helena -- I can't remember her last name. Maybe  
2 Rodrigues.

3 Q. Just one person?

4 A. There was somebody that worked with her, Staci.  
5 I can't remember Staci's last name. And there was a --  
6 there was an additional person that I -- that I remember  
7 from reviewing the email strings with Ryan Curtis.

8 Q. You knew from your discussions with the folks at  
9 the University of Arizona that the university was  
10 interested in having ADOA's plan provide better healthcare  
11 coverage for transgender people; correct?

12 A. Yes.

13 Q. And they were pushing for basic benefits before  
14 they were implemented; correct?

15 A. Yes.

16 Q. And they also were pushing for benefits to cover  
17 transgender gender dysphoria surgery; correct?

18 A. I think so.

19 Q. Well, didn't you have a number of meetings with  
20 people at the University of Arizona where they pointed out  
21 that professors and other staff at the University of  
22 Arizona were interested in having that coverage?

23 A. I wouldn't say -- Well, phone conversations.  
24 There were a number of phone conversations.

25 Q. Oh, okay. And let's include phone conversations

Marie Frances Isaacson - 03/26/2021

25

1 with face-to-face conversations. There were a number of  
2 those; correct?

3 A. Yes.

4 Q. And they made clear that they wanted coverage for  
5 surgery for gender dysphoria; correct?

6 A. Yes.

7 Q. And ultimately, at least while you were at ADOA,  
8 that was not provided; correct?

9 A. Yes.

10 Q. Did the University of Arizona folks you talked  
11 with tell you why they wanted to have the coverage for  
12 surgery for gender dysphoria for their professors and  
13 staff?

14 A. Helena said that there was a meeting with the  
15 U of A president and that there was concern because  
16 there -- transgender studies was offered at the University  
17 of Arizona and there were concerns that our health plan  
18 didn't cover transgender reassignment surgery, didn't  
19 cover it -- didn't cover that at all, and that -- In  
20 particular I remember that there were professors with  
21 children and they were paying for treatment out of pocket  
22 and it was very expensive.

23 Q. So they made it clear that it was an important  
24 issue.

25 A. Yes.

Marie Frances Isaacson - 03/26/2021

26

1 Q. And what did you say in response to those  
2 conversations?

3 A. Currently not covered by our plan.

4 Q. Did you tell them ADOA was exploring the  
5 possibility of covering surgery for gender dysphoria?

6 A. I said we were researching it.

7 Q. And did you research it?

8 A. Yes.

9 Q. And I think the research took place around this  
10 time, starting in September of 2015 and went through -- at  
11 least through November of 2015. We can look at the  
12 documents, and will, as time allows.

13 What did the research tell you about  
14 coverage for gender dysphoria surgery?

15 A. I think the majority of our plans said that it  
16 was not covered and, you know, confirmation that some  
17 states did cover it.

18 Q. So were you looking to see whether other states  
19 covered it to determine whether the ADOA should cover it?

20 A. I was researching what -- what existed as far as  
21 in the benefits world, reached out to Mercer, reached out  
22 to all of our health plans, trying to gather as much  
23 information as possible about it to help inform a  
24 decision.

25 Q. Well, one of the things that the ADOA health plan

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1 under a dollar per plan.

2 A. I --

3 MR. CURTIS: Objection.

4 MR. ECKSTEIN: Per employee. Per employee  
5 per plan.

6 THE WITNESS: I -- I -- I don't remember,  
7 Paul.

8 Q. BY MR. ECKSTEIN: Okay. Well, we'll -- we'll  
9 take a look.

10 Thinking back, did you believe that the --  
11 the cost that was estimated was -- was too high to justify  
12 providing that benefit?

13 A. I don't remember that being -- We discussed cost,  
14 but I don't remember that being the driving factor in the  
15 discussion.

16 Q. What was the deciding factor?

17 A. What was required by law. What was required by  
18 law for us to cover.

19 Q. So as you recall it, if the -- Strike that.

20 As you recall it, the persons making the  
21 decisions were focused on what was legally required. And  
22 if it wasn't legally required, surgery for gender  
23 dysphoria was not going to be offered in the plan.

24 A. What I recall is that there was a decision that  
25 had to be made, and reaching out to the health plans,

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1 doing research ourselves to -- to gather as much  
2 information as possible to make a decision.

3 Q. Do you consider yourself part of the group that  
4 made that decision?

5 A. I would say no.

6 Q. Who was in the group that made the decision?

7 A. Legal counsel and the governor's office and the  
8 director's office.

9 Q. Did you consult with anyone in the legislature,  
10 particularly the Joint Legislative Budget Committee, JLBC,  
11 as to the wisdom of covering surgery for gender dysphoria?

12 A. No.

13 Q. Did anyone from the legislature weigh in and tell  
14 you their thoughts?

15 A. No.

16 Q. Did you ever hear that anyone from the  
17 legislature had weighed in and given thoughts on that?

18 A. No.

19 Q. Was this considered a political issue of any  
20 kind?

21 A. Not that anyone raised to me, no.

22 Q. Did you hear secondhand that there was concern  
23 about the politics of including surgery for gender  
24 dysphoria?

25 A. No.

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1 Q. No one ever told you that it was not politically  
2 acceptable to provide that coverage if it wasn't required  
3 by law?

4 A. No.

5 Q. None of your discussions with anyone within ADOA  
6 or the governor's office indicated that the political heat  
7 was not worth it to cover surgery for gender dysphoria?

8 A. Not that I recall.

9 Q. Did you hear it secondhand?

10 A. Not that I recall.

11 Q. Do you believe -- Strike that.

12 Did you believe at the time that there were  
13 political costs for expanding the plan to cover surgery  
14 for gender dysphoria?

15 A. I don't remember having an opinion about it.

16 Q. Did anyone in ADOA or elsewhere express an  
17 opinion to you about that?

18 A. Not that I recollect.

19 Q. You understood, didn't you, that none of the  
20 universities -- strike that -- that the University of  
21 Arizona -- neither the University of Arizona nor Arizona  
22 State University could provide health benefits that  
23 covered surgery for transgender people?

24 A. Yes.

25 Q. And why was that?

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1 A. It was an exclusion in the plan.

2 Q. It was also in the statute. Do you recall a  
3 statutory provision that said that you had to use the --  
4 the State-offered plan?

5 A. I -- I know that the universities had wanted to  
6 not use our plan, to have their own plan. And I -- I do  
7 recall that there is a statute that said -- now that  
8 you're saying it it does refresh my mind that there is a  
9 statute that says the universities have to use the DOA  
10 plan.

11 Q. But there was one university, Northern Arizona,  
12 that came within an exclusion because they had coverage  
13 beforehand. They had their own -- their own plan and they  
14 were able to provide that coverage. And by "that  
15 coverage" I mean coverage for surgery, transgender  
16 dysphoria surgery.

17 A. I was aware that U -- that the -- NAU had a  
18 grandfathered plan, a Blue Cross Blue Shield plan. I was  
19 not aware they covered that.

20 Q. That never came up in your research?

21 A. Not that I recall.

22 Q. Would you describe the reaction of -- How would  
23 you describe the reaction of the University of Arizona  
24 when you told them that surgery for gender dysphoria was  
25 not going to be covered?

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1           A.    I don't remember -- I'm assuming I contacted  
2 Helena, but I don't remember -- I don't remember her  
3 reaction.

4           Q.    You don't remember that they were extremely  
5 unhappy?

6           A.    I'm not surprised if you tell me that, but I  
7 don't remember the reaction.

8           Q.    Well, you did know that it was a big issue on the  
9 University of Arizona campus.

10          A.    Yes.

11          Q.    They made that clear to you.

12          A.    Yes.

13          Q.    On more than one occasion.

14          A.    Yes.

15          Q.    Do you know how many employees of the State of  
16 Arizona were covered by the plan when you left in April of  
17 2018?

18          A.    I don't remember.

19          Q.    Approximately?

20          A.    I know we had 133,000 lives. That's -- that's  
21 what I recall.

22          Q.    And do you recall roughly the percentage that  
23 were represented by employees at the University of Arizona  
24 and Arizona State University?

25          A.    No. But I would say it's about 70,000. I'm

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1 just -- I remember for each employee it was about two --  
2 two people. So it was about 70,000. And then the  
3 universities would have been the other 133 -- Or the  
4 difference between 133 and the 70,000 is -- is an  
5 approximation.

6 Q. So if I -- my math is correct, more than half of  
7 the people covered by the plan were employees of the  
8 University of Arizona and Arizona State University;  
9 correct?

10 A. I'd say a little bit less than half because it  
11 was 70,000 that were State and then 63,000 were ASU,  
12 U of A, and NAU.

13 Q. Okay. I got it -- I got it, just reversed.

14 On how many occasions did you have  
15 discussions with representatives of the governor's office  
16 about coverage for surgery for gender dysphoria?

17 A. I don't know. I don't have an exact number. A  
18 few times. Several times.

19 Q. Well, let's start with Tab 36, if you can find  
20 that. Should be the last exhibit in the book. And we  
21 will mark that as [Exhibit 101](#). We'll call these A --  
22 ABOR 100 and ABOR 101.

23 On the screen I'll identify it as a string  
24 of emails starting with an email from Erica Emmons dated  
25 July 21, 2016. And then the middle item in the string is

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1 an email from Scott Bender to Erica Emmons. And it says  
2 that -- and I'm summarizing -- that you had a meeting with  
3 the governor's office on transgender issues tomorrow,  
4 meaning September 2, 2016, and Scott was asking for  
5 additional information, I guess from Cigna, that would  
6 help you with the meeting.

7 Is that a fair summary of that?

8 A. Yes.

9 Q. You're not listed as getting a copy on that. Do  
10 you recall getting a copy?

11 A. No.

12 Q. Is this one of the exhibits you looked at? When  
13 was it, last Sunday you were looking at exhibits, or more  
14 recently?

15 A. I know that we looked at exhibits with Erica's  
16 name on it. I don't know if this was one of them or not.

17 Q. Okay. Did you tell Scott that you had this  
18 meeting coming up?

19 A. Based on the email I'm assuming I did.

20 Q. Do you recall the meeting?

21 A. I know that I met with the governor's office. I  
22 can't tell you that I recall this specific meeting, no.

23 Q. Do you recall more than one meeting with the  
24 governor's office?

25 A. There's one meeting that sticks out in my mind.

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1 Q. And do you recall when that meeting took place?

2 A. I don't. I'm assuming it was around 2016, around  
3 this time frame, but I don't really recall.

4 Q. And why does that stand out?

5 A. The meeting with the governor's office?

6 Q. Yes. You said there was one meeting that stood  
7 out and I was asking why that particular meeting, whenever  
8 it took place, perhaps around September of '16, why does  
9 that stick out in your mind?

10 A. Because that is when the resolution of what we  
11 would cover, in my mind, was made.

12 Q. Who was in that meeting?

13 A. I think Christina Corieri, Mike Liburdi, Ryan  
14 Curtis, myself, I think John Fry from the Attorney  
15 General's Office. That's who I recall. Maybe Nicole Ong.

16 Q. Does Nicole have a last name?

17 A. Ong, O-N-G.

18 Q. Okay. And what was her position?

19 A. She was a general counsel at Arizona Department  
20 of Administration.

21 Q. Were you the only two employees from ADOA who  
22 were there?

23 A. I can't remember if the director was there or  
24 not, Craig Brown.

25 Q. Do you recall what you said at that meeting?

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1 A. No.

2 Q. Were you asked to give a report on what other  
3 states provided coverage for gender dysphoria surgery?

4 A. If it's the meeting that I'm recalling, I just  
5 remember talking about advice from legal counsel and --  
6 and, you know, what we need to do moving forward, what  
7 we're going to do moving forward.

8 Q. And you had met with legal counsel who told you  
9 what was legally required; correct?

10 A. I don't know if we met or we just communicated  
11 via email or phone. Or both.

12 Q. And you repeated that to the governor's office  
13 even though counsel were there?

14 A. No. I think in advance of the meeting -- again,  
15 if it's the same meeting -- I shared the legal advice. It  
16 was written. I shared that with Christina Corieri, maybe  
17 Mike Liburdi, John Fry, Nicole.

18 Q. And Mike Liburdi was the counsel for the governor  
19 at the time; correct?

20 A. That's right.

21 Q. Do you recall how long that meeting lasted?

22 A. No.

23 Q. But your recollection is at the end of that  
24 meeting you understood that surgery for gender -- gender  
25 dysphoria was not going to be covered.

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1 A. Correct.

2 Q. And was it based on the fact that it was not  
3 legally required?

4 A. I remember that the discussion was services have  
5 to be covered, not specifically surgery, so you could  
6 cover counseling and hormone replacement therapy -- or not  
7 replacement, hormone therapy, and that that is what we  
8 would cover.

9 Q. Was hormone therapy covered by -- required by the  
10 law?

11 A. I don't remember.

12 Q. Do you remember discussion about that?

13 A. Like I said, I just remember that the law  
14 requires that services are covered. No specific services  
15 are outlined. That's what I recall the discussion being.

16 Q. I don't understand that answer. Maybe you can  
17 help me a little bit. When you say no specific services  
18 were -- Did you say out -- outlined or outlawed?

19 A. What I'm saying is that what I recall is the  
20 discussion of what the law requires is that you cover some  
21 services, plural, related to transgender gender dysphoria,  
22 but nothing -- no specific service is outlined. That's  
23 what I recall the discussion --

24 Q. Okay.

25 A. -- being.

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1 Q. Did the plan during the time you had involvement  
2 with it cover any services, health services, that were not  
3 required by law?

4 A. I don't know. I mean, I'm sure there are  
5 services that aren't required by law that were part of the  
6 plan description. The plan was adopted from when we were  
7 fully insured. So, you know, I'm assuming there are  
8 things that are covered that aren't required.

9 Q. Do you recall what they might be?

10 A. I think some plans offered healthy back. You  
11 know, that's the one that comes to my mind.

12 Q. But that was not required by law?

13 A. Not to my knowledge.

14 Q. So there was no general policy at ADOA to cover  
15 health benefits only if they were required by law; isn't  
16 that correct?

17 A. I would say that's correct.

18 Q. Other than coverage for healthy backs, can you  
19 recall any other services that were not required by law  
20 that were offered in the plan?

21 A. Not off the top of my head, no.

22 Q. You say that this one meeting took place and may  
23 or may not have been around this time in September. We'll  
24 look at other documents to see if we can pin it down. Do  
25 you recall how many times you did meet with the governor's

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1 A. I -- I don't remember the -- the context of the  
2 email.

3 Q. Well, let me ask it a different way.

4 When you went into the meeting with the  
5 governor's office you were of the view, were you not, that  
6 the exclusion for transgender surgery should be  
7 maintained?

8 A. When I went into the governor's office meeting  
9 that we've talked about previously with Christina Corieri  
10 and Mike Liburdi and John Fry and Nicole, that, to me, was  
11 when the decision was made. I didn't go into the meeting  
12 with the decision.

13 Q. No, I know that. But did you go in with a view  
14 that it should be excluded?

15 A. It wasn't my decision to make.

16 Q. I understand that. But you were the person in  
17 charge of the plan. Surely they asked for your view on  
18 this and your opinion, did they not?

19 A. They asked me to -- Or I don't even know that I  
20 can say they asked me. I researched it and gave them all  
21 the information based on the research that I conducted.

22 Q. And never once --

23 A. It wasn't about my opinion.

24 Q. And never once did they say, Marie, even though  
25 it not required, what's your opinion on this?

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1 material that is struck out?

2 A. Yes.

3 Q. And that's the same as appears on Page 5568. The  
4 language you came up with.

5 A. Yes.

6 Q. Why was that modification of the language  
7 necessary?

8 A. Because we were not excluding hormone therapy and  
9 counseling.

10 Q. So do you take from this that until January 1,  
11 2017, hormone therapy was excluded, and by changing this  
12 language you meant to cover hormone therapy but not gender  
13 reassignment surgery?

14 A. Yes.

15 Q. Was one of the topics at the meeting in the  
16 governor's office whether hormone therapy should be  
17 covered or was the discussion solely focused on covering  
18 the gender reassignment surgery?

19 A. The discussion, again, was around the  
20 interpretation of what services were -- were -- which  
21 services were required to be covered. And the conclusion  
22 was that not -- not everything had to be covered. That  
23 you had to provide some services, but it wasn't specified  
24 as to which services were required.

25 Q. Take this a little out of order, but could you

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1 gender reassignment surgery?

2 A. I don't know that we ever landed on an exact  
3 number.

4 Q. Okay. But as I understand your testimony this  
5 was not a cost issue. This was an issue of whether it was  
6 legally required; correct?

7 A. Correct.

8 Q. Okay. Did you ever have an actuary determine the  
9 cost?

10 A. Michael Meisner was an actuary. He worked for  
11 Kelly. I'm not sure if he got involved in that or not.

12 Q. Okay. Let's take a look at Tab 17. This will be  
13 [Exhibit 109](#). You were copied on the email indirect -- in  
14 the second email indirectly. You see that there was an  
15 email that Scott Bender sent you on August 22nd, 2016,  
16 which attaches an email from Stephanie Martin of  
17 UnitedHealth; correct?

18 A. Yes.

19 Q. And so this was what UnitedHealth costs were?

20 A. Do you want me to read the email?

21 Q. Sure.

22 Just so you know, my question --

23 THE COURT REPORTER: Who is speaking,  
24 please?

25 MR. ECKSTEIN: Paul Eckstein.

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1 Q. And what about -- what is it about bariatric  
2 surgery that sticks out in your mind?

3 A. Just what type of procedure -- there are  
4 different types -- there are different ways of conducting  
5 it, and we wanted to cover the gastric sleeve. We wanted  
6 to add that as a benefit.

7 Q. And when was that work?

8 A. 2013 maybe.

9 Q. And was it -- was that work almost all in 2013 or  
10 did it go on for a number of years?

11 A. It -- it was for the plan design for the  
12 following year.

13 Q. So in 2013 you recall working on what coverage  
14 the plan provided for bariatric surgery?

15 A. That's right.

16 Q. Do you recall ever working on any other -- And to  
17 clarify, did the plan exclude coverage for bariatric  
18 surgery at that point?

19 A. I didn't exclude it, but I think it covered  
20 specific types of bariatric surgery. It may have excluded  
21 it. I honestly don't remember. As I recall, it was to  
22 include that type of bariatric surgery.

23 Q. How did that process begin?

24 A. Two of the managers in the benefits division came  
25 to me with the recommendation to include gastric sleeve.

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1 Q. And is gastric sleeve the type of bariatric  
2 surgery the plan was considering covering?

3 A. Adding, yes.

4 Q. Is that typically how extensions of benefits come  
5 to your -- came to your attention?

6 A. Yes.

7 Q. So someone working in the benefit services  
8 division would come to you and say the plan should cover a  
9 particular type of service or treatment?

10 A. Yes.

11 Q. Did you ever -- did you ever get such requests  
12 top down, say, from a supervisor?

13 A. No.

14 Q. And do you know where those two -- So speaking  
15 specifically -- speaking with respect to the bariatric  
16 surgery -- and I think it was a type of sleeve, gastric  
17 sleeve -- do you know where those two managers got the  
18 idea that the plan might -- should cover or should  
19 consider extending coverage for gastric sleeves?

20 A. I'm guessing from the health plans.

21 Q. And what do you mean by the health plans?

22 A. Aetna, Cigna, United, Blue Cross Blue Shield.

23 Q. And why would that be your guess?

24 A. Just knowing the functioning of benefits and how  
25 it works.

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1 Q. Is it typical for the health plans to come to the  
2 ADOA recommending that coverage be extended for treatment?

3 A. I -- I would say it's typical that the health  
4 plans come to DOA with various recommendations: what to  
5 cover, what not to cover, changes to make.

6 Q. How often would you say, in your time working at  
7 ADOA, this happened?

8 A. That they recommended changes?

9 Q. Yes.

10 A. We met -- we met regularly. We met -- I -- I  
11 can't remember how often. Quarterly at least with the  
12 health plans. I can't say that each of those meetings  
13 resulted in recommendations of change. It was more how  
14 the -- how the plan was doing, a review of -- of the plan  
15 and utilization.

16 Q. So continuing to focus on this gastric sleeve for  
17 bariatric surgery, do you recall the outcome of that  
18 inquiry?

19 A. It was added as a benefit.

20 Or I should say, to be clear, extended a  
21 benefit. So for the type of surgery.

22 Q. Does that make a difference, whether a benefit is  
23 being added or extended?

24 A. I just wanted to be clear. It wasn't new, it was  
25 just an extension of the type of surgery we would cover.

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1 Q. Thank you for clarifying that, Ms. Isaacson. But  
2 my question remains, does it make a difference whether the  
3 ADOA is considering whether to add a benefit or extend  
4 benefits?

5 A. I'm not sure I'm following your question.

6 Q. Sure. Is -- is there a standard process for when  
7 the insurers bring a recommendation on whether the plan  
8 should cover a benefit?

9 A. The process is that they bring the -- the  
10 recommendation and then we discuss it amongst ourselves --  
11 we discussed it amongst ourselves, and then we would raise  
12 it to the director's office.

13 Q. And how long would that process typically take?

14 A. I'd say plan design started in June and was ready  
15 in -- I'm sorry, let me backtrack.

16 I would say it starts -- in the beginning of  
17 the plan year is when you start looking at your plan and  
18 what happens. And it results in a plan design change by  
19 June. So six months.

20 Q. Do you recall if it took -- Do you recall with  
21 respect to this gastric sleeve or bariatric surgery  
22 whether it took the six months?

23 A. I don't recall specifically, but that's about the  
24 time frame. I'm not sure how long the plans brought that  
25 idea forward.

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1 generally I would say, yes, he would be involved.

2 Q. Why was it important to have Mr. Meisner  
3 involved? Sorry. Let me -- let me actually clarify that.

4 Was it important to have Mr. Meisner  
5 involved --

6 A. Yes.

7 Q. -- in the analysis of whether the plan should  
8 cover a particular treatment?

9 A. Yes.

10 Q. Why is that?

11 A. To estimate the impact to the plan regarding  
12 costs.

13 Q. And for those -- for those same reasons would it  
14 be important to have an external consultant, actuarial  
15 consultant?

16 A. I don't know that we always had an outside  
17 actuarial consultant look at -- I don't -- I can't say  
18 they were always involved in every decision, every  
19 analysis.

20 Q. How was it decided when you would involve an  
21 outside actuarial consultant?

22 A. We didn't have any specific -- I think it was  
23 reviewing the decision at the time and what we thought was  
24 needed.

25 Q. When you say "we," are you referring to yourself?

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1 A. I'm assuming from the plans, the doctors -- the  
2 medical directors from the health plans.

3 Q. But you don't know?

4 A. No, I don't.

5 Q. Were there any other cat -- were there any other  
6 categories of data or information that the managers  
7 brought to you with respect to this gastric sleeve  
8 procedure?

9 A. Not that I remember.

10 Q. In general, when a new treatment is proposed are  
11 there categories of information aside from actuarial  
12 analysis that are brought to you, that were brought to  
13 you?

14 A. I would say just the recommendation from the  
15 plan, from the medical directors.

16 Q. Anything else?

17 A. Not that I recall.

18 Q. What about information about how other states  
19 cover a particular treatment?

20 A. Yes, that's part of the research.

21 Q. That's part of the research generally done?

22 A. I think it depends on what it is that we're  
23 talking about.

24 Q. Why does it depend on what -- what -- Let me  
25 clarify.

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1                   What do you mean by what we're talking  
2 about? Do you mean by what treatment is proposed?

3           A.    What change is being proposed, yes.

4           Q.    And when you say what change is being proposed,  
5 this goes back to my earlier question, does it matter  
6 whether it's an addition of a benefit, a new benefit or,  
7 say, the removal of a plan exclusion?

8           A.    As to whether or not there's an actuarial  
9 analysis or where it's coming from? I'm sorry.

10          Q.    Sorry. Let me --

11          A.    Could you rephrase that.

12          Q.    -- clarify. So I believe you said that generally  
13 the ADOA would collect information about how other states  
14 cover a particular treatment that's being considered for  
15 coverage.

16          A.    No. What I -- It's not unusual to look and see  
17 how other states handle something. That's not unusual.  
18 But I can't say that it was standard practice to say what  
19 were other states doing.

20          Q.    Was it typical to look at what other states were  
21 doing?

22          A.    Again, I think it just depended on what it was  
23 that we were looking at, who recommended it. If a -- if  
24 the plans -- if all medical directors were recommending  
25 something, and that it was, you know, the general practice

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1 her through the -- when you were at the ADOA?

2 A. I -- Yeah, I -- Yes.

3 Q. Has there ever been a conflict of interest in  
4 your work with the Arizona governor's office because of  
5 your prior work at the ADOA?

6 A. No.

7 Q. So just to be clear, there's never been a matter  
8 that you didn't feel like you could approach the  
9 governor's office because of your prior work with the  
10 ADOA?

11 A. Correct.

12 Q. And are you aware whether the Isaacson Law Firm  
13 ever screened you off from anything because of your work  
14 at the ADOA?

15 A. No.

16 Q. So -- And, again, we're going to pivot to your --  
17 to your work as the benefits director, you know, in the  
18 last role -- your last role in the ADOA. But just before  
19 that, on the bariatric surgery and gastric sleeve  
20 procedure we've been discussing, I believe you said  
21 earlier that procedure was ultimately approved.

22 A. Correct.

23 Q. Was that procedure legally required?

24 A. No.

25 Q. Why was it approved?

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1 cost of administering the plan.

2 Q. So you said you don't recall whether there was a  
3 cost analysis. From your experience do you know what the  
4 cost is generally of gastric sleeve -- of this gastric  
5 sleeve procedure?

6 A. I don't.

7 Q. And do you recall, aside from a cost analysis,  
8 any other information that you would have presented to the  
9 director's office in connection with this gastric sleeve  
10 procedure?

11 A. I don't.

12 Q. If you had to guess, what other information would  
13 you have presented?

14 A. Perhaps if there were other types of gastric  
15 bypass surgery, and maybe the complications of that in  
16 comparison to the gastric sleeve.

17 Q. So just to sum up, I just want to make sure I'm  
18 understanding correctly. You recall that the treatment  
19 was approved because it was in the best interest of the  
20 plan and the patients.

21 A. Yes.

22 Q. And would you say that's the most important  
23 factor you remember in the approval of this gastric bypass  
24 procedure?

25 A. Yes.

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1 THE COURT REPORTER: I'm sorry, can I  
2 clarify, I don't think I got an answer to, how often do  
3 you recall the ADOA adjusting an exclusion of coverage?

4 THE WITNESS: Not often.

5 THE COURT REPORTER: Thank you.

6 Q. BY MR. WALL: And do you -- Is there a general  
7 reason or a circumstance in which such coverage is usually  
8 added in to the plan or an ex -- Let me clarify.

9 Is there -- is there a reason for why an  
10 exclusion is typically removed from the plan?

11 A. Again, I would say the best interest of the plan,  
12 the best interest of its members.

13 Q. Does the medical necessity of a particular  
14 treatment or coverage factor into its removal, the removal  
15 of an exclusion?

16 A. I don't think medical necessity was taken into  
17 consideration for this.

18 Q. Does medical necessity factor in to the ADOA's  
19 analysis of whether to maintain or remove exclusions  
20 generally?

21 A. When you say medical necessity, are you saying  
22 required by law or -- What do you mean by medical  
23 necessity?

24 Q. What do you understand medical necessity to mean?

25 A. There are certain things that you have to cover

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1 maintain an exclusion, we didn't get to medical necessity.  
2 What we got to was, what is -- you know, what the doctors  
3 were seeing in the field as far as the best -- best care  
4 when it came to gastric bypass surgery.

5 Q. So is the answer, no, that the medical necessity  
6 of a particular procedure does not impact the ADOA's  
7 analysis of whether to maintain an exclusion of that  
8 procedure?

9 A. Yes, the answer is no.

10 Q. Would you say the best -- Earlier you testified  
11 that this gastric sleeve surgery was -- this change in  
12 coverage of gastric sleeve surgery was approved because it  
13 was in the best interest of the plan and the patients.  
14 Correct?

15 A. Yes.

16 Q. Is there a connection between the best interest  
17 of a patient and a procedure claimed to be medically  
18 necessary?

19 A. Can you say that again.

20 Q. Is there a connection between the best interest  
21 of a patient and a procedure claimed to be medically  
22 necessary?

23 A. Yes.

24 Q. Would you say that a procedure deemed to be  
25 medically necessary is in the best interest of a patient?

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1 A. There -- Yes. Yes.

2 Q. So was the approval of this gastric sleeve  
3 procedure because such procedure was deemed medically  
4 necessary?

5 A. I don't recall that being part of the  
6 conversation. What I recall is that we provided gastric  
7 bypass surgery and that this procedure was better than the  
8 other procedures or resulted in better results than the  
9 other procedures.

10 Q. Do you know if the AD -- Let me clarify.

11 Did the ADOA need to know whether the  
12 procedure was medically necessary to assess whether it  
13 should maintain the exclusion or not?

14 A. Gastric bypass surgery wasn't excluded, it was  
15 just that type of gastric bypass surgery.

16 Q. Did the ADOA need to know whether this type of  
17 gastric bypass surgery was medically necessary or not to  
18 decide whether to maintain the exclusion?

19 A. No.

20 Q. And so this type of gastric bypass surgery could  
21 be in the best interest of a patient and that would be  
22 enough for the ADOA to remove the exclusion.

23 A. Best interest in the patient and best interest  
24 for the plan, both.

25 Q. Can you recall any instance in which the best

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1 A. It could go as long as February.

2 Q. And would you have had -- would you, as the  
3 benefits director, have had final sign off on the language  
4 of this document?

5 A. Yes.

6 Q. Would you turn for me to Page 67 of this  
7 document. The Bates number in the bottom right-hand  
8 corner reading AZSTATE.010973. And actually, would you  
9 turn the page -- turn it back one page to Page 65. And so  
10 this is "Article 9, Exclusions and General Limitations";  
11 is that right, Ms. Isaacson?

12 A. Yes.

13 Q. And does this document accurately reflect the  
14 exclusions to the plan for the year 2016?

15 A. Yes.

16 Q. So I am looking at Paragraph 16 under this  
17 Section 9.1, "Exclusions and General Limitations." And  
18 that's on Page 67, which I had you turn to first. And  
19 this Paragraph 16 reads [as read]: Transsexual surgery  
20 including medical or psychological counseling, hormonal  
21 therapy in preparation for, or subsequent to any such  
22 surgery.

23 Did I read that accurately, Ms. Isaacson?

24 A. Yes.

25 Q. So when we were talking about the plan's

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1 exclusion of transgender benefits in 2016, is this what  
2 you have -- is this what you have in mind when we talk  
3 about that topic?

4 A. Yes.

5 Q. And is this the language you believe was in place  
6 when the plan went self-funded?

7 A. I believe so.

8 Q. You don't recall any other version of this  
9 exclusion prior to 2016, do you?

10 A. No.

11 Q. Do you know the original rationale for this  
12 exclusion, Ms. Isaacson?

13 A. I think the State -- My understanding is the  
14 State just adopted the plan that was the fully insured  
15 plan design.

16 Q. Did the State undertake any review of the plan  
17 design when it adopted it?

18 A. I was not involved in that decision. I don't  
19 know.

20 Q. Did the ADOA undertake any review while you were  
21 the benefits director of the plan design?

22 A. Those -- Yes.

23 Q. Did it -- did it review -- How did it go about  
24 that review?

25 A. Based on recommendations on an annual basis

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1 Q. And then it says estimated cost per utilization  
2 is \$10,884. Would you have considered that high for a  
3 cost per utilization?

4 A. No.

5 Q. And so finally the average annual cost it says  
6 \$130,419. Would you have considered that a high annual  
7 cost?

8 A. No.

9 Q. Ms. Isaacson, would you turn to Tab 5 in this  
10 binder. And we'll ask the madam reporter to mark that as  
11 [Exhibit 5](#). The first page of which is Bates stamped  
12 AZSTATE.006152.

13 Ms. Isaacson, do you recognize this  
14 document?

15 A. Yes.

16 Q. And what is it?

17 A. It's an email from Kelly Sharritts to me, copying  
18 Michael Meisner, regarding transgender coverage.

19 Q. And did you review this document in preparation  
20 for your deposition?

21 A. Yes.

22 Q. Did you recall the contents of this document even  
23 before that preparation?

24 A. No.

25 Q. Do you recall receiving this -- this email from

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1 Ms. Sharritts?

2 A. I don't specifically recollect it, no, but I  
3 don't doubt its existence or that it happened.

4 Q. Well, what about the information contained in  
5 here? Is this -- Do you recall this information?

6 A. Generally, yes.

7 Q. What do you recall about it generally?

8 A. That she prepared an estimate of what the cost  
9 would be. That we had UHC -- I -- I didn't specifically  
10 recall that UHC was the outlier, but that there were  
11 varied estimates.

12 Q. So Ms. Isaacson, are you saying that you -- you  
13 generally recall the summary, the bolded summary here?

14 A. I generally recall that Kelly prepared -- you  
15 know, was doing research and preparing documents.

16 Q. And Ms. Sharritts estimated here that the  
17 utilizations estimates range from one to 11 claims per  
18 year; is that right?

19 A. Yes.

20 Q. And that the average annual cost was 130,000 to  
21 582,000; is that right?

22 A. Yes.

23 Q. And that this would have been 0.02 percent to  
24 0.08 percent of the 711 million in medical costs; is that  
25 right?

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1 A. Yes.

2 Q. Is that 711 million in medical costs the average  
3 cost -- medical cost of the plan per year?

4 A. That sounds about right.

5 Q. So do you believe Ms. Sharritts was referencing  
6 here that the average cost of providing -- of removing the  
7 exclusion for transsexual surgery would be about 0.02  
8 percent to 0.08 percent of the plan's average medical  
9 cost?

10 A. Yes.

11 Q. And then you referenced earlier that you recall  
12 that UHC had been an outlier in estimating a cost of  
13 3.6 million.

14 A. I -- I remembered there was an outlier. Not  
15 until I looked at the memo did I remember that it was UHC.

16 Q. But UH -- Even with that outlier at 3.6 million  
17 in annual cost, Ms. Sharritts estimated here that that  
18 would work out to 0.17 to 0.77 dollars per month per  
19 employee; is that right?

20 A. I -- I -- I'm not sure that she's including it at  
21 the 3.6 million. But I -- her conclusion is that the per  
22 month increase to cover these costs for 60,000 employees  
23 we currently have would range from 17 cents to 77 cents  
24 per month per employee.

25 Q. So that range -- is that range for per month per

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1 employee, would you consider that high?

2 A. No.

3 Q. Is it a significant increase over an estimate --  
4 and I'm referring back to what was [Exhibit 4](#), the per  
5 member per month cost increase, estimated increase of  
6 86 cents?

7 A. I'm sorry, were you asking if [Exhibit 4](#) --

8 Q. Yeah. So let me clarify.

9 So I'm asking -- This estimate here is on a  
10 per month per employee basis. Whereas in [Exhibit 4](#) in the  
11 chart we looked at there was an estimate on a per member  
12 per month estimate.

13 A. Yes.

14 Q. Is -- does that difference -- Would that  
15 difference have mattered or would that have been a factor  
16 the ADOA considered?

17 A. No, I don't think so. I mean, they would have  
18 considered it. They consider all costs. But if it was  
19 significant, if that was what you -- I thought you were  
20 asking if it was significant.

21 Q. And it -- And that estimate for per month per  
22 employee is not significant; correct?

23 A. Right.

24 Q. Ms. Isaacson, did you read Ms. Sharritts' summary  
25 when she sent it to you?

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1 A. Yes.

2 Q. And what did you do with this information?

3 A. Added it to the accumulation of what we had.

4 Q. Would you have forwarded it to anyone, such as  
5 the director of the ADOA?

6 A. I don't know. I don't think so.

7 Q. At what point would you have decided to share  
8 this information with the director of the ADOA?

9 A. I'm not sure I would have shared this email with  
10 him.

11 Q. Why not?

12 A. Just a level of detail that I'm not sure he would  
13 have read, needed.

14 Q. So would you have shared this information with  
15 the governor's office?

16 A. Probably not.

17 Q. And is that for the same reasons, that it's at a  
18 level of detail that you think they would not need?

19 A. Correct.

20 Q. Did you -- Do you have any reason to doubt the  
21 accuracy of which Ms. Sharritts is -- is summarizing here?

22 A. No.

23 Q. And did the ADOA do -- Did anyone else at the  
24 ADOA do as in depth an analysis of the coverage of  
25 transgender -- transsexual surgery as Ms. Sharritts did

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1 A. Not that I recall.

2 Q. So what was the decision -- the decision -- In  
3 that meeting where the decision was made, what was that  
4 decision based off of?

5 A. We -- we reviewed the legal advice and -- and I  
6 don't -- I can't -- like I said, I can't remember if we  
7 covered any of the summary information or not, and -- and  
8 then a decision was made.

9 Q. And who made the decision?

10 A. The -- the decision was voiced by Christina  
11 Corieri.

12 Q. And who were the decision-makers in reaching it?

13 A. That I don't know.

14 Q. Was there a vote?

15 A. No.

16 Q. So did Christina Corieri announce the decision or  
17 was there a conference about the decision?

18 A. I took it as an announcement.

19 Q. Was there a discussion in that meeting about it  
20 or was -- did you attend this meeting and you were told  
21 what the decision was?

22 A. There wasn't really a discussion.

23 Q. So who do you understand to be the ultimate  
24 decision-makers on the decision of whether to continue the  
25 plan's exclusion of gender reassignment surgery?

# Exhibit 32

IN THE 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 ELIZABETH MARIE SCHAFER

Via Zoom videoconference  
April 28, 2021  
8:33 a.m.

Glennie Reporting Services, LLC  
1555 East Oranewood Avenue  
Phoenix, Arizona 85020

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Prepared by:

Jill Marnell, RPR  
Arizona Certified  
Reporter No. 50021

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1 A. I was a -- became a plan adviser in October 2016  
2 I believe.

3 Q. And what was your job responsibility in that role  
4 as plan adviser?

5 A. Plan adviser or plan administrator?

6 Q. I'm sorry, I may have gotten that wrong. So in  
7 2010 your role was plan adviser or plan administrator?

8 A. Plan administrator.

9 Q. Okay.

10 A. I managed -- To be honest, I don't really  
11 remember very well anymore. But I had the life contracts.  
12 I always had flexible spending. I always had the dental  
13 contracts. And I handled one medical contract with Aetna.

14 Q. And how long were you -- were you a plan  
15 administrator?

16 A. I was a plan administrator until I left in  
17 January of 2018.

18 Q. So to summarize, you worked at the ADOA from  
19 October 2006 until January of 2018?

20 A. Correct.

21 Q. And more specifically, you started working at --  
22 in the benefit services division in the ADOA in April of  
23 2007; is that correct?

24 A. Yes.

25 Q. And you worked in the benefit service division

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21

1 from April of 2007 until you left the ADOA in January of  
2 2018; is that correct?

3 A. That is correct.

4 Q. And in your various roles in the benefit service  
5 division did you work with the State of Arizona's  
6 healthcare plan?

7 A. I did.

8 Q. Would you say you became familiar with the State  
9 of Arizona's healthcare plan?

10 A. Yes.

11 Q. And were you involved in administering the State  
12 of Arizona's healthcare plan?

13 A. Yes.

14 Q. Were you involved in making changes to the plan?

15 A. I was not a decision maker on making changes, but  
16 I was involved in -- in meetings that involved, you know,  
17 what are the possibilities? Any suggestions of what could  
18 be changed? Things like that.

19 Q. So is it fair to say you were involved in the  
20 process of making changes to the plan but you were not  
21 yourself a decision maker?

22 A. Correct.

23 Q. And who were the decision makers?

24 A. Scott Bender is the director of benefits so  
25 ultimately it usually was Marie who was the director of

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22

1 benefits, or the director of ADOA, and sometimes it went  
2 above that.

3 Q. Okay. So I have Scott Bender, I have Marie  
4 Isaacson, and then who would have been above Marie  
5 Isaacson?

6 A. I don't remember the guy's name, to be honest,  
7 when I was there. So if you threw him out I'm sure I  
8 would remember but I don't remember the director. We had  
9 a couple changes, especially when Governor Ducey took  
10 over, so I don't remember all the changes there.

11 Q. So to be clear, Marie Isaacson was for a time the  
12 director of the benefit services division of the ADOA?

13 A. Correct.

14 Q. And above her there was a director -- there were  
15 various directors of the ADOA?

16 A. Correct.

17 Q. And Marie Isaacson reported to the director of  
18 the ADOA?

19 A. Yes.

20 Q. Does the name Craig Brown sound familiar to you?

21 A. Yes.

22 Q. Is it possible that he was the director or one of  
23 the directors of the ADOA?

24 A. Yes.

25 Q. And about when do you remember him being a

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24

1 Legislative -- It's the -- the committee within the  
2 legislature that handles the financial stuff. And I don't  
3 remember what -- I'm really horrible with acronyms. I am  
4 so sorry.

5 Q. Would it be the Joint Legislative Budget  
6 Committee?

7 A. It would. Yes.

8 Q. And what is your understanding of what the joint  
9 legislative budget committee's role was?

10 A. You have to get their approval. It's not  
11 required that they say yes, but it's a good thing for them  
12 to approve any of the changes you are making to the plan.

13 Q. What do you mean by it's a good thing to get  
14 their approval?

15 A. If they are not happy with the decisions being  
16 made they can make it much more difficult for the benefits  
17 department.

18 Q. And how would they make it more difficult?

19 A. Sometimes they put in a new statute or rule  
20 and -- or they make sure the director of the department  
21 knows that they don't approve.

22 Q. Can you recall any instances where the Joint  
23 Legislative Budget Committee got involved and expressed  
24 its interest in a particular benefit?

25 A. This is not an area I was deeply involved with.

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1 Q. And what was the governor's office role?

2 A. Again, never been involved in the meetings. I  
3 don't know. I just know that most everything had to be  
4 run through the governor's office.

5 Q. Did the governor's office have to approve changes  
6 to the plan?

7 A. I would say no.

8 Q. So to your knowledge the governor's office did  
9 not have to approve changes to the plan?

10 A. Correct.

11 Q. And the Joint Legislative Budget Committee did  
12 not have to approve changes to the plan?

13 A. Correct. We just had to present it to them.

14 Q. So both the -- the Joint Legislative Budget  
15 Committee and the governor's office were involved in  
16 decision-making about the plan, but to your knowledge it  
17 was not required to get either entity's approval to make a  
18 change to the plan?

19 A. Correct.

20 Q. Whose approval was required, to your knowledge,  
21 to make a change to the plan?

22 A. That's a really good question. I would probably  
23 say the benefits director and ADOA's director.

24 But, again, wasn't in the room for any of  
25 those -- that.

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1 Q. Okay. And just to be clear, I want to go back to  
2 the Joint Legislative Budget Committee and the governor's  
3 office briefly. You don't think that the governor's  
4 office had to approve changes to the plan; right?

5 A. They -- Were they required by law to approve it?

6 No.

7 Q. But you're not sure whether or not the governor's  
8 office had to approve a change to the plan. So it's  
9 possible that the governor could have expressed an  
10 interest in not covering a benefit and then the ADOA would  
11 have not covered that benefit; is that correct?

12 A. It is possible, yes.

13 Q. Who did you report to at the ADOA?

14 A. You want my entire tenure or just at the end?

15 Q. Let's -- let's -- That's a good question.

16 Let's stick for now to the period of 2015  
17 and 2016.

18 A. When I first started as a plan administrator I  
19 reported to Yvette Medina, and then I reported I think  
20 like the last year and a half to Scott Bender.

21 Q. So you reported at various times to both Yvette  
22 Medina and Scott Bender?

23 A. Correct.

24 Q. And what was Yvette Medina's position at the  
25 ADOA?

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1 A. It is.

2 Q. And it covers cosmetic surgery when that surgery  
3 constitutes necessary care; is that correct?

4 A. Correct.

5 Q. Okay. I would like to go to -- Well, actually,  
6 let me ask this question.

7 To your knowledge was the ADOA required by  
8 law or regulation to cover cosmetic surgery?

9 A. To my knowledge?

10 Q. Yeah, sorry. To your knowledge was the ADOA  
11 required to cover any cosmetic surgery?

12 A. You have to realize I retired and forgot a lot of  
13 stuff. But yes, there is -- there are times -- there have  
14 been some very specific laws where it is required. So,  
15 yes, like I believe reconstruction surgery after breast  
16 cancer and that kind of stuff. Children's and -- the  
17 women's and children's act or something to that effect.

18 Q. I would like to turn to, on the same page,  
19 Section 8.17, which is chiropractic care services. So we  
20 won't read all of this, but is it fair to say that in some  
21 circumstances the ADOA covers chiropractic care services?

22 A. It is.

23 Q. And to your knowledge was the ADOA required by  
24 law or regulation to cover chiropractic care services?

25 A. No.

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1 Q. Okay. I would like you to take a couple minutes  
2 and flip through. And the question I want to get at here  
3 is -- and I'll put it this way. Does ADOA only cover  
4 things when it is required to cover them?

5 MR. CURTIS: Objection; form of the  
6 question.

7 MR. GARBACZ: You can answer, Ms. Schafer.

8 THE WITNESS: Can you give me the question  
9 again.

10 Q. BY MR. GARBACZ: Sure. I'll make it more clear.  
11 So we'll -- we'll use chiropractic care services.

12 You said that the ADOA was not required to  
13 cover chiropractic care services, and yet it covers  
14 chiropractic care services as evidenced by Section 8.17 of  
15 the plan; is that correct?

16 A. Correct.

17 Q. So ADOA covers some benefits even when it is not  
18 required by law or regulation to cover them.

19 A. Yes.

20 Q. And there may be some benefits that ADOA covers  
21 only because law or regulation requires them to cover it;  
22 is that right?

23 A. Yes.

24 Q. I would like you to take a minute and just flip  
25 through this section Article 8, and see if you can point

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1 out any other benefits here that you know the ADOA was not  
2 required by law or regulation to cover, but it covered  
3 voluntarily.

4 MR. CURTIS: Objection to the form of the  
5 question.

6 THE WITNESS: Yeah, and I -- I mean, I can  
7 look through, but I'm no expert on law of what has to be  
8 covered by the plans. And because a lot of stuff is  
9 required under ERISA and stuff and -- and the State plan  
10 was not a ERISA plan, it gets kind of hazy sometimes.

11 I mean, dental, some plans will cover more  
12 dental than others. Diabetic, some -- some plans will  
13 cover a lot more in diabetic because it's one of the  
14 larger killers and drivers of medical costs in the United  
15 States. So almost everything you could cover more of. I  
16 mean --

17 Q. BY MR. GARBACZ: So -- so let's -- let's just  
18 take dental for -- as an example.

19 A. Uh-huh.

20 Q. To your knowledge is ADOA required to cover any  
21 dental coverage?

22 A. Not to my knowledge, no.

23 Q. Okay. Let's turn to Page 40. And in the bottom  
24 right-hand corner you should see AZSTATE.008982.

25 Do you see that?

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1 Do you see that?

2 A. I do.

3 Q. So this article, Article 9, describes  
4 prescription drug benefits that are covered under the  
5 plan; is that right?

6 A. Correct.

7 Q. And we won't go into a whole lot of detail here  
8 but I just want to get your sense of what prescription  
9 drugs are covered by the ADOA. Can you think of any  
10 examples of prescription drugs that the ADOA covers?

11 MR. CURTIS: Objection to the form of the  
12 question.

13 You can answer.

14 THE WITNESS: Huge, most drugs.

15 Q. BY MR. GARBACZ: Can you think of any examples  
16 just to familiarize me?

17 A. With things -- the drugs that are covered?

18 Q. Yes, a prescription drug that the ADOA would  
19 cover.

20 A. I would say 90 percent of drugs that are used  
21 to -- for most medical conditions as long as it's been --  
22 it's recognized by the FDA. It's easier to ask the  
23 opposite question.

24 Q. Got it.

25 Is the ADOA required to cover, as you say,

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1 90 percent of prescription drugs or are some of those  
2 drugs covered voluntarily?

3 MR. CURTIS: Objection to the form of the  
4 question.

5 THE WITNESS: Yes, they are -- Yes.

6 Q. BY MR. GARBACZ: Sorry. Let me make my question  
7 more clear.

8 So ADOA you said covers about 90 percent of  
9 prescription drugs; is that right?

10 A. That percentage is really just me grabbing  
11 something out of the air. I --

12 Q. So that -- I mean, that -- that estimate is based  
13 on your knowledge. You would ballpark that ADOA covers  
14 something like 90 percent of prescription drugs; is that  
15 right?

16 A. I -- What I can tell you from working not only  
17 with the ADOA plan and then I have worked with -- my last  
18 employer was the County, that ADOA's plan is very generous  
19 on the types of medication that they cover. They have a  
20 very wide formulary.

21 Q. And when you say very generous, do you mean that  
22 the ADOA covers things that other providers do not -- or  
23 other self-funded plans do not cover?

24 A. Not -- no, not necessarily but it covers a wider  
25 range of medication. Usually you try and only cover --

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1 you know, you have to have a minimum of, you know, a  
2 certain number of drugs for a certain condition. ADOA has  
3 a very broad number usually.

4 Q. So it might have more than one drug available for  
5 any given condition; is that right?

6 A. Correct. Like if you had high cholesterol a lot  
7 of plans would require you to use the generic version of a  
8 certain plan -- medication. So ADOA has a very large -- a  
9 very broad formulary.

10 Q. And is that -- is it required to have a very  
11 broad coverage or is it -- does it elect to have very  
12 broad coverage?

13 A. It has elected to have it in the past. Again, I  
14 left in 2018. And the pharmacy is the largest spend for  
15 medical plans, so I am sure that they are tightening that  
16 baby down as fast as they can because the expenses are so  
17 huge.

18 Q. But it's fair to say that ADOA covers some  
19 prescription drugs that it is not required to cover.

20 A. Probably --

21 Q. Is that right?

22 A. -- yes. Probably.

23 Q. I'm going to use Humira as an example. Do you  
24 know whether ADOA covers the prescription drug Humira?

25 A. I would have to ask you what Humira is treatment

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1 for. I don't -- I'm going to say probably yes, but -- and  
2 I know that's a very common name but, again, my mind has  
3 gone blank on what Humira is used for.

4 Q. That's okay.

5 You had mentioned that ADOA is very generous  
6 with prescription drugs under the plan. What did you mean  
7 by that exactly?

8 A. A lot of times you will work for employers that  
9 formulary is as tight as can be, which means they will  
10 offer just the minimum amount of coverage that they have  
11 or they will -- if there is a generic they will require  
12 you use the generic. And ADOA in the past has been very  
13 generous in allowing you to use the brand. That's just an  
14 example. But, you know, there can be 20 different  
15 medications to -- to handle, you know, high blood pressure  
16 and, you know, one plan may say you can use one -- one of  
17 these ten; another plan will say you can use all 20. And  
18 ADOA has a -- a very generous formulary. I don't know how  
19 else to say it.

20 Q. So there are -- there are other self-funded plans  
21 that will only cover the -- the minimal amount, say, for  
22 example, they will only cover the generic version of a  
23 specific drug, whereas ADOA will oftentimes cover the  
24 generic drug and certain name-brand drugs which are more  
25 expensive; is that right?

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1 A. Yes.

2 Q. Other than prescription drugs can you think of  
3 any other area in the plan where ADOA is generous?  
4 Meaning, are there any other areas where ADOA -- ADOA's  
5 self-funded plan covers more than other self-funded plans?

6 A. Again, that's a huge question. Nothing is like  
7 standing out. I mean, they try and -- and remain very  
8 competitive. So they're going to try and make sure  
9 they're meeting the market, what most people are getting  
10 from their plan.

11 Q. What do you mean by competitive? What does that  
12 mean?

13 A. Well, benefits is a way to retain employees. So  
14 as a State employee you don't get a lot of benefits other  
15 than your retirement or your health insurance. So you  
16 try -- we -- At least when I worked for the benefits  
17 department we tried very hard to make sure we were  
18 meeting -- you know, we met most of the book of business  
19 coverages and things like that.

20 Q. So would that mean if the trend is to cover a  
21 particular benefit, that ADOA, in order to be competitive,  
22 would want to cover that benefit?

23 A. In some cases, yes. It depends on how expensive  
24 it is, but yes. I mean, you always have to -- We always  
25 had to look at the -- the -- the cost as a whole. Are you

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1 MR. CURTIS: Objection; form of the  
2 question.

3 THE WITNESS: I am not an expert. But yes,  
4 it sounds -- What I know of the subject, yes.

5 Q. BY MR. GARBACZ: Okay. Do you know if  
6 hysterectomy, for example, is a type of surgery that might  
7 constitute gender reassignment surgery?

8 A. Sounds like something that could, yes.

9 Q. Okay. Ms. Schafer, I will represent to you that  
10 the plaintiff in this case, Dr. Toomey, who's a member  
11 under the plan, was seeking to have a hysterectomy and the  
12 hysterectomy was denied under this exclusion. So I'm  
13 representing to you that a hysterectomy is one of several  
14 surgeries, as you alluded to, that might constitute gender  
15 reassignment surgery.

16 With that in mind, does ADOA generally cover  
17 hysterectomies?

18 A. If they're medically necessary, yes.

19 Q. Okay. So if a hysterectomy -- So ADOA does not  
20 cover all hysterectomies. It only covers hysterectomies  
21 that are determined by a third-party administrator to be  
22 medically necessary; is that right?

23 MR. CURTIS: Objection; form of the  
24 question.

25 THE WITNESS: Correct.

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1 Q. BY MR. GARBACZ: But there's an exception to  
2 that. So there's an exception to the exception. Which  
3 is, ADOA covers hysterectomies when they are medically  
4 necessary, but not if the medical necessity is due to the  
5 patient's need -- or the patient's gender dysphoria?

6 MR. CURTIS: Objection; form of the  
7 question.

8 THE WITNESS: I'm not sure, but yes.

9 Q. BY MR. GARBACZ: So let me -- let me -- I know  
10 this is a little complicated, so I'll try to make it a  
11 little more clear.

12 So a hysterectomy is a procedure; correct?

13 A. Yes.

14 Q. And are you aware of -- have you heard of a CPT  
15 code before?

16 A. Yes.

17 Q. Have you heard of a diagnosis code before?

18 A. Yes.

19 Q. So when something is being covered, someone goes  
20 to their doctor, their doctor generally gives a diagnosis  
21 code and a CPT code, a procedure code; is that right?

22 A. Yes.

23 Q. So say, for example, a woman has ovarian cancer.  
24 She goes to her doctor. The doctor says you -- I am --  
25 I'm prescribing -- or I order that you have a hysterectomy

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1 and there's two codes. The diagnosis code would be  
2 whatever the diagnosis code is for ovarian cancer. And  
3 the procedure code would be hysterectomy; is that right?

4 MR. CURTIS: Objection; form of the  
5 question.

6 THE WITNESS: That sounds correct.

7 Q. BY MR. GARBACZ: And is it your understanding  
8 that if someone went to their doctor and the diagnosis was  
9 ovarian cancer and the procedure that was prescribed to  
10 treat that ovarian cancer was a hysterectomy, that that  
11 would be determined -- the procedure would qualify as  
12 medically necessary? The hysterectomy would be medically  
13 necessary; is that right?

14 MR. CURTIS: Objection; form of the  
15 question.

16 THE WITNESS: The TPA or your medical  
17 directors would have to determine that. I -- I'm sorry,  
18 I'm hung up on the fact that you're saying ovarian and  
19 hysterectomy, and they are not exactly the same organ.

20 Q. BY MR. GARBACZ: Okay. So I have that off. So  
21 let's step back to the particular type of cancer and let's  
22 just say you have cancer -- or the patient has cancer and  
23 the diagnosis code is cancer and the procedure code is  
24 hysterectomy. In other words, the doctor is prescribing a  
25 hysterectomy to treat the diagnosis which is cancer.

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1 A. Yes.

2 Q. Is it your understanding that that would qualify  
3 as medically necessary?

4 MR. CURTIS: Objection; form of the  
5 question.

6 THE WITNESS: It certainly sounds like  
7 something that should, but again, that's why we have a  
8 medical vendor.

9 Q. BY MR. GARBACZ: Okay. So let's suppose that it  
10 was -- Let's say that the third-party administrator does  
11 determine that this procedure is medically necessary.  
12 Would it be covered under the ADOA's plan?

13 A. Yes.

14 Q. Because it is -- because the ADOA covers  
15 hysterectomies when they are medically necessary; is that  
16 correct?

17 A. Correct.

18 MR. CURTIS: Objection; form of the  
19 question.

20 THE WITNESS: Correct.

21 Q. BY MR. GARBACZ: Okay. Now I'm going to change  
22 only one variable in that hypothetical. Let's say you go  
23 to your doctor and the doctor prescribes hysterectomy for  
24 you so the procedure -- so the procedure code is  
25 hysterectomy. But the doctor is not prescribing a

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1 hysterectomy because you have cancer, the doctor is  
2 prescribing a hysterectomy because you have gender  
3 dysphoria and a hysterectomy is being used to treat your  
4 gender dysphoria.

5 Do you follow my hypothetical so far?

6 A. I do.

7 Q. And let's take it one step further and suppose  
8 that the third-party administrator looks at that and  
9 determines that the procedure is medically necessary. In  
10 other words, the hysterectomy is medically necessary to  
11 treat gender dysphoria for this particular patient.

12 Does that make sense?

13 A. Yes.

14 Q. Now, my question for you is, would that procedure  
15 be covered or denied under the ADOA's plan?

16 A. The exact scenario you just -- I'm sorry, are we  
17 still on the exact hysterectomy one or is this a more  
18 generic question?

19 Q. We're on the hysterectomy. So --

20 A. Yeah.

21 Q. -- I know there's a lot of variables here. So a  
22 hysterectomy is a type of surgery that can constitute  
23 gender -- gender reassignment surgery. In this  
24 hypothetical, hysterectomy is being used to treat gender  
25 dysphoria. In other words, it's being used as a gender

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1 reassignment surgery.

2 A. Uh-huh.

3 Q. Because it constitutes gender reassignment  
4 surgery, would it be excluded under the plan under this  
5 Number 16, gender reassignment surgery?

6 A. Yes.

7 Q. Okay. So that was -- I wanted to go through that  
8 exercise to -- to point out the disparity here between a  
9 hysterectomy which is covered in some situations but not  
10 others. And in both situations it's medically necessary,  
11 right? It's medically necessary for the patient who has  
12 sought -- who was prescribed a hysterectomy because they  
13 have cancer and over here it's necessary because it was  
14 medically necessary to treat gender dysphoria. But in one  
15 situation it's covered and in the other situation it's  
16 not.

17 Do you see the difference?

18 A. Yes.

19 Q. So the difference there depends on the diagnosis  
20 code; right? The difference -- it's -- it's not that ADOA  
21 doesn't cover hysterectomies. As we just established,  
22 ADOA covers hysterectomies when they are medically  
23 necessary; isn't that right?

24 A. Correct.

25 Q. But if the reason for the medical necessity is

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1 area.

2 Q. And are you referring to changes that came down  
3 in 2015 and 2016 and specifically changes under  
4 Section 1 -- 1557 of the ACA?

5 A. Yes.

6 Q. Okay. We're going to get there in a minute.  
7 We're going to turn -- we're going to turn to some  
8 documents from 2015 and '16. But for now I want to be a  
9 little bit more specific.

10 Prior to 2015 and '16 when there was a  
11 change regarding 1557 of the ACA, prior to that were you  
12 aware of this exclusion for transsexual surgery?

13 A. I -- To be honest, I don't think we ever had  
14 any -- anything came across my desk, so we weren't getting  
15 complaints or anything about that. At -- at least sent to  
16 me.

17 Q. So were you aware that the plan excluded  
18 transsexual surgery prior to 2015?

19 A. Actually, I don't think I was. I -- I didn't --  
20 I don't remember it being talked about much.

21 Q. Do you know why the exclusion was in the policy?  
22 What was the rationale for the exclusion?

23 A. I have no idea.

24 Q. Do you have any idea when the exclusion was first  
25 introduced into the plan?

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1           A.     If I were to guess, as long as I was at ADOA it  
2 was there. But I don't actually know for a fact.

3           Q.     Okay. So to your knowledge this exclusion for  
4 transsexual surgery was in the plan for as long as you can  
5 remember and you're not aware of the rationale for why  
6 that exclusion was in the plan?

7           A.     Correct.

8           Q.     Okay. You mentioned that you hadn't heard any  
9 complaints. So I just want to be very clear about that.  
10 You never -- You don't remember any instances where any  
11 member or employee raised an issue with the transsexual  
12 surgery exclusion prior to 2015?

13          A.     No. I mean, it could have been something that  
14 was once we told them it was excluded, we -- we -- you  
15 know, we didn't spend much time on it but -- but I don't  
16 remember it.

17          Q.     If there was a complaint from an employee, for  
18 example, or another member, would you have known about it  
19 necessarily or is it possible that the exclusion -- or  
20 that complaint would not have come to your attention?

21          A.     It's possible that it would not have come to my  
22 attention. Kind of depends on how it came.

23          Q.     So what things generally came to your attention?

24          A.     It would have had to have been, you know, like  
25 (indecipherable) was really pushing it and they had gone

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1 that added coverage to the policy, for example, removing  
2 an exclusion or adding a new benefit. Can you think of  
3 any other instances where, in your time at the ADOA, the  
4 plan was modified to remove an exclusion or to add a  
5 benefit?

6 A. I mean, changes were made every single year on  
7 those plans. But, no, I can't -- I don't remember  
8 anything sticking out as to suddenly being covered, no.

9 Q. Do you remember a change in the plan to cover 3D  
10 mammography?

11 A. Yes.

12 Q. What do you remember about the change to cover 3D  
13 mammography?

14 A. And that was like right before I left so I'm  
15 assuming it was around 2017. I just know that the vendors  
16 recommended that it be covered and that then we had -- we  
17 have what's called medical directors meetings. They used  
18 to be quarterly but they were down to maybe once a year by  
19 the time I left, and I believe most of the medical  
20 directors for the vendors felt that a 3D was more  
21 appropriate.

22 Q. And so the ADOA ultimately modified the plan so  
23 that it would cover 3D mammography?

24 A. Yes.

25 Q. And that, to your recollection, happened likely

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1 in 2017?

2 A. Yes, or it could have been '18.

3 Q. And I want to go over exactly why the ADOA made  
4 that change. So why -- why in your view did the ADOA  
5 modify the plan to cover 3D mammography?

6 A. I, again, don't really remember a lot of  
7 specifics about it. I do think on the -- The ADOA plan  
8 had four vendors. So we were always struggling to make  
9 sure the coverages were very consistent across and it  
10 didn't matter which plan you were on, you should have  
11 gotten the same exact coverages. And I seem to remember  
12 one vendor started covering 3D before the others so we had  
13 to try and figure out if it was appropriate. But I don't  
14 really have a lot of memories about that.

15 Q. Okay. So would you say that recommendation of  
16 the vendors is one of the reasons why ADOA decided to  
17 cover 3D mammography?

18 A. Yes.

19 Q. What other factors or criteria did ADOA consider  
20 when deciding whether or not to cover 3D mammography? So  
21 I have recommendation of the vendors. Was there anything  
22 else that influenced the decision?

23 A. I seem to remember there might have been some  
24 analysis of you have to get a 3D anyways if the 2D showed  
25 certain things, so you ended up having to go back in and

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1 Q. So sitting here today you do not know whether 3D  
2 mammography was considered an expensive benefit to the  
3 ADOA?

4 A. My assumption is it's probably more expensive  
5 than a 2D, but I don't think it was hugely more expensive  
6 but I do not know. I've never looked at the claim.

7 Q. So to your knowledge did cost weigh into the  
8 decision-making at all?

9 A. Cost usually weighed into most decisions at ADOA.  
10 So I would say it probably did.

11 Q. What about trend; was the trend to cover 3D  
12 mammography?

13 A. It was becoming more common in the industry, yes.

14 Q. And do you think that that might have had an  
15 influence on the ADOA's decision?

16 A. Possibly, yes.

17 Q. But you're not sure?

18 A. No.

19 Q. Okay. Medical necessity; do you think or is it  
20 your understanding that a 3D mammography can be medically  
21 necessary?

22 A. Yes.

23 Q. And did the fact that a 3D mammography can be  
24 medically necessary weigh into the decision-making, to  
25 your knowledge?

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1 this -- or the first email, so you can turn to the base  
2 email which is on little Bates AZSTATE.006076.

3 Do you see that?

4 A. I do.

5 Q. This is an email from Yvette Medina to Jay Dash  
6 at Aetna, Colette Severns at Blue Cross Blue Shield, Amy  
7 Clatterbuck at UHC, and others, and you and Marie Isaacson  
8 are copied on the email.

9 Do you see that?

10 A. I do.

11 Q. So take a minute to review this email.

12 A. Okay.

13 Q. And so Yvette Medina is reaching out to the four  
14 vendors in this email regarding transgender reassignment;  
15 is that correct?

16 A. Correct.

17 Q. Why in your -- To your knowledge, why is Yvette  
18 Medina reaching out to ADOA's vendors about transgender  
19 reassignment?

20 A. She's probably looking for their experience with  
21 the book of business. So we're trying to figure out what  
22 are, you know, other health plans doing and how are they  
23 covering the procedure.

24 Q. And what prompted, to your knowledge, Yvette  
25 Medina to do that?

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1           A.    Back in 2015, I -- I'm not sure.  I know the  
2 Affordable Care Act prompted a lot of it.

3           Q.    So this likely could have had something to do  
4 with the Affordable Care Act?

5           A.    Yes.

6           Q.    If we look at the next email which is from Marie  
7 to the vendors on October 25th, 2015, Marie says [as  
8 read]:  All, as you are probably aware, the HHS issued a  
9 proposed rule on Section 1557 of the ACA.  Section 1557  
10 prohibits discrimination but is open for comment through  
11 November.  For your convenience the link to the proposed  
12 rule is below.

13                           And then Marie says [as read]:  Please  
14 advise how you believe this rule, if passed as proposed,  
15 will impact your business and its impact to the State  
16 under our current contracts with your organization.

17                           Do you see that?

18           A.    I do.

19           Q.    So does this refresh your memory as to why ADOA  
20 was reaching out in 2015 regarding transgender  
21 reassignment?

22           A.    Yes.

23           Q.    And why was ADOA reaching out in 2015 in --  
24 specifically in October of 2015 regarding transgender  
25 reassignment?

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1           A.     Because they -- we were being notified that this  
2 change was coming and I believe they were going to ask for  
3 comments or something, the federal government. So she  
4 wanted to know if it would impact us at the State.

5           Q.     So there was a proposed rule under Section 1557  
6 of the ACA. And Marie Isaacson was trying to understand  
7 how that rule would impact the ADOA.

8           A.     Correct.

9           Q.     Is that right?

10          A.     Correct.

11          Q.     Okay. If we look at the next email, which kind  
12 of cuts off to the next page, it starts on the page  
13 with -- the first page of the exhibit with little Bates  
14 AZSTATE.006074.

15                         See that?

16          A.     Yes.

17          Q.     So this one is from you to Amy Clatterbuck and  
18 Heather Gallegos at U -- UnitedHealthcare. You're  
19 following up on Marie's request. And at the end you say  
20 [as read]: Does UHC feel that UHC would not be able to  
21 exclude transgender reassignment no matter if the State  
22 plan excludes the benefit or not?

23                         Do you see that?

24          A.     I do.

25          Q.     Why are you sending this email?

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1           A.     Because Marie said to, I'm sure. But I am  
2 trying -- I have a feeling UHC didn't return their  
3 information within the time frame. And then based on some  
4 information we got she was trying to figure out whether  
5 the plans could administer the plan no matter what the  
6 decision was on what was covered.

7           Q.     So did Marie ask you to send the email?

8           A.     Because it starts with Marie, I'm going to say  
9 yes, but I don't have any memory of this.

10          Q.     Without regard to this email and -- specifically,  
11 do you remember being asked to look into this issue or  
12 having any role in this issue?

13          A.     My role in this particular issue was Marie was  
14 gathering a lot of information from a lot of different  
15 sources so she kind of wanted a centralized person or, you  
16 know, a place -- one place to go to be able to get all  
17 this different information that would be in one place. So  
18 I -- my big -- my big assignment was a chart. I had this  
19 chart where I took all this different information from all  
20 these different sources and I put the chart together for  
21 her and we would -- she -- so she could have an easy to  
22 kind of understand document to look at in one place  
23 instead of having to jump around in a million different  
24 places to look at stuff.

25          Q.     So Marie wanted someone to keep all of the

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1 information that was being collected centralized.

2 A. Yes.

3 Q. Is that correct?

4 A. To kind of take it and put it into something that  
5 a normal person might be able to understand.

6 Q. And was that your role, to take the information  
7 that was being collected and to centralize it?

8 A. Yeah. I -- I made the chart and did a lot of  
9 cutting and pasting as I recall.

10 Q. So you were involved in coordinating and  
11 centralizing all the research that the ADOA was doing  
12 regarding this issue in particular?

13 A. Yeah. Correct.

14 Q. Did you do any analysis of this issue or were you  
15 just collecting information and analysis that other people  
16 were doing?

17 A. I was pretty much just collecting the  
18 information.

19 Q. And where was the information being collected  
20 from?

21 A. The vendors, the HHS website, as I recall. I  
22 remember Googling and finding things from different -- a  
23 lot of different agencies. Different -- I mean, we  
24 gathered information from different states, universities.

25 Q. Okay. So I have vendors, the HHS website, and

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1 and centralizing information in response to the proposed  
2 rule on Section 1557 of the ACA; correct?

3 A. Correct.

4 Q. Okay. That is clear to me. If we go --  
5 Actually, let's stick with this same email. And if we  
6 turn to the first page, so the email that Marie is  
7 forwarding to you and others, Marie is describing  
8 Section 1557 of the ACA. Or sorry, this is -- this email  
9 is from Leena Bhakta at Mercer to Marie Isaacson and Chris  
10 Giammora -- Giammona.

11 Do you see that?

12 A. Yes.

13 Q. Take a second to -- or take a minute to review  
14 this email.

15 A. Okay.

16 Q. And what is your understanding of -- of what this  
17 email is saying?

18 A. It's a very consultant answer. Basically  
19 saying -- Well, to me it's not a very good answer, but --  
20 (reading sotto voce) insured options they sell on the  
21 exchange, ADOA would be impacted. It's basically saying  
22 we could be impacted.

23 Q. It's saying you could be impacted by 1557 --

24 A. Yes.

25 Q. -- of the ACA?

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1 Q. Do you remember how or if at all Marie Isaacson  
2 reacted to this assessment of cost?

3 A. No.

4 Q. We discussed earlier that generally when cost is  
5 minimal or when a -- a new benefit has an inexpensive  
6 cost, that ADOA is more likely to cover the benefit. Is  
7 that right?

8 A. That I think it would be safe to say the odds go  
9 up.

10 Q. So the fact that Oregon and Washington are seeing  
11 that in their experience the cost associated with covering  
12 transgender benefits is minimal, should that have made the  
13 odds go up that ADOA would cover transgender benefits?

14 A. I think it would be something that would be  
15 important to know.

16 Q. So it would be a factor that would weigh in favor  
17 of covering transgender benefits?

18 A. Yes.

19 Q. Okay. If we turn to [Exhibit 24](#). This has been  
20 premarked as Schafer [Exhibit 24](#). We can enter it into the  
21 record as Schafer [Exhibit 24](#). In the bottom right-hand  
22 corner you should see Bates AZSTATE.009183.

23 Do you see that?

24 A. Yes.

25 Q. And this is an email chain including you, Scott

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1 A. Very much so.

2 Q. Okay. I want to look at the chart. The first  
3 page in particular which has a little -- well, big Bates  
4 number 004484. And the little Bates is the same.

5 Do you see that?

6 A. Yes.

7 Q. If you look at under costs, the first bullet  
8 says: ADO -- ADOA analysis estimated the overall impact  
9 to cost to be relatively low.

10 Do you see that?

11 A. Yes.

12 Q. Do you know who wrote that?

13 A. Probably me.

14 Q. So this is your bullet point summarizing the  
15 research that had been done on cost?

16 A. Yes.

17 Q. And your impression at the time based on that  
18 research was that the cost would be relatively low.

19 A. Yes.

20 Q. Is that right?

21 A. Correct.

22 Q. If you look at the third bullet point it mentions  
23 that employers have found it to be less expensive because  
24 the benefit is not as utilized as expected.

25 Do you see that?

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1 Do you see that?

2 A. Yes.

3 Q. Let's talk about Kelly first. Do you know  
4 which -- Or who is Kelly? Who are you referring to?

5 A. It's the finance manager.

6 Q. Is that Kelly Sharritts?

7 A. Yes.

8 Q. So you had gotten with Kelly Sharritts to talk  
9 about the difference between per employee and per member  
10 statements; is that right?

11 A. Well, based on the earlier email we just looked  
12 at, that was one of my first questions, was, were we  
13 talking per member per -- or per employee? So obviously I  
14 had to go to her to try and get clarification on that.

15 Q. And did Kelly give you clarification on that?

16 A. She must have.

17 Q. What do you remember about the clarification  
18 Kelly gave you?

19 A. I remember nothing about that conversation except  
20 for what's in front of me. So I'm assuming she said it  
21 was per employee.

22 Q. Okay. In the email you say [as read]: I made  
23 the changes we discussed.

24 If we look at the chart, you notice that the  
25 first bullet point that was in the previous version of the

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1 chart which had mentioned the cost being, quote,  
2 relatively low is no longer there.

3 Do you see that?

4 A. I do.

5 Q. Did Marie Isaacson direct you to make that  
6 change?

7 A. I have no memory of that, but I would guess that,  
8 yes, she probably did.

9 Q. And so as we mentioned before, Marie Isaacson was  
10 ultimately directing what this chart looked like and what  
11 it contained. Is that right?

12 A. I needed to please Marie, yes.

13 Q. And in needing to please Marie, one of the  
14 changes that you made or likely made was removing this  
15 bullet point that said the overall impact to cost would be  
16 relatively low.

17 A. Yes.

18 Q. Do you remember or do you know why Marie wanted  
19 you to remove that bullet point?

20 A. No.

21 Q. Do you have a guess based on your interactions  
22 with Marie Isaacson and based on circumstances of this  
23 chart why she might have wanted you to delete that bullet  
24 point?

25 A. If I had to guess, someone didn't want it in

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1 black and white.

2 Q. And who would that someone might have been?

3 A. I have no idea.

4 Q. And to be clear, what they didn't want in black  
5 and white was that the cost to ADOA would be relatively  
6 low.

7 A. Yeah, the way it was -- it makes it sound like  
8 it's not a lot of money.

9 Q. Okay. We can turn to Tab 30. This has been  
10 premarked as Schafer [Exhibit 30](#). And we can enter it into  
11 the record as Schafer [Exhibit 30](#). In the bottom  
12 right-hand corner you should see AZSTATE.151707.

13 Do you see that?

14 A. I do.

15 Q. And this is another version of the chart that you  
16 were working on; correct?

17 A. Yes.

18 Q. I will represent to you that this document is a  
19 stand-alone document, meaning it's not attached to any  
20 email. Does that make sense?

21 A. Yes.

22 Q. I will also represent to you that unlike the  
23 other charts that we had previously looked at this one  
24 does not have a draft watermark. I don't know if you  
25 noticed but the other ones had a draft watermark

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1 underneath.

2 A. Yes.

3 Q. This one does not.

4 Does it make sense that this would be a  
5 final version of the chart?

6 A. Yes.

7 Q. What is the significance of it being the final  
8 version of the chart?

9 A. No more people were going to be looking at it and  
10 making changes.

11 Q. So no more changes were made. But was it  
12 presented to anyone?

13 A. My assumption would be yes.

14 Q. Who do you assume it was likely presented to?

15 A. Either the director or the governor's office.

16 Q. But you don't know for sure whether this was  
17 presented to the director's office or the governor's  
18 office; is that right?

19 A. Correct.

20 Q. Is it possible that it was also presented to the  
21 Joint Legislative Budget Committee?

22 A. It's possible, but I think it seems unlikely.

23 Q. Why does it seem unlikely?

24 A. Because it's -- it's not the type of thing that  
25 usually went before them.

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1 Q. Is it fair to say that the -- the Joint  
2 Legislative Budget Committee is generally not in the weeds  
3 about, for example, per member per month cost?

4 A. Right. I mean, normally when you go before them  
5 you've got your plans. You know, this is the changes  
6 we're going to make, dot, dot, dot, dot, dot. And you're  
7 just looking for their blessing.

8 Q. And is it fair to say that the J -- the Joint  
9 Legislative Budget Committee cares about the headline, the  
10 ultimate decision, and not necessarily the details?

11 A. (Indecipherable.)

12 THE COURT REPORTER: Did you say no?

13 THE WITNESS: I said yes.

14 Q. BY MR. GARBACZ: Okay. If we look at the first  
15 page, the first page is what appears to be a summary of  
16 all of the information that follows. Is that right? Does  
17 that seem right?

18 A. Well, it's really not a summary. Yeah, I guess,  
19 yes.

20 Q. If we look at the first page, and just based on  
21 the headings, it looks like there are really three topics  
22 of information gathering here. The first topic is vendor  
23 and A-H-C-C-C-S current coverage. Is that right?

24 A. Yes.

25 Q. And the second category of information is on

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1 Section 1557 and whether or not it requires coverage;  
2 right?

3 A. Correct.

4 Q. And the third category of information is costs.

5 A. Yes.

6 Q. Is that correct?

7 A. Yes.

8 Q. If we look down at the last bullet point on costs  
9 it says [as read]: Vendor/ADOA research.  
10 UnitedHealthcare estimates an approximate .5 increase in  
11 cost or approximately 3.6 million annually. ADOA research  
12 indicates a range of 17 cents to 77 cents per employee per  
13 month increase or approximately an annual increase of  
14 130,552 to 582,720 annual increase in cost.

15 Do you see that?

16 A. Yes.

17 Q. So 17 cents to 77 cents per employee per month,  
18 is it fair to say that that cost is low?

19 A. Yes.

20 Q. Did you have any involvement in interfacing with  
21 UnitedHealthcare about their projection?

22 A. About how they got the number?

23 Q. Yes, about the number that they have here,  
24 .5 increase in cost.

25 A. I don't remember -- I don't remember anything

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1 coverage for such services, we nonetheless must remove  
2 exclusionary language. We are concerned that this may be  
3 misleading to consumers and how State DOIs may interpret  
4 no specific exclusionary language when a claim is denied.

5 It goes on to say N -- [as read]: The NPRM  
6 would require insurers to cover services for gender  
7 dysmorphia as we would for other medical conditions. For  
8 instance, hysterectomy, mastectomy, et cetera.

9 Do you see that?

10 A. Yes.

11 Q. So based on what Cigna was telling you -- or was  
12 telling ADOA, under 1557 ADOA would have to cover  
13 hysterectomies for gender reassignment just like it  
14 covered hysterectomies for other medically necessary  
15 reasons; is that right?

16 A. Yes.

17 Q. But as we discussed earlier, ADOA does not cover  
18 a hysterectomy when the purpose is for gender reassignment  
19 surgery; is that right?

20 A. Yes.

21 Q. Okay. If we turn now to Page 10, which is in the  
22 bottom right-hand corner AZSTATE.151716, little Bates, up  
23 at the top there is a title here which is "ADOA Analysis."

24 Do you see that?

25 A. Yes.

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1 Q. Does this look familiar to you?

2 A. Yes.

3 Q. Have you reviewed it before?

4 A. I'm sure I have, yes.

5 Q. Is this one of the documents you remember from  
6 preparing for this deposition?

7 A. Yes.

8 Q. Prior to that do you remember seeing this?

9 Let me be more clear. Do you know where  
10 this -- this information in the chart came from?

11 A. It came from that information that Kelly  
12 provided.

13 Q. Okay. So in the email that we had previously  
14 discussed where Marie Isaacson forwarded you Kelly  
15 Sharritts' research, this is Kelly Sharritts' research --  
16 Kelly Sharritts' analysis, I should say.

17 A. Correct.

18 Q. And if we look at the first column, which is "Max  
19 Utilization and Cost," is it fair to say that this column  
20 projects what cost would be under sort of a worst-case  
21 highest utilization and highest cost scenario?

22 A. Yes.

23 Q. And if we look at the bottom under the max  
24 utilization and cost approach, it says that the per  
25 employee per month cost is 71 cents.

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1 that are more expensive than that.

2 Q. BY MR. GARBACZ: Do you know if ADOA has added  
3 things that are more expensive than that or that added  
4 benefits that are more expensive than that in your tenure  
5 at the ADOA?

6 A. No. I'm sure they added stuff but I wouldn't  
7 know the cost of each addition.

8 Q. Can you think of an example of something that  
9 might have cost more than that that ADOA added in your  
10 time at ADOA?

11 A. I know we add -- like we added the drugs to take  
12 care of hepatitis C, which is an extremely expensive drug,  
13 because it cured people. So I know we added things like  
14 that.

15 Q. Let's take that example for a minute. Do you  
16 remember what the name of that drug was?

17 A. No.

18 Q. But it's a hepatitis -- hepatitis C drug?

19 A. Right. And it -- it actually cures the person of  
20 the disease so we -- then we stop getting claims from that  
21 person. So it's worth the large expense.

22 Q. So if a procedure cures someone of a disorder,  
23 that's a reason to cover it. Yes?

24 A. Yes.

25 Q. Do you remember generally what the cost was for

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1 Q. BY MR. GARBACZ: I think earlier you had  
2 mentioned that, you know, if cost is minimal that that's  
3 one of several factors. But if we're looking just at that  
4 factor and that factor alone, the fact that cost is  
5 minimal is one thing that would weigh in favor of covering  
6 a benefit; is that right?

7 A. Yes.

8 Q. So in this particular instance the fact that the  
9 cost of covering gender reassignment was low should have  
10 weighed in favor -- I understand there's other factors,  
11 but just looking at the cost factor, that cost should have  
12 weighed in favor of covering the benefit; right?

13 A. If you're just looking at cost, you're looking at  
14 how many people it impacts, it may not have much bang.

15 Q. So and then if we talk about the other factor,  
16 the trend -- I know you mentioned that when you started  
17 doing the research there were more states that did not  
18 cover the benefit than did. But as we have discussed,  
19 there were vendors and states and other employers who were  
20 changing their coverage; right?

21 A. Correct.

22 Q. So would you say the trend was to cover the  
23 benefit? Or the trend was to modify your plan to cover  
24 the benefit? In other words, other states and other  
25 providers were changing their plans to cover gender

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1 reassignment surgery; right?

2 A. Yes.

3 Q. Should that have weighed in favor of covering  
4 gender reassignment surgery or against covering gender  
5 reassignment surgeries?

6 A. I would say it usually is considered.

7 Q. Was it considered here?

8 A. I don't know. I assume since we got all the  
9 information it was.

10 Q. So ultimately what I'm trying to get at is,  
11 why -- why did ADOA maintain its exclusion for gender  
12 reassignment surgery if -- And I understand that you were  
13 not in the room when the decision was made. But if it  
14 doesn't seem like cost was the reason and the trend was  
15 that providers were changing their coverage, what reason  
16 or what rationale, what factors did -- was ADOA looking at  
17 that might have caused them to not cover gender  
18 reassignment surgery?

19 MR. CURTIS: Objection; form of the  
20 question.

21 THE WITNESS: I do not know.

22 Q. BY MR. GARBACZ: So sitting here today you cannot  
23 say one way or another why ADOA ultimately decided not to  
24 cover gender reassignment surgery?

25 A. Correct.

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1 Q. Based on your experience at ADOA and the research  
2 that you did in your involvement in this process, if you  
3 had to guess, what do you think might have motivated ADOA  
4 to maintain the exclusion for gender reassignment surgery?

5 MR. CURTIS: Objection; form of the  
6 question.

7 THE WITNESS: Sorry, your question is  
8 what -- what did I think motivated the decision?

9 MR. GARBACZ: Yes.

10 THE WITNESS: I don't know.

11 Q. BY MR. GARBACZ: Earlier, Ms. Schafer, I think  
12 you had alluded to Ms. Isaacson making changes or  
13 suggesting that changes be made to the chart because it  
14 didn't look -- or it didn't want to put in black and white  
15 that the cost was low.

16 Do you remember that?

17 A. Yes.

18 Q. Where would that pressure have been coming from?

19 A. Above.

20 Q. By above is it fair to say the governor's office?

21 A. Or her director.

22 Q. Or the Joint Legislative Budget Committee?

23 A. Again, I don't think they would have been  
24 involved at that point.

25 Q. Why don't you think that the Joint Legislative

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1 the plan can just, you know, like exclude bariatric  
2 surgery. You would -- may find many people that would  
3 find that medically necessary but the plan excludes it.  
4 They don't have to cover it.

5 Q. You mentioned that a doctor might prescribe  
6 something to be medically necessary but that might not  
7 actually mean that it's medically necessary. Is that  
8 correct?

9 A. Correct.

10 Q. Did ADOA view transgender benefits as one of  
11 those things that a doctor might prescribe as medically  
12 necessary but weren't actually medically necessary?

13 A. I remember no discussions about whether it's  
14 really medically necessary or not.

15 Q. So sitting here today you have no recollection of  
16 whether anyone at the ADOA ever expressed an opinion  
17 regarding whether transgender benefits are medically  
18 necessary or not?

19 A. Correct.

20 Q. Okay. You mentioned that generally as a  
21 self-funded plan ADOA covers things not because it's  
22 required by law to cover them but because it elects to  
23 cover them. Right?

24 A. Okay.

25 Q. Is that correct?

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1 A. Yes. I -- The wording is a little weird, but  
2 yes.

3 Q. So most benefits that are in the plan are  
4 benefits that ADOA has decided to cover, not ones that it  
5 has determined it is legally required to cover.

6 A. Correct.

7 Q. And you mentioned some reasons why ADOA elects to  
8 cover benefits. One of those reasons I -- you mentioned  
9 was that it might be nice to have. Is that right?

10 A. I believe I threw that out, yes.

11 Q. Was gender reassignment surgery considered a nice  
12 to have by the ADOA?

13 MR. CURTIS: Objection; form of the  
14 question.

15 THE WITNESS: I couldn't answer that  
16 question.

17 Q. BY MR. GARBACZ: Do you consider gender  
18 reassignment surgery a nice to have?

19 A. No.

20 Q. Why not?

21 A. Nice to have is -- I'm more -- it's -- To me it's  
22 a more carefree kind of thing, just things that are not  
23 quite as serious as that.

24 Q. So you don't view gender -- you don't view gender  
25 reassignment surgery as serious as other procedures?

# Exhibit 33

Message

---

**From:** Elizabeth Schafer [Elizabeth.Schafer@azdoa.gov]  
**on behalf of** Elizabeth Schafer <Elizabeth.Schafer@azdoa.gov> [Elizabeth.Schafer@azdoa.gov]  
**Sent:** 8/9/2016 4:50:09 PM  
**To:** Marie Isaacson [Marie.Isaacson@azdoa.gov]; Scott Bender [Scott.Bender@azdoa.gov]; Yvette Medina [Yvette.Medina@azdoa.gov]  
**Subject:** Transgender - Washington

I talked with Lou McDermott, Public Employee Benefits Director for the State of Washington. He basically said that he does not have any specific figures regarding Transgender coverage. They truly believe it to be nominal. He stated for their plan many of the claims were covered prior to the Transgender coverage that started in 2015. Specifically he mentioned Mental Health Therapy Claims. He stated that would have been covered before so really the only increases would be in the Hormone Therapies which he believes to be minimal. The surgeries would be an increase but very few people actually get the surgery so that is not a huge expense. Because the decision was made to provide Transgender coverage they do not feel it is appropriate to go and try and figure out exactly what the expenses tied to the coverage are. Basically he said they wouldn't want to open the discussion again since the decision has been made.

Summary - the costs do not matter to them as they have to cover it but they are confident that the costs are nominal.

---

**From:** Marie Isaacson  
**Sent:** Tuesday, August 02, 2016 9:21 AM  
**To:** Elizabeth Schafer; Scott Bender; Yvette Medina  
**Subject:** RE: Transgender - Oregon

Thank you Elizabeth. I do recall that information from our original research. Oregon has a separate law for non-discrimination which was the basis for the lawsuit.

---

**From:** Elizabeth Schafer  
**Sent:** Tuesday, August 02, 2016 9:19 AM  
**To:** Marie Isaacson; Scott Bender; Yvette Medina  
**Subject:** Transgender - Oregon

I talked to Bobbie Barrott, Plan Design Manager for the Oregon Public Employees Benefit Board. She said Oregon does not have any separated out data on the transgender coverage but she is going to check with her finance people to verify that. She did say that they cover it because they lost a lawsuit about 3 years ago and had to add the coverage. She states that is pretty confident that the coverage did not add to any increase in the premiums. Ms. Barrott added that it is difficult to pull the data because some procedures are not marked as transgender procedures such as a hysterectomy or mastectomy. She did indicate that the main motivation of Oregon was to make sure the requirements of the court case were met.

I'll let you all know if she calls me back with any more information.

**Elizabeth Schafer, CEBS**  
Plan Administrator  
ADOA – Benefit Services Division | State of Arizona  
100 North 15th Avenue, Suite 260, Phoenix AZ 85007  
p: 602.364.1388 | f: 602.542.4048 | [elizabeth.schafer@azdoa.gov](mailto:elizabeth.schafer@azdoa.gov)

**How am I doing? Please take a few moments to answer a few questions.**  
<https://www.surveymonkey.com/r/BenPlanAdmin>



# Exhibit 34

IN THE 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 PAUL JAMES SHANNON  
(EXCLUDING CONFIDENTIAL FOR ATTORNEYS' EYES ONLY PORTION)

Via Zoom videoconference  
June 25, 2021  
8:30 a.m.

Glennie Reporting Services, LLC  
1555 East Oranewood Avenue  
Phoenix, Arizona 85020

602.266.6535  
www.glennie-reporting.com

Prepared by:

Jill Marnell, RPR  
Arizona Certified  
Reporter No. 50021

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1 problems, but yes.

2 Q. And lots of huddles also --

3 A. Right.

4 Q. -- sounds like.

5 Do you typically interact with insurers in  
6 your role?

7 A. So you are using a term and I don't know how  
8 you're using it. We refer to them as carriers. We are a  
9 self-insured program. So what we purchase from a carrier,  
10 which is what you probably would call an insurer, and --  
11 and I'll use UnitedHealthcare as an example.

12 We have a contract with UnitedHealthcare  
13 that pays on a per member, per month administrative basis.  
14 Access to UnitedHealthcare's network of providers and  
15 access to their claims processing systems, which is -- You  
16 know, those are -- those are extremely complicated and  
17 robust systems, okay? We -- The actual claims that are  
18 incurred by our members are paid out of what's called the  
19 special Employee Health Insurance Trust Fund. And it's  
20 a -- it's a State fund that accumulates all the premiums  
21 that -- that, you know, State employees, the State  
22 agencies, the retirees, and COBRA people pay into the --  
23 into this fund, and then from that fund we pay the claims  
24 as they are submitted to us by the carrier, okay?

25 So we are not actually insured by anyone.

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1 And we do not maintain any -- any other kind of stop-loss  
2 insurance. We are fully self-insured and all the claims  
3 are our responsibility to pay. But we use the systems  
4 that are provided by the carrier to do that.

5 Q. I see.

6 So you mentioned UHC being one of the  
7 carriers. Is Aetna another carrier?

8 A. Aetna and Cigna were carriers up until  
9 January 1st of this year. They did -- we did a  
10 procurement, a very lengthy procurement to do a new  
11 medical carrier contract, and Aetna and Cigna were not  
12 successful. Blue Cross and UnitedHealthcare were, were  
13 successful.

14 Q. So the current carriers are UnitedHealthcare and  
15 Blue Cross Blue Shield of Arizona?

16 A. That's correct.

17 Q. Any others?

18 A. We have other carriers for dental insurance. We  
19 have a fully insured dental product. We have a life  
20 insurance. We have vision insurance. And those are also  
21 fully insured. We have short-term disability insurance;  
22 we have long-term disability insurance which are also  
23 fully insured.

24 Q. But for medical benefits, UHC and Blue Cross?

25 A. That's correct.

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1 Q. What about -- how does Mercer fit in, if at all?

2 A. Mercer is a -- an insurance consultancy. So they  
3 provide experts upon request to -- to assist in the  
4 management of, you know, whatever kind of insurance topic,  
5 you know, we need assistance with.

6 Q. Prior to January 1st of this year when UHC and  
7 Blue Cross became the only carriers for medical benefits,  
8 who were the prior carriers and how long had they been  
9 carriers with the ADOA?

10 A. The previous set of contracts were -- ended after  
11 six years. So that was -- those were the contracts that  
12 ended on December 31st of 2020. And for medical carriers  
13 it was United, Blue Cross, Aetna, and Cigna.

14 Q. And you mentioned that when the six-year  
15 contracts were up on the last day of last year Aetna and  
16 Cigna didn't -- weren't successful in their bids. And why  
17 was that?

18 A. Well, the procurement committee made a decision  
19 not to award those contracts based on the -- on the -- the  
20 way they awarded points in the procurement.

21 Q. In your understanding did it have any --  
22 Rephrase.

23 In your understanding did the decision not  
24 to continue to use Aetna and Cigna as carriers have  
25 anything to do with the decision of whether to cover

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1 items and correspond with her.

2 She's -- she's very interested in -- in  
3 telework of employees, and my -- my data scientist was  
4 able to capture that data out of the human resources  
5 information system to describe, on a payroll-by-payroll  
6 basis, how many -- how many employees were teleworking  
7 versus how many were -- were working at the physical  
8 location.

9 So that's one example. But it's not very  
10 common that I meet with -- with her or -- or really anyone  
11 else in the governor's office.

12 Q. So would you say it's uncommon -- you just  
13 said -- for you to take a meeting with Christina Corieri  
14 or others in the governor's office on benefit decisions?  
15 Is that right?

16 A. Well, uncommon -- uncommon is one way of saying  
17 it. Another way of saying it, it doesn't happen very  
18 often, but it's not -- it's not particularly surprising  
19 when it does happen. And -- and there are always, you  
20 know, reasons why that would happen.

21 Q. And what are the types of reasons? Why some  
22 (indecipherable due to Zoom connection)?

23 THE COURT REPORTER: Why what, I'm sorry?

24 MS. SHEETS: Something would rise to that  
25 level.

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1 Q. So to be clear, if experts from the fully insured  
2 book of business carriers recommended covering a benefit,  
3 the ADOA would be inclined to cover that benefit; is that  
4 right?

5 A. That's correct.

6 Q. And you mentioned earlier you couldn't recall  
7 specific thresholds or costs. But can you think of, in  
8 the context we're speaking now, any benefit that the  
9 medical directors and fully insured book of business  
10 recommended covering which the ADOA chose not to cover on  
11 the basis of cost?

12 A. I can't remember any -- anything like that. I --  
13 I attended -- My first medical directors meeting was 2018.  
14 My second one was in 2019. The medical directors meeting  
15 in 2020 was almost exclusively about COVID.

16 Q. So basically if the experts from the fully  
17 insured book of business carriers were recommending that  
18 the ADOA cover a certain benefit, it's very likely that  
19 the ADOA would cover that benefit; right?

20 A. Yes.

21 Q. And cost, in all the time that you've been at the  
22 ADOA, has not been a reason to go against what the fully  
23 insured book of business carrier experts have recommended,  
24 has it?

25 A. Well, no, but that's not really saying very much.

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1 Remember, they're medical directors for a fully insured  
2 book of business. So they're -- they're tasked with that  
3 same consideration. By the time it's gotten to us it's  
4 been discussed, you know, quite -- probably quite robustly  
5 within the carriers' fully insured actuary -- you know,  
6 the actuaries for their fully insured business, because  
7 they -- you know, the survival of their business is  
8 dependent on making good cost decisions.

9 Q. Understood.

10 So when the experts from the fully insured  
11 book of business carriers recommends covering a benefit,  
12 you understand that to include a consideration for costs  
13 already; is that right?

14 A. Yes. I think that's implied.

15 Q. And to be clear, the fully insured book of  
16 business carriers we're talking about is who -- which  
17 carriers are those?

18 A. Well, you know, up until this year it was UHC,  
19 Blue Cross, Aetna, and Cigna. And now -- and now -- I  
20 mean, we'll have -- we'll have that meeting this summer  
21 again and it will just be UHC and Cigna. Or excuse me,  
22 UHC and Blue Cross.

23 Q. So to be clear, when, you know, UHC and Blue  
24 Cross, and previously Aetna or Cigna, recommended that the  
25 ADOA cover a certain benefit, the ADOA would very likely

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1 cover that benefit; is that right?

2 A. We would very likely consider it and probably  
3 cover it, yes.

4 Q. And you testified that to you it's implied that  
5 the consideration for costs is already baked into the  
6 recommendation by the carriers that the ADOA cover a  
7 certain benefit; right?

8 A. Right. But you are leaving out one of the other  
9 considerations that they have to make, their actuaries  
10 have to make, is, does the law compel me to provide this  
11 benefit?

12 Q. And does the ADOA consider the carriers'  
13 recommendation when it's based on their evaluation that a  
14 law compels them to provide a benefit?

15 A. Because the ADOA is a self-insured plan we are  
16 not compelled to provide the same benefits. So we may  
17 have a different calculus as to whether or not to provide  
18 that benefit.

19 Q. But does the ADOA take into consideration that  
20 the rest of the fully insured book of business is deciding  
21 to cover that benefit on the basis that in their view it's  
22 required under the law?

23 A. We would understand that if the law compelled our  
24 fully insured -- you know, our carriers, who have a fully  
25 insured book of business, were compelled to provide a

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1 an exclusion for gender reassignment surgery?

2 A. So this -- this document that we're looking at  
3 here was not in consideration of whether or not to offer  
4 it. It was to understand what the benefit cost. And it  
5 was not part of the decision-making other than to be --  
6 other than to do my due diligence should we provide that  
7 benefit. For whatever reason, okay? We asked all of the  
8 carriers for that information and we asked Michael for  
9 that information. And, you know, some of that -- This is  
10 definitely falling into the art area, right, where we  
11 didn't have previous experience, so -- and -- You know,  
12 and I don't think that this benefit was widely offered  
13 prior to the Affordable Care Act.

14 THE COURT REPORTER: I'm sorry, did you say  
15 you don't think that this benefit was widely offered?

16 THE WITNESS: Yes. I -- I don't think that  
17 this benefit was widely offered prior to the Affordable  
18 Care Act.

19 Q. BY MS. SHEETS: So you asked Michael Meisner to  
20 do a cost analysis, but you also reached out to carriers  
21 who had done cost analyses of their own based on their  
22 data; is that right?

23 A. That's correct.

24 Q. Was there any reason to discount the analyses  
25 done by carriers who were already covering this benefit?

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1 to do is remove the exclusion for gender reassignment  
2 surgery?

3 A. That -- that's how we would conform to that  
4 section, yes, if we chose to do that.

5 Q. I think you mentioned earlier that it was a  
6 simple task of removing the exclusion and changing the  
7 plan language. Right?

8 A. That's correct.

9 Q. And you mentioned earlier that this would be a  
10 relatively easy thing to do; right?

11 A. From an administrative standpoint, yes, it would  
12 be a relatively easy thing to do.

13 Q. But the ADOA, as of the date of this deposition,  
14 has chosen not to remove the gender reassignment surgery  
15 exclusion; right?

16 A. That's correct. That's why we're here.

17 Q. So when Scott Bender -- turning to the very  
18 beginning of this document, when Scott Bender forwarded  
19 this email to you in November of 2019, he says [as read]:  
20 This seems to be in line with the info that Aetna sent  
21 over this morning.

22 Do you remember whether there were any  
23 carriers who said that the ADOA could be compliant with  
24 1557 if it chose to do so while maintaining the gender  
25 reassignment surgery exclusion?

Paul Shannon, Videotaped - 06/25/2021

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1 A. I don't remember anyone ever -- or any of the  
2 carriers saying that, no.

3 Q. Did all of the carriers that the ADOA reached out  
4 to say that to conform with 1557 the ADOA would need to  
5 remove the exclusion for gender reassignment surgery?

6 A. What we asked them was, if we were going to be  
7 complying with 1557, what we would need to do? And they  
8 all said the same thing, remove the --

9 Q. And that --

10 A. -- exclusion, yeah.

11 Q. They all said the same thing, to remove the  
12 exclusion for gender reassignment surgery; right?

13 A. Correct.

14 Q. Could you turn to Tab 18. This has been marked  
15 as Shannon Exhibit 18 previously. And in the bottom  
16 right-hand corner it has the Bates number AZSTATE.129678.

17 Do you see that?

18 A. Yes, I do.

19 MS. SHEETS: And could we mark this as  
20 Shannon Exhibit 18.

21 THE COURT REPORTER: Yes.

22 Q. BY MS. SHEETS: So Mr. Shannon, take a minute to  
23 look through this document.

24 Was this a document that you were shown in  
25 preparation for this deposition?

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1 A. That's correct.

2 Q. Would you -- or who would have been most likely  
3 to have asked that a chart like this be made in their --  
4 their role at the time in 2016?

5 MR. CURTIS: Objection; form.

6 THE WITNESS: I don't know. Marie was in --  
7 Marie was the benefits director so she would instruct  
8 people on their work.

9 Q. BY MS. SHEETS: And during your time as the  
10 budget director up through August of 2016 were you ever  
11 asked to conduct a cost analysis on the impact of covering  
12 gender reassignment surgery?

13 A. I do not recall ever being asked that, no.

14 Q. What about coverage for any transgender benefits,  
15 including hormone therapy?

16 A. No, I don't recall that.

17 Q. If you look at the last bullet on this first page  
18 of AZSTATE.118313 it says that [as read]: ADOA research  
19 indicates a range of 17 cents to 77 cents per employee per  
20 month increase for coverage of gender reassignment  
21 surgery.

22 Is that a cost that in your experience would  
23 prohibit the ADOA from considering covering a benefit?

24 A. As I mentioned previously, the absolute dollar  
25 amount is not the only factor in determining whether or

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1 nobody else has to pay \$58,000 if they want residential  
2 treatment for their daughter. That's just one way that  
3 people want coverage.

4 You can understand how my job is so  
5 difficult, because there are so many competing demands.

6 Q. BY MS. SHEETS: I do appreciate that context and,  
7 as you said, being the monkey in the middle on a lot of  
8 these issues that everyone wants covered.

9 But just to bring it back to the specific  
10 point of gender reassignment surgery, would you agree with  
11 the statement that the cost of covering gender  
12 reassignment surgery, in your view, is the reason that  
13 ADOA is not covering gender reassignment surgery?

14 A. I do not know the reason why ADOA is not covering  
15 gender reassignment surgery. It was that way when I got  
16 there.

17 Q. Has anyone explained to you since you came back  
18 to the ADOA in 2018 why the ADOA continues to maintain an  
19 exclusion for gender reassignment surgery?

20 A. No.

21 Q. Have you asked?

22 A. I don't think I have.

23 Q. If you were going to ask, who would you ask to  
24 find out the answer to that question?

25 A. I suppose I would ask the director or one of my

Paul Shannon, Videotaped - 06/25/2021

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1 bosses, the deputy or Emily.

2 Q. So Andy Tobin or Emily?

3 A. Rajakovich.

4 Q. Thank you. So you --

5 A. Or Elizabeth Thorson, yeah. Those three.

6 Q. And you have reason to believe that they would  
7 know the reasoning behind the ADOA's decision to --

8 A. No, you asked me who I would ask. I would ask  
9 them. I'm not sure that they would know.

10 Q. Well, someone must know; right?

11 A. I -- All I know is I don't know.

12 Q. Is there any strong reason in your estimation  
13 that you can think of why the ADOA would continue to  
14 maintain the exclusion for gender reassignment surgery?

15 A. When I say I don't know it means that I don't  
16 know. Just why [sic] I don't know why we don't cover  
17 residential treatment.

18 Q. But in the context for coverage for gender  
19 reassignment surgery has there been any reason that you've  
20 heard of since becoming benefits director in 2018 for  
21 maintaining the exclusion for gender reassignment surgery?

22 A. I have not heard a good reason why we exclude it.

23 Q. If you turn to the second page of this  
24 document -- And you might have to turn the binder because  
25 it's landscape. But on the left-hand side there's a

Paul Shannon, Videotaped - 06/25/2021

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1 understanding what the potential coverage would cost.

2 Q. Let's turn to Tab 32. So this has been marked  
3 Shannon Exhibit 32, Bates number AZSTATE.151099.

4 Do you see that?

5 A. Yes, I do.

6 MS. SHEETS: Let's mark this as Exhibit 32.

7 Q. BY MS. SHEETS: Do you recognize this?

8 A. Yes.

9 Q. Is this the analysis by Michael Meisner that we  
10 were just talking about?

11 A. Yes, it is.

12 Q. And there is a date here, 9/23/2019.

13 A. Yes.

14 Q. Does that seem like the right date that Michael  
15 Meisner would have completed this analysis?

16 A. I trust that it is. It -- Usually our documents  
17 are dated correctly.

18 Q. And it's titled estimated annual costs to  
19 included transgender benefits. Did you ask Michael  
20 Meisner to perform this analysis?

21 A. I think I did.

22 Q. Was it in response to this lawsuit?

23 A. Yes, it was -- it was in line with all of our  
24 investigations.

25 Q. When you say -- I mean -- Excuse me. What do you

# Exhibit 35

Message

---

**From:** Scott Bender [Scott.Bender@azdoa.gov]  
**on behalf of** Scott Bender <Scott.Bender@azdoa.gov> [Scott.Bender@azdoa.gov]  
**Sent:** 9/1/2016 7:11:54 PM  
**To:** Marie Isaacson [Marie.Isaacson@azdoa.gov]  
**Subject:** RE: Additional information on Cigna policy on transgender coverage

Yes, they intend to cover all services for their fully insured products.

---

**From:** Marie Isaacson  
**Sent:** Thursday, September 01, 2016 6:05 PM  
**To:** Scott Bender <Scott.Bender@azdoa.gov>  
**Subject:** RE: Additional information on Cigna policy on transgender coverage

In quickly reviewing the link, it looks like the document focuses on reassignment surgery. Since this is likely the most costly, I would assume the coverage for HRT, counseling, etc. would also be covered.

---

**From:** Scott Bender  
**Sent:** Thursday, September 01, 2016 5:54 PM  
**To:** Marie Isaacson <Marie.Isaacson@azdoa.gov>  
**Subject:** FW: Additional information on Cigna policy on transgender coverage

Here's the latest guidance from Cigna on transgender benefits, Erica just confirmed that there has been no change since this was issued.

---

**From:** Emmons, Erica 654 [mailto:Erica.Emmons@Cigna.com]  
**Sent:** Thursday, July 21, 2016 4:39 PM  
**To:** Scott Bender <Scott.Bender@azdoa.gov>; Yvette Medina <Yvette.Medina@azdoa.gov>; Elizabeth Schafer <Elizabeth.Schafer@azdoa.gov>  
**Cc:** Gillum, Alicia M HHHH <Alicia.Gillum@Cigna.com>  
**Subject:** Additional information on Cigna policy on transgender coverage

Hi Scott, Yvette, and Elizabeth –

As promised, as I get more information on the recent non-discrimination regulations and how Cigna is reacting regarding transgender coverage, I am keeping you updated. Below are a few questions and answers we were able to get from our legal and compliance team. I would encourage you to consider these changes for the 1/1/17 plan year and discuss with your legal counsel.

1. With the enhancement in regulations, will we include Transgender Reassignment services to our fully insured products? **Yes.** And if so, what services specifically? **Coverage will be consistent with the below linked Coverage Policy:**

[https://cignaforhcp.cigna.com/public/content/pdf/coveragePolicies/medical/mm\\_0266\\_coveragepositioncriteria\\_gender\\_reassignment\\_surgery.pdf](https://cignaforhcp.cigna.com/public/content/pdf/coveragePolicies/medical/mm_0266_coveragepositioncriteria_gender_reassignment_surgery.pdf)

2. Same as above, but for an ASO client – might we 'suggest' they add this coverage at renewal? **Yes.** And if so, what services specifically? **Same as above Coverage Policy.** What exactly are their legal requirements – if any – should this scenario arise where they are approached about coverage?

**We expect ASO clients to elect to cover transgender services on renewal after 1/1/17 and are making that our new standard Cigna benefit offering. The ACA § 1557 nondiscrimination rules do not apply to ASO accounts unless the plan receives federal funding or assistance from HHS which is unusual. However, other federal non-discrimination laws do apply to ASO employers. For instance, employers need to be concerned with employment discrimination which extends**

to employee benefits. Excluding these services will very likely be considered discriminatory for employers under Title VII of the Civil Rights Act by the Equal Employment Opportunity Commission (EEOC). If an ASO client wishes to maintain such an exclusion, we recommend they consult with their own attorney.

I hope this information is helpful to you and ADOA. If you have additional questions, please let me know.

Thanks!

**Erica Emmons** | Strategic Account Executive | Government and Education | Cigna | 5310 East High Street, Suite 200 | Phoenix, AZ 85054 | Direct: 480.426.6761 | Mobile: 480.622.0899 | [erica.emmons@cigna.com](mailto:erica.emmons@cigna.com)



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# Exhibit 36

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 Orangewood Avenue  
Phoenix, Arizona 85020  
602.266.6535  
www.glennie-reporting.com

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

Christina Corieri - 07/13/2022

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1 me.

2 Q. Were you reporting to Mr. Liburdi about new  
3 policy concerns?

4 MS. LAMM: Same objection if this relates to  
5 attorney-client privileged communication, then I would  
6 instruct the witness not to answer. But if it -- I mean,  
7 she can certainly say the general subject matter, but if  
8 it -- if it gets to specific information requested by  
9 Mr. Liburdi or provided in an effort to seek legal  
10 advice, then witness cannot answer.

11 THE WITNESS: Mr. Liburdi came to me to ask me  
12 to participate in a meeting.

13 BY MR. ECKSTEIN:

14 Q. Okay. And you weren't seeking legal advice  
15 from Mr. Liburdi, were you?

16 A. At that point, Mr. Liburdi was just asking if I  
17 would attend a meeting.

18 Q. Okay. And that was your first -- that was the  
19 sum and substance of your first meeting with Mr. Liburdi?

20 A. Yes.

21 Q. Is it --

22 A. He --

23 Q. Not that it matters a whole lot, but was that  
24 on the phone, e-mail, or in person?

25 A. It was in person. I believe he caught me in

Christina Corieri - 07/13/2022

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1 the hallway or it was at the end of a discussion on  
2 something else, basically said he was having a meeting  
3 with ADOA, and outside counsel, and asked if I would  
4 participate in that meeting.

5 Q. Okay. And you did participate in that second  
6 meeting -- in that meeting?

7 A. Yes, I participated in a meeting.

8 Q. How long after your -- Mr. Liburdi requested  
9 your presence at that second meeting did the second  
10 meeting take place?

11 A. To the best of my recollection, it was a couple  
12 days, I don't -- I don't remember how many.

13 Q. Do you remember where it was?

14 A. Yes.

15 Q. Mr. Liburdi's office. Right?

16 A. No.

17 Q. Whose office?

18 A. It was in a conference room.

19 Q. On the 9th floor?

20 A. No.

21 Q. 8th floor?

22 A. Yes.

23 Q. How many people were there?

24 A. I don't recall the exact number.

25 Q. Approximately how many?

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1 A. Less than 10, I think.

2 Q. Okay. Please tell us the names of the people  
3 you remember being there.

4 Do you remember Marie Isaacson being there.  
5 Correct?

6 A. Yes, Marie was there.

7 Q. And you remember Mike Liburdi being there?

8 A. Yes.

9 Q. And you remember you were there?

10 A. Yes. I --

11 Q. And -- go ahead.

12 A. There was outside counsel.

13 Q. From -- from Fennemore Craig?

14 A. Yes. I don't remember how many or what their  
15 names were. And Marie may have brought somebody else  
16 from ADOA, but I don't remember for sure if she did.

17 Q. Okay. And approximately when did this  
18 discussion take place in 2016?

19 A. It was in August of 2016. I don't -- I don't  
20 remember exactly when in August.

21 Q. Okay. Did Mr. Liburdi tell you either before  
22 this meeting or at the meeting what the meeting was  
23 about?

24 A. Yes.

25 Q. When did he tell you what the meeting was

Christina Corieri - 07/13/2022

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1 about?

2 A. When he asked me to join the meeting.

3 Q. And what did he say?

4 A. He said that it was a meeting to discuss the  
5 ADOA exclusion on gender reassignment surgery, and making  
6 sure that it was compliant with the regulations that came  
7 down under the ACA.

8 Q. Did you have a personal position on whether it  
9 was a good idea, from a policy perspective, to cover  
10 gender reassignment surgery or not?

11 A. I had not ever thought about this issue with  
12 the State plan before.

13 Q. Your Tweet back in 2013 was different,  
14 obviously, you were talking about Medicare and Medicaid.  
15 Are you saying that it didn't occur to you that it could  
16 possibly be part of the State plan?

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

18 THE WITNESS: In 2013, I had never worked for  
19 the State government and I don't believe I had given any  
20 thought to the State health insurance plan.

21 BY MR. ECKSTEIN:

22 Q. Okay. You knew in August of 2016, that  
23 coverage in the State healthcare plan for gender  
24 reassignment surgery was not popular in the Republican  
25 party, didn't you?

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

2 THE WITNESS: Again, I'm not sure that I ever  
3 had any conversations or had given that any thought prior  
4 to -- prior --

5 BY MR. ECKSTEIN:

6 Q. I didn't ask for conversations. I asked for  
7 what you knew. And it could be that someone told you  
8 that. It could be that some -- that you read that. It  
9 could be that others in the governor's office said that  
10 gender reassignment surgery, Christina, is not something  
11 that's very popular in the Republican party.

12 You understood that. Right?

13 A. Nobody ever --

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

15 THE WITNESS: Nobody in the governor's office  
16 ever said that to me.

17 BY MR. ECKSTEIN:

18 Q. Did you hear them say that to anyone else?

19 A. I have not said that to anyone else. I don't  
20 recall any conversations about this issue prior to that  
21 meeting.

22 Q. Okay. But there was conversation about this  
23 issue at that meeting?

24 A. At that meeting, yes.

25 Q. Okay. So would you please -- who -- who

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1     chaired the meeting?

2             A.     I -- I don't know that there was an official  
3     chair to the meeting.

4             Q.     Do you recall someone opening the meeting  
5     saying the purpose of this meeting is?

6             A.     I don't. It wasn't me. I don't remember if  
7     somebody did that, maybe Mike or Marie, but I don't know.

8             Q.     Okay. But as best you can now recall, tell us  
9     what -- what was said and by whom at that meeting?

10            MS. LAMM:  Objection; this is Betsy. I'm going  
11     to object to the question to the extent the meeting  
12     involved or was for the purposes of obtaining legal  
13     advice, then I'm going to instruct the witness not to  
14     disclose any attorney-client privileged communications  
15     that would have occurred at that meeting. If there were  
16     communications that fall outside of the privilege or  
17     that -- that were not for the purpose of seeking legal  
18     advice, then she may answer.

19            MS. COHAN:  The defendants join.

20            THE WITNESS:  The -- the purpose of that  
21     meeting was to seek legal advice regarding the exclusion.

22     BY MR. ECKSTEIN:

23             Q.     Was anything else discussed at that meeting  
24     besides legal advice?

25             A.     Not that I recall.

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1 Q. For example, was the cost of including gender  
2 reassignment surgery discussed at that meeting?

3 A. I do not recall it being discussed at that  
4 meeting.

5 Q. Did you discuss the cost of gender reassignment  
6 surgery with anyone at any time during the time you have  
7 been at the Office of the Governor?

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

9 THE WITNESS: I -- I don't recall specific  
10 discussions about the cost.

11 BY MR. ECKSTEIN:

12 Q. Did anyone -- anyone ever tell you that gender  
13 reassignment surgery was not going to be covered by the  
14 State of Arizona, by the Arizona Department of  
15 Administration healthcare plan because of its cost?

16 A. I know that cost is something that we look at  
17 for everything. Especially in the context of adding cost  
18 to the State Health Insurance Trust Fund or to State  
19 employees. So our position, in general at that time, was  
20 that the State was in a very bad economic situation. In  
21 2015, we had something like a billion dollar deficit and  
22 had to cut across the board in agencies. The State  
23 health insurance plan was in trouble and had to be bailed  
24 out. We still had to put dollars into the health  
25 insurance trust fund because it's under water, our State

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1 during the meetings, if anything?

2 MS. LAMM: Again, to the extent this would  
3 entail or would require Ms. Corieri to disclose  
4 attorney-client privileged communications, then I'm going  
5 to instruct her not to answer, but -- but to the extent  
6 she can answer without disclosing attorney-client  
7 privileged communications, she can do so.

8 MS. COHAN: Join.

9 THE WITNESS: I -- again, I don't remember  
10 specific discussions about costs in that meeting.

11 BY MR. POWELL:

12 Q. Did you ask anyone who participated in this  
13 meeting to provide you with cost information?

14 A. I do not recall asking that, because I knew  
15 that, again, adding a benefit, any benefit, adds cost.

16 Q. But you didn't know what the costs would be?

17 A. I don't recall asking for that specific cost.  
18 I don't -- I don't remember if someone said it or not.

19 Q. Did you ever, in the context of this  
20 decision-making process, with respect to the exclusion of  
21 gender reassignment surgery, did you -- did anyone  
22 provide you a written analysis of the cost of eliminating  
23 the surgery exclusion?

24 A. I don't recall receiving a written analysis of  
25 that.

Christina Corieri - 07/13/2022

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1 Q. Did you ask anyone to provide you with a  
2 written analysis of what the cost implications would be  
3 of eliminating the exclusion for surgery?

4 A. No.

5 Q. In any of these meetings that you have  
6 described, and we'll get to specifics about them later,  
7 did you hear anyone request an assessment, written or  
8 otherwise, of the cost implications of eliminating the  
9 exclusion for surgery?

10 A. I don't recall if that was brought up in  
11 this -- in this meeting.

12 Q. And in this context or otherwise, have you ever  
13 asked anyone within the governor's office, or otherwise,  
14 for a quantification of the cost of covering gender?  
15 re- -- reassignment surgery?

16 A. I have not, no.

17 Q. And has anyone in any context ever given you an  
18 estimate of what the cost is for gender reassignment  
19 surgery?

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

21 THE WITNESS: Not that I can recall.

22 BY MR. POWELL:

23 Q. Did -- apart from what you've just described as  
24 a general comment concerning the fact that any new  
25 benefit might carry some cost to it, did -- did anyone

Christina Corieri - 07/13/2022

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1 Corrections of Arizona had its own healthcare coverage  
2 policy that also addressed the scope of gender -- gender  
3 dysphoria care; is that correct?

4 A. That's correct.

5 Q. And what was the scope of the coverage at the  
6 Department of Corrections?

7 MS. LAMM: Foundation.

8 THE WITNESS: I don't believe they covered that  
9 either.

10 BY MR. POWELL:

11 Q. And the "that" being gender reassignment  
12 surgery?

13 A. Correct.

14 Q. So as of the time of this meeting in  
15 August 2016, divisions of Arizona government, the  
16 Medicaid agency, and the Department of Corrections had in  
17 place an exclusion of coverage for gender reassignment  
18 surgery?

19 A. That's correct. All of which predated Governor  
20 Ducey's administration.

21 Q. And so the decision to modify the plan  
22 effective July -- sorry, January 1, 2017, to also exclude  
23 gender reassignment surgery, was consistent with the  
24 provisions of the Medicaid program and the Department of  
25 Corrections program with respect to gender dysphoria; is

# Exhibit 37

IN THE 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 MICHAEL MEISNER

Via Zoom videoconference  
March 16, 2021  
8:38 a.m.

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

Prepared by:  
  
Jill Marnell, RPR  
Arizona Certified  
Reporter No. 50021

Michael Meisner, Videotaped - 03/16/2021

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1 to the contribution strategy document; is that right?

2 A. That's correct. Our benefits -- our benefits --  
3 If there's a change in benefits, if there's a change in  
4 vendors, all that gets communicated through that document.

5 Q. Okay.

6 A. Now, there could be a process -- there could be a  
7 process that I'm unaware of and there could be  
8 communications, but I'm unaware of, outside of that  
9 process that I just described. But I -- I -- I don't have  
10 any personal knowledge of those -- those communications.

11 MS. SHEETS: Okay. I think it's time for a  
12 break.

13 MR. GARBACZ: Time for a lunch break.

14 MS. SHEETS: Yeah. And if it's -- Could we  
15 go off the record, please.

16 THE VIDEOGRAPHER: Off the record at  
17 11:58 a.m.

18 (Recess.)

19 THE VIDEOGRAPHER: Back on the record at  
20 12:41 p.m.

21 Please proceed when you're ready.

22 Q. BY MS. SHEETS: Mr. Meisner, there were a series  
23 of digital copies of files that were sent over to your  
24 counsel. Do -- do you have those files in front of you?

25 A. Yes, I do.

Michael Meisner, Videotaped - 03/16/2021

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1 is that right?

2 A. That's correct, yes.

3 Q. Had you seen any version of this document?

4 A. I have not.

5 Q. Do you know what this document is?

6 A. It appears to be -- I mean, it appears to be --  
7 to be a side-by-side comparison of what -- maybe some  
8 analysis done on the cost of transgender surgery. But  
9 there could -- it also looks like there's -- it's relating  
10 to some external documents as well that were initially  
11 embedded in this document that is not coming through here.  
12 So those -- those documents that were embedded might be in  
13 the list of -- of -- of the other documents that we have.  
14 But that's what I'm looking at.

15 Q. Have you ever seen a chart like this one  
16 comparing how insurers have approached coverage before?

17 A. Yes. So this is fairly typical of what we would  
18 do, plan administration would do, is if -- if -- if there  
19 was going to be some copy change or text change within the  
20 plan guide, the plan document, we would reach out to our  
21 medical vendors, and in this case it looks like they  
22 reached out to the four medical vendors plus Mercer for a  
23 copy, for some text.

24 Q. And when you say copy what do you mean by that?

25 A. Letters, words, sentence, descriptions, and, you

Michael Meisner, Videotaped - 03/16/2021

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1 know, so -- so this -- this is what -- this is what it  
2 looks like to me what's here.

3 Q. And so when you -- it's fairly typical -- So let  
4 me rephrase.

5 When you reach out to these insurers for  
6 copy, words, sentences, what are you looking for  
7 specifically? Like what do those words and sentences mean  
8 to the ADOA?

9 A. So, you know, to -- to use -- I guess so I'm --  
10 I'm not sure if I -- if I -- I can't really speak to what  
11 plan administration uses this document for, but this is  
12 really plan administration's tool to -- to look at various  
13 text, if you will, and -- and maybe through this is some  
14 discovery of what the text should look like in our plan  
15 document. This is --

16 Q. Okay.

17 A. But, you know, this is -- this is my  
18 understanding of what they use this document for.

19 Q. Do you typically contribute?

20 A. No. This -- So this is purely from the four  
21 insurers and Mercer. So I -- I wouldn't -- this would  
22 be -- Going back to our analogy of reaching out  
23 externally, this is a very good example of what I was  
24 talking about. So they reached out externally to the four  
25 medical and Mercer.

Michael Meisner, Videotaped - 03/16/2021

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1 this analysis at all?

2 A. Not that I recall, no. Not at all.

3 Q. Now, I want to talk about the analysis that you  
4 have performed on gender reassignment surgery. You -- you  
5 established that you were not involved in this analysis on  
6 Pages 10 and 11. Were you involved in any gender  
7 reassignment surgery analysis --

8 A. Yes.

9 Q. -- in 2015?

10 A. Not in 2015, no.

11 Q. What about in 2016?

12 A. No.

13 Q. 2017?

14 A. No.

15 Q. I'm -- I -- I've asked you this kind of area  
16 again, but we're going to move toward what you -- we're  
17 going to move toward the analysis that you did do on  
18 gender reassignment surgery for ADOA. How many  
19 analysis -- Excuse me. How many cost analyses have you  
20 performed for ADOA on the coverage of gender reassignment  
21 surgery?

22 A. I believe only two.

23 Q. And what were those?

24 A. Those were in 2019.

25 Q. Okay. And why two separate analyses in 2019?

Michael Meisner, Videotaped - 03/16/2021

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1 A. Oh, I continued my research and refined my  
2 analysis.

3 Q. Do you remember when the regulation concerning  
4 the ACA came down that would have required coverage of  
5 gender reassignment surgery?

6 A. Well, I recall that there was quite a few years  
7 that the final rules were to come out about that issue.

8 Q. And do you remember when those rules were  
9 finalized?

10 A. I believe they were finalized in -- I don't --  
11 No, I don't. Maybe 2018. I don't.

12 Q. When you performed your analysis in 2019, the  
13 first analysis --

14 A. Uh-huh.

15 Q. -- what was the reason for doing the analysis on  
16 gender reassignment surgery in the first place?

17 A. It was at the request of our attorneys.

18 Q. Do you know why they would have requested you to  
19 perform the analysis in 2019?

20 A. We were being sued.

21 Q. What was the nature of the lawsuit?

22 A. It was Toomey versus the State of Arizona.

23 Q. So am I hearing correctly the first time that you  
24 dug in and did an analysis on whether the ADOA should  
25 cover gender reassignment surgery was in 2019 in response

Michael Meisner, Videotaped - 03/16/2021

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1 Q. Just going back briefly to the -- the articles  
2 that you have cited here, did you do an analysis of which  
3 article to rely on when you were citing them as the -- the  
4 sole article for the estimation for --

5 A. I believe -- The second article I believe is from  
6 John Hopkins. And that was based on a federal -- a study  
7 of federal employees. And it looked to be extremely  
8 credible to me and very -- It just looked very credible,  
9 the study itself. And the study had been published.

10 Q. Did you look at other studies or articles and  
11 determine that this was the best one or --

12 A. No. This looked -- you know, this looked to be a  
13 very good, credible study to me.

14 Q. So did you -- How did you find this article?

15 A. Yahoo.com.

16 Q. So you got on yahoo.com and you typed in -- Well,  
17 what did you type in, if you remember?

18 A. I don't. Maybe transgender cost estimates or  
19 transgender benefits. But it -- it turns out that there's  
20 very little -- very little credible -- in my opinion,  
21 credible information out there. And -- and this looked to  
22 be a study that was at least published and -- and made --  
23 made publicly to all.

24 The other ones, such as like the  
25 San Francisco study, was never published. It did -- The

Michael Meisner, Videotaped - 03/16/2021

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1 A. Yeah. I would have never done this analysis.

2 Q. So if there was no lawsuit against ADOA you would  
3 have never done this --

4 A. Yeah.

5 Q. -- estimated cost analysis on the coverage for  
6 gender reassignment surgery; right?

7 A. Unless there was a -- you know, here again, if --  
8 if there was -- you know, maybe there was a question from  
9 the governor's office, or -- or maybe the universities  
10 would ask us to do this analysis. I would have done that.  
11 I would have done exactly what I did here. But -- but  
12 this is -- this was from the attorney from -- from last  
13 year -- or from 2019. This is why I did this.

14 Q. Which attorney was that?

15 MR. CURTIS: I'm -- I'm going to state  
16 that's attorney/client privileged communication  
17 (indecipherable).

18 THE COURT REPORTER: Privileged  
19 communication what?

20 MR. CURTIS: That that's a privileged  
21 attorney/client -- attorney/client privileged  
22 communication that we're not going to get into.

23 THE WITNESS: I don't remember -- I don't  
24 remember the individual's name.

25 MR. CURTIS: You don't need to answer.

# Exhibit 38

**In The Matter Of:**

*Toomey vs.*

*State of AZ*

---

*Scott Bender, Videotaped*

*March 31, 2021*

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**Min-U-Script®**

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.	)	
	)	

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VIDEOTAPED DEPOSITION OF SCOTT BENDER

Via Zoom Videoconference  
March 31, 2021  
8:00 a.m.  
Phoenix, Arizona

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

Scott Bender, Videotaped - 03/31/2021

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1 Q. So, Mr. Bender, you said that the process was  
2 similar at Sprouts Farmers Market as well as at Amkor  
3 Tech and as at Dial Soap. Is it fair to say that there  
4 is a general process to, you know, facilitating the  
5 implementation of a plan change?

6 A. I would say so, yeah. Just not any official  
7 documented process, but the -- the annual cycle of things  
8 that happen, is pretty much the same in most  
9 organizations that I've been part of.

10 Q. And when you say there's no official process,  
11 you mean there's nothing written down anywhere that tells  
12 you how to go about facilitating the implementation of a  
13 plan change?

14 A. Not for those organizations, no.

15 Q. Is there anything written down for any  
16 organization you worked at?

17 A. There are different requirements for the State  
18 of Arizona. We're required to, for example, any plan  
19 changes that are recommended would need to be presented  
20 to the Joint Legislative Budget Committee, the  
21 legislature. So it's just a little bit different, and  
22 obviously, with the size of the state, there's more  
23 layers of leadership to consider.

24 Q. So appreciating those differences with respect  
25 to the ADOA and its health plan, would you say that

Scott Bender, Videotaped - 03/31/2021

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1 general process includes -- and I'm going to name things  
2 and I'd like you to tell me if I'm right -- so would the  
3 general process for, you know, assessing a proposed  
4 change to the plan include a cost analysis?

5 A. Yes.

6 Q. And would it include market analysis?

7 A. Yes.

8 Q. What about the impact to members', let's say,  
9 health and well-being?

10 A. Yes.

11 Q. Is there anything else it would include?

12 A. Off the top of my head, I can't think of really  
13 anything else. But you have to consider all factors,  
14 so --

15 Q. And to go back, when we were talking about how  
16 this isn't written down or at least it wasn't written  
17 down at places you've worked at --

18 A. Right.

19 Q. -- are there general professional standards  
20 with respect to this process?

21 A. I'm -- I don't know if there are general  
22 standards. I know how it's worked everywhere I've been,  
23 and it's -- it's been sort of the -- what we call it at  
24 the State is the contribution strategy, sort of lays out  
25 what are -- what are the benefits going to be and who is

Scott Bender, Videotaped - 03/31/2021

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1 decision-making?

2 A. It may be.

3 Q. But the governor's office is not always  
4 involved in the decision making when there's a change  
5 that is optional to the plan?

6 A. Correct. Anything that would potentially have  
7 a significant cost to the plan, we -- we need to consult  
8 the governor's budget office.

9 Q. If something didn't have a significant cost to  
10 the plan, would you expect the governor's office to be  
11 involved in the decision making?

12 A. I would say it depends on what it is.

13 Q. And what is it exactly that depends?

14 A. I think is there anything that's, aside from  
15 the cost, is there -- is there something that the  
16 governor's office has a particular feeling one way or the  
17 other about.

18 Q. So you would expect the governor's office's  
19 position -- when you say "feeling," what do you mean by  
20 that?

21 A. If anyone has a -- anybody in leadership has a  
22 particular feeling one way or another.

23 Q. And a feeling one way or another, do you mean  
24 political position on an issue?

25 A. Could be political, personal views.

Scott Bender, Videotaped - 03/31/2021

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1 And we need to make decisions each year as to how we're  
2 going to spend that money. And, unfortunately, it sort  
3 of ends up in an erosion of benefits for the employees  
4 and more cost sharing to the employees. That's just the  
5 nature of this business, unfortunately.

6 Q. Would the removal of a plan exclusion affect  
7 the contribution strategy?

8 A. It could, depending upon the cost.

9 Q. At what point would the removal of a plan  
10 exclusion affect the contribution strategy?

11 A. I can't give you a number.

12 Q. Is there a thre -- is there a ballpark  
13 threshold?

14 A. There's not a stated threshold that I'm aware  
15 of, no.

16 Q. What about an unstated threshold?

17 A. I'm not aware of that either. But I am --

18 Q. Practically --  
19 I'm sorry, go ahead.

20 A. What I am aware of is that there's insufficient  
21 funds to manage the plan as it is, and there is not much  
22 appetite for any additional changes that would increase  
23 costs.

24 Q. Practically, in your experience working at the  
25 ADOA, what cost would cause a change to the contribution

Scott Bender, Videotaped - 03/31/2021

1 strategy?

2 A. The biggest focus lately is around specialty  
3 medications and how do we handle those challenges. I  
4 mean, you can't watch TV without seeing three ads for new  
5 specialty drugs that are coming to the market. They've  
6 become an extremely expensive part of the plan. That is  
7 a focus of ours.

8 We follow recommendations of a pharmacy and  
9 therapeutics committee with our pharmacy benefit manager  
10 with those. But at some point we're going to have to  
11 have the realistic conversation of what do we exclude and  
12 are we going to continue to add everything that comes  
13 down the pike.

14 There are therapies that cost hundreds of  
15 thousands of dollars a year. For one person. And we  
16 need to make hard decisions as to are we going to  
17 continue to cover these things, or are we going to put  
18 limits on them.

19 Q. What are the costs of those specialty  
20 medications?

21 A. The -- first of all, the definition of what's  
22 considered a specialty varies from organization to  
23 organization. We sort of view it as over 500 or a  
24 thousand dollars a month or at least our PBM does. And  
25 they can go, you know, up to \$500,000 a year or more.

Scott Bender, Videotaped - 03/31/2021

1           When might the removal -- when might the  
2 removal of a plan exclusion not impact the contribution  
3 strategy? And actually, let me clarify, I think we're  
4 getting hung up on the word "impact."

5           When might the removal of a plan exclusion not  
6 change the contribution strategy?

7           A.     I think it would not change if it were a  
8 minimal cost. And I believe we discussed between, you  
9 know, more than \$500,000.

10          Q.     Oh, okay. So I think that's -- so if a cost  
11 were around a million, I think that's where we landed, or  
12 above, that would impact the contribution strategy?

13          A.     That could impact the contribution strategy,  
14 and it's something noteworthy.

15          Q.     It's more likely to impact the contribution  
16 strategy than not at a million?

17          A.     It's more likely at a million than it is at  
18 500,000.

19          Q.     Does the governor's office ever get involved in  
20 the decision-making process about a plan change before  
21 you've presented the change to them?

22          A.     I can't think of a case like that.

23          Q.     So, for instance, if you don't know -- say  
24 you're -- the network providers come to you with a  
25 proposed change to the plan, and you don't know the cost

Scott Bender, Videotaped - 03/31/2021

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1 her on. Gosh, I can't remember. It was right when I  
2 started. We had conversations with her on something.  
3 I'm sorry, I don't remember. And I know that she was  
4 involved in the discussion in our redesign of our new  
5 wellness program, and what the governor's office would be  
6 interested in from the perspective of a new vendor and  
7 what kind of capabilities they wanted for the wellness  
8 program, but my -- my interaction with her is very  
9 limited.

10 Q. Have you ever interacted with her with respect  
11 to the plan's coverage of transgender benefits?

12 A. I have not, no.

13 Q. So I think I understand now, you know, the  
14 structure of who reports to who. I'd like to understand  
15 it better, the decision-making process at the ADOA. So  
16 with respect to the plan's exclusion, a change to a plan  
17 exclusion, a removal of a plan exclusion, which is what  
18 is at issue in this case, how would you first  
19 learn -- how would it come to the ADOA's attention a  
20 proposal about removing a plan exclusion?

21 A. I'm trying to -- could you rephrase your  
22 question? I think -- this is not something that happens  
23 often.

24 Q. Sure. Well, let me ask you about that. How  
25 often does -- is a proposal to remove a plan exclusion,

Scott Bender, Videotaped - 03/31/2021

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1 how often does that occur?

2 A. Not very frequently.

3 Q. Twice a year?

4 A. No, not even that often.

5 Q. Once every two years?

6 A. I'd say that's probably more -- more likely.

7 And, typically, it's done in conjunction with change in  
8 law that we have to, you know, cover something in  
9 particular.

10 Q. Was the removal of the plan's exclusion of 3-D  
11 mammography the last plan exclusion you dealt with?

12 A. No, it was the -- the clinical cancer trial.  
13 And that was something that we had to cover. 3-D  
14 mammography was more of a change in medical coverage  
15 guidelines.

16 Q. So what do you mean it -- what do you mean by  
17 it was a "change in medical coverage guidelines"?

18 A. The vendors themselves determine what is  
19 considered a medically necessary service. As I  
20 mentioned, Aetna was the first organization to make the  
21 determination that 3-D mammography was an appropriate  
22 service and not experimental. They had seen enough  
23 evidence to determine that that is something that should  
24 be covered. And they were covering it on their -- on  
25 their medical guidelines. And slowly, but surely, the

Scott Bender, Videotaped - 03/31/2021

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1 record?

2 MR. WALL: Sorry, could you take us off the  
3 record while we fix this? And this actually might be a  
4 good time to take another break.

5 THE VIDEOGRAPHER: Off the record at 11:20 a.m.

6 (Recessed from 11:20 a.m. until 11:31 a.m.)

7 THE VIDEOGRAPHER: Back on the record at  
8 11:31 a.m. Please proceed when ready.

9 BY MR. WALL:

10 Q. So, Mr. Bender, before we went on break, we  
11 were discussing the most recent changes to plan  
12 exclusions that you've encountered.

13 Do you recall that?

14 A. Yes.

15 Q. And so I think you said the most recent one was  
16 the clinical cancer trials.

17 A. Yes.

18 Q. And when was that -- when was that change to  
19 the plan? Well, let me ask, was the plan exclusion for  
20 that removed?

21 A. It was, yes.

22 Q. And when was that?

23 A. It was within the last six months.

24 Q. And then prior to that you'd spoke about 3-D  
25 mammography treatment?

Scott Bender, Videotaped - 03/31/2021

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1 A. Right.

2 Q. And when was that exclusion removed?

3 A. That was probably two years ago. Maybe 2019.

4 Q. And then before that, was there anything  
5 else -- was the transgender benefits exclusion the last  
6 modification before that?

7 A. I believe so, yes.

8 Q. And that was in 2017?

9 A. Yes.

10 Q. Or, rather, I should say --

11 A. Move forward to 2017, yes.

12 Q. So just to be clear, the plan was changed in  
13 2017, the transgender benefits covered or excluded were  
14 changed in 20 -- for the 2017 plan year?

15 A. Correct.

16 Q. So let's take the 3-D mammography as an  
17 example, for instance. So there, Aetna came forward and  
18 said that they're going to start covering 3-D  
19 mammography. Correct?

20 A. Right.

21 Q. And then Blue Cross Blue Shields, UHC, and  
22 Cigna about a year later decided that they were going to  
23 start covering that service?

24 A. Right.

25 Q. So this was presented to the ADOA how? How did

Scott Bender, Videotaped - 03/31/2021

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1 than that, we typically query our health plans to  
2 determine, you know, is this a standard service. And  
3 that's all part of that medical director meeting.

4 Q. Okay. So the ADOA doesn't affirmatively  
5 consider, you know, guideline or standards of care for  
6 treatment; it relies on its network providers?

7 A. Correct.

8 Q. So once Ms. Medina had collected or did this  
9 research for the team, she -- what does she then do with  
10 it?

11 A. We would have a discussion -- and this is just  
12 my assumption in how we did this; I don't recall  
13 specifically -- we would have a discussion as to, you  
14 know, this is now an appropriate service, according to  
15 our -- according to our vendors. It's not necessarily a  
16 high cost driver. We present it to our director and the  
17 decision would be made whether to include or exclude.

18 Something like that, where all four programs  
19 are aligned that this is now a standard course of  
20 treatment, and it's zero -- you know, limited cost to the  
21 plan. That's, I think, a fairly easy decision, and we  
22 don't necessarily need to run to the governor's office or  
23 to the director to make those decisions.

24 Q. So where the -- all four network providers are  
25 aligned, you think it's an easy decision on whether to

Scott Bender, Videotaped - 03/31/2021

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1 extend coverage?

2 A. Correct. That's if -- that's if -- and I'll  
3 caveat that with if the cost is reasonable.

4 Q. So when you say this is a discussion, would you  
5 and Ms. Medina have a discussion first?

6 A. Yes, just to review her findings.

7 Q. And let me be more specific. On the 3-D  
8 mammography treatment, did you and Ms. Medina have a  
9 discussion first about the findings of her research?

10 A. I -- I don't recall -- I presume we did. I  
11 don't recall it specifically, but that's typically how  
12 things happen. She researches and updates me on what she  
13 finds.

14 Q. And so once you and Ms. -- once you and  
15 Ms. Medina have that discussion, do you all form a  
16 recommendation that you take to the -- to Mr. Shannon or  
17 did you?

18 A. That's typically how it works, yes. I don't  
19 recall specifically in that case.

20 Q. And so when you say "typically," you mean when  
21 you're assessing whether to remove a plan exclusion, you  
22 and your team come to a recommendation, and then you take  
23 that to the benefit services director?

24 A. And not necessarily just removing a plan  
25 exclusion, which is fairly rare. But just any -- any

Scott Bender, Videotaped - 03/31/2021

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1 it as such and it is their recommendation that we -- we  
2 include it, so we did.

3 Q. And the 3-D mammography treatment, that wasn't  
4 required by law, was it?

5 A. Not that I'm aware of, no. It is a  
6 preventative service, and we're required to offer  
7 mammograms, but I don't believe that particular type of  
8 mammogram is required by law.

9 Q. So on the 3-D mammography, you don't recall the  
10 governor's office being involved, but hypothetically say  
11 they were involved, once the governor's office makes the  
12 decision, do they then advance that to the JLBC for their  
13 favorable or unfavorable vote?

14 A. Something on a one-off like that, typically  
15 not. The JLBC is more concerned about, since they are a  
16 budget agency, they're more concerned about things that  
17 are going to have a material impact to the budget. And  
18 the treatment of one mammogram versus another would not  
19 have a material impact on the budget.

20 Q. What impact did that extension of that  
21 treatment have on the budget?

22 A. I don't recall. But I know that the pricing  
23 was close between 3-D and the standard.

24 Q. Was the additional cost of 3-D mammography  
25 below a million per year to the plan?

Scott Bender, Videotaped - 03/31/2021

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1 A. Correct.

2 Q. And so you cannot recall whether you made a  
3 recommendation that you would, in the ordinary course  
4 make, about transgender benefits?

5 A. In the ordinary course of business, it would  
6 have been a bottom-up approach, and this clearly was not.  
7 She brought this to us. So there was obviously some  
8 concern by someone somewhere about this program and these  
9 specific benefits.

10 Q. And so -- so -- so because this is -- this was  
11 not a bottom-up approach, you can't remember whether you  
12 made a recommendation to Ms. Isaacson of whether the plan  
13 should cover transgender benefits?

14 A. Correct.

15 Q. Now, are those two things connected? The fact  
16 that it was not a bottom-up approach and your memory of  
17 whether you made a recommendation?

18 MR. CURTIS: Objection; form of the question.

19 You can answer.

20 BY MR. WALL:

21 Q. You can answer, Mr. Bender.

22 A. So can you reask that?

23 Q. Sure. Are those two things connected, the fact  
24 that it was not a bottom-up approach, and your memory of  
25 whether you made a recommendation?

Scott Bender, Videotaped - 03/31/2021

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1 A. Are they connected? I don't really know how to  
2 respond to that question. I --

3 Q. Well, I do want to be clear, Mr. Bender, is it  
4 that you do not remember whether you made a  
5 recommendation or you did not make a recommendation to  
6 Ms. Isaacson?

7 A. I do not remember if I made a recommendation.  
8 I don't believe I did. It was clear that this was a  
9 sensitive topic.

10 Q. Why was it clear that this was a sensitive  
11 topic?

12 A. Just in the amount of work that was put into  
13 it, and we were -- my team was not really included in any  
14 discussions outside of our office. We were not included  
15 in any discussions with the governor's office. Which  
16 made me think that this was very sensitive.

17 Q. And your team not being included in any of  
18 those discussions was out of the ordinary. Correct?

19 A. As we discussed, yes, for a benefit change or a  
20 significant benefit issue that this is, it seemed  
21 unusual.

22 Q. Why was the plan's exclusion of transgender  
23 benefits a significant benefit issue?

24 A. It's -- well, I -- I know that -- I believe it  
25 was viewed -- it may have been viewed more along

Scott Bender, Videotaped - 03/31/2021

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1 political lines, if you will, different ideologies. And,  
2 obviously, in a political environment, that's -- many  
3 people consider those things.

4 Q. Was the plan's exclusion of transgender  
5 benefits viewed along political lines?

6 A. That was my sense, but I don't know for sure.

7 Q. What was that sense based on?

8 A. Well, my sense is based on where we were a  
9 fairly conservative state with conservative leadership,  
10 in the legislature and governor, and transgender benefits  
11 are not necessarily something that's a super important  
12 factor to many conservatives.

13 Q. And, Mr. Bender, earlier you mentioned that  
14 there were obviously some concerns about this topic.  
15 Correct?

16 A. Yes, just in my discussion and interaction with  
17 Marie Isaacson, it was clearly something that was being  
18 seriously debated.

19 Q. Did you hear from anyone else about these  
20 concerns?

21 A. I -- I sensed that our team was well aware that  
22 this was not necessarily an easy decision.

23 Q. And it wasn't an easy decision because of the  
24 political considerations around it?

25 A. Correct. That was my sense.

Scott Bender, Videotaped - 03/31/2021

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1 are referring to gender reassignment surgery, as well as  
2 hormone therapy and counseling in connection therewith.

3 Correct?

4 A. Correct.

5 Q. So the network -- so to back up, the ADOA asked  
6 the network providers to provide you with a cost-impact  
7 analysis; is that right, Mr. Bender?

8 A. Yes.

9 Q. And that cost-impact analysis showed that the  
10 marketplace and industry were going to cover tran --  
11 gender reassignment surgery, as well as counseling and  
12 hormone therapy in connection therewith?

13 A. That's correct. And their estimates were  
14 varied. Some gave us an estimate of per employee per  
15 month cost, additional to our -- our current plans,  
16 others gave a percentage of cost increase is my  
17 recollection.

18 Q. So with this information available, the ADOA  
19 decided to maintain the exclusion on gender reassignment  
20 surgery. Correct?

21 A. I don't know that that was the ADOA's decision,  
22 but that was the decision that was communicated to us to  
23 implement.

24 Q. If not the ADOA's decision, whose decision  
25 would it have been?

Scott Bender, Videotaped - 03/31/2021

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1 A. Someone up the food chain from ADOA. I'm not  
2 certain who made that decision.

3 Q. When we're referring to someone up the food  
4 chain, to whom are you referring, Mr. Bender?

5 A. Could be anyone in the governor's office.

6 Q. Is there anyone else outside of the governor's  
7 office who could have made that decision?

8 A. No. ADOA bears responsibility for managing the  
9 program, and we report to the governor's office, so no.

10 Q. So just to back up a bit. So once the decision  
11 was made, Ms. Isaacson informed you of that decision.  
12 Correct?

13 A. She asked us to -- I'm sorry --

14 Q. I'm sorry, let me clarify. Once the decision  
15 was made on whether to continue the plan's exclusion of  
16 transgender benefits, Ms. Isaacson communicated to you  
17 that the plan would continue its exclusion of gender  
18 reassignment surgery, but not counseling or --

19 THE REPORTER: I'm sorry, Mr. Wall, can you  
20 repeat that, please?

21 MR. WALL: Sure.

22 Q. So once a decision was made on whether the plan  
23 would continue its exclusion of transgender benefits,  
24 Ms. Isaacson communicated that decision to you and your  
25 team. Correct?

Scott Bender, Videotaped - 03/31/2021

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1 or deleted the exclusions and absorbed the costs  
2 associated with that, for sure.

3 BY MR. WALL:

4 Q. So if the ADOA had removed the exclusion listed  
5 in paragraph 16, would there have been any other question  
6 about the ADOA's compliance with Section 1557?

7 A. From a compliance standpoint, no. If we  
8 voluntarily opted in, there's no compliance issue.

9 Q. So why didn't the ADOA remove the exclusion for  
10 all transgender benefits under the plan?

11 A. Can you rephrase?

12 Q. Why didn't the ADOA remove the plan's exclusion  
13 of transgender benefits, inclusive of gender reassignment  
14 surgery?

15 A. I believe there are several reasons, one being  
16 cost and the other being we didn't feel it was required  
17 for us to include -- or to eliminate the exclusion for.

18 Q. So the ADOA did not remove the plan's exclusion  
19 of gender reassignment surgery because of cost, and it  
20 didn't feel it was required to remove that exclusion?

21 A. Those are both reasons. I think, primarily, is  
22 we weren't required to, and if we're not required to,  
23 then we weren't interested in taking on additional costs  
24 in a plan that's already under water.

25 Q. The ADOA's primary reason for not removing the

Scott Bender, Videotaped - 03/31/2021

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1 and if you don't understand, you can let me know. Okay?

2 A. Okay.

3 Q. So except when a medically necessary  
4 hysterectomy is sought in connection for the treatment of  
5 gender dysphoria.

6 A. It's excluded if it's in connection with a  
7 transgender surgery.

8 Q. So but for being in connection with a  
9 transgender surgery, a medically necessary hysterectomy  
10 would be covered under the plan?

11 MR. CURTIS: Objection; form of the question.

12 THE WITNESS: Correct.

13 BY MR. WALL:

14 Q. You can answer.

15 Under --

16 A. That's correct.

17 Q. Are you aware of any procedures that are  
18 medically necessary that are covered -- of any procedures  
19 that are covered -- uh -- let me restate this.

20 Are you aware of any other instances under the  
21 plan where a medically necessary procedure is covered in  
22 some instances, but not others?

23 A. Off the top of my head, I'm not aware.

24 Q. Mr. Bender, would you turn for me to Exhibit --  
25 Tab 1 in this binder, which is premarked as Bender

Scott Bender, Videotaped - 03/31/2021

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1 different estimates from the four different health plans,  
2 and just anecdotally from our actuary as to what he felt  
3 our exposure was, based on what he was seeing in the  
4 marketplace.

5 Q. So just to sum up, the ADOA had numerous  
6 different estimates of the cost from the various -- from  
7 the four network providers?

8 A. Right.

9 Q. And also, the in-house actuary, Mr. Meisner,  
10 had a different calculation of the cost?

11 A. Correct.

12 Q. So now I'm looking at the bottom-most bullet in  
13 this box on cost, that says, "Based on input from the  
14 vendors and ADOA's research, ADOA feels it can" safe --  
15 "it can be safely say if transgender coverage is  
16 implemented, the cost would be under a dollar per  
17 employee per month. Approximately 50 cents per employee  
18 per month seems to be an agreed-upon amount based on  
19 ADOA's research."

20 Did I read that correctly, Mr. Bender?

21 A. Yes.

22 Q. So appreciating that you saw different  
23 estimates and a different estimate from Mr. Meisner  
24 later, would you consider this estimate here to be high?

25 A. A dollar per employee per month, is

Scott Bender, Videotaped - 03/31/2021

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1 approximately \$60,000 [sic] a month, so \$120,000 a year.  
2 In the overall scheme of the plan, I -- I would not say  
3 that that is a high cost.

4 Q. And if a dollar per month is not a high cost,  
5 then you would agree 50 cents per employee per month is  
6 also not a high cost?

7 A. That's right.

8 Q. When the ADOA is assessing the cost of a  
9 particular treatment, does it matter whether it's being  
10 calculated on a per employee per month basis or a per  
11 member per month basis?

12 A. I don't know that it necessarily matters. Both  
13 of them will get you to sort of an annual cost.

14 Q. And what about calculating as a percentage of  
15 total plan cost?

16 A. Same. We know what our annual plan costs, and  
17 if the recommendations are in various methodologies, we  
18 can account for that and convert everything to an annual  
19 total impact.

20 Q. So if you turn now, Mr. Bender, to the fourth  
21 physical page of this document, Bates number  
22 AZSTATE.009272.

23 A. Got it.

24 Q. Do you see that bottom box that says  
25 A-H-C-C-C-S?

# Exhibit 39

**In The Matter Of:**

*Toomey vs.  
State of Arizona*

---

*Yvette Medina, Videotaped  
February 18, 2021*

---

*Glennie Reporting Services, LLC  
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Original File 021821YM\_1.txt

**Min-U-Script®**

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 YVETTE MEDINA

Via Zoom Videoconference  
February 18, 2021  
8:30 a.m. (MST)  
Phoenix, Arizona

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

Yvette Medina, Videotaped - 02/18/2021

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1 Q. So there are instances in which the governor's  
2 office provides you, ADOA, with language that ends up in  
3 the plan change log?

4 A. Yeah. There could be instances, and this  
10:17:57 5 was -- this -- I don't know if this was one of them, but  
6 there -- yes, there could be instances.

7 Q. Do you remember any specific instances?

8 A. No -- well, it's -- I can say that it was not  
9 often that they would give us information unless there  
10:18:23 10 was something like this kind of situation where there was  
11 a court case happening that affects our plan. There  
12 could have been throughout the -- you know, each  
13 different plan year, but other than -- so we had this  
14 instance and -- I'm trying to think of other -- we had --  
10:18:55 15 sometimes when the ACA would pass things or there was  
16 changes being made, like, federally and they would  
17 actually -- they would look at everything. So like our  
18 same-sex or domestic partners, they did -- they did for  
19 the -- the nondiscrimination transgender item and -- I'm  
10:19:28 20 trying to think if they had feedback on ACA. I -- those  
21 are probably the only two.

22 Q. So when you say "they," do you mean the  
23 governor's office?

24 A. Yes.

10:19:45 25 Q. So would you say that the governor's office

Yvette Medina, Videotaped - 02/18/2021

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1 limitation. Any experimental -- what's considered  
2 experimental or not medically necessary type of services.  
3 We have, gosh, lots of exclusions -- sorry, do you want  
4 me to name all the exclusions, because there are quite a  
10:36:15 5 few?

6 Q. Let me make this easier on both of us.

7 A. Okay.

8 Q. So you mentioned experimental. Would you say  
9 cosmetic surgeries also fall broadly under the  
10:36:31 10 exclusions?

11 A. It does. I -- I believe -- I would say that  
12 was a limitation. So we don't cover cosmetic surgery,  
13 but we would cover any -- someone that had cosmetic  
14 surgery, but it went -- it did not go so well, so they  
10:36:53 15 needed to get it fixed, because it could have been a  
16 medically necessary situation for, like, an emergency  
17 type of situation. So that would have been a limitation.

18 So we don't -- we don't cover cosmetic surgery  
19 for, you know, changing, like, a feature in the face, but  
10:37:13 20 if there was something happening that was causing medical  
21 issues, we would cover that to be treated.

22 Q. Would it be fair to say that you don't cover  
23 cosmetic surgeries, but if it's medically necessary, then  
24 you do?

10:37:34 25 MR. CURTIS: Objection; form of the question.

Yvette Medina, Videotaped - 02/18/2021

1 BY MS. SHEETS:

2 Q. You can answer.

3 A. Medically necessary, yeah, as deemed by the --  
4 the plan with the vendors themselves. So, yes, if they  
10:37:47 5 consider it to be medically necessary, then yes.

6 Q. So if cosmetic surgery is found under the plan  
7 to be medically necessary, then it would be covered?

8 A. Yes.

9 Q. And experimental surgery, is there any process  
10:38:06 10 for determining whether that's medically necessary?

11 A. The process wouldn't fall on the plan, the  
12 process would fall onto the actual medical vendor  
13 themselves, because they have medical guidelines that  
14 they follow. So they have to follow their medically  
10:38:23 15 necessarily -- so -- excuse me -- their medically  
16 necessary guidelines to follow it.

17 Q. And if those guidelines are followed and a  
18 procedure is deemed medically necessary, would it then be  
19 covered even if it was considered experimental?

10:38:51 20 A. It would if the language said this is  
21 experimental, or it's not covered unless it's medically  
22 necessary.

23 Q. So it sounds like the keywords here are "unless  
24 it's medically necessary"; is that right?

10:39:07 25 A. Correct. Yes.

Yvette Medina, Videotaped - 02/18/2021

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1 Q. So moving back to the document here, item 51.  
2 So we're going to walk through an example of an  
3 exclusion, because I really want to understand how the  
4 process works for developing these and changing them. So  
10:39:38 5 for item 51, in the "Proposed Change" column, we have,  
6 "Remove exclusion as the plan will cover services, if  
7 approved by medical management as medically necessary."

8 Do you see that?

9 A. Yes.

10:39:54 10 Q. And what does that mean?

11 A. So this is for orthognathic surgery or  
12 treatment. We had it as an exclusion, but when we remove  
13 it from the exclusions, if someone were to go get that  
14 treatment and it was considered medically necessary by  
10:40:18 15 the medical vendor, then it would be covered. If it --

16 Q. And -- sorry. Please complete your answer,  
17 Ms. Medina.

18 A. If the language stayed, then it would be  
19 excluded.

10:40:34 20 Q. So if the current language listed under  
21 "Current Plan Language" stayed for orthognathic treatment  
22 or surgery, then the exclusion would hold?

23 A. Correct.

24 Q. Is that -- and by the exclusion holding, I mean  
10:40:57 25 any orthognathic surgery, whether or not it was medically

Yvette Medina, Videotaped - 02/18/2021

1 necessary, would be excluded from the plan; is that  
2 right?

3 A. Not necessarily. Our plan does say that we  
4 will only cover medically necessary services.

10:41:14 5 Q. So as the current plan language for item 51  
6 lists orthognathic surgery before including -- let me  
7 back up.

8 As the item 51, "Current Plan Language" stands,  
9 orthognathic surgery is excluded under the plan; is that  
10:41:49 10 right?

11 A. That's correct.

12 Q. Under this "Current Plan Language" for item 51,  
13 is there an opportunity for someone to prove the  
14 orthognathic surgery medically necessary?

10:42:12 15 A. Because this is specifically excluded, even if  
16 it was medically necessary, it would not be covered  
17 because we specifically exclude it.

18 Q. So under this language, in the current plan  
19 language for item 51, even if orthognathic surgery was  
10:42:35 20 medically necessary, it would be excluded under the plan?

21 A. Yes.

22 Q. And just so I understand, feel free to say you  
23 don't know, if you don't know, but what is orthognathic  
24 surgery?

10:42:53 25 A. I don't know the full details of it, but I know

Yvette Medina, Videotaped - 02/18/2021

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1 it does have something to do with the jaw and the face  
2 and -- and that particular area of -- and dental.

3 Q. Would it -- like an underbite fall under  
4 orthognathic surgery?

10:43:16 5 MR. CURTIS: Objection; form.

6 THE WITNESS: Yeah, I don't know.

7 BY MS. SHEETS:

8 Q. That's fine. But let's say an underbite did  
9 fall into orthognathic surgery, if someone needed surgery  
10:43:31 10 and it was deemed medically necessary for an underbite  
11 and this current plan language stood, would that be  
12 covered under the plan?

13 A. No.

14 Q. Let's move on to the proposed plan language.  
10:44:00 15 So for item 51, it appears to be the same language but  
16 crossed out in red.

17 Do you see that?

18 A. Yes.

19 Q. What does that mean?

10:44:12 20 A. That means that we are removing that language  
21 from the plan.

22 Q. And if you recall, what does that mean in this  
23 particular instance, in item 51, to have removed the  
24 exclusion for orthognathic surgery?

10:44:37 25 A. So that means if someone presented with that

## Yvette Medina, Videotaped - 02/18/2021

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1 type of treatment in the next plan year, the 2012 plan  
2 year, it would be covered on the plan if it was medically  
3 necessary.

4 Q. And if for some reason under the new plan  
10:45:05 5 language getting rid of the exclusion for orthognathic  
6 surgery, and orthognathic surgery was found to be not  
7 medically necessary in the first instance, would the  
8 person seeking coverage have an opportunity to appeal  
9 that decision?

10:45:23 10 A. Yes, they would.

11 Q. Are you familiar with the appeals process if  
12 someone is denied coverage?

13 A. Yes, I am.

14 Q. In what capacity? What is your role in that  
10:45:51 15 process, if any?

16 A. So the appeals process goes through our  
17 vendors. They have the first, second, third -- we have  
18 three levels of appeal, and they all go through our  
19 medical plan vendor. So your first level of -- you get  
10:46:09 20 three levels, the first two are with the actual appeals  
21 team at the medical plan. So an appeals team reviews  
22 level one, and if it's still denied, then they go to a  
23 level two and a different appeals team reviews the  
24 information in the appeal. And if that's denied, then  
10:46:31 25 you -- you have a third level, which is an external

# Exhibit 40

IN THE 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 KELLY SHARRITTS

Via Zoom videoconference  
April 22, 2021  
8:34 a.m.

Glennie Reporting Services, LLC  
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Phoenix, Arizona 85020

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www.glenne-reporting.com

Prepared by:

Jill Marnell, RPR  
Arizona Certified  
Reporter No. 50021

Kelly Sharritts - 04/22/2021

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1 the one involved in doing that.

2 Q. Why would your assumption be that they were  
3 shared with the governor's office?

4 A. It was for the point of it going up to the  
5 legislature for it to pass in the budgeting and all that  
6 process that the government goes through.

7 Q. What types of decisions, if any, were required to  
8 be reviewed by the State legislature?

9 A. I would not be able to clearly tell you that.  
10 That's up to the government laws.

11 Q. What types of content was usually in the  
12 presentations that you were preparing to ultimately be  
13 shared with the State legislature?

14 A. We would put in plan design changes, plan premium  
15 costs, employer or -- I say employer, but State-funded by  
16 area -- by the different divisions, plan design structure,  
17 wellness initiatives. That's all I recall at the moment.

18 Q. You mentioned plan design changes. Do you  
19 remember any changes to the plan that did not involve you  
20 creating a presentation to be shared with the State  
21 legislature?

22 A. Not that I can recall today.

23 Q. Did you ever prepare a report or presentation on  
24 the coverage of transgender benefits?

25 A. I know I -- I did a lot of research and emails

Kelly Sharritts - 04/22/2021

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1 Q. Are you familiar with this exclusion?

2 A. Yes.

3 Q. Do you remember how you first learned of the  
4 exclusion?

5 A. I believe that only -- when it got brought to my  
6 attention was when one of the universities reached out for  
7 information on it and so Marie asked me to research it to  
8 see if we were being discriminatory in our plan design or  
9 not. And so we had to research it and figure out what the  
10 rules were and what it would mean.

11 Q. Do you remember which university reached out to  
12 the ADOA about this exclusion?

13 A. I don't recall. I get the two mixed up all the  
14 time.

15 Q. Which two do you mean?

16 A. Is it Arizona State University and -- U of A,  
17 ASU. Those two.

18 Q. Is U of A the University of Arizona?

19 A. Yes.

20 Q. And ASU would be Arizona State University?

21 A. Yes.

22 Q. So you think one of these universities reached  
23 out to Marie Isaacson; is that right?

24 A. Someone reached out from the university to  
25 someone and Marie reached out to me. So it got -- I don't

Kelly Sharritts - 04/22/2021

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1 know what the exact trickle was. But Marie reached out to  
2 our department -- or to our team to look into it.

3 Q. Do you remember around when Marie Isaacson  
4 reached out to your team to look into coverage of this  
5 exclusion?

6 A. It was, I would say, mid to late 2015.

7 Q. Do you remember how long you had been working at  
8 the ADOA when you were first approached about this issue?

9 A. I would say roughly six months. Somewhere in  
10 that range.

11 Q. Now -- Oh, before we move on, do you remember  
12 learning about the history of how this exclusion first  
13 came to exist in the ADOA plan?

14 A. I don't recall knowing how it started. I just  
15 was looking at does it stay.

16 Q. Did you know how long it had been part of the  
17 ADOA plan?

18 A. I don't recall that answer.

19 Q. Did it seem like something that had just been  
20 added, from the conversations you were having?

21 A. I wouldn't be able to infer that. I don't know.

22 Q. And when Marie Isaacson reached out to your team  
23 to assess whether the ADOA should maintain this exclusion  
24 as written in the 2016 plan, what specifically did you  
25 take her to be asking for?

Kelly Sharritts - 04/22/2021

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1 benefits was a more sensitive topic?

2 A. Yes.

3 Q. What do you remember about conversations you had  
4 around this Number 16 exclusion for transgender benefits  
5 that make you say it was more sensitive?

6 A. It definitely was more of a headline-test topic  
7 than a vision exam would be. So it was making sure that  
8 we were making the best, most informed decision, and  
9 making sure that we had all the information we needed to  
10 before just kind of making a -- an -- making an answer to  
11 it.

12 There's also a lot of discussion,  
13 especially -- we've come a long way in the last whatever  
14 many years it's been -- on whether it is a actual mental  
15 health situation or is it an option, is it an opinion, is  
16 it a choice. And so there was just a lot more  
17 controversial discussion around it. And probably today  
18 there still is.

19 Q. When you say there were discussions about whether  
20 the decision to maintain this exclusion affected something  
21 that was just an opinion or a choice, what do you mean?

22 A. I guess I -- There's a generic, I will say  
23 overall, I think society-wise on whether it's medically  
24 necessary to do these steps to actually change your sexual  
25 orientation or if it's more of a decision that you want to

Kelly Sharritts - 04/22/2021

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1 it? And I believe their advice to us at the time was we  
2 didn't have to cover it. That we could and it could be  
3 considered medically necessary if we chose to go that  
4 route, but it wasn't discrimination if we excluded it. If  
5 we did include it it would be covered under a medical  
6 necessity to get done.

7 Q. So when you previously said there was discussion  
8 about whether the need for the transgender benefits  
9 covered under Number 16 in the exclusions was a choice or  
10 an opinion instead of being medically necessary, who was  
11 having that discussion?

12 A. It was I would say all of the -- the managers  
13 under Marie and Marie a well [sic] -- as long as -- in  
14 addition to Mercer and our health plans and asking them  
15 what -- what it was. We just -- we aren't educated to  
16 know and so we were trying to get that information.

17 And I would say the discussion was more of  
18 the societal discussion of whether it was or not, not  
19 someone's specific opinion on it.

20 Q. So you testified earlier that it's your  
21 recollection that resources you typically relied on said  
22 that these benefits could be considered medically  
23 necessary if the ADOA chose to cover it.

24 A. They could be considered covered if we chose to  
25 and people were covering it. So I guess I should clarify.

Kelly Sharritts - 04/22/2021

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1 knee-jerk decision and that they have committed to this  
2 lifestyle.

3 MS. SHEETS: I'd like to propose that we  
4 take about a ten-minute break at this point. Could we go  
5 off the record.

6 THE VIDEOGRAPHER: Off the record at  
7 10:53 a.m.

8 (Recess.)

9 THE VIDEOGRAPHER: Back on the record at  
10 11:11 a.m.

11 Please proceed when ready.

12 Did she hear me?

13 MR. CURTIS: We are --

14 Q. BY MS. SHEETS: Ms. Sharritts --

15 MR. CURTIS: Oh, sorry. Go ahead.

16 Q. BY MS. SHEETS: Ms. Sharritts, would you please  
17 turn to Tab 28 in your binder. This has been marked as  
18 Sharritts [Exhibit 28](#) and in the bottom right-hand corner  
19 is AZSTATE.151707. So Ms. Sharritts, this is a chart  
20 labeled "Transgender Reassignment Surgery." Do you  
21 recognize this document?

22 A. It's a format of documents that is familiar to  
23 me. I personally can't recall this specific one.

24 Q. Were you shown this document in preparation for  
25 the deposition today?

Kelly Sharritts - 04/22/2021

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1 A. No.

2 Doesn't mean I didn't see it when I worked  
3 there, but I don't recall seeing it.

4 Q. Would you turn to Pages 10 and 11 of this chart.  
5 Do you recognize this section on Pages 10 and 11 that  
6 reads "ADOA Analysis"?

7 A. This looks like a format I would have put  
8 together. I may have done this one.

9 Q. Do you know whether or not you put this ADOA  
10 analysis section together?

11 A. I feel like it was me that did this. It's been a  
12 long time. I've done a lot of spreadsheets.

13 Q. If you could turn to Tab 5. This has been marked  
14 as Sharritts [Exhibit 5](#) and the Bates reads AZSTATE.006152.

15 A. Yes.

16 Q. Ms. Sharritts, this is an email that you sent to  
17 Marie Isaacson, copying Michael Meisner. Subject  
18 "Transgender Coverage," that attaches what looks to be an  
19 Excel sheet labeled "Transgender Coverage Analysis."

20 Do you see that?

21 A. Yes.

22 Q. And if you flip to that attachment behind the  
23 blue slip sheet do you see --

24 A. That was mine.

25 Q. -- do you see what appears to be the same chart

Kelly Sharritts - 04/22/2021

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1 that was on Pages 10 and 11 of Sharritts 28, the document  
2 we previously looked at?

3 A. Yes.

4 Q. Does this look to be your work?

5 A. Yes. If that's what was attached to this, that  
6 is my work.

7 Q. Does this look similar to Pages 10 and 11 of the  
8 Sharritts 28 chart that we previously looked at?

9 A. Yes.

10 Q. If you flip the page you'll see -- Now, in the  
11 Excel this is labeled, quote, summary of research. It's a  
12 separate tab and it starts [as read]: From the sources  
13 quickly available on the internet, most studies --

14 Do you see that?

15 A. Yes. I do see that.

16 Q. And the rest of that sentence is [as read]: Most  
17 studies find that utilization and cost of covering  
18 transgender hormones, surgery, medication, and/or mental  
19 health have an immaterial impact on health plans. Is that  
20 right?

21 A. Correct.

22 Q. Did you write this summary of research?

23 A. Yes. This was my research that I did.

24 Q. Do you remember sending this research to Marie  
25 Isaacson and Michael Meisner?

Kelly Sharritts - 04/22/2021

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1 A. Yes.

2 Q. In the bottom of the summary it states that [as  
3 read]: Utilization estimates range from one to 11 claims  
4 per year.

5 Do you see that?

6 A. Yes.

7 Q. Do you remember how you came to that conclusion?

8 A. I would have to say it's probably in the detail  
9 that was in here at the time, (indecipherable) research.

10 THE COURT REPORTER: I'm sorry, at the time  
11 something research?

12 THE WITNESS: Based on the research.

13 I'd have to go back through all my research  
14 to know where exactly I pulled that from.

15 Q. BY MS. SHEETS: So I'll give you a minute to look  
16 back through this summary of research. Just give it a --  
17 a read and see if you remember what research led you to  
18 these conclusions.

19 A. So it looks like I got the one to seven claims  
20 per year from the San Francisco data. And at the  
21 University of California there was an estimated 11 claims,  
22 so that's probably where I got the one through 11. That  
23 was the minimum and the maximum that I had found.

24 Q. How could you be sure that the estimates from  
25 San Francisco and University of California would be

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1 A. Yes.

2 Q. And do you remember what the conclusion was on  
3 the first question of whether or not the ADOA was required  
4 to cover transgender benefits?

5 A. I believe from the documents that we looked at  
6 today that Mercer had come back and said that there was  
7 not a -- it did not fall under the -- the -- Can't think  
8 of the word. That we weren't required to. That it wasn't  
9 legally required. That we weren't being discriminatory by  
10 not covering it, therefore there wasn't a requirement to  
11 have to. Things evolved I think, as we saw from that  
12 email that Marie sent, that HCC or HHS was trying to push  
13 that that law was clarifying that it was discriminatory.  
14 I think at the end of the day it was resolved that it was  
15 a grey area and no one really had a clear answer on yes or  
16 no. And we believed, since others were not, it wasn't  
17 something that was a clear black-and-white we had to do  
18 it.

19 Q. You say others were not. Do you mean other state  
20 plans were not covering transgender benefits?

21 A. Correct. There were state plans out there not  
22 covering it.

23 Q. Did Ms. Isaacson -- Let me rephrase.

24 In approaching this analysis where the first  
25 question was, are we required to cover this or not, is

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1 that approach unique to this exclusion?

2 A. No. Only in the sense that when other things  
3 would come up, like dental plans and seeing your dentist  
4 every six months, are you required to have that coverage  
5 or not, it was more of what's required in the standard  
6 treatment in the field. And we would get that advice from  
7 UHC and Aetna and Blue Cross and the other health plans  
8 and their physicians on what was typically required and  
9 should be done and we should be doing. This was more  
10 specific to is it discriminatory to not. And so, what is  
11 our legal obligation on the discrimination front on  
12 whether it's required for discrimination purposes?

13 Q. And when you say this decision on whether or not  
14 to maintain the exclusion was more specific to whether it  
15 was discriminatory or not, was that a unique approach in  
16 deciding coverage?

17 A. Yes. In my time there.

18 Q. And why do you think there was such emphasis on  
19 approaching this exclusion with the question of whether  
20 ADOA was required to cover these benefits?

21 A. Because it was such a grey area and had such a --  
22 I mean, it was a big topic in society at the time and it  
23 was a big change to things. That before we just changed  
24 something in the State plan and State tax dollars we  
25 wanted to make sure it was fully understood and vetted.

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1 And we wanted to make sure we weren't doing something  
2 wrong in the plan and discriminating. If we were, it was  
3 an immediate we have to fix it and change it. If we  
4 weren't being discriminatory, then it was more of a  
5 discussion on do we feel like it should be covered or not.

6 Q. When you say that the reason this approach of  
7 figuring out what the ADOA was required to cover was  
8 because this was a big topic in society at the time, what  
9 do you mean by that?

10 A. It was becoming -- I guess the topic itself with  
11 gay marriage and gay rights and transgenders was something  
12 that was evolving in society at the time and was becoming  
13 much more comfortable and much more commonplace than it  
14 had historically. And so it was trying to understand  
15 something that personally I don't understand because I  
16 don't have those experiences to empathize and understand.  
17 I do on dental work, so I can empathize and understand on  
18 those things. So it was more of trying to really  
19 understand what was out there and learning about it and  
20 educating ourselves on it.

21 I think the world --

22 Q. I think --

23 Go ahead.

24 THE COURT REPORTER: I'm sorry?

25 THE WITNESS: The world -- the world was

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1           A.     I would say Michael's approach to most of his  
2 analysis, in my opinion, were always kind of extreme. And  
3 so -- or -- I'm trying to think how to say it.

4                     He liked to pull the data that supported  
5 his -- his case. He's an actuary who can pull stats.  
6 And -- and you can make stats anything you want them to  
7 be. And in any analysis, not just this one, I think he  
8 definitely liked to prove himself correct in his  
9 viewpoints.

10           Q.     You say that Mr. Meisner would pull stats to help  
11 his case. In this scenario what did you take his overall  
12 case to be on transgender benefits?

13           A.     I believe, and I think it was just a -- a gut  
14 opinion of his, that it would be too costly to the plan  
15 and it shouldn't be covered. My analysis showed  
16 otherwise, and so he really wanted to show that it was  
17 going to be too costly.

18           Q.     And when Mr. Meisner first raised this idea that  
19 it would be too costly to the plan to cover transgender  
20 benefits, was that before he had gone back and done  
21 actuarial analysis?

22           A.     I don't know. I honestly can't remember the  
23 timing. I just -- from the mush of time and my  
24 recollection of this, that was the sense I got, that he  
25 just felt it was going to be and so he -- I think that's

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1 why he leaned on the UHC study. Because that supported  
2 him in the fact that it would be really expensive and  
3 support in the fact that we should be very, very  
4 conservative in the cost analysis just to make sure we  
5 were covering ourselves.

6 Q. Did Michael Meisner have a personal view  
7 unrelated to cost on whether transgender benefits should  
8 be covered by the ADOA?

9 MR. CURTIS: Objection; form of the  
10 question.

11 You can answer.

12 MS. SHEETS: You can answer.

13 THE WITNESS: I honestly don't recall what  
14 his personal opinion on it is. If it was said, I don't  
15 remember.

16 Q. BY MS. SHEETS: To be clear, you don't remember  
17 Michael Meisner making any statements about his opinion on  
18 whether transgender benefits should be covered generally?

19 A. I don't remember if he did. He may have. I  
20 don't recall it. I -- I couldn't quote to say that he  
21 did.

22 Q. Did you have the impression that he wanted  
23 transgender benefits to be covered under the plan?

24 A. I got the impression that it was not something  
25 that was felt to be necessary in the plan.

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1 wrong, that the ADOA decided this was a grey area and then  
2 moved on to the second question. So taking aside whether  
3 or not they were legally required to cover these benefits,  
4 the ADOA considered, as you stated, do we want to? Should  
5 we or should we not cover the benefits? And I want to be  
6 clear that that's the portion of the analysis that we're  
7 talking about now.

8 So in that second part of the analysis, so  
9 put aside whether or not it was legally required, what  
10 factors were considered by the ADOA?

11 A. I would say costs and what the trend of other  
12 states and public sectors were.

13 Q. Ms. Sharritts, were you -- do you remember  
14 discussion about coverage of 3D mammography while you were  
15 at the ADOA?

16 A. I have a vague recollection -- recollection. I  
17 can't say that word. I have a vague memory of that.

18 Q. And do you remember that the ADOA decided to  
19 cover 3D mammography?

20 A. I believe so, yes.

21 Q. Do you remember that -- There was no legal  
22 requirement to cover 3D mammography; right?

23 A. Correct.

24 Q. So the ADOA's approach to deciding whether or not  
25 it would cover 3D mammography is different from the

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1 defined response. And over time we all came to accept it  
2 and -- and to cover those things.

3 That's -- I feel like transgender benefits  
4 are going to do the same thing. It's just something new  
5 and unknown to a large population of people and it's going  
6 to take time for that to evolve to become generally  
7 accepted.

8 Q. We talked about the perception of others  
9 generally in society. And now I want to talk about the  
10 perception of those people who you were working with at  
11 the ADOA at the time this decision was made.

12 You were working with Marie Isaacson; is  
13 that right?

14 A. Yes.

15 Q. Do you remember any conversations with Marie  
16 Isaacson in which she expressed her personal opinion on  
17 whether it was necessary to cover transgender benefits in  
18 her view?

19 A. I don't believe I ever got her personal opinion  
20 on the topic.

21 Q. Do you remember a conversation with Marie  
22 Isaacson that Michael Meisner would have been present for  
23 in your office when Marie Isaacson popped her head in and  
24 then you told her your view of the ADOA covering  
25 transgender benefits?

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1 MR. CURTIS: Objection; form of the  
2 question.

3 MS. SHEETS: You can answer.

4 THE WITNESS: I don't specifically recall  
5 that. But I also know I am open with my opinion and so I  
6 probably would have shared that I thought the cost was  
7 minuscule and it doesn't seem like there's an obvious  
8 reason not to cover it other than what the State feels on  
9 it.

10 Q. BY MS. SHEETS: When you say that cost was  
11 minuscule, can you say more about that?

12 A. From my analysis, it was less than a dollar per  
13 member for their premium to cover it. Yes, the cost was a  
14 lot, but you have 136,000 members that you can spread that  
15 cost around. It ended up being less than a dollar,  
16 potentially pennies, to the plan on a per-person basis.  
17 So I didn't feel like that was a driver to make a decision  
18 on.

19 Q. So the cost, as you calculated it, didn't make  
20 sense to rely on as a driving factor for why not to cover  
21 transgender benefits; is that right?

22 A. Correct. And from the other resources, the other  
23 states I talked to, most of them said it was a negligible  
24 impact to their plan when it came to cost.

25 Q. What was Marie Isaacson's response to your

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1 cost factor in that decision and I didn't see why we  
2 needed to make a stance on not covering it, when other  
3 states had started. It was, there wasn't really a reason  
4 to stop or to not do it.

5 Q. Why, in your opinion, do you think ADOA decided  
6 not to do it? Not to cover transgender benefits?

7 A. I don't think they were ready to.

8 Q. And what do you mean by ready to?

9 A. Similar -- I think I said before is the state of  
10 Arizona has not been on the forefront of any major changes  
11 in things. We tend to follow and watch what other states  
12 do first and then we get on board with it. So I think  
13 that's just -- they wanted to see more of an adaption --  
14 adoption of this nationwide before Arizona was going to do  
15 it.

16 Q. Would you say that this was more of a political  
17 decision on ADOA's part?

18 A. I don't know how you would define if it was a  
19 political decision, so I don't want to say yes to that. I  
20 think it was more of a -- I don't know. It was just they  
21 weren't ready to make that change to the plan. So I guess  
22 that would be political.

23 Q. So we can define political, but would you say the  
24 ADOA saw the decision not to cover or to cover transgender  
25 benefits as different from, say, dental benefits, because

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1 this was more of a hot-topic issue?

2 A. It was something that was not widely accepted at  
3 the time. Dental benefits are widely accepted. This was  
4 not. And so they weren't ready to take on something that  
5 wasn't widely adopted already.

6 Q. And the decision of states to adopt something  
7 that was not universally accepted is political; right?

8 A. I could see --

9 MR. CURTIS: Objection; form of the  
10 question.

11 THE WITNESS: I guess you could say that.

12 Q. BY MS. SHEETS: Would you say that?

13 (Brief interruption off the record.)

14 THE WITNESS: I didn't say that.

15 Yes, I would -- I guess I would agree with  
16 that, yes. It was a -- it was political.

17 Q. BY MS. SHEETS: So the ADOA's decision not to  
18 cover transgender benefits was a political one?

19 A. In my personal opinion.

20 Q. In your personal opinion --

21 A. Yes.

22 Q. -- the ADOA's decision not to cover transgender  
23 benefits was a political one; right?

24 A. Yes.

25 MS. SHEETS: At this point we're going to

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1 Q. -- was a headline topic when you were employed by  
2 ADOA; right?

3 A. It was -- it potentially could have been a  
4 headline topic.

5 Q. It was a sensitive topic; right?

6 A. It was definitely a sensitive topic.

7 Q. And it was a controversial topic; right?

8 A. Absolutely.

9 Q. And the reason it was, when you were employed by  
10 ADOA, a sensitive and controversial topic is because it  
11 was not generally accepted in Arizona whether the coverage  
12 of -- whether transgender healthcare benefits are  
13 medically necessary or a personal choice. Is that a fair  
14 summary of your testimony earlier?

15 A. I would say that that is a fair summary, yes.

16 Q. And because it wasn't generally accepted in  
17 Arizona whether transgender healthcare benefits were  
18 medically necessary or a personal choice, I -- ADOA was  
19 concerned about how it would be perceived if it provided  
20 coverage for transgender healthcare benefits; right?

21 A. Correct. And I -- I would say the ADOA probably  
22 wouldn't have used the word personal choice. That's my --  
23 I don't think it's a personal choice, but it was my  
24 abbreviation of the thought.

25 Q. Sure. And the thought is the -- What's the

# Exhibit 41

## Message

**From:** Scott Bender [Scott.Bender@azdoa.gov]  
 on behalf of Scott Bender <Scott.Bender@azdoa.gov> [Scott.Bender@azdoa.gov]  
**Sent:** 8/22/2016 4:08:46 PM  
**To:** Marie Isaacson [Marie.Isaacson@azdoa.gov]; Elizabeth Schafer [Elizabeth.Schafer@azdoa.gov]; Michael Meisner [Michael.Meisner@azdoa.gov]  
**Subject:** FW: Nondiscrimination Section 1557 Gender Transformation Coverage

Below is final guidance from UHC on their treatment for transgender health services.

**From:** Martin, Stephanie A [mailto:stephanie\_martin@uhc.com]  
**Sent:** Thursday, August 18, 2016 4:18 PM  
**To:** Yvette Medina <Yvette.Medina@azdoa.gov>; Scott Bender <Scott.Bender@azdoa.gov>  
**Cc:** Gallegos, Heather K <heather\_gallegos@uhc.com>  
**Subject:** Nondiscrimination Section 1557 Gender Transformation Coverage

Hi All,

Our organization recently announced how we will be handling the requirements of Section 1557 of the Affordable Care Act (ACA). As an overview, Section 1557 is the civil rights provision of the Affordable Care Act (ACA) of 2010. Section 1557 prohibits discrimination on the grounds of race, color, national origin, sex, age, or disability in certain health programs and activities.

Protection against sex discrimination include:

- Individuals cannot be denied health care or health coverage based on their sex, including their gender identity and sex stereotyping.
- Women must be treated equally with men in the health care they receive and the insurance they obtain.
- Categorical coverage exclusions or limitations for all health care services related to gender transition are discriminatory.
- Individuals must be treated consistent with their gender identity. Treatment may not be denied or limited for any health services that are ordinarily or exclusively available to individuals of one gender based on the fact that a person seeking such services identifies as belonging to another gender.
- While the recent guidance prohibits broad categorical exclusion of gender transformation, it does not mandate coverage of specific medical services. However, when any benefits are covered, they may not be administered in a discriminatory manner.

I had previously mentioned that I would provide information related to how UnitedHealthcare would be handling our risk-based business (Fully Insured). That is something that most Self-Funded clients will use as a guideline. However, I also need to advise that for our Self-Funded (ASO) customers it is up to the plan sponsor to consult with your legal department to determine whether or not you are a covered entity under Section 1557 and to review your plan for any changes that may be necessary.

For **fully insured plans**, UnitedHealthcare's 2017 Certificate of Coverage (COC) will include the following benefits and exclusions/limitations. Standard benefits for the treatment of gender dysphoria are limited to the following services when clinical criteria for eligibility are met:

- **Psychotherapy** and mental health services for gender dysphoria and associated co-morbid psychiatric diagnoses.
- **Certain drug therapies, including cross-sex hormone therapy**, administered by a medical provider during an office visit or dispensed from a pharmacy.
  - **Puberty suppressing medications** for treatment of gender dysphoria, such as Lupron and Supprelin® LA, which are administered in the physician's office, have been added under the medical benefit.
- **Laboratory testing** to monitor the safety of continuous cross-sex hormone therapy.
- **Specified surgeries** including genital surgery for the treatment of gender dysphoria and breast surgery including bilateral mastectomies and breast reduction.
- **The exclusion for gender transformation surgery has been removed.**

Specific documentation and written psychological assessments from one or more qualified behavioral health providers experienced in treating gender dysphoria are required prior to approval for a bilateral mastectomy, breast reduction surgery or genital surgery.

Exclusions and limitations include surgeries and/or related services that are considered cosmetic, unproven and not medically necessary.

I am providing you with the Material Modification Update (MMU)/ Summary of Material Modifications that we are providing to our Self-Funded customers wishing to adopt UnitedHealthcare's standard benefit coverage. It's important to note that UnitedHealthcare's standard coverage aligns with scientifically-based clinical evidence and WPATH guidelines. WPATH is the **World Professional**

**Association for Transgender Health.** We can also support your custom program requests as well and they are identified in the sample MMU as Plan Design Variable. Keep in mind this includes Rx language which may fall under your PBM contract for medications dispensed by the pharmacy.

**Expected costs from our actuaries are as follows:**

Medical coverage

\$.09 per member per month (PMPM) / Based on UHC covered lives: Approximately \$86K per year.

Let me know if you have any questions.

Thanks,  
Stephanie

**Stephanie A. Martin**

Strategic Client Executive, Client Management

UnitedHealthcare National Accounts

1 E. Washington St., Suite 1700, AZ009-17TE, Phoenix, AZ 85004

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January 2017 MMU Gender Dysphoria

## UnitedHealthcare Material Modification Updates January 2017 - Gender Dysphoria

Your Summary Plan Description is the core of the benefit plan informing participants as to what is and is not considered a covered treatment or service under your plan. This Summary of Material Modification (SMM) will serve as a resource to you in preparing and updating benefit plan information. Please take the time to think about adding applicable clarifications to your Summary Plan Description. This information is not intended nor should it be construed as legal advice. Consult your own legal counsel for advice on your Plan and the proper timing for notice of material modifications, including material reductions in benefits, to plan members.

Identified in the attached SMM is sample language from UnitedHealthcare's most current product templates. If not stated, the language below applies to all standard products. Disregard bracketed text for treatments, services and programs that do NOT pertain to your plan designs.

### **What is in this SMM?**

This SMM provides model language describing Benefits for the treatment of Gender Dysphoria consistent with UnitedHealthcare Coverage Determination Guidelines. Plans may cover, or exclude, surgical or non-surgical treatment for gender dysphoria. Note: Plan specific benefits may differ greatly from the standard benefit plan provided in this SMM.

This model language is provided for informational purposes. It does not constitute medical advice.

January 2017 SMM Gender Dysphoria

**SUMMARY OF MATERIAL MODIFICATIONS**

**To the Summary Plan Description for [ERISA Plan Name]**

Plan change effective on: [effective date of this SMM]

Group Number: [XX]

A Summary Plan Description (SPD) was published effective [date of Summary Plan Description to be amended]. The following are modifications and clarifications that are effective [effective date of amendment]. These modifications and clarifications are intended as a summary to supplement the SPD. It is important that you keep this summary with your SPD since this material plus the SPD is your complete SPD.

**In the event of any discrepancy between this Summary of Material Modifications (SMM) and the SPD, the provisions of this SMM shall govern.**

*A. This SMM provides Benefits for the treatment of Gender Dysphoria. Certain capitalized words have special meanings. [UnitedHealthcare][The Claims Administrator] has defined these words in the Summary Plan Description (SPD) in Section 14, Glossary and in this SMM below. The words "you" and "your" are referring to people who are Covered Persons, as the term is defined in the SPD in Section 14, Glossary.*

**SECTION 5 - PLAN HIGHLIGHTS**

*B. The provision below for Gender Dysphoria is added to the Schedule of Benefits [and replaces Treatment of Gender Dysphoria in its entirety]:*

**Schedule of Benefits**

Covered Health Services	Benefit <i>(The Amount Payable by the Plan based on Eligible Expenses)</i>	
	Network	Non-Network
Gender Dysphoria	Depending upon where the Covered Health Service is provided, Benefits will be the same as those stated under each Covered Health Service category in the <i>Schedule of Benefits</i> [.] [and in Section 15, <i>Outpatient Prescription Drugs</i> .] [and in [Carve-out RX	[Depending upon where the Covered Health Service is provided, Benefits will be the same as those stated under each Covered Health Service category in the <i>Schedule of Benefits</i> [.] [and in Section 15, <i>Outpatient Prescription Drugs</i> .] [and in [Carve-out

January 2017 SMM Gender Dysphoria

Covered Health Services	Benefit <i>(The Amount Payable by the Plan based on Eligible Expenses)</i>	
	Network	Non-Network
	Plan name variable.]	RX Plan name variable.]] [Non-Network Benefits are not available]]

Covered Health Services	Benefit <i>(The Amount Payable by the Plan based on Eligible Expenses)</i>	
	Network	
Gender Dysphoria	Depending upon where the Covered Health Service is provided, Benefits will be the same as those stated under each Covered Health Service category the <i>Schedule of Benefits</i> [.] and in Section 15, <i>Outpatient Prescription Drugs</i> .] [ and in [Carve-out RX Plan name variable.]	

**SECTION 6 - ADDITIONAL COVERAGE DETAILS**

*C. The following provision is added to the SPD, Section 6, Additional Coverage Details, as a Covered Health Service [and replaces Treatment of Gender Identity Disorder/Dysphoria in its entirety]:*

**Gender Dysphoria**

Benefits for the treatment of Gender Dysphoria limited to the following services:

**Plan Design Variable for ASO**

- [Psychotherapy for Gender Dysphoria and associated co-morbid psychiatric diagnoses are provided as described under *Mental Health Services* in your SPD].
- Cross-sex hormone therapy:
  - Cross-sex hormone therapy administered by a medical provider [(for example during an office visit) is provided as described under *Pharmaceutical Products – Outpatient* in your SPD].

**Plan Design Variable for ASO**

- [Cross-sex hormone therapy dispensed from a pharmacy is provided as described under [Section 15, *Outpatient Prescription Drugs*.][Carve-out RX Plan Name Variable.]]

January 2017 SMM Gender Dysphoria

- Puberty suppressing medication injected or implanted by a medical provider in a clinical setting.
- Laboratory testing to monitor the safety of continuous cross-sex hormone therapy.
- [Surgery for the treatment for Gender Dysphoria, including the surgeries listed below:

*Male to Female:*

- Clitoroplasty (creation of clitoris)
- Labiaplasty (creation of labia)
- Orchiectomy (removal of testicles)
- Penectomy (removal of penis)
- Urethroplasty (reconstruction of female urethra)
- Vaginoplasty (creation of vagina)

*Female to Male:*

- Bilateral mastectomy or breast reduction
- Hysterectomy (removal of uterus)
- Metoidioplasty (creation of penis, using clitoris)
- Penile prosthesis
- Phalloplasty (creation of penis)
- Salpingo-oophorectomy (removal of fallopian tubes and ovaries)
- Scrotoplasty (creation of scrotum)
- Testicular prosthesis
- Urethroplasty (reconstruction of male urethra)
- Vaginectomy (removal of vagina)
- Vulvectomy (removal of vulva)]

#### Plan Design Variable for ASO

#### **[Genital Surgery and Bilateral Mastectomy or Breast Reduction Surgery Documentation Requirements:**

The Covered Person must provide documentation of the following for breast surgery:

- A written psychological assessment from at least one qualified behavioral health provider experienced in treating Gender Dysphoria. The assessment must document that the Covered Person meets all of the following criteria:
  - Persistent, well-documented Gender Dysphoria.
  - Capacity to make a fully informed decision and to consent for treatment.
  - Must be 18 years or older.

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- If significant medical or mental health concerns are present, they must be reasonably well controlled.

The Covered Person must provide documentation of the following for genital surgery:

- A written psychological assessment from at least two qualified behavioral health providers experienced in treating Gender Dysphoria, who have independently assessed the Covered Person. The assessment must document that the Covered Person meets all of the following criteria.
  - Persistent, well-documented Gender Dysphoria.
  - Capacity to make a fully informed decision and to consent for treatment.
  - Must 18 years or older.
  - If significant medical or mental health concerns are present, they must be reasonably well controlled.
  - Complete at least 12 months of successful continuous full-time real-life experience in the desired gender.
  - Complete 12 months of continuous cross-sex hormone therapy appropriate for the desired gender (unless medically contraindicated).]

Plan Design Variable for ASO. The following bullet contains language to satisfy a portion of the Corporate Equality Index (CEI) survey.

- [The treatment plan is based on identifiable external sources including the *World Professional Association for Transgender Health (WPATH)* standards, and/or evidence-based professional society guidance.]

## **SECTION 8 – EXCLUSIONS AND LIMITATIONS: WHAT THE MEDICAL PLAN WILL NOT COVER**

*D. The exclusion for sex transformation operations and related services in the SPD under Section 8, Exclusions and Limitations, Procedures and Treatments is deleted. In addition, the following exclusions apply:*

Plan Design Variable for ASO.

- [Cosmetic Procedures, including the following:
  - [Abdominoplasty.]
  - [Blepharoplasty.]
  - [Breast enlargement, including augmentation mammoplasty and breast implants.]
  - [Body contouring, such as lipoplasty.]
  - [Brow lift.]
  - [Calf implants.]
  - [Cheek, chin, and nose implants.]
  - [Injection of fillers or neurotoxins.]

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- [Face lift, forehead lift, or neck tightening.]
- [Facial bone remodeling for facial feminizations.]
- [Hair removal.]
- [Hair transplantation.]
- [Lip augmentation.]
- [Lip reduction.]
- [Liposuction.]
- [Mastopexy.]
- [Pectoral implants for chest masculinization.]
- [Rhinoplasty.]
- [Skin resurfacing.]
- [Thyroid cartilage reduction; reduction thyroid chondroplasty; trachea shave (removal or reduction of the Adam's Apple).]
- [Voice modification surgery.]
- [Voice lessons and voice therapy.] ]

## SECTION 14 – GLOSSARY

*E. The following definition of Gender Dysphoria is added to the SPD under Section 14, Glossary:][and replaces Gender Identity Disorder:]*

**Gender Dysphoria** - A disorder characterized by the following diagnostic criteria classified in the current edition of the *Diagnostic and Statistical Manual of the American Psychiatric Association*:

■ *Diagnostic criteria for adults and adolescents:*

- A marked incongruence between one's experienced/expressed gender and assigned gender, of at least six months' duration, as manifested by at least two of the following:
  - ◆ A marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics (or in young adolescents, the anticipated secondary sex characteristics).
  - ◆ A strong desire to be rid of one's primary and/or secondary sex characteristics because of a marked incongruence with one's experienced/expressed gender or in young adolescents, a desire to prevent the development of the anticipated secondary sex characteristics).
  - ◆ A strong desire for the primary and/or secondary sex characteristics of the other gender.
  - ◆ A strong desire to be of the other gender (or some alternative gender different from one's assigned gender).

January 2017 SMM Gender Dysphoria

- ◆ A strong desire to be treated as the other gender (or some alternative gender different from one's assigned gender).
- ◆ A strong conviction that one has the typical feelings and reactions of the other gender (or some alternative gender different from one's assigned gender).
- The condition is associated with clinically significant distress or impairment in social, occupational or other important areas of functioning.
- *Diagnostic criteria for children:*
  - A marked incongruence between one's experienced/expressed gender and assigned gender, of at least six months' duration, as manifested by at least six of the following (one of which must be criterion as shown in the first bullet below):
    - ◆ A strong desire to be of the other gender or an insistence that one is the other gender (or some alternative gender different from one's assigned gender).
    - ◆ In boys (assigned gender), a strong preference for cross-dressing or simulating female attire; or in girls (assigned gender), a strong preference for wearing only typical masculine clothing and a strong resistance to the wearing of typical feminine clothing.
    - ◆ A strong preference for cross-gender roles in make-believe play or fantasy play.
    - ◆ A strong preference for the toys, games or activities stereotypically used or engaged in by the other gender.
    - ◆ A strong preference for playmates of the other gender.
    - ◆ In boys (assigned gender), a strong rejection of typically masculine toys, games and activities and a strong avoidance of rough-and-tumble play; or in girls (assigned gender), a strong rejection of typically feminine toys, games and activities.
    - ◆ A strong dislike of one's sexual anatomy.
    - ◆ A strong desire for the primary and/or secondary sex characteristics that match one's experienced gender.
  - The condition is associated with clinically significant distress or impairment in social, school or other important areas of functioning.

[UnitedDocID] DRAFT SET X – MM/DD/YEAR

# Exhibit 42

Message

**From:** Elliott, Noel [Noel.Elliott@azblue.com]  
**on behalf of** Elliott, Noel <Noel.Elliott@azblue.com> [Noel.Elliott@azblue.com]  
**Sent:** 9/15/2016 3:31:35 PM  
**To:** 'Scott Bender' [Scott.Bender@azdoa.gov]  
**CC:** Muth, Ken [Ken.Muth@azblue.com]; Tucker, Sharon [Sharon.Tucker@azblue.com]  
**Subject:** RE: Transgender benefits

Hi Scott,

I reached out to our legal department and here is their response:

It is important for self-insured employer groups to consult their legal counsel to determine if they are a covered entity under the Section 1557 non-discrimination provisions and, if so, to review the plan coverage to determine if changes are necessary. Beginning in Jan. 2017, the standard options BCBSAZ administers for self-insured employer group plans will not contain blanket exclusions for transgender surgery and medications related to transition. These services, as with all services, are reviewed against applicable medical necessity criteria.

Thanks!  
Noel Elliott  
Supervisor, Client Implementation Management  
Blue Cross® Blue Shield® of Arizona  
(602) 864-4555 | cell: (480) 215-0266  
[noel.elliott@azblue.com](mailto:noel.elliott@azblue.com)

---

**From:** Scott Bender [mailto:Scott.Bender@azdoa.gov]  
**Sent:** Tuesday, September 13, 2016 5:05 PM  
**To:** Elliott, Noel  
**Subject:** Transgender benefits

**\*\*We're keeping security a top priority. Review this email carefully before responding or opening attachments\*\***

Hi Noel, I believe you were working with Elizabeth Schafer on the transgender benefits question and whether ADOA would have to cover the benefit if 1557 became effective or if we had flexibility as a self insured plan. Attached is proposed language you had sent to her last year, and below is a summary of the correspondence on the topic:



Proposed Language  
Changes 10 30 15 - F

We are presently analyzing the current proposed regulations

11.10.15

attached you will find a redline of the language changes BCBSAZ is proposing to make to our benefit plans to take into account the latest round of Q&As. This does not take into account if the government finalizes the proposed non-

discrimination regulations to require coverage of transgender transition surgery and related services. This proposed language is still being reviewed but should give the ADOA some idea of the changes we are making to both insured and self-funded group plans.



Proposed Language  
Changes 10 30 15 - F

That said, if the ADOA determines that the current exclusion will stand, BCBSAZ can continue to administer the exclusion & we ask that the final decision be provided to us in writing.

1.11.16

As the final regulations have not yet been issued, I wanted to pass along an update as to the direction BCBSAZ will take in regard to the proposed rule on Section 1557 of the ACA .... BCBSAZ has made a decision to remove all gender edits for preventive services in its insured individual and small group non-grandfathered products for 2016. In addition, those products will continue to exclude transgender surgery and medications pending final regulations but will no longer exclude services related to gender dysphoria (such as counseling for gender dysphoria).

Generally speaking, some self-funded clients choose to adopt the changes being made to the BCBSAZ business while other self-funded clients do not. As the State continues to evaluate the proposed regulations, please let us know if you want to make changes to your benefit plans.

Please let me know if BCBS has any different or additional guidance on this topic now that 1557 has been decided. This is a heavily scrutinized topic in state leadership and we need to ensure all of our plan administrators' stance and whether we can continue to operate our plan as it is today or if we must adopt the new rules. If the former, please advise if BCBS can continue to administer our plan as it exists today.

Thanks,  
Scott

**Scott Bender**

Plan Administration Manager

ADOA – Benefit Services Division | State of Arizona

100 North 15th Avenue, Suite 260, Phoenix, AZ 85007

p: 602-542-4958 | f: 602-542-4048 | [Scott.Bender@azdoa.gov](mailto:Scott.Bender@azdoa.gov)

<http://benefitoptions.az.gov/>



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# Exhibit 43

Message

**From:** Yvette Medina [Yvette.Medina@azdoa.gov]  
**on behalf of** Yvette Medina <Yvette.Medina@azdoa.gov> [Yvette.Medina@azdoa.gov]  
**Sent:** 12/8/2016 1:41:48 PM  
**To:** Emmons, Erica 654 [Erica.Emmons@Cigna.com]; Scott Bender [Scott.Bender@azdoa.gov]  
**CC:** Gillum, Alicia M HHHH [Alicia.Gillum@Cigna.com]  
**Subject:** RE: Transgender benefits

Erica,  
We will be covering the counseling and hormonal therapy but not the surgery.

---

**From:** Emmons, Erica 654 [mailto:Erica.Emmons@Cigna.com]  
**Sent:** Monday, October 17, 2016 2:26 PM  
**To:** Scott Bender <Scott.Bender@azdoa.gov>; Yvette Medina <Yvette.Medina@azdoa.gov>  
**Cc:** Gillum, Alicia M HHHH <Alicia.Gillum@Cigna.com>  
**Subject:** Transgender benefits

Hi Scott and Yvette –  
Has ADOA decided whether transgender benefits will be covered under your plans beginning 1/1/17? My last notes were that this was a pending item. We are in need of confirmation as soon as possible in order to get our systems set up correctly.

I wanted to provide you an update to Cigna’s stance on this topic. Beginning 1/1/17, all insured AND self-insured plans will remove the exclusion for transgender benefits to comply with Section 1557. Self-insured plans may provide in writing to Cigna their decision to not remove the exclusion from the plan. In the case that confirmation is provided in writing, Cigna will administer the plans with those benefits excluded.

Please let me know where this stands for your plans.

Thanks!

**Erica Emmons** | Strategic Account Executive | Government and Education | Cigna | 5310 East High Street, Suite 200 | Phoenix, AZ 85054 | Direct: 480.426.6761 | Mobile: 480.622.0899 | [erica.emmons@cigna.com](mailto:erica.emmons@cigna.com)



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# Exhibit 44

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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 Benefit Services  
Division of the Arizona  
Department of Administration,  
Defendants.

Cause No.  
  
No.  
  
4:19-cv-00035

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VIDEOTAPED VIDEOCONFERENCE DEPOSITION  
OF CRAIG BROWN

BE IT REMEMBERED, the Deposition Under Oath of CRAIG BROWN was taken by MR. JORDAN C. WALL, Attorney at Law, for the Plaintiff, at the offices of Hazlett Reporting & Legal Video Services at 140 Second Avenue West, Suite B, Kalispell, Montana, on Tuesday, June 22, 2021, beginning at the hour of 9:35 A.M. Reported by Stacy M. Baldwin, Registered Merit Reporter and Notary Public.

1 that. But in this one it's clearly Marie Isaacson and  
2 the plan sponsor.

3 Q Mr. Brown, what do you understand the Benefit  
4 Services Division of the ADOA's obligations under the  
5 plan to be as plan sponsor?

6 A Well, I think we talked about that already,  
7 which was to take the plan benefits as designed, get  
8 suppliers to make available that capability, the  
9 insurance providers, set the rate for which employees  
10 need to donate at and then fill the gap with the JLBC's  
11 legislative bucket to make the plan work. And then  
12 monitor, collect payments and all of the above. Right?  
13 So, those are the things that got to come together.

14 Q Do you understand that, as the Benefit Services  
15 Division, the ADOA's responsibility as plan sponsor to --  
16 among the responsibilities include establishing the  
17 policies, interpretations, practices and procedures of  
18 this plan and issuing interpretations thereof?

19 A I guess that would be part of the scope too,  
20 yes.

21 Q And so, just to be clear, you agree that would  
22 be part of the work of the Benefit Services Division as  
23 plan sponsor of the plan?

24 A Specifically restating those set policy -- what  
25 other elements did you say?

1 Q Establishing the policies, interpretations,  
2 practices and procedures of this plan, issuing  
3 interpretations thereof.

4 A Yes.

5 Q Would that --

6 A I don't know about the interpretations thereof.  
7 But, yes, the policy and that would be part of their role  
8 to do that as well.

9 Q Would turn to Page 75 of this document, Exhibit  
10 2 that we're in, ending in Bates No. 010169.

11 A Got it.

12 Q And I'm looking -- and this is Article 13,  
13 Administration. I'm looking under Section 13.1, Plan  
14 Sponsor's Responsibilities, and specifically Item 2. Do  
15 you see that?

16 A Yes.

17 Q Do you see that it states that among the plan  
18 sponsor's responsibilities are "establishing the  
19 policies, interpretations, practices and procedures of  
20 this plan and issuing interpretations thereof"?

21 A Yes.

22 Q And do you have any reason to doubt that the  
23 Benefit Services Division of the ADOA as plan sponsor,  
24 that that was among its responsibilities?

25 A I think this makes it clear it's part of their

1 responsibility.

2 Q And also I'm looking -- and would that include,  
3 then, decisions on whether to maintain or remove a plan's  
4 exclusion?

5 A I suppose so.

6 Q When you say "suppose so," are you agreeing,  
7 Mr. Brown, or do you have reason to doubt that?

8 A Well, I don't know if -- I mean, I think legal  
9 needs to be part of -- I mean, the Benefit Services can't  
10 just make up all the rules and what they want to do. I  
11 think they also have some rule and law boundaries that  
12 have been put around their role, and legal would have  
13 need to buy off on that kind of stuff.

14 So, they don't have cart blanche to do whatever  
15 they want, if it's written in the rules otherwise. I  
16 haven't seen the rules. I'm just saying they don't --  
17 they have limits around what they can do, perhaps, is  
18 what I'm saying.

19 Q What rules are you referring to, Mr. Brown?

20 A No specific rule. I know that each division  
21 would have rules about what is required for them to  
22 execute their performance of their role.

23 Q Would these rules be written down anywhere?

24 A Should be. I don't know where they would be.

25 Q Have you ever seen these rules for the Benefit

1 THE WITNESS: There that's better. Yes.

2 BY MR. WALL:

3 Q Great. So, as you can see here, this is  
4 Article 9 of the 2015 EPO Plan document, Exclusions and  
5 General Limitations. And in particular, I'm reading that  
6 very first section, 9.1; Exclusions and General  
7 Limitations, which reads: "Any services and supplies  
8 which for not described as covered or are specifically  
9 excluded in any other Article in this plan description  
10 are excluded. In addition, the following are  
11 specifically excluded services and supplies."

12 Do you see that?

13 A Yes.

14 Q And do you see what follows is a numbered list?

15 A Yes.

16 Q All right. We're going to go back to Page 69,  
17 and look at number, what is 16, on this list.

18 So, I'm reading at exclusion No. 16, in the  
19 2015 EPO Plan document: "Transsexual surgery including  
20 medical or psychological counseling and hormonal therapy  
21 in preparation for, or subsequent, to any such surgery."

22 Did I read that accurately?

23 A Yes.

24 Q Does this language in exclusion 16, comport  
25 with your understanding of the plan's exclusion of

1 transgender benefits in 2015, when you began as the  
2 director of ADOA?

3 A I didn't have any conversation or knowledge of  
4 this topic in 2015, when I started at DOA. My first  
5 introduction was in the introduction of the claim from  
6 Marie, more mid 2016, where she talked about these three  
7 terms. The first time I'd known that this was an issue  
8 within the state.

9 Q So to clarify, Mr. Brown, you didn't know about  
10 this exclusion when you started as director in  
11 September 2015 --

12 A Correct.

13 Q -- correct?

14 A Yes, correct.

15 Q But at some point in 2016, you spoke with  
16 Ms. Isaacson and she informed you that the plan contained  
17 this exclusion, correct?

18 A Yes.

19 Q All right. So, for purposes of our  
20 conversation, when I refer to transgender benefits going  
21 forward, I'm going to be referring to this particular  
22 definition or variations thereof, as we'll see in later  
23 plan documents. Okay?

24 A Okay.

25 Q Now, do you recall, Mr. Brown, whether this

1 Q Is this your first time learning that someone  
2 at the ADOA did an analysis of the potential cost of  
3 covering transgender benefits, such as this, and with  
4 these results?

5 A Yes.

6 Q Would you consider an average annual cost of  
7 \$130,000 to \$582,000, or .02 percent to .08 percent, of  
8 the then 71 million estimated medical cost to the plan to  
9 be significant?

10 A From a raw cost standpoint, that is not a  
11 significant increase.

12 Q And would you consider the \$0.17 to \$0.77  
13 increase in cost per month, per employee, to be  
14 significant?

15 A No.

16 MR. WALL: Would you, Mr. Villa, now open  
17 up what is labelled Tab 37B, in the electronic record  
18 circulated before the deposition.

19 (Whereupon, Mr. Villa complied  
20 with the request.)

21 MR. WALL: And I would ask the Madame  
22 Reporter to mark this down at Exhibit 14.

23 (Exhibit 14 marked for identification.)

24 MR. WALL: And I will represent that the  
25 Bates Number for this document, although it's not stamped

# Exhibit 45



# Tweet



**Christina Corieri**

@CCorieri



advocates now demanding taxpayer dollars for gender reassignment surgery under Medicare - bet Medicaid is next

[amednews.com/article/201304...](https://amednews.com/article/201304...)

2:51 PM · Apr 29, 2013 · Twitter Web Client



**Corieri**  
**EXHIBIT 06**

# Exhibit 46

**Date:** Monday, November 18  
2019 02:40 AM

**Subject:** 1 Year After Sex Change,  
This Teen Regrets His  
'Frankenstein Hack Job'

**From:** The Daily Signal  
<morningbell@heritage.org  
>

**To:** ccorieri@az.gov;



Nov 18, 2019

*Good morning from Washington, where House Democrats' impeachment hearings continue tomorrow. Among Republicans insisting on fairness to President Trump is a new face on the Intelligence Committee: Rep. Jim Jordan. We tell why he bears watching. On the podcast, a Texas pastor talks about why many young Americans don't need to attend college right after high school to succeed. Plus: a web designer is punished for her views on*

*marriage, some in Congress want to revive ideologically motivated science at the EPA, and one teen's transgender nightmare. On this date in 1863, President Abraham Lincoln takes a train to Gettysburg, Pennsylvania, to deliver a short speech that lives on.*

---

COMMENTARY

## 1 Year After Sex Change, This Teen Regrets His 'Frankenstein Hack Job'



**By Walt Heyer**

Less than a year after having gender surgery, Nathaniel now says, "This whole thing was a bad idea. I am 19 years old, and I feel as though I have ruined my life."

More

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COMMENTARY

## You'll Be Surprised Who Is Trying to Empower the Deep State at EPA



**By Steve Milloy**

In a nutshell, a bill requires that federal agencies set up formalized grievance procedures for federal scientists who claim they are being silenced by senior bureaucrats and political appointees.

More

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NEWS

## 7 Things to Know About Rep. Jim Jordan as He Leads GOP's Defense of Trump



**By Aaron Credeur**

Rep. Jim Jordan is temporarily reassigned to the House committee driving the impeachment process. The Ohio Republican already is questioning witnesses

sharply and voicing his party's frustration with the partisan process.

More

---

COMMENTARY

## This Web Designer Shouldn't Have to Wait to Be Free to Create



**By Joanna Duka**

The fact that Lorie Smith wants to make artistic decisions consistent with her faith makes her a target for punishment by the Colorado Civil Rights Commission.

More

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ANALYSIS

## New Program Aims to Help Young Adults Grow in Faith, Maturity Before College



**By Virginia Allen**

Tommy Nelson, a pastor, has created GAP, a nine-month leadership program where high school graduates can learn theology, life skills, job skills, and more before attending a university.

More

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COMMENTARY

## We Hear You: Oberlin College's 'Lawsuit Mess' With a Local Bakery



**By Ken McIntyre**

"I am an alumna of Oberlin College, class of '92, and have watched with dismay, but not surprise, the lawsuit mess with Gibson's Bakery. I have received Oberlin's emails and letters on the subject, which were very one-sided," writes Keely A. Dien, Fountain Valley, Calif.

More



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# Exhibit 47

**Date:** Friday, February 26 2021  
02:53 AM

**Subject:** It's Not a COVID-19 Relief  
Bill. It's Christmas for  
Democrats.

**From:** The Daily Signal  
<morningbell@heritage.org  
>

**To:** ccorieri@az.gov;



February 26 2021

*Happy Friday from Washington, where liberals hope to ram through a COVID-19 bill packed with spending that has nothing to do with the pandemic. David Harsanyi objects. Sen. Rand Paul demonstrates that common sense may still be brought to bear against the transgender agenda, Jared Eckert writes. On the podcast, a former prison inmate shares his vision for criminal justice reform. Plus: a Virginia congressman exposes the Equality Act, and the loss of talk radio's happy warrior for conservatism. Nine years ago today,*

*neighborhood watch volunteer George Zimmerman, 28, fatally shoots 17-year-old Trayvon Martin in a confrontation at a Florida townhouse community, creating a racially charged case that gives rise to the Black Lives Matter movement.*

---

COMMENTARY

## It's Not a COVID-19 Relief Bill. It's Christmas for Democrats.



**By David Harsanyi**

The Biden plan provides \$852 million for lefty-approved civic volunteer agencies that have zero to do with COVID-19 relief or stimulus. Why?

More

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COMMENTARY

## Rand Paul Is Right: Transgender Interventions for Kids Can Include 'Genital Mutilation'



**By Jared Eckert**

Liberals seem to have no hesitation about injecting America's children full of life-altering drugs that are not FDA-approved for treatment of gender dysphoria.

More

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COMMENTARY

## Standing Up to the Intolerant Equality Act



**By Rep. Robert Good**

For years, Big Tech, Hollywood elites, and Democrats in power have stretched their reach to gain control over our speech and our culture. The Equality Act is just one chapter in this saga.

More

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ANALYSIS

## He Spent 14 Years in Prison. Here's Why He's Fighting for Criminal Justice Reform



**By Rachel del Guidice**

While in federal prison, "I had an unapologetic transformation of my mind, having adopted the Christian principles and philosophies of Jesus," says Louis Reed.

[More](#)

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COMMENTARY

## How the Gig Economy Helps American Workers, Explained



**By Video Team**

Gig work provides opportunity for many Americans who might not otherwise be able to work.

[More](#)

---

COMMENTARY

## We Have Lost an American Genius



**By Victor Davis Hanson**

Limbaugh's canon was never to talk down to or insult the base. Deplorables and clingers trusted him to stay Rush. They were assured there would never be a sudden about-face, confessional, or sellout.

[More](#)

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NEWS

## ICYMI: Read Sen. Rand Paul's Exchange With Biden Nominee Over Transgender Treatment for Kids

## By Video Team

“Do you support the government intervening to override the parent’s consent to give a child puberty blockers, cross-sex hormones, and/or amputation surgery of breasts and genitalia?” Paul asks.

More



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### The Daily Signal

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(800) 546-2843

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# Exhibit 49

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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No. 21-71312

-----x

In re: STATE OF ARIZONA; et al.,

STATE OF ARIZONA; et al.,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR

THE DISTRICT OF ARIZONA, TUCSON,

Respondent,

RUSSELL B. TOOMEY; et al.,

Real Parties in Interest.

-----x

Oral Argument

March 10, 2022

B E F O R E :

HON. PAUL J. WATFORD

HON. RICHARD A. PAEZ

HON. RICHARD CLIFTON

1 MR. BERG: May it please the Court.  
2 I'm Timothy Berg of Fennemore Craig, representing  
3 Petitioner, State of Arizona, Andy Tobin, and  
4 Paul Shannon.

5 The issue presented here is whether the  
6 Petitioners waived their attorney/client  
7 privilege by stating in answers to  
8 interrogatories that they consulted Counsel with  
9 respect to the policy at issue here, by  
10 identifying those Counsel, and by identifying  
11 attorney/client privileged documents, but not  
12 disclosing the contents of the communications or  
13 documents, or raising an advice of counsel  
14 defense. The answer has to be no, there has been  
15 no waiver here, and the District Court committed  
16 clear error.

17 As then-Judge, later Justice Ginsburg  
18 stated in United States versus White, implied  
19 waiver in sum is not appropriately invoked when a  
20 client has gone to an attorney in good faith,  
21 seeking an opinion as to the legality of certain  
22 conduct in an area where legal boundaries may be  
23 difficult for the layman to discern. I think the  
24 clear lesson of the White case is, simply because  
25 someone says, I didn't have intent to commit a

1 crime, or I didn't have intent to discriminate,  
2 and as part of the discovery they reveal that  
3 they talked to their lawyer, that isn't a waiver  
4 of the attorney/client privilege. It takes  
5 something more. Again, as Justice Ginsburg said,  
6 it has to be specific -- then-Judge Ginsburg,  
7 pardon me said it has to be specific in a  
8 positive waiver, and that hasn't happened here.

9 HON. MIDDLE: Can I change the facts  
10 here just -- only slightly? What if the  
11 Plaintiff sues, says, you know, we've  
12 discriminated against us in not providing this  
13 coverage, and you -- your clients say, well, the  
14 reason we didn't provide the coverage has nothing  
15 to do with discrimination? We consulted with our  
16 lawyers, and they told us the law prohibited us  
17 from offering that coverage.

18 MR. BERG: Well, I think, Your Honors,  
19 if what we say is, we didn't have bad intent here  
20 because we relied on the advice of our lawyers in  
21 deciding we didn't have bad intent, that is a  
22 waiver. But that isn't what happened here.

23 HON. PAUL WATFORD: Okay. And, just to  
24 stop --

25 MR. BERG: Okay.

1           HON. PAUL WATFORD: -- that is, though,  
2 what the District Court thought you had done. Is  
3 that right?

4           MR. BERG: Yes. But I think the  
5 District Court is in error, and I think --

6           HON. PAUL WATFORD: Okay.

7           MR. BERG: -- this is something this  
8 Court can decide itself de novo, because you have  
9 in front of you the materials the District Court  
10 looked at, the interrogatory answers.

11          HON. PAUL WATFORD: Right.

12          MR. BERG: Unlike a typical case, where  
13 we might put a witness on and there's a  
14 credibility issue, this Court has in front of it  
15 the specific interrogatory answers the District  
16 Court relied on --

17          HON. PAUL WATFORD: Right.

18          MR. BERG: -- in concluding there was a  
19 waive. So, it seems to me, what you have in  
20 front of you isn't a fact question. You have a  
21 legal question of whether those interrogatory  
22 answers are sufficient to create a waiver.

23          HON. PAUL WATFORD: Okay. So, why is  
24 what happened here different from the  
25 hypothetical I posed?

1 MR. BERG: Because we didn't say, we  
2 had no intent here. Our lawyers told us we could  
3 do this legally, and therefore, we thought it was  
4 legal. What we said is, we had no intent. We  
5 were asked, what are the reasons that you did  
6 this? We said, well, we talked to our lawyers,  
7 and we also had cost concern and cost containment  
8 issues. It is different.

9 I think that the attorney/client  
10 privilege is important, and drawing this line is  
11 really important. And it may seem subtle, but I  
12 think there's a significant difference between  
13 saying, I talked to my lawyer. I had no intent  
14 to discriminate. I looked at other things, which  
15 is true here -- again, the record reflects that  
16 our client went out to its insurance brokers, it  
17 gathered legal opinions from legal periodicals,  
18 it did all sorts of other things other than just  
19 talk to its lawyers -- and say, we had no  
20 malintent, and saying, the reason I can prove I  
21 didn't have discriminatory intent here is that I  
22 talked to my lawyer, and my lawyer told me it was  
23 legal to do this. And that isn't what happened  
24 here.

25 And that's the kind of defense that I

1 think, if you found in the White, case would be a  
2 waiver. Just, again, Judge Ginsburg in that case  
3 makes the distinction between saying, generally,  
4 I had no -- I think in that case, it was intent  
5 to commit a crime rather than discriminatory, but  
6 I had no mis intent, and oh, by the way, part of  
7 what I did was walk to my lawyer, and saying, the  
8 reason I can defend and I didn't have mis intent  
9 is I relied on the advice of my Counsel in making  
10 this decision. And because I relied on advice of  
11 counsel, the Court can't find that I had bad  
12 intent.

13 HON. PAUL WATFORD: So, the reason I  
14 put the hypothetical the way I did is that I'm  
15 not sure I see a huge difference between what you  
16 actually said. So, instead of saying, we  
17 consulted with our lawyers, and we were told it's  
18 prohibited to offer this coverage, when asked,  
19 give us the reasons why you didn't offer the  
20 coverage, you say, well, we consulted with our  
21 lawyers, and they told us we didn't have to. And  
22 that's our reason, and that's why there's no  
23 discrimination, because they told us we didn't  
24 have to offer it. And it seems to me, isn't it  
25 just half-dozen of one and six of the other?

1 MR. BERG: Your Honor, Your Honor,  
2 you've taken it a step further than I think the  
3 interrogatory answer does.

4 HON. PAUL WATFORD: Okay.

5 MR. BERG: We have not said -- the  
6 interrogatory answers said, what considerations  
7 did you take into account in deciding not to  
8 offer this?

9 HON. PAUL WATFORD: It said, what are  
10 the reasons why you didn't. Okay?

11 MR. BERG: Right.

12 HON. PAUL WATFORD: So, and one of the  
13 reasons given --

14 MR. BERG: One of them was, we talked  
15 to our -- we talked to our lawyers --

16 HON. PAUL WATFORD: -- and they told us  
17 we didn't have to do it.

18 MR. BERG: Okay. That isn't what the -  
19 - I don't think that's what the interrogatory  
20 answer says, Your Honor.

21 HON. PAUL WATFORD: Okay. Well, let's  
22 look at the interrogatory. Pull it up and you  
23 can quote it to me.

24 MR. BERG: Let me -- I don't think I  
25 have the exact words of the interrogatory answer

1 in front of me. I have it back over there. But  
2 I don't believe we said, and therefore, we didn't  
3 do it. I think we said, we talked to our lawyer,  
4 we -- and we were told -- you're right -- we were  
5 told it was not legally required. We also looked  
6 at cost containment and cost (indiscernible).

7 HON. PAUL WATFORD: Right. Two  
8 reasons.

9 MR. BERG: Again -- okay.

10 HON. PAUL WATFORD: You gave two  
11 reasons, and that's why you said there was no  
12 discrimination.

13 MR. BERG: But -- but no, that -- there  
14 is -- you're making a -- you're making a step  
15 we're not making.

16 HON. PAUL WATFORD: Okay.

17 MR. BERG: What we said is, this is why  
18 we did it. We haven't said, those reasons in and  
19 of themselves aren't discriminatory. Again, we  
20 relied on our lawyer's advice in deciding we  
21 could legally do this, and therefore, we had no  
22 malintent. Plaintiff is still entitled to prove  
23 that our intent was bad or that -- or if they can  
24 prove without intent that we've discriminated in  
25 some way, they can do that.

1           The defense -- because the  
2 attorney/client privilege is so important, I  
3 think the Court has to be careful in how broadly  
4 you read waivers. And to me, if you read the  
5 White case, if you read the other cases in the  
6 circuit, the -- what a client does to waive the  
7 defense is to say, you can't find me guilty, or  
8 you can't find me liable, because I relied on my  
9 lawyer's advice. And that isn't what --

10           HON. RICHARD CLIFTON: Are you saying  
11 that there was no reliance on the Counsel's  
12 advice?

13           MR. BERG: What I'm saying, Your Honor,  
14 is that the interrogatory response doesn't  
15 reflect --

16           HON. RICHARD CLIFTON: Other question.

17           MR. BERG: Okay.

18           HON. RICHARD CLIFTON: What is the  
19 State's position as to whether or not it relied  
20 upon advice of counsel? Would it disclaim  
21 reliance upon advice of counsel as a defense?

22           MR. BERG: I think it would disclaim  
23 reliance on advice of counsel as a defense, Your  
24 Honor, yes. If you're asking me, what did the  
25 State consider, I think the interrogatory

1 reflects that we talked to our lawyers, we talked  
2 to insurance brokers --

3 HON. RICHARD CLIFTON: Let me be more  
4 focused --

5 MR. BERG: Okay. I'm sorry.

6 HON. RICHARD CLIFTON: -- because I  
7 don't want to lose all your time. What role does  
8 advice of counsel play in this case, from your  
9 perspective?

10 MR. BERG: I don't think it plays any  
11 role unless we raise advice of counsel as a  
12 defense, and we haven't done that. So --

13 HON. RICHARD CLIFTON: And are you  
14 prepared to disclaim raising advice of counsel as  
15 a defense?

16 MR. BERG: Yes, Your Honor, we are. We  
17 are not sitting here, saying -- we are not saying  
18 to the Court -- obviously, the issue before this  
19 Court is privilege and not liability for whether  
20 or not the plan is invalid. But I think what we  
21 are saying is, no one is claiming we -- that  
22 advice of counsel is a defense to the underlying  
23 claim here, which is of course what is not in  
24 front of the Court today. What's in front of the  
25 Court today is a privilege question and a

1 mandamus question.

2 HON. PAUL WATFORD: Okay. So, I think  
3 that's helpful, but let me -- and we'll have to  
4 ask your opponents and see what they say about  
5 this. But as I understand, what you're saying is  
6 that you've provided these interrogatory  
7 responses. You're saying that the District Court  
8 and the Plaintiffs misinterpreted what you were  
9 trying to say there. And you're saying now, to  
10 the extent that any of you all thought that we  
11 were trying to raise some kind of an advice of  
12 counsel defense, we are not doing so. We are,  
13 you know, assuming this case were to go to a jury  
14 or whatever, we are not going to be arguing that.  
15 And I guess, if we or the District Court were to  
16 hold you to that, then there'd be no reason for  
17 them to get access to these documents? Is that  
18 what you're saying?

19 MR. BERG: Correct, Your Honor.  
20 Exactly. That's precisely the argument we're  
21 making.

22 HON. RICHARD PAEZ: Is that what you  
23 told the District Court?

24 MR. BERG: Your Honor, I believe so. I  
25 was not --

1 HON. RICHARD PAEZ: But did you tell  
2 the District Court you were not going to rely on  
3 a advice of counsel defense?

4 MR. BERG: I don't -- I do not believe  
5 -- I don't know the answer to that question.

6 HON. RICHARD PAEZ: So, why -- how can  
7 we say that the District Court clearly erred?

8 MR. BERG: Because --

9 HON. RICHARD PAEZ: This is a -- you  
10 know, mandamus, we don't go around issuing writs  
11 of mandamus against the District Court very  
12 often. They have to -- there has to be clear  
13 error. There has to be, you know, a case that  
14 they've just disregarded. It's pretty tough.

15 MR. BERG: It would be my position,  
16 Your Honor, that the interrogatory answers, even  
17 without the concession I just made -- and I'm  
18 sorry I hit the microphone; I know I'm not  
19 supposed to touch it. Even if -- even without  
20 the concession that I just made in response to  
21 Judge Clifton, it is still clear we were not  
22 raising an advice of counsel defense, and the  
23 Court's finding that we were is a clear legal  
24 error, based on what's in the interrogatories.

25 HON. RICHARD PAEZ: It's a legal error,

1 or a factual error?

2 MR. BERG: Legal error. I think it's -  
3 - I think the question here is whether what is in  
4 these interrogatory answers is sufficient as a  
5 legal matter --

6 HON. RICHARD PAEZ: I thought you -- I  
7 thought one of the bases for the District Court's  
8 ruling was that they found a waiver by  
9 implication.

10 MR. BERG: Yes, Your Honor. And the  
11 waiver by implication would be if we'd raised an  
12 advice of counsel defense. That is -- that is  
13 waiver by implication.

14 HON. RICHARD PAEZ: Well, I mean, you  
15 didn't raise it in your answer.

16 MR. BERG: Well, Your Honor, if we  
17 raised it in these interrogatory answers, that  
18 would be a waiver by -- I think an explicit  
19 waiver would say, we're waiving our  
20 attorney/client privilege. Nobody suggests we  
21 did that. Nobody suggests we disclosed the  
22 content of attorney -- or at least the District  
23 Court didn't find we disclosed the content.

24 What it found was an implied waiver,  
25 based on its interpretation of these

1 interrogatory answers as legally meeting the  
2 provisions of an advice of counsel defense. And  
3 our position is, they do not do that, that if you  
4 read the interrogatory answers, we are not  
5 saying, we are relying on advice of counsel as a  
6 defense in this case, and we're waiving our  
7 attorney/client privilege by doing so. It simply  
8 isn't here.

9 HON. PAUL WATFORD: Well, it took me a  
10 little while, but I have it in front of me.

11 MR. BERG: Okay.

12 HON. PAUL WATFORD: So let me just  
13 quote it and make sure you're on board with this.  
14 So, Interrogatory Number 1 -- let's forget about  
15 4 and 7. Those other ones didn't seem --

16 MR. BERG: Okay. I agree with Your  
17 Honor, the key one is 1.

18 HON. PAUL WATFORD: Okay. So,  
19 Interrogatory 1 asks you to identify and describe  
20 all reasons why the plan excludes coverage for  
21 gender reassignment surgery. And then, what your  
22 clients say is, the State of Arizona's self-  
23 funded health plan excludes coverage for gender  
24 reassignment surgery because the State concluded  
25 under the law that it was not legally required to

1 change its health plan to provide such coverage  
2 under Title 7, blah, blah, blah. And then,  
3 later, you say, hey, by the way, that legal  
4 advice we got is privileged.

5 MR. BERG: Yeah.

6 HON. PAUL WATFORD: So, that seems to  
7 be -- okay, well, you respond to that, then.  
8 That's what you said.

9 MR. BERG: Okay. To me, that is not  
10 saying, we are defending based on that advice of  
11 counsel, and we're arguing we didn't have intent,  
12 based on the fact we got advice from our counsel  
13 on that. And that is what I'm suggesting to you  
14 in light of the United States versus White would  
15 be required to be a waiver here. It takes  
16 something more than us saying, we talked to our  
17 lawyers about this, and one of the reasons we  
18 took into account in making our decision was that  
19 we talked to our lawyers.

20 If we had said, you cannot prove we had  
21 intent here because we went and talked to our  
22 lawyers, and they told us it was legal, and we  
23 went ahead and did it anyway, that would be an  
24 advice of counsel defense. That would be  
25 sufficient to be an implied waiver. That would

1 permit the discovery order here.

2 HON. RICHARD PAEZ: To prevail, do the  
3 Plaintiffs have to prove intent?

4 MR. BERG: I think, Your Honor, that  
5 certainly, on at least some of their theories,  
6 they do. I do think intent is an issue here. I  
7 wouldn't quarrel with that proposition. But I  
8 don't think that what we -- I don't think that  
9 that interrogatory answer says we have a defense  
10 to intent based on advice of counsel, and I think  
11 that's what it would need to do.

12 HON. RICHARD PAEZ: So, what would one  
13 of your witnesses say, just that they determined  
14 that it wasn't -- it wasn't illegal?

15 MR. BERG: Deposition testimony was  
16 taken, Your Honor. In this case, it was  
17 deposition testimony of people who did not have  
18 the ability to waive the privilege. They don't  
19 have the authority to waive the privilege. I  
20 think frankly, one of the reasons the District  
21 Court focused on the interrogatory responses is  
22 that, if you get into the deposition testimony,  
23 you have to worry about whether a former employee  
24 can, at a time of a deposition when she no longer  
25 works for our client, waive their privilege. And

1 so, I think that's why the focus here was on the  
2 interrogatory answers, Your Honor.

3 HON. RICHARD PAEZ: I don't think that  
4 answers my question.

5 MR. BERG: Okay. I believe if you look  
6 at the -- if you look at --

7 HON. RICHARD PAEZ: What would a  
8 witness say on the stand about intent or about  
9 counsel? Would they --

10 MR. BERG: Oh, I --

11 HON. RICHARD PAEZ: Is it your -- does  
12 your concession mean that no witness is going to  
13 get up there and say, we consulted with a lawyer?  
14 That's not going to be -- you're not going to do  
15 that.

16 MR. BERG: I think what my concession  
17 means is no witness is going to get up there and  
18 said, because we had legal advice that we could  
19 do this, we didn't have the intent. What they're  
20 going to get up and say is, we looked at a whole  
21 bunch of things, and here was what we decided to  
22 do, and one of the reasons was cost containment.  
23 And one of the reasons is, when we looked at all  
24 this stuff, including stuff from our insurance  
25 company and outside periodicals, we didn't think

1 we had to cover them, and we didn't think we had  
2 bad intent.

3 But that's not, in my -- again, I think  
4 if you read the White case, a waiver, even an  
5 implied waiver, has to be positive and specific,  
6 and we don't get there here.

7 HON. RICHARD PAEZ: Okay.

8 MR. BERG: I'd like to save a little  
9 bit of time for rebuttal, if I may, Your Honor.  
10 Thank you.

11 HON. PAUL WATFORD: We'll make sure you  
12 have time for rebuttal.

13 MR. BERG: Okay.

14 HON. PAUL WATFORD: Okay. Let's hear  
15 from Counsel for the Respondent.

16 MR. BERG: I'll just get out of your  
17 way here.

18 MR. WALL: Good morning, Your Honors.  
19 May it please the Court, Jordan Wall, Wilkie Farr  
20 & Gallagher, on behalf of the real party in  
21 interest, Dr. Russell B. Toomey. Thank you for  
22 this opportunity to be heard.

23 As the Court has noted, a petition for  
24 a writ of mandamus is indisputably a drastic and  
25 extraordinary remedy that is granted in the case

1 of extraordinary causes involving exceptional  
2 circumstances. As this Court has consistently  
3 recognized, and including in in re Van Dusen,  
4 this is not an instance where the mandamus is  
5 warranted because it is not a case of  
6 extraordinary circumstances. Yes, Your Honor?

7 HON. PAUL WATFORD: Yeah, yeah, and you  
8 -- I don't want to cut off the rest of your  
9 argument, but maybe can you just respond, like,  
10 the concession you just heard on -- from the  
11 lectern today? That's good enough, not good  
12 enough? Tell us your response to that.

13 MR. WALL: Your Honor, it's not good  
14 enough, and it was not an argument that was  
15 presented to the District Court, and I think  
16 there are several reasons for that. Backing out,  
17 the Petitioners claim that it is all focused on  
18 Interrogatory Number 1 is plainly incorrect. The  
19 record is replete with instances in which the  
20 Petitioners put forward affirmatively the advice  
21 of counsel. You can look -- we've already  
22 discussed Interrogatory Number 1, which they were  
23 responding to the question as to, why do you  
24 maintain the exclusion? And the answer, that we  
25 reached a legal conclusion that we were not

1 required to provide such care, and the legal  
2 advice we received on this --

3 HON. PAUL WATFORD: Okay. Right, we  
4 just went through that. And so, then, your  
5 opponent stands up and says, to the extent there  
6 was any confusion on that, I'm going to clear it  
7 up right now. We were not trying to interject  
8 the advice we got from our lawyers, and we are  
9 not going to interject, going forward, the advice  
10 of our lawyers as a defense to the -- you know,  
11 the intent element of your claims. Why doesn't  
12 that eliminate the need for you now -- as a  
13 matter of fairness, because that's the basis on  
14 which the District Court ruled -- why doesn't  
15 that eliminate the need for you to get access to  
16 these privileged documents?

17 MR. WALL: Well, Your Honor, because  
18 the involvement of Counsel here has now become a  
19 factual point in the case. And so, even though  
20 Petitioners have disclaimed that they will rely  
21 on this, it is the burden of Dr. Toomey to  
22 establish an evidentiary record refuting their  
23 defense. For instance, in response to  
24 Interrogatory Number 4 and Number 7, which I  
25 heard Your Honor say you didn't think mattered, I

1 would point to Petitioner's own cases, Hernandez  
2 versus Canyon. They have miscited those for  
3 different reasons about, you know, a blanket  
4 waiver of --

5 HON. PAUL WATFORD: Can I tell you why  
6 I don't think those are relevant? It's because  
7 they're just -- you asked them questions that  
8 they have to give truthful answers to. Tell us  
9 all the people you consulted with. Okay, well, I  
10 can't lie and not mention my lawyer, so you can't  
11 possibly predicate a waiver of attorney/client  
12 privilege on a truthful -- you're just asking for  
13 truthful factual information. If the person  
14 doesn't intend in the litigation to interject  
15 advice of counsel as any kind of defense, the  
16 mere answering your question truthfully can't be  
17 a waiver. That's why I just think you've got to  
18 put everything on the response to Interrogatory  
19 Number 1, right?

20 MR. WALL: And I understand your point,  
21 Your Honor. And what I would say is that the  
22 Petitioners fundamentally misunderstand the  
23 nature of an implied waiver in the at-issue  
24 doctrine. As the Court established in Chevron  
25 Corp v. Pennzoil, what undergirds the at-issue

1 doctrine is the fairness principle. By putting  
2 forward the advice of counsel both in  
3 Interrogatory Number 1, but also noting the  
4 involvement of counsel in the decision making  
5 here at Interrogatory Number 4, these are issues  
6 of fact that now Dr. Toomey needs to establish an  
7 evidentiary record on. In Hernandez, what the  
8 Court noted was that the involvement of counsel -  
9 -

10 HON. RICHARD CLIFTON: Well, let me --  
11 why? I mean, if the question of whether this  
12 constitutes discrimination is a legal question as  
13 to which advice of counsel you have to assume  
14 happened. If they thought that they had to, they  
15 presumably would have provided the coverage  
16 that's being sought. But the Court's going to  
17 decide whether the law requires the provision of  
18 that coverage, and the Court, to be polite about  
19 it, really doesn't care very much about what the  
20 advice of counsel some years before was. So, why  
21 does it matter? Is the advice of counsel really  
22 an issue in the underlying case?

23 MR. WALL: Your Honor, I think it  
24 matters for two reasons. The first is because  
25 the advice of counsel is the stated reason why

1 the government has maintained this --

2 HON. RICHARD CLIFTON: You have to  
3 assume that's the case. I mean, even if they had  
4 never mentioned lawyer, I think you would accept  
5 that if they'd been told by their lawyers, you  
6 don't have a prayer, this is clearly covered as -  
7 - this would be discriminatory not to cover this.  
8 So, I just take as a given that's out there. I  
9 don't think it's going to be passionately  
10 disputed. On your point, you don't think you  
11 have to persuade the Court that the State's  
12 lawyers gave them advice that they didn't follow.  
13 You're interested in what the state of the law  
14 is, which the Court will decide. So, why is it  
15 you have to prove something about advice of  
16 counsel if it's not offered as a defense beyond  
17 this interpretation of the law?

18 MR. WALL: Well, Your Honor, because  
19 t's been offered as a defense both by the witness  
20 -- by numerous witnesses that the Petitioners  
21 have put forward as persons with knowledge about  
22 the decision making here. And so, we have to  
23 establish a record to be able to refute this  
24 defense.

25 HON. RICHARD CLIFTON: Well, but what

1 are you going to refute?

2 MR. WALL: Well, that's what we're  
3 looking for the discovery, Your Honor. We want  
4 to be able to examine the advice that was  
5 provided, because one of the reasons Petitioners  
6 have claimed that they have -- they decided to  
7 main the exclusion is because of the legal  
8 reasoning.

9 HON. RICHARD CLIFTON: But well, but  
10 still, the Court's not going to be persuaded by  
11 whatever legal reasoning was offered by counsel  
12 to the State some years before. You're not going  
13 to argue to the Court that it has to accept  
14 whatever the Arizona lawyer said to the State.  
15 You're going to argue to the Court the law  
16 requires these services to be provided;  
17 otherwise, you're violating -- it constitutes sex  
18 discrimination. So, why is advice of counsel  
19 relevant?

20 MR. WALL: Well, Your Honor, because  
21 intent is a factor in this case.

22 HON. RICHARD CLIFTON: How is intent a  
23 factor?

24 MR. WALL: Well, Your Honor, Dr.  
25 Toomey's alleged claims under both it's a

1 violation of the Equal Protection Clause of the  
2 14th Amendment and Title VII. Under Title VII,  
3 Dr. Toomey is pleading a case based on disparate  
4 treatment or disparate impact, of which this may  
5 be supporting evidence as to animus or  
6 discriminatory intent on the part of the  
7 government. For instance, if the documents  
8 corroborate that the Petitioners were informed  
9 that, yes, this exclusion is illegal, we think  
10 that would be a relevant fact as part of the  
11 record to present before the District Court.

12 We also think the involvement of  
13 counsel in the actual decision making here puts  
14 their involvement as a factual point in the  
15 record to be developed. We cannot simply accept  
16 Petitioner's representation that we received  
17 legal advice and everything is, you know, okay.  
18 Dr. Toomey, again, has the burden of establishing  
19 that evidentiary record.

20 What I would also say is, the Court  
21 asks fairly, you know, when we get to trial, what  
22 will witnesses say? And I think, as you look  
23 through the record -- and it's established in all  
24 of our papers, as we had cited the deposition  
25 testimony itself -- that all the witnesses have

1 repudiated, now, that cost was a significant  
2 factor in the Court -- in the Petitioner's  
3 decision making. They have all uniformly pointed  
4 to the legal advice they received about his  
5 decision making, and that was the basis for the  
6 Petitioner's decision to maintain the exclusion.

7 HON. RICHARD CLIFTON: Okay, but I  
8 don't really understand that. I mean, the fact  
9 that the -- a lawyer says you don't have to do it  
10 doesn't explain why you don't do it. It just  
11 says that's a permissible course. And if they  
12 disclaim cost, is there any other reason offered  
13 for not providing the service that your client  
14 seeks to obtain?

15 MR. WALL: Well, yes, Your Honor,  
16 because I believe Dr. Toomey -- it's incumbent  
17 upon him to be able to examine that record if  
18 that is now, as we believe through discovery, the  
19 only reason why they maintained the exclusion.

20 HON. RICHARD CLIFTON: But that's not a  
21 reason to maintain the exclusion. To say that  
22 you don't have to do something doesn't mean you  
23 don't do something. It just says it's an option  
24 available. You can do it or you can not do it  
25 for whatever reason. But that you don't have to

1 do it isn't, by itself, an explanation for why  
2 you don't do it. Cost is what I anticipated the  
3 response to be, and that's what I'd understood  
4 until you just said they disclaimed cost, so...

5 MR. WALL: Well, Your Honor, I would  
6 say that we have to think in the context of how  
7 this response from Petitioners came about. And  
8 the answer, Petitioners averred that there are  
9 legitimate nondiscriminatory and non-pretextual  
10 reasons why they maintain the exclusion. When  
11 they were asked what those reasons were, the very  
12 first thing they pointed to was, we are -- the  
13 legal conclusion was that we are not required to  
14 do so. It is their explanation as to -- and they  
15 have affirmatively (indiscernible) into this case  
16 that the legitimate reason why they do not have  
17 to cover it -- they can maintain the exclusion is  
18 legal advice.

19 HON. PAUL WATFORD: I mean, I think I  
20 understand your argument if they said in response  
21 to your assertion that you acted with  
22 discriminatory intent, and they said, no, no, no.  
23 We weren't trying to discriminate. Our policy is  
24 always to do the bare minimum that the law, you  
25 know, requires, and we went to our lawyers, and

1 they told us, no, the law doesn't require it.  
2 And so, we said, okay, well, that settles it. I  
3 mean, that wouldn't negate intent, I suppose. It  
4 would be a nondiscriminatory, you know, neutral  
5 reason for why they took the course of action  
6 they did.

7 But I guess my problem still, and I  
8 wanted to come back to your response on this, if  
9 they now come forward and say that is not -- that  
10 is most definitely not the defense we are going  
11 to assert, the advice we got from Counsel is  
12 never going to be interjected as a basis to  
13 defend against the intent element of your claims,  
14 I guess I'm still struggling to understand why  
15 you need, and as a matter of fairness, access to  
16 these documents. I just -- maybe if there's  
17 another -- you can take another run at answering  
18 that, because I'm still not clear on how this  
19 concession doesn't eliminate this problem.

20 MR. WALL: True, Your Honor. And I  
21 think the reason for that is because the Court  
22 understood that even if Petitioners will sit here  
23 and disclaim that they're going to rely on the  
24 advice of counsel, it's not so much that there  
25 are magic words as to the assertion of that

1 defense. It's not that you have to say, we're  
2 asserting advice of counsel defense or that we  
3 relied on certain evidence. The Court  
4 established in Chevron Corp v. Pennzoil that once  
5 a party has placed its knowledge of the law at  
6 issue, it also places the basis of its  
7 understanding of what the law requires at issue.

8 And so, everything is relevant to our  
9 ability to develop the record. That includes the  
10 newspaper articles; that includes consultation  
11 with other governmental entities, as well as the  
12 legal advice they relied upon on forming that  
13 understanding of the law, which they cite as  
14 their chief reason for maintaining the exclusion.  
15 We need all of that evidence to be able to refute  
16 this defense that there were legitimate reasons  
17 to maintaining the exclusion.

18 HON. PAUL WATFORD: And is it your  
19 understanding from our cases that once you've put  
20 at issue legal advice you got from counsel, it's  
21 kind of -- it's just a one-way street? You can  
22 never take that back? Do you know what I mean?  
23 Because they're kind of saying, this was all a  
24 mistake. To the extent that the way we drafted  
25 the interrogatory response that led you and the

1 District Court to think that we were trying to  
2 put at issue the legal advice, that was just --  
3 it was all a big misunderstanding, we're ready to  
4 step back from that; you're basically saying, as  
5 I hear you, nope, that's not an option. Once  
6 you've kind of, you know, gone down that road,  
7 you're stuck, and we now get access to all these  
8 documents, whether you like it or not. So --

9 MR. WALL: Well, Your Honor, I think  
10 this goes to your question of whether this is a  
11 legal question for determination or a factual  
12 question. And that's my point in saying that  
13 it's not just Interrogatory Number 1. It's the  
14 involvement of counsel which is the factual point  
15 in this case in that decision making.

16 HON. RICHARD CLIFTON: How could  
17 counsel not be involved? I mean, just by nature,  
18 your argument is that the law requires. Anybody  
19 looking at it would say, well, the first  
20 question, does the law require? So, the fact  
21 that they consulted with counsel doesn't strike  
22 me as very meaningful here. If they hadn't  
23 consulted with counsel, that might be meaningful.  
24 But that's the -- this is the dog that barked.

25 MR. WALL: Well, Your Honor, I would

1 say that it's not the mere consultation with  
2 counsel. And that's why I think Petitioner's  
3 concerns that somehow, allowing the District  
4 Court's order to stand will entail a parade of  
5 horribles for every instance in which the  
6 Government says it consulted counsel, is that the  
7 specific reason they explained for maintaining  
8 this exclusion is the legal rationale. You can  
9 imagine that the Government might have other  
10 legitimate bases for maintaining exclusion, such  
11 as costs, such as a facially neutral policy that  
12 they only was the bare minimum, which discovery  
13 has now repudiated as the case. They did not  
14 have that policy, and they do treat -- cover  
15 other policies that -- or other benefits that are  
16 not legally required.

17 But the reason the -- the reason the  
18 Petitioners asserted for maintaining the  
19 exclusion is the advice of counsel. And so, that  
20 is an entirely relevant fact that we need to be  
21 able to explore.

22 HON. RICHARD PAEZ: Let me ask you  
23 this. I was not expecting the concession that  
24 Counsel offered during his argument. That wasn't  
25 in my, you know, on my radar screen at the time.

1 It seems to me, though, that it's significant  
2 enough that the District Court should be able to  
3 consider that and maybe rethink whether or not  
4 she -- ordering disclosure is the appropriate  
5 thing.

6 MR. WALL: Well, Your Honor, I would --  
7 I would say that, you know, the club of mandamus,  
8 as we've all noted, is extraordinary, and the  
9 fact that --

10 HON. RICHARD PAEZ: I'm reluctant --  
11 you know, the concession was made in front of us,  
12 and I'm just reluctant to say, you know, the  
13 concession, and therefore, District Court, you  
14 clearly erred. Mandamus; set aside that order.  
15 I'm not sure that that -- well, I'm not sure that  
16 I'm prepared to do that just because we got a  
17 concession here today.

18 It seems like the District Court should  
19 be able to consider that and to think through  
20 some of the questions that I was asking, because,  
21 you know, when I asked him about what would a  
22 witness testify to, and he said, well, we can --  
23 you know, we determined that it was lawful or  
24 whatever, and we considered this -- we consulted  
25 with people. Well, the first thing the cross-

1 examination is going to be, who did you consult  
2 with?

3 MR. WALL: You're right, Your Honor,  
4 and I would say that --

5 HON. RICHARD PAEZ: And it seems to me  
6 that those kinds of issues that relate to the  
7 litigation itself ought to be explored by the  
8 District Court, not by -- I mean, this is -- I  
9 wasn't expecting this.

10 MR. WALL: Well, Your Honor, that's  
11 exactly why I would say the petition of mandamus  
12 should not warn here. If you consider the other  
13 Bauman factors, particularly the first factor  
14 about the availability of other adequate means of  
15 relief, Petitioners certainly could have failed  
16 to comply with the Court's discovery order, and  
17 they would have had available to them post-  
18 judgment relief, where a court could have  
19 reviewed this and said, you know, they didn't  
20 actually put this at issue, that, you know, could  
21 remand it for a new trial and have this evidence  
22 excluded. But they didn't do that. They --

23 HON. RICHARD PAEZ: Well, they could  
24 file a motion for reconsideration and say, hey,  
25 look, Judge, you got it all wrong. We're not

1 going to raise this as a defense.

2 MR. WALL: Well, Your Honor, they  
3 didn't file a motion for reconsideration.

4 HON. RICHARD PAEZ: Oh, I know. I'm  
5 saying, but there's ways they could have brought  
6 this to the District Court's attention, and they  
7 didn't do it.

8 MR. WALL: Exactly, and that's why the  
9 petition does not lie. Because they could have  
10 failed to comply with the order, and the District  
11 Court could have entered a discovery sanction  
12 saying that you cannot assert this defense,  
13 exactly what Petitioners have conceded here  
14 before. And that's why the petition should lie.  
15 None of the Bauman factors, specifically the  
16 clear error that we've discussed already, support  
17 granting this petition. The District Court did  
18 not err. It certainly got this right. And it  
19 certainly did not commit clear error.

20 HON. PAUL WATFORD: Okay.

21 MR. WALL: Thank you, Your Honors.

22 HON. PAUL WATFORD: Thank you very much  
23 for your argument. Let's put two minutes on the  
24 clock for rebuttal.

25 MR. BERG: Let me start with the last

1 point. To argue that the State of Arizona should  
2 have disobeyed an order of the District Court,  
3 permitted itself to be found in contempt, and  
4 then proceed to litigate this issue is something  
5 this Court has rejected in a couple -- in several  
6 cases we've cited in our reply, but also, I  
7 think, ignores the reality that to say it's an  
8 adequate remedy to violate a court order seems to  
9 me to be inappropriate.

10 HON. RICHARD PAEZ: Well, you could  
11 have gone back and filed a motion for  
12 reconsideration, saying, hey, Judge, you know,  
13 there's been a -- there's been a mistake here.

14 MR. BERG: Well, what we did do is,  
15 first we were in front of the magistrate judge.  
16 We made our argument. Then we went to the  
17 District Court, and we made our argument. I  
18 don't think --

19 HON. RICHARD PAEZ: You didn't make  
20 this concession in front of the District Court,  
21 did you?

22 MR. BERG: Your Honor, I didn't argue  
23 this. I don't know exactly what was said in  
24 front of the District Court on oral --

25 HON. RICHARD PAEZ: Right, but

1 something --

2 MR. BERG: There wasn't any oral  
3 argument --

4 HON. RICHARD PAEZ: But wait a minute.  
5 Something clicked along the way, and you decided,  
6 well, you know, I've got to make it clear. I'm  
7 going to make it clear to the Ninth Circuit that  
8 this is not -- that the District Court  
9 misunderstood, and I'm going to concede in front  
10 of the District Court that we will not raise an  
11 advice of counsel defense. It's all a  
12 misconception. And now you're asking us, on  
13 that basis, to issue a writ of mandamus against  
14 the District Court.

15 MR. BERG: Yes, because we think it was  
16 clear from the interrogatory answer that we  
17 weren't raising that defense, Your Honor. I  
18 mean, it may be clearer because I got asked the  
19 specific question today and I answered it  
20 specifically. But remember, in this case,  
21 neither the magistrate judge nor the district  
22 judge had oral argument. We didn't have a  
23 dialogue like we've had here today. We filed  
24 papers. We took our position, which we still  
25 stand by, which is that the interrogatory answer

1 to Interrogatory Number 1, which is the only one  
2 I think that is even close, isn't sufficient to  
3 raise an advice of counsel defense, and  
4 therefore, there wasn't a waiver.

5 Now, had we had oral argument, and had  
6 we had a chance to have the kind of exchange  
7 we've had here, it may have -- it may have been  
8 clear. The attorney/client privilege is an  
9 incredibly important privilege. It is the oldest  
10 privilege known to the law, and --

11 HON. RICHARD CLIFTON: Let me ask you  
12 about that.

13 MR. BERG: Yes.

14 HON. RICHARD CLIFTON: And we're --

15 MR. BERG: Sure, Your Honor.

16 HON. RICHARD CLIFTON: -- I'm going to  
17 beg your indulgence and my colleagues'. We've  
18 all lived with the attorney/client privilege. We  
19 understand its importance. In this particular  
20 case, how does it really matter? I mean, unless,  
21 in fact, it turns out that, as your colleague  
22 suggested, maybe the advice was, you can't do  
23 this, and they decided to disregard it. I don't  
24 expect that's the case. I expect you have your  
25 usual lawyer qualifications and so forth, but --

1 I used to write those letters myself.

2 But in practical terms, okay, suppose  
3 those documents are produced. How does it  
4 matter?

5 MR. BERG: Well, I think -- first of  
6 all, I think going forward, it may chill the  
7 State in how it uses its lawyers. And that's a  
8 harm that revises -- I think when the  
9 attorney/client privilege for government agencies  
10 is undermined.

11 Secondly, without -- without -- there  
12 may well be information in those attorney/client  
13 confidences about, like for example, future  
14 litigation strategy, I don't know -- I am  
15 speculating -- that you would not want to turn  
16 over to the other side in litigation. I mean,  
17 there are lots of reasons why there's an  
18 attorney/client privilege and a work product  
19 privilege, and one of them is to prevent one side  
20 from going to school in their case on the other  
21 side's legal theories and legal thought, Your  
22 Honor.

23 HON. PAUL WATFORD: Okay. Thank you  
24 very much.

25 MR. BERG: Thank you very much, Your

1 Honors.

2 HON. PAUL WATFORD: We appropriate it.  
3 The case just argued is submitted, and we are  
4 adjourned for the day.

5 CLERK: All rise.

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certify that the foregoing transcript is a true and accurate record of the proceedings.

*Sonya M. Ledanski Hyde*

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Date: May 2, 2022

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[relying - thank]

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