

1 FENNEMORE CRAIG, P.C.
Timothy J. Berg (No. 004170)
2 Amy Abdo (No. 016346)
Ryan Curtis (No. 025133)
3 Shannon Cohan (No. 034429)
2394 E. Camelback Road, Suite 600
4 Phoenix, Arizona 85016
Telephone: (602) 916-5000
5 Email: tberg@fennemorelaw.com
Email: amy@fennemorelaw.com
6 Email: rcurtis@fennemorelaw.com
Email: scohan@fennemorelaw.com

7 *Attorneys for Defendants*
8 *State of Arizona, Andy Tobin, and Paul Shannon*

9 UNITED STATES DISTRICT COURT
10 DISTRICT OF ARIZONA

11 Russell B. Toomey,
12 Plaintiff,
13 v.
14 State of Arizona, *et al.*
15 Defendants.

CV-19-00035-TUC-RM

**DEFENDANTS STATE OF
ARIZONA’S, ANDY TOBIN’S, AND
PAUL SHANNON’S RESPONSE TO
PLAINTIFF’S COUNTERVAILING
STATEMENT OF FACTS TO
DEFENDANTS’ SEPARATE
STATEMENT OF FACTS IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

17
18 Defendants State of Arizona, Andy Tobin, and Paul Shannon (collectively, “State
19 Defendants”) hereby respond to Plaintiff’s Countervailing Statement of Facts (Doc. 322.)

20 **I. RESPONSE TO SEPARATE STATEMENT OF FACTS IN SUPPORT OF**
21 **PLAINTIFF’S RESPONSE TO STATE DEFENDANTS’ MOTION FOR**
22 **SUMMARY JUDGMENT**

23 1. Disputed. ADOA consults with the Governor’s Office regarding proposed
24 revisions to the Plan design. (Doc. 296 (Declaration of Ryan Curtis (“Curtis Decl.”)), Ex. 8
25 (Deposition Transcript of Marie Isaacson (“Isaacson Depo.”)) at 119:11–120:15; *id.*, Ex. 10
26 (Deposition Transcript of Scott Bender (“Bender Depo.”)) at 71:7–11, 81:4–20.) The
27 Governor’s Office was always involved in determining the contribution strategy for the
28 Plan. (Doc. 317 (Declaration of Ryan Curtis (“Curtis Decl.”)), Ex. G (Isaacson Depo.)) at
120:1-15.)

1 2. Undisputed.

2 3. Undisputed.

3 4. Undisputed.

4 5. Undisputed.

5 6. Undisputed.

6 7. Undisputed.

7 8. Undisputed.

8 9. Disputed. ADOA only removed exclusions from the Plan if it was legally
9 required or if the revision would not increase the cost of the Plan. (Doc. 296 (Curtis Decl.),
10 Ex. 10 (Bender Depo.) at 116:24–117:9, 167:12–24.)

11 10. Undisputed.

12 11. Disputed. In 2015, the majority of ADOA’s insurance vendors did not provide
13 coverage for transgender benefits. (*Id.*, Ex. 8 (Isaacson Depo.) at 26:13–17, 29:15–19; *id.*,
14 Ex. 14 (Deposition of Yvette Medina (“Medina Depo.”)) at 119:17–120:4; *id.*, Ex. 18
15 (AZSTATE.006325); *Id.*, Ex. 19 (AZSTATE.006198); *Id.*, Ex. 20 (AZSTATE.006129);
16 *see also id.*, Ex. 7 (Deposition of Joan C. Barrett (“Barrett Depo.”)) at 28:1–6.) Pursuant to
17 the 2016 Rules, insurance carriers were required to provide compliant insurance plans.
18 Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 96, 31376, 31386 (May
19 18, 2016) (codified at 45 C.F.R. pt. 92). While the 2016 Rules did not require any particular
20 service be covered (*see id.*), the carriers made a decision to cover surgery in their fully-
21 insured plans. ADOA’s consideration of the Exclusion as a self-insured plan was
22 “independent” and ADOA was “responsible for making [its] own determination.” (*See* Doc.
23 296 (Curtis Decl.), Exs. 26 & 28.)

24 12. Disputed. ADOA maintained the Exclusion after conducting substantial
25 research into the 2016 Rules, cost, market and industry trends, and interest of the Plan
26 members. (Doc. 295 (State Defendants’ Statements of Facts (“SOF”)), ¶¶ 32–50.) ADOA
27 also considered recommendations from its insurance vendors. (*Id.*) ADOA representatives
28 also discussed the Exclusion with representatives from the Governor’s Office, including

1 during multiple meetings, telephone conferences, and emails in the fall of 2016. (*See id.*)

2 13. Disputed.

3 a. Disputed. There were multiple meetings between the Governor’s
4 Office and ADOA. (Declaration of Ryan Curtis (“Curtis Decl.”),
5 concurrently filed, Ex. A (Deposition of Christina Corieri (“Corieri
6 Depo.”)) at 60:3–22.) Ms. Corieri did not participate in one of the
7 meetings. (*Id.* at 74:11–24.)

8 b. Objection; Rules 602, 802.

9 14. Undisputed.

10 15. Objection; Rules 402. Disputed; Ms. Corieri did not make the decision
11 regarding the Exclusion. (*Id.* at 86:4–8.) The tweet was made several years before Ms.
12 Corieri began her employment with the Governor’s Office, at a time when Ms. Corieri was
13 working on issues related to Medicaid expansion generally, and more than three years
14 before ADOA made its decision to expand the Exclusion. (*See* Doc. 296 (Curtis Decl.),
15 Ex. 32 (Corieri Depo.) at 12:2-4.)

16 16. Objection; Rules 402. Disputed; Ms. Corieri testified in her deposition that
17 she did not recall receiving the emails, did not read them, and (contrary to Plaintiff’s
18 statement) did not sign up to receive the emails. (Curtis Decl., Ex. A (Corieri Depo.) at
19 118:22–121:9.) Ms. Corieri testified that she often receives emails which she did not sign
20 up for due to the public nature of her Governor’s Office email address. (*Id.*) Ms. Corieri
21 testified that she does not harbor any animus towards transgender persons or gender
22 reassignment procedures. (*Id.* at 55:21–56:14.)

23 17. Objection; Rule 1002. Disputed; No one at ADOA has expressed a negative
24 opinion about transgender persons. (Doc. 296 (Curtis Decl.), Ex. 9 (Shannon Depo.) at
25 98:1–5, 224:12–15, 243:24–244:9; *Id.*, Ex. 13 (Schafer Depo.) at 181:9–20, 184:10–185:7,
26 185:24–186:6; *Id.*, Ex. 10 (Bender Depo.) at 98:19-21, 286:9-14.) No one at the Governor’s
27 Office has expressed a negative opinion about transgender persons. (*See id.*, Ex. 8 (Isaacson
28 Depo.) at 43:4-6; *Id.*, Ex. 9 (Shannon Depo.) at 224:16–21, 243:24–244:9; *Id.*, Ex. 32

1 (Corieri Depo.) at 55:21–56:8.) The Arizona Board of Regents apparently authorized the
2 Arizona universities to “provide a financial subsidy of up to \$10,000 for gender-affirming
3 medical care services not currently covered by” ADOA’s Plan. (Curtis Decl., Ex. C.)

4 18. Undisputed.

5 19. Objection; Rules 402, 1002. The Arizona Board of Regents apparently
6 authorized the Arizona universities to “provide a financial subsidy of up to \$10,000 for
7 gender-affirming medical care services not currently covered by” ADOA’s Plan. (Curtis
8 Decl., Ex. C.)

9 20. Objection; Rule 602. Disputed; ADOA’s contemporaneous cost analyses
10 indicated that removing the Exclusion would add \$130,000–\$582,000 in annual costs to the
11 Plan. (Doc. 296 (Curtis Decl.), Ex. 24 (AZSTATE.151707); *Id.*, Ex. 22
12 (AZSTATE.006095).)

13 a. Disputed. Ms. Schafer was not told why specific edits were suggested
14 and only “guessed” that “someone above” didn’t want the cost for the
15 Exclusion in writing. (Curtis Decl., Ex. B (Schafer Depo.) at 150:24–
16 152:3.) She testified that she did not recall anyone directing her to
17 remove that information and only speculated that someone may not
18 have wanted it in the report. (*Id.* at 150:24–151:8.)

19 b. Objection; Rules 602.

20 21. Undisputed.

21 22. Objection; Rules 602. Disputed; ADOA consults with the Governor’s Office
22 regarding proposed revisions to the Plan design. (Doc. 296 (Curtis Decl.), Ex. 8 (Isaacson
23 Depo.) at 119:11–120:15; *id.*, Ex. 10 (Bender Depo.) at 71:7–11, 81:4–20.) The Governor’s
24 Office was always involved in determining the contribution strategy for the Plan. (Doc. 317
25 (Curtis Decl.), Ex. G (Deposition Transcript of Marie Isaacson (“Isaacson Depo.”)) at
26 120:1–15.)

27 23. Objection; Rules 602. Disputed; ADOA expanded coverage for transgender
28 benefits under the Plan—removing the exclusion for hormone therapy and medical or

1 psychological counseling—effective for the Plan year beginning January 1, 2017. (*See* Doc.
2 296 (Curtis Decl.), Ex. 6 at AZSTATE.01049.)

3 24. Objection; Rules 602. Disputed; ADOA made the decision to maintain the
4 Exclusion in order to minimize increased costs to the Plan and because it believed that the
5 modified exclusion was legal.¹ (*Id.*, Ex. 10 (Bender Depo.) at 167:12-24.)

6 25. Objection; Rules 402.

7 DATED this 23rd day of November, 2022.

8 FENNEMORE CRAIG, P.C.

9
10 By: *s/ Ryan Curtis*

11 Timothy J. Berg

12 Amy Abdo

13 Ryan Curtis

14 Shannon Cohan

15 *Attorneys for Defendants State of*
16 *Arizona, Andy Tobin, and Paul*
17 *Shannon*

18
19
20
21
22
23
24
25
26
27
28
28354090

¹ Pursuant to this Court’s Order (Doc. 278 (Order granting Motion for Reconsideration)), State Defendants will not argue that their good-faith understanding of the law is a defense in this litigation.