

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

JOAQUÍN CARCAÑO, et al.,

Plaintiffs,

v.

PATRICK MCCRORY, et al.,

Defendants,

PHIL BERGER, et al.,

Intervenor-Defendants.

No. 1:16-cv-00236-TDS-JEP

**MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR PROTECTIVE ORDER**

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INTRODUCTION AND NATURE OF THE MATTER

Pursuant to Federal Rule of Civil Procedure 26(c) and Local Civil Rule 26.2, Plaintiffs Joaquín Carcaño; Payton Grey McGarry; H.S., by her next friend and mother, Kathryn Schafer, and her next friend and father, Machenry George Schafer II; Angela Gilmore; and American Civil Liberties Union of North Carolina (“Plaintiffs”), respectfully submit the following memorandum of law in support of their motion for a protective order regarding certain categories of privileged, irrelevant, and highly-sensitive medical and mental health records of Plaintiffs and related deposition questioning.

At stake in this case is the right of transgender individuals,¹ including Plaintiffs, not to be barred from using restrooms and other sex-specific facilities in government buildings that they used previously and that others who identify as the same sex as them are permitted to use. Plaintiffs have brought federal constitutional and statutory claims challenging House Bill 2 (“H.B. 2”), which, among other things, limits individuals to using sex-specific facilities that match the sex listed on their birth certificates (or single-user facilities, where they are available), which harms only transgender people. Plaintiffs seek declaratory and injunctive relief against Defendant Governor McCrory and Intervenor-Defendants President *Pro Tempore* Phil Berger and Speaker Tim Moore

¹ For a definition of “transgender individuals,” see ECF 127 (preliminary injunction order) at 2 n.1.

(collectively, “Defendants”).² ECF No. 151. Plaintiffs have sought only nominal damages with respect to their Title IX claim (but not their constitutional claims), and are not seeking damages for emotional distress, medical expenses, or other harms. ECF No. 151 at 3, 54.

Plaintiffs and Defendants plan to introduce expert testimony at trial regarding the diagnosis of gender dysphoria³ in general and its typical appropriate treatment. Neither Plaintiffs nor Defendants plan to introduce expert testimony regarding *Plaintiffs’* transgender status or diagnosis of gender dysphoria. Yet Defendants have served a document request seeking a breathtakingly broad array of individual Plaintiffs’ highly sensitive medical and mental health records, the vast majority of which have no conceivable relevance to this case and are protected by the psychotherapist-patient privilege. Without waiving any applicable privilege or conceding the relevance of the records sought, Plaintiffs have agreed to produce certain categories of medical and mental health records responsive to Defendants’ request, particularly categories of documents that relate to the three individual transgender plaintiffs’ diagnoses and treatment of gender dysphoria. Plaintiffs have also agreed that these individual plaintiffs may be questioned in depositions about their transition to align their physical appearance

² Defendants University of North Carolina and President Margaret Spellings have not sought any medical records from Plaintiffs and thus are not parties to this motion for a protective order.

³ Gender dysphoria is the medical diagnosis for the incongruence between a person’s gender identity and birth-assigned sex and accompanying clinically-significant distress. *See* ECF 127 (preliminary injunction order) at 2 n.1.

and attributes with their gender identity, and the harm caused by H.B. 2. Despite Plaintiffs' agreement—in an effort to avoid motion practice—to provide Defendants with much more than they are even arguably entitled to, Defendants still inexplicably seek access to Plaintiffs' entire medical and mental health records for the past ten years.

The vast array of medical and mental health records and testimony Defendants seek is so far afield from any of the issues in the case, and sweeps in information that is so sensitive, that Defendants' persistent request constitutes harassment. It has the effect of not only punishing the individual Plaintiffs and other transgender fact witnesses for seeking to vindicate their rights under federal law, but also potentially intimidating them from doing so, including testifying at trial. Accordingly, Plaintiffs are entitled to a protective order that shields from document and deposition discovery all medical and mental health information beyond that which Plaintiffs have already agreed to produce.

FACTUAL BACKGROUND

I. DEFENDANTS' BROAD REQUESTS FOR MEDICAL RECORDS AND RELATED DEPOSITION QUESTIONING.

On August 12, 2016, Defendants served a document request on Plaintiffs initially seeking “[a]ll documents relating to treatment for any gender, sexuality-, or reproductive-system-related medical or mental health condition,” for the individual Plaintiffs, from January 1, 2012 to the present. Exh. A at 12 (“RFP 6”).⁴ Plaintiffs timely served

⁴ This request sought these medical records for all the then individual Plaintiffs, Joaquín Carcaño, Payton Grey McGarry, H.S., Kelly Trent, Beverly Newell, and Angela Gilmore. Kelly Trent and Beverly Newell are no longer plaintiffs in this action. Second Amended Complaint, ECF 151. Ms. Gilmore is a plaintiff, but she is not a transgender individual

responses and objections to Defendants’ request, objecting on the basis of, among other things, all applicable privileges, overbreadth, undue burden, and relevance. Exh. B at 10. In these responses, Plaintiffs agreed to produce “documents sufficient to show Joaquín Carcaño’s, Payton Grey McGarry’s, and H.S.’s diagnosis of gender dysphoria.” *Id.* The parties met and conferred regarding this document request, and Defendants identified four categories of documents they were seeking:

1. Records related to any diagnoses of gender dysphoria and treatment of gender dysphoria, including the basis for the diagnoses;
2. Records related to any diagnoses of a sex development disorder, recognized by DSM V as one possible basis for a gender dysphoria diagnosis;
3. Records related to any co-occurring mental health or physical disorders; and
4. Records sufficient to explore whether any harm allegedly caused by HB2 might have another cause, in whole or in part.

Exh. C. During the parties’ meet and confer, Plaintiffs confirmed that there are no records responsive to the second category, because none of the individual transgender plaintiffs has been diagnosed with a sex development disorder.

During the September 30, 2016 case management conference, Plaintiffs stated their concern that the four categories of medical records Defendants were seeking—particularly categories 3 and 4—went far beyond the scope of RFP 6. On October 4,

and is not challenging Part I of H.B. 2. Instead, as a lesbian, she is challenging Parts II and III of H.B. 2, which pre-empt local government non-discrimination protections based on sexual orientation. As a result of the foregoing, Plaintiffs informed Defendants that they would interpret this document request as applying only to the three individual plaintiffs who are transgender, and Defendants have raised no objection to that interpretation.

2016, Defendants vastly heightened the dispute by serving Plaintiffs with a document request of remarkable breadth, seeking *the entire medical and mental health history of the three individual transgender plaintiffs for the past ten years*:

Any and all records of individual named plaintiffs Joaquín Carcaño, Payton Grey McGarry’s, and H.S. . . . in any way pertaining to or concerning each individual named plaintiff’s medical, psychiatric, or psychological treatment including, without restriction, all histories, records, reports, summaries, diagnoses, prognoses, progress sheets, order sheets, nurses daily notes, psychiatric/psychological records, counseling records, records of treatment and medication ordered and given, operative notes, pathology reports, tests and test results, imaging (films or electronic), records of in- or out-patients substance abuse treatment facilities, and all other written notes, entries, reports or other written or graphic data prepared, kept or maintained which pertain to him/her and any office visit or hospital confinement, including all outpatient treatment subsequent to the last discharge and any other periods of hospitalization; said records to include all written, printed or other written or graphic data of each individual named plaintiff.

Exh. D at 7 (“RFP 33”). The accompanying instructions provide that the request seeks documents created “on or after October 4, 2006.” *Id.* at 6. Defendants have propounded this same request on the non-party individual transgender fact witnesses who plan to testify in support of the United States. Furthermore, Defendants have indicated that they intend to serve the same all-encompassing medical records request on any transgender fact witness in the case.

Notwithstanding the breadth of RFP 33, it appears that Defendants may still be seeking the four categories of documents they identified during the meet and confer regarding RFP 6. However, Defendants have refused to narrow the scope of RFP 33 to those categories of documents or the categories Plaintiffs agreed to produce (see Part II *infra*) and are demanding the full scope of records that fall within RFP 33. Exh. E. at 2.

They have also refused to agree to any limitations on the topics they can explore in depositions, such as the topics they originally suggested, Exh. C at 1, or the ones we agreed to (see Part II *infra*). Exh. E at 2-3.

II. PLAINTIFFS HAVE AGREED TO PRODUCE A WIDE RANGE OF MEDICAL AND MENTAL HEALTH RECORDS AND TO PERMIT RELATED DEPOSITION TESTIMONY.

Without waiving any claims of privilege, or conceding the relevance of such documents, Plaintiffs have agreed to produce the following categories of documents with respect to the individual transgender plaintiffs:

1. ***Birth certificates.*** These documents demonstrate that each of the three individual transgender plaintiffs possesses a birth certificate with a gender marker differing from the plaintiff's gender identity.
2. ***Medical or other records demonstrating a diagnosis of gender dysphoria.*** Plaintiffs have said all along that they would produce documents sufficient to show that the three individual transgender plaintiffs have been diagnosed with gender dysphoria.
3. ***Medical records demonstrating treatment of gender dysphoria.*** All three individual transgender plaintiffs have medically treated their gender dysphoria through hormone therapy, and two of the three have undergone chest surgery as part of their treatment. Plaintiffs will produce medical records demonstrating the hormone therapy and surgery these plaintiffs have undergone.
4. ***Records regarding any medical consequences stemming from the requirements of H.B. 2.*** Plaintiffs will produce any medical records regarding medical consequences of H.B. 2, such as those caused by avoiding restrooms.

Exh. E at 1, 5.

During the meet and confer process, Defendants also indicated that they are likely to ask questions in the individual transgender plaintiffs' depositions such as the following: "what stage of transition are you?"; "are you taking cross-sex hormones and

for how long?"; "are you under a doctor's care for gender dysphoria?"; and, "is using a particular bathroom part any treatment plan?" Exh. C. As Plaintiffs indicated during the meet and confer, they do not object to those lines of questioning—or to questions generally about the individual transgender plaintiffs' gender identity, process of transition, and the harm they have experienced as a result of H.B. 2.⁵

Should Plaintiffs choose to call additional, individual transgender fact witnesses—including, but not limited to those persons described in the Declaration of the Acting Director of the American Civil Liberties Union of North Carolina, Sarah Preston, in support of Plaintiffs Motion for Preliminary Injunction, ECF 22-15—Plaintiffs agree to produce the same categories of documents described above for these witnesses, to the extent applicable.⁶

QUESTION PRESENTED

Where Plaintiffs have offered to provide documents and testimony substantiating the individual transgender plaintiffs' gender dysphoria diagnoses and treatment, do Federal Rule of Civil Procedure 26(b)(1) and (c)(1) and the psychotherapist-patient

⁵ In fact, Plaintiffs explicitly agreed to all the following lines of deposition questioning for individual transgender witnesses: (1) Education/career history; (2) Diagnosis of and treatment for gender dysphoria; (3) Steps taken to transition, socially and medically; (4) What it means to live as a transgender individual; (5) Factual information about harms experienced due to H.B. 2; (6) History of using multiple-occupancy, sex-segregated bathrooms and changing facilities and experiences related to that use; and (7) History of using single-occupancy bathrooms and changing facilities and experiences related to that use. Exh. E at 5.

⁶ The arguments presented here on behalf of the individual transgender plaintiffs would also apply to any subsequently-named individual transgender fact witnesses.

privilege protect these plaintiffs from disclosure of other medical and mental health records that have no relevance to the claims or defenses in this action, are not proportional to the needs of the case, are not likely to lead to the discovery of admissible evidence, and would subject Plaintiffs to annoyance, embarrassment, oppression, and undue burden?

ARGUMENT

I. LEGAL STANDARD.

Under Fed. R. Civ. P. 26(c), the Court may, for good cause, issue an order to protect a party from “annoyance, embarrassment, oppression, or undue burden or expense,” including, among other things, by “forbidding the disclosure or discovery” and “forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters.” Fed. R. Civ. P. 26(c)(1). The party seeking protection initially must demonstrate the need for a protective order and provide a specific demonstration in support of the request as opposed to conclusory or speculative statements. *E.g., Drexel Heritage Furnishings, Inc. v. Furniture USA, Inc.*, 200 F.R.D. 255, 259 (M.D.N.C. 2001). In addition, as the parties asserting the psychotherapist-patient privilege, Plaintiffs must demonstrate the privilege’s applicability. *NLRB v. Interbake Foods, LLC*, 637 F.3d 492, 501 (4th Cir. 2011). Once Plaintiffs have made this showing for a protective order, “the party seeking the materials then must establish that the information is sufficiently necessary and relevant to his case to outweigh the harm of disclosure.” *In re Wilson*, 149 F.3d 249, 252 (4th Cir. 1998).

II. THE PSYCHOTHERAPIST-PATIENT PRIVILEGE PROTECTS FROM DISCOVERY MANY OF THE MENTAL HEALTH RECORDS DEFENDANTS SEEK.

Defendants explicitly seek records and testimony involving confidential communications between the individual transgender plaintiffs and their mental health providers, in that Defendants seek documents: “in any way pertaining to or concerning . . . medical, psychiatric, or psychological treatment including, without restriction, all histories, records, reports, summaries, diagnoses, prognoses, progress sheets, order sheets, nurses daily notes, psychiatric/psychological records, counseling records” Exh. D. Defendants are not entitled to records or testimony regarding these communications, however, because they are protected by the psychotherapist-patient privilege. *See Jaffee v. Redmond*, 518 U.S. 1 (1996).

Federal courts operating under federal question jurisdiction, as here, must resolve matters of privilege based on federal common law. Fed. R. Evid. § 501. In *Jaffee*, the U.S. Supreme Court recognized a psychotherapist-patient privilege: “confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence.” *Jaffee*, 518 U.S. at 15.⁷ Given the deeply sensitive nature of psychotherapist-patient communications and the “transcendent importance” of the “mental health of our citizenry,” the Court rejected a balancing of interests in the

⁷ The *Jaffee* Court itself recognized that the privilege broadly applies to mental health professionals, including licensed social workers. *Jaffee*, 518 U.S. at 15.

application of the privilege: “Making the promise of confidentiality contingent upon a trial judge’s later evaluation of the relative importance of the patient’s interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege.” *Id.* at 11, 17.

Thus, even if testimony and records involving communications between the individual transgender plaintiffs and their mental health providers were deemed to be relevant, they would still be protected by the psychotherapist-patient privilege. Indeed, the Fourth Circuit recently held that a district court abused its discretion in ordering the production of mental health treatment records of a witness, even where the court had determined the production was necessary to protect the constitutional rights of a criminal defendant. *See Kinder v. White*, 609 F. App’x 126, 130 (4th Cir. 2015). In that case, the government’s key witness in a criminal prosecution “testified at length and in detail about her mental health diagnoses, hospitalizations, and treatments.” *Id.* at 133 (Wynn, J., dissenting). The district court then ordered the witness to produce records containing her psychotherapist-patient communications for impeachment purposes, inasmuch as the “case may well hinge on her credibility.” *Id.* at 129 (quotation mark omitted). In reversing, the Fourth Circuit explained that, even where the interest in the privileged records is strong, the very existence of the privilege means that the U.S. Supreme Court has “already determined that the privilege in question ‘promotes sufficiently important interests to outweigh the need for probative evidence.’” *Id.* at 131 (citation omitted).

III. EVEN IF NOT PROTECTED BY THE PSYCHOTHERAPIST-PATIENT PRIVILEGE, THE MEDICAL RECORDS AND TESTIMONY DEFENDANTS SEEK ARE IRRELEVANT AND NOT PROPORTIONAL TO THE NEEDS OF THE CASE.

A. The Medical Records Defendants Seek Beyond Those Plaintiffs Have Agreed to Produce Are Not Relevant to the Alleged Harm Caused by H.B. 2 or Any Other Element of the Parties' Claims or Defenses and Are Not Likely to Lead to the Discovery of Admissible Evidence.

The individual transgender plaintiffs contend that Part I of H.B. 2 violates their statutory and constitutional rights because it prevents them from continuing to use single-sex restrooms and other facilities in public buildings in accordance with their gender identity, which causes them harm. That harm manifests itself in a number of ways. Plaintiffs are harmed in that their constitutional and statutory rights are being violated. It is well-established that the loss of constitutional freedoms, “for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality); *see also Ross v. Meese*, 818 F.2d 1132, 1135 (4th Cir. 1987) (“the denial of a constitutional right, if denial is established, constitutes irreparable harm” as a matter of law). Similarly, there is “irreparable injury when a plaintiff has shown a ‘violat[ion] [of] a civil rights statute,’” such as Title IX. *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep’t of Educ.*, No. 2:16-CV-524, 2016 WL 5372349, at *19 (S.D. Ohio Sept. 26, 2016) (quotation marks omitted; brackets in original), *appeal docketed*, No. 16-4107 (6th Cir. Sept. 28, 2016).

The individual transgender plaintiffs fear for their safety, because, as this Court recognized, “requiring the individual transgender Plaintiffs, who outwardly appear as the

sex with which they identify, to enter facilities designated for the opposite sex (e.g., requiring stereotypically-masculine appearing transgender individuals to use women’s bathrooms) . . . prompt[s] unnecessary alarm and suspicion.” ECF 127 at 76. As this Court also recognized, Part I of H.B. 2 “interferes with these [transgender] individuals’ ability to participate in their work and educational activities.” ECF 127. The Court went on to note that “[a]s a result, some of these Plaintiffs limit their fluid intake and resist the urge to use the bathroom whenever possible,” which “can lead to serious medical consequences, such as urinary tract infections, constipation, and kidney disease.” *Id.* at 76. And, although they are not seeking compensatory or punitive damages, these Plaintiffs have also experienced and continue to experience anxiety and emotional distress because of the requirement that they use restrooms and public facilities inconsistent with their gender identities. ECF 22-4, 22-8, 22-9. Plaintiffs intend to proffer evidence regarding these harms at trial.

Plaintiffs are willing to produce any records concerning the medical harms caused by H.B. 2, which would include any such records created from the date of H.B. 2’s enactment (March 23, 2016) forward, with the exception of any records protected by the psychotherapist-patient privilege. *See supra* Part II. Those are the only medical records that could be relevant to the claims and defenses in this action. Nonetheless, Plaintiffs have also agreed to produce several additional categories of medical records and testimony for the individual transgender plaintiffs, including documents demonstrating

any diagnosis of gender dysphoria and any medical treatment to alleviate gender dysphoria, including hormone therapy and/or surgery. Exh. E at 5.

Yet Defendants insist that they are entitled to *ten years* of the individual transgender plaintiffs' entire medical and mental health histories. Defendants have never even attempted to explain, much less justify, this request, which would cover every doctor's visit, whether for regular check-ups, for the flu, asthma, appendicitis, wisdom teeth extractions, a broken bone, or any other health need, for much if not most of the individual transgender patients' lives. And even if Defendants' all-encompassing document requests were narrowed to the categories of documents they claim to be interested in—records related to any diagnoses of gender dysphoria and treatment of gender dysphoria, including (1) the basis for the diagnoses; (2) records related to any co-occurring mental health or physical disorders; and (3) records sufficient to explore whether any harm allegedly caused by H.B. 2 might have another cause, in whole or in part—Defendants still cannot demonstrate why this information, beyond what Plaintiffs have already agreed to produce, is sufficiently necessary and relevant to this case to outweigh the harm of disclosure. *In re Wilson*, 149 F.3d at 252.

With respect to the first category, Plaintiffs have already agreed to produce documents sufficient to show that the three individual transgender plaintiffs have been diagnosed with gender dysphoria, as well as medical records demonstrating the hormone therapy and surgery these plaintiffs have undergone to treat their gender dysphoria. Defendants have not explained why they are entitled to broader discovery. Although

Defendants have not suggested that the individual transgender plaintiffs are not in fact transgender, if they are trying to test whether Plaintiffs were in fact diagnosed with gender dysphoria, and whether they received medical treatment based on that diagnosis, the documents Plaintiffs have agreed to produce will fully allow Defendants to do so. *See United States v. Se. Okla. State Univ.*, No. CIV-15-324-C, 2016 WL 4250482, at *1 (W.D. Okla. Aug. 10, 2016) (motion to compel discovery denied as irrelevant for transition-related medical records of transgender employee where employer had never raised as a defense that employee was not in fact transgender).

With respect to the second and third categories of medical records Defendants identified—“records related to any co-occurring mental health or physical disorders” and “records sufficient to explore whether any harm allegedly caused by H.B. 2 might have another cause, in whole or in part,” Exh. C at 1—Defendants have explained that they seek both of these categories of records in order to explore whether the harms allegedly caused by H.B. 2 might have another cause. Of course, if the alleged harms are caused at least “in part” by H.B. 2 that is sufficient to establish harm attributable to H.B. 2 for purposes of this case.

As a result, any attempt to identify “co-occurring mental health or physical disorders” wholly unrelated to the individual transgender plaintiffs’ gender dysphoria or gender identity that could independently cause the harms that Plaintiffs claim are caused by H.B. 2 is misguided and unlikely to lead to the discovery of admissible evidence. At most, it would warrant discovery of the medical records Plaintiffs have already offered:

any medical records concerning the harms caused by H.B. 2 from the date of its enactment (March 23, 2016) forward, with the exception of any records protected by the psychotherapist-patient privilege.

B. Defendants Have No Basis For Deposing Individual Transgender Plaintiffs on Medical Topics Beyond Those Agreed to by Plaintiffs.

Defendants insist that they are entitled in depositions of the individual transgender plaintiffs to ask questions on any medical or mental health topic they wish, regardless of the sensitivity of the issues and their potential to cause distress and harm. Plaintiffs have already agreed to a broad range of deposition questioning relating to medical and psychological topics, including, among others, any diagnosis of gender dysphoria and its treatment, the individual transgender plaintiffs' gender transitions, and the harms they have experienced as a result of H.B. 2. *See supra* Factual Background Part II.

Defendants refuse to limit in any way the topics they will delve into and insist that Plaintiffs' only recourse is to object on the record and allow the witness to answer the question, no matter how distressing or harmful. That position not only entirely disregards the psychotherapist-patient privilege, which would justify instructions not to answer, but also Plaintiffs' ability to seek the Court's intervention during the deposition and, if that the Court is not available, end the deposition to prevent any further harassing and harmful questioning in violation of the Federal Rules and Defendants' ethical obligations.

IV. EVEN IF THE ADDITIONAL MEDICAL RECORDS AND TESTIMONY SOUGHT BY DEFENDANTS WERE RELEVANT, THE BURDEN ON PLAINTIFFS FAR OUTWEIGHS THEIR LIKELY BENEFIT.

Even if the requested records and areas of testimonial inquiry were even remotely relevant, which they are not, the sheer scope of the medical and mental health testimony and records sought by Defendants imposes a significant burden on Plaintiffs, which far outweighs their likely benefit. *See* Fed. R. Civ. P. 26(b)(1) (courts must consider “the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit”); *see also Nicholas v. Wyndham Int’l, Inc.*, 373 F.3d 537, 543 (4th Cir. 2004) (“Even assuming that this information is relevant (in the broadest sense), the simple fact that requested information is discoverable under Rule 26(a) does not mean that discovery must be had.”). Just as a matter of logistics, to collect every single medical and mental health record for the past ten years, Plaintiffs would have to seek access records from dozens of doctors, clinics, and hospitals—a significant burden.

The far greater burden on the individual transgender plaintiffs, however, is the extremely sensitive nature of many of the records. “The scope of discovery into the sensitive area of private medical information should be limited and confined to that information that is essential to a fair trial.” *Cappetta v. GC Servs. Ltd. P’ship*, 266 F.R.D. 121, 126 (E.D. Va. 2009) (internal quotation marks omitted). In that case, the court concluded that a subpoena by defendants that sought all medical records, regardless of content, for ten years prior to the action was far too broad—even though, *unlike here*,

the plaintiff was seeking emotional distress damages—and the court modified the subpoena to records relating directly to the plaintiff’s emotional distress claims for two years prior to the action. *Id.* at 126-27.

Here, Defendants are not only seeking a similarly broad swath of records and testimony about topics that are inherently sensitive, but they are seeking to probe “co-occurring mental health or physical disorders.” Based on their briefing, their interest in the individual transgender plaintiffs’ medical and mental health history is likely to focus on some of the most sensitive aspects of any person’s medical history—including possible childhood abuse, depression, and suicidal thoughts, even where totally unrelated to gender dysphoria. ECF No. 149 at 10-17 (describing the theories of Defendants’ experts that gender dysphoria may be caused by a history of abuse and that transition may worsen “depression, suicide, and other psychological problems”).

Allowing Defendants to probe Plaintiffs’ possible co-occurring mental and physical disorders would impose an enormous, oppressive emotional burden on Plaintiffs, potentially discouraging them from testifying and/or from asserting their constitutional rights. Indeed, it is troubling and telling that Defendants’ response to Plaintiffs’ concern about the scope of the medical records request was not to narrow the requests, but instead, to significantly expand it. *Compare* RFP 6, which sought a broad set of medical records for the past four years, *with* RFP 33, which seeks all medical records of any kind for the past ten years. “The rules of discovery,” however, “do not sanction a broad sweep into the lives of the parties—a veritable witch hunt—in the hopes of uncovering some

‘dirt.’” *Sharp v. Baltimore City Police Dep’t*, Civil No. CCB–11–2888, 2013 WL 937903, at *2 (D. Md. Mar. 1, 2013) (citing *Avianca, Inc. v. Corriea*, 705 F. Supp. 666, 677 (D.D.C. 1989)).

In cases where highly sensitive medical information is sought and plaintiffs are not seeking emotional distress damages, courts have granted protective orders denying access to these records, where such records were not necessary to defendants’ case. *See, e.g., A Helping Hand, LLC v. Baltimore Cty.*, 295 F. Supp. 2d 585, 592 (D. Md. 2003) (protective order granted for patient records of plaintiff methadone clinic in case alleging ADA violations, because the records by nature were highly sensitive and the defendants did not “need individualized patient data to defend against the suit.”); *Sharp*, 2013 WL 937903, at *2 (motion to quash subpoena for medical records of past drug use granted even though defendants argued that the records were “absolutely material to [the plaintiff’s] competency as a witness,” because the records would cause the plaintiff embarrassment, were an attempt to pressure him to drop his suit, and would prevent an evenhanded review of the case). The Court should do the same here.

CONCLUSION

Where Plaintiffs already have offered to produce certain categories of medical records and testimony regarding their gender dysphoria and treatment, Defendants have no basis for seeking additional records and testimony that are protected by the psychotherapist-patient privilege, irrelevant to the claims and defenses in this case, not likely to lead to the discovery of admissible evidence, and otherwise of an extremely

sensitive nature. Plaintiffs respectfully ask this Court to issue a protective order barring Defendants from seeking medical and mental health records and testimony beyond the broad information Plaintiffs already have offered to produce.

Dated: October 18, 2016

Respectfully submitted,

/s/ Christopher A. Brook

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* Appearing by special appearance pursuant to L.R. 83.1(d).

CERTIFICATE OF SERVICE

I, Christopher A. Brook, hereby certify that on October 18, 2016, I electronically filed the foregoing MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR A PROTECTIVE ORDER, as well as the accompanying exhibits, using the CM/ECF system, and have verified that such filing was sent electronically using the CM/ECF system to all parties who have appeared with an email address of record.

/s/ Christopher A. Brook

Christopher A. Brook

**EXHIBIT A to MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR PROTECTIVE ORDER**

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

JOAQUIN CARCANO, <u>et al.</u> ,)	
)	
Plaintiffs,)	
)	
vs.)	CASE NO. 1:16-CV-00236-TDS-JEP
)	
PATRICK MCCRORY, in his official capacity)	
as Governor of North Carolina, <u>et al.</u> ,)	
)	
Defendants.)	

**425/236 DEFENDANT GROUP'S FIRST SET OF
REQUESTS FOR PRODUCTION OF DOCUMENTS
TO PLAINTIFFS IN CASE NO. 1:16-CV-00236**

Pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure and Rule 26.1 of the Rules of Practice and Procedure of the United States District Court for the Middle District of North Carolina (“Local Rules”), Defendants State of North Carolina, Patrick McCrory (in his official capacity of Governor of North Carolina), the North Carolina Department of Public Safety (“DPS”), along with Tim Moore (in his official capacity as Speaker of the North Carolina House of Representatives), Phil Berger (in his official capacity as President Pro Tempore of the North Carolina Senate), and North Carolinians for Privacy (collectively, “425/236 Defendant Group”) hereby request that Plaintiffs Joaquin Carcano, Payton Grey McGarry, H.S. (by her next friend and mother Kathryn Schafer), Angela Gilmore, Kelly Trent, Beverly Newell, and the American Civil Liberties Union of North Carolina produce the documents described below for inspection and copying at the offices of **Millberg Gordon Stewart PLLC, 1101 Haynes Street, Suite 104, Raleigh, NC 27604** in accordance with the schedule established by the Court in its

July 25, 2016 scheduling order, or at such other place and date as set forth by the Court or by agreement of the parties. Pursuant to the July 25, 2016 scheduling order, your responses and objections, if any, must be served within fourteen days of service of these requests, and production of documents must begin at that time. Production of documents responsive to this request must be completed within thirty days of service of these requests. Your responses and/or objections must conform to the requirements of Federal Rule of Civil Procedure 34(b)(2).

DEFINITIONS

1. “Communication” refers to all inquiries, discussions, conversations, negotiations, agreements, understandings, meetings, telephone conversations, voicemail messages, instant messages, text messages, emails, letters, notes, telegrams, advertisements, correspondence, memoranda, and other forms of verbal, written or electronic contact, including drafts, facsimiles, and copies, as well as originals.

2. “Concerning” means relating to, referring to, describing, evidencing, or constituting.

3. “Document” refers to the original and all non-identical copies of any handwritten, printed, typed, recorded or other graphic material, or electronically stored information (“ESI”) (as defined below) of any kind and nature, including all drafts and transcriptions thereof, however produced or reproduced, and including but not limited to accounting materials, accounts, agreements, analyses, appointment books, books of account, calendars, catalogs, checks, computer data, computer disks, contracts, correspondence, date books, diaries, diskettes, drawings, electronically generated or

stored information, e-mail messages, faxes, guidelines, instructions, inter-office communications, invoices, ledgers, letters, licenses, logs, manuals, memoranda, microfilm, minutes, notes, opinions, payments, plans, receipts, records, regulations, reports, sound recordings, statements, studies, surveys, telegrams, telexes, timesheets, vouchers, word processing materials (however stored or maintained) and working papers, and all other means by which information is stored for retrieval in fixed form. The term “document” has the broadest meaning possible consistent with the terms of the applicable Federal Rules of Civil Procedure.

4. “Electronically stored information” or “ESI” refers to information created, manipulated, communicated, stored, or utilized in digital form. ESI includes, without limitation, data stored on or in local computer servers, web-hosted computer servers (“cloud services” or “cloud servers”), computer desktops, laptops, handheld or tablet computers, portable digital media, backup media, CD-ROMs, DVD-ROMs, floppy discs, non-volatile memory including flash memory devices, external hard drives, personal digital assistants, Blackberry-type devices, smart phones, cell phones, electronic voicemail systems, text messages, instant messages, e-mails and attachments to e-mails, or any other device or medium capable of storing data in any format.

5. “You” refers to Joaquin Carcano, Payton Grey McGarry, H.S. (by her next friend and mother Kathryn Schafer), Angela Gilmore, Kelly Trent, Beverly Newell, and the American Civil Liberties Union of North Carolina, both individually and collectively. It also includes any party that may be added as a plaintiff in Case No. 1:16-CV-00236. Furthermore, with respect to the American Civil Liberties Union of North Carolina, it

refers to any other organization that is affiliated or connected with it, whether as a parent, subsidiary, affiliate, or otherwise.

6. “Lawsuit” refers to the actions pending in the United States District Court for the Middle District of North Carolina with Case Nos. 1:16-CV-00236, 1:16-CV-425, 1:16-CV-844, and 1:16-CV-845.

7. “Other Relevant Lawsuit” includes any civil litigation or administrative proceeding to which you or any entity or organization with which you are affiliated has ever been a party and that has involved claims or allegations of discrimination on the basis of an individual’s transgender status. It also includes any such civil litigation or administrative proceeding in which you filed an amicus curiae brief or otherwise submitted information to a court or tribunal.

8. “Person” refers to, without limitation, any natural person, firm, association, partnership, corporation, or any other form of legal entity.

9. “H.B. 2” refers to the North Carolina Public Facilities Privacy and Security Act, N.C. Session Law 2016-3.

10. “Defendants” refers to any party named as a defendant or that has intervened as a defendant in the actions pending in the United States District Court for the Middle District of North Carolina with Case Nos. 1:16-CV-00236 or 1:16-CV-425.

11. The following definitions apply to the statutory references herein: “Title VII” refers to Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241. “Title IV” refers to Title IV of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235. “Title IX” refers to Title IX of the Education Amendments of 1972, Pub. L.

No. 92-318, 86 Stat. 235. “VAWA” refers to Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54, and 42 U.S.C. § 13925.

12. The connectives “and” and “or” shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the request as much information as possible and shall not be interpreted to exclude information otherwise within the scope of the request. To effectuate this purpose, both conjunctives include the meaning “and/or.”

13. Any term that is not defined herein has its usual and customary meaning.

INSTRUCTIONS

The preceding definitions apply to each of the requests below for production of documents and any subsequent requests for production of documents unless specifically indicated otherwise.

1. You are required to obtain and furnish all information available to you and to any of your representatives, agents, employees, officers, accountants, or attorneys, and to obtain and furnish all information that is in your actual or constructive possession, custody, or control, or in the actual or constructive possession, custody, or control of any of your representatives, agents, employees, officers, accountants, or attorneys.

2. You are requested to produce each document in its entirety. If a document that is responsive to any request cannot be produced in full, it should be produced to the extent possible with an explanation of why production of the remainder is not possible.

3. These document productions are made subject to, and shall comply with, any and all protective orders and stipulations that are in effect in the Lawsuit at the time a production of documents is made as well as with the requirements of the Local Rules.

4. Documents should be produced by source, as kept in the ordinary course of business. Documents produced should be clearly identified so as to reflect their owner and custodian and the location from which they were produced.

5. If a document is no longer in your possession, custody, or control, identify the following: its date, author(s), recipient(s), subject matter(s), when such document was most recently in your possession, custody, or control, what disposition was made of the document, and the person or entity (if any) currently in possession, custody, or control of the document. If a document has been destroyed, identify its date of destruction, the person who destroyed the document, the person who directed that the document be destroyed, and the reason for its destruction.

6. Each request is continuing in nature. If, after responding to these requests, you obtain or become aware of additional documents responsive to any request, such documents should be produced promptly in accordance with Fed. R. Civ. P. 34 and these definitions and instructions.

7. If a claim of privilege is asserted in response to any request, and a document is not provided on the basis of such assertion, you should provide the following information with respect to such document: (i) the type of document or tangible thing, *e.g.*, letter or memorandum; (ii) the general subject matter of the document; (iii) the date of the document; (iv) the author, addressees, and other recipients of the document; and

(v) the basis of your asserted privilege. If a portion of any responsive document is claimed to be protected from disclosure by any privilege or other protection, any such document should be produced with appropriate redactions.

8. If you object to any request, your objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest.

9. Some of the requests may overlap. No inference is to be drawn from the fact that two or more requests (or parts of requests) might appear to request the same documents or tangible things.

10. The singular form of a word should alternatively be interpreted as the plural form (and vice versa) whenever necessary to bring documents or tangible things within the scope of a request that might otherwise be construed to be outside its scope.

11. These requests call for documents or tangible things created, modified, sent, or received on or after January 1, 2012, unless some other time period is specified within a particular request, or is implied by the specific subject matter of a request.

12. If you encounter any ambiguity in construing a request, or any definition or instruction relevant to a request, you should set forth the matter deemed ambiguous and the construction you adopted to respond to the request.

13. All communications and documents produced should conform to the following requirements, unless the parties mutually agree to alternative forms of production:

a. Images: Hard-copy scanned documents (“Hard-copy”) and ESI shall be produced with images delivered as single-page 300-dpi-resolution Group IV TIF format (“TIFF”). Each image should have a unique file name and should be named with the beginning Bates number assigned to it. Image file names should not contain spaces.

b. Text: Text should be produced in the form of document-level “.TXT” files. Text from Hard-copy documents should be obtained by utilizing optical character recognition (“OCR”), and text from ESI should be produced as extracted full text. Text from redacted pages may be obtained by utilizing OCR rather than produced as extracted full text.

c. Native Files: Spreadsheets (*e.g.*, Excel), databases (*e.g.*, Microsoft Access and Microsoft Project), presentations (*e.g.*, Microsoft PowerPoint), emails (*e.g.*, Microsoft Outlook), audio/visual files, and any other file types that are not readily useful when imaged or printed, should be produced in native format with a cross-link DAT file to a Bates- stamped placeholder sheet.

d. Parent-Child Relationships: Parent-child relationships (the association between an attachment and its parent record) should be preserved and produced.

e. Load Files: Database load files should consist of: (1) a comma-delimited values (“.DAT”) file containing the fields identified in the following paragraph; and (2) an Opticon (“.OPT”) file to facilitate the loading of TIFF images. All load files should be named to match the production volume name. Bates numbers and production

volume names must not be duplicated and should run consecutively throughout the entirety of the production(s).

f. Load Files Format: The first line of the DAT file should contain metadata field headers, and below the first line there should be only one line for each record. Each subsequent line must contain the same number of fields as the field header line. The database structure should be maintained across the entire document production. Database load files should be produced in Concordance default format, which consists of the following characters:

- (i.) ASCII code 020 (“ ”) is used as a comma;
 - (ii.) ASCII code 254 (“þ”) is used as a text qualifier (or “quote”);
- and
- (iii.) ASCII code 174 (“0”) denotes a new line.

g. Data Structure: Images should be provided within a root-level folder named “Images” containing reasonably structured subfolders (preferably not to exceed 2,000 images per subfolder), text files should be provided in a single root-level folder named “Text,” native files should be provided in a single root-level folder named “Natives,” and load files should be provided in a root-level folder named “Data.”

h. Metadata: You shall provide the following metadata fields (where a listed field would contain more than one type of data, you may produce the data in separate fields):

- (i.) Beginning Bates Number;
- (ii.) Ending Bates Number;

- (iii.) Beginning Attachment Bates Number;
- (iv.) Ending Attachment Bates Number;
- (v.) Custodian Name;
- (vi.) Confidentiality Designation (if any);
- (vii.) To;
- (viii) From / Author;
- (ix.) cc;
- (x.) BCC;
- (xi) Subject / Filename;
- (xii.) Created Date;
- (xiii.) Modified Date;
- (xiv.) Sent Date;
- (xv.) Sent Time;
- (xvi.) Page Count;
- (xvii.) File Extension
- (xviii.) Nativelink (populated where applicable); and
- (xix.) Text.

i. Objective Coding Fields: For Hard-copy documents, the following Objective Coding Fields should be provided:

- (i.) Beginning Bates Number;
- (ii.) Ending Bates Number;
- (iii.) Beginning Attachment Bates Number;

- (iv.) Ending Attachment Bates Number;
- (v.) Confidentiality Designation (if any); and
- (vi.) Source/Custodian/Location/Box/Folder.

DOCUMENTS TO BE PRODUCED

1. Any and all documents reviewed or relied upon by any witness you intend to call as an expert witness in this Lawsuit, including any articles, texts, treatises, rules, policies, and regulations.

RESPONSE:

2. Any and all items, documents, and things, including any audio and/or video recordings, photographs, electronic documents, data, and summaries, that you intend or reserve the right to introduce into evidence at any hearing or trial in this Lawsuit.

RESPONSE:

3. Any and all items, documents, and things, including any audio and/or video recordings, photographs, electronic documents, data, and summaries, reviewed by any witness prior to testifying at any deposition, hearing, or trial in this Lawsuit.

RESPONSE:

4. A copy of any and all document retention policies utilized by the American Civil Liberties Union of North Carolina.

RESPONSE:

5. All documents obtained from third parties, whether by subpoena or otherwise, in connection with this Lawsuit.

RESPONSE:

6. All documents relating to treatment for any gender-, sexuality-, or reproductive-system-related medical or mental health condition, for the following named individuals:

- a. Joaquin Carcaño;
- b. Payton Grey McGarry;
- c. H.S.;
- d. Angela Gilmore;
- e. Kelly Trent;
- f. Beverly Newell.

RESPONSE:

7. All documents relating to any written or oral complaints made by you or anyone else to any local, state, or federal government entity, or any non-governmental entity or organization, regarding any provision of H.B. 2.

RESPONSE:

8. All documents relating to your contention that transgender individuals have experienced systematic historical discrimination.

RESPONSE:

9. All documents relating to any federal court or administrative body which has interpreted the word “sex” in Title VII or Title IX to cover “gender identity,” as you define the term in your Amended Complaint or as defined in any other way, or has determined that “gender identity” is protected under Title IV or the Equal Protection Clause of the United States Constitution.

RESPONSE:

10. All documents relating to your claim that “gender identity,” as you define the term in your Amended Complaint or as defined in any other way, is protected by the

prohibition against discrimination on the basis of “sex” contained in Title IX or the Equal Protection Clause of the United States Constitution or is protected under Title IV.

RESPONSE:

11. All documents relating to any communication, whether written or oral, between you and any third party regarding the case captioned, *G.G., by his next friend and mother, Deirdre Grimm v. Gloucester County School Board*, whether denominated by the Eastern District of Virginia case number 4:15cv54, or the United States Court of Appeals appeal number 15-2056, or the United States Supreme Court number 16A52.

RESPONSE:

12. All documents evidencing or relating to your communications with schools, school districts, colleges and universities, or any other educational institution regarding the scope of Title IX’s prohibition against discrimination on the basis of sex.

RESPONSE:

13. All documents relating to any decision or determination you have made to define “gender” or “gender identity” as encompassing any category or designation other than “male” or “female.”

RESPONSE:

14. All documents developed or submitted by you relating to the development and promulgation of any policy of any federal agency, educational institution, or other instrumentality regarding transgender or intersex individuals, including but not limited to their access to bathrooms, locker rooms, and showers.

RESPONSE:

15. All documents containing or relating to any communication between you and any member of the North Carolina Legislature pertaining in any way to the Charlotte non-discrimination ordinance referenced your Amended Complaint or pertaining to H.B. 2.

RESPONSE:

16. All documents containing or relating to any communication between you and any member of the Charlotte City Council pertaining in any way to the Charlotte non-discrimination ordinance referenced in your Amended Complaint or pertaining to H.B. 2.

RESPONSE:

17. All documents containing or relating to any communication between you and Jennifer Roberts or Daniel G. Clodfelter pertaining in any way to the Charlotte non-discrimination ordinance referenced in your Amended Complaint or pertaining to H.B. 2.

RESPONSE:

18. All documents containing or relating to any communication between you and any employee of the City of Charlotte pertaining in any way to the Charlotte non-discrimination ordinance referenced in your Amended Complaint or pertaining to H.B. 2.

RESPONSE:

19. All documents containing or relating to any communication between you and any employee of the United States government pertaining in any way to the Charlotte non-discrimination ordinance referenced in your Amended Complaint or pertaining to H.B. 2.

RESPONSE:

20. All documents containing or relating to any communication between you and any employee of the United States Government pertaining in any way to the

withdrawal or suspension of federal funding from North Carolina because of H.B. 2 or because of its position on transgender access to public facilities.

RESPONSE:

21. All documents containing or relating to any communication between you and any employee of the United States government pertaining in any way to the withdrawal or suspension of federal funding from any other state, educational institution, or school district because of its position on transgender access to restrooms, locker rooms, or shower facilities.

RESPONSE:

22. All documents concerning any communications or documents identified in your response to any interrogatory propounded by the 425/236 Defendant Group during the course of this action.

RESPONSE:

23. All documents produced to you or produced by you in discovery, or otherwise, in connection with any Other Relevant Lawsuit.

RESPONSE:

24. All transcripts of depositions taken in connection with any Other Relevant Lawsuit.

RESPONSE:

25. All pleadings, discovery requests (including, but not limited to, requests for the production of documents, interrogatories, and requests for admissions), and responses thereto in connection with any Other Relevant Lawsuit.

RESPONSE:

26. All expert reports, exhibits, and other disclosures produced, served, or filed in connection with any Other Relevant Lawsuit.

RESPONSE:

27. The employer personnel files of the following plaintiffs:

- a. Joaquin Carcaño
- b. Payton Grey McGarry;
- c. Angela Gilmore;
- d. Kelly Trent;
- e. Beverly Newell.

RESPONSE:

28. The academic files or other similar files maintained by any educational institution attended by either Payton Grey McGarry or H.S. that refer to either such individual.

RESPONSE:

29. Any and all communications, including press releases and public statements, sent to or by you concerning the Charlotte Ordinance referenced in your Amended Complaint.

RESPONSE:

30. Any statement in your possession, including press releases, interviews, and audio and/or visual recordings, which you contend is a statement made by any of the

Defendants regarding H.B. 2 or that you contend represents evidence of any illegal animus or prejudice relevant to the passage and enforcement of H.B. 2.

RESPONSE:

31. Any other document in your possession that has not already been requested above that relates to your allegations or claims in the Lawsuit.

RESPONSE:

32. Any document, item, or thing produced to any other party as part of discovery in the Lawsuit.

RESPONSE:

Respectfully submitted, this 12th day of August, 2016.

By: /s/ Karl S. Bowers, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, I served the foregoing document upon all counsel of record.

This the 12th day of August, 2016.

By: /s/ William W. Stewart, Jr.
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**EXHIBIT B to MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR PROTECTIVE ORDER**

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

JOAQUÍN CARCAÑO, *et al.*,

Plaintiffs,

v.

PATRICK MCCRORY, *et al.*,

Defendants,

and

PHIL BERGER, *et al.*,

Intervenor-Defendants.

No. 1:16-cv-00236-TDS-JEP

**PLAINTIFFS' OBJECTIONS AND RESPONSES TO
DEFENDANT MCCRORY'S AND INTERVENOR-DEFENDANTS BERGER
AND MOORE'S FIRST SET OF REQUESTS FOR PRODUCTION OF
DOCUMENTS**

Pursuant to Federal Rule of Civil Procedure 34, Plaintiffs Joaquín Carcaño, et al. ("Plaintiffs") hereby respond to the 425/236 Defendant Group's First Set of Requests for Production of Documents.

GENERAL OBJECTIONS

The following General Objections to the document requests are incorporated by reference into each of Plaintiffs' responses set forth below:

1. Plaintiffs object to any document request, including the definitions and instructions, to the extent it seeks production of documents covered by the attorney-client privilege, the attorney work-product doctrine, the common interest privilege, or any other applicable privilege or doctrine. Plaintiffs object to the extent that any document request seeks documents from Jenner & Block LLP, Lambda Legal Defense and Education Fund, American Civil Liberties Union of North Carolina Legal Foundation, or the American Civil Liberties Union Foundation in their capacity as counsel to Plaintiffs or counsel or potential counsel to other individuals or organizations or clients not named in this lawsuit. Any inadvertent disclosure of such information shall not be deemed a waiver of the attorney-client privilege, the attorney work-product doctrine, or any other applicable privilege or doctrine. Particularly in light of the expedited discovery and trial schedule in this case, Plaintiffs will not log or produce: (i) internal communications within or among Jenner & Block LLP, Lambda Legal Defense and Education Fund, American Civil Liberties Union of North Carolina Legal Foundation, or the American Civil Liberties Union Foundation, (ii) internal communications among counsel for the *Carcaño* plaintiffs and the United States; (iii) communications with any retained or potential clients; or (iv) communications with any retained or potential experts protected from disclosure, including but not limited to communications that are protected pursuant to Rule 26 of the Federal Rules of Civil Procedure.

2. Plaintiffs object to any document request, including the definitions and instructions, to the extent it seeks documents from Jenner & Block LLP, Lambda Legal

Defense and Education Fund, American Civil Liberties Union of North Carolina Legal Foundation, or the American Civil Liberties Union Foundation that were generated or obtained outside their work on this litigation, and will not log or produce such documents because that request is overbroad, unduly burdensome, and does not seek relevant information.

3. Plaintiffs object to any document request to the extent it imposes obligations beyond those set forth in Rule 34 of the Federal Rules of Civil Procedure.

4. Plaintiffs object to any document request to the extent it is ambiguous, duplicative, and/or vague.

5. Plaintiffs object to any document request to the extent it is overbroad and/or unduly burdensome.

6. Plaintiffs object to any document request to the extent it requests documents or information that are outside the scope of the allegations made in Plaintiffs' First Amended Complaint or Second Amended Complaint.

7. Plaintiffs object to any document request to the extent it seeks information and documents already in Defendants' possession or equally available to Defendants from other sources that are more convenient, less burdensome, and/or less expensive.

8. Plaintiffs object to the definition of "You" as overbroad and improperly directed at persons or organizations not party to this lawsuit and not subject to any discovery obligations to Defendants. Plaintiffs object to the inclusion of Kelly Trent and Beverly Newell in the definition of "You" and to any specific request referencing them,

as it is anticipated that both will no longer be plaintiffs in this case, as indicated in Plaintiffs' Second Amended Complaint (ECF No. 116). Plaintiffs further object to the definition of "You" with respect to the American Civil Liberties Union of North Carolina, regarding the definition's inclusion of "any other organization that is affiliated or connected with it, whether as a parent, subsidiary, affiliate, or otherwise." The American Civil Liberties Union of North Carolina is an independent 501(c)(4) entity, with no parent. It is incorporated and governed separately from any other entity, including the national ACLU and ACLU-affiliated organizations across the country. Plaintiffs construe Defendants' requests to apply to the named plaintiffs only, and not to any affiliated or connected entity. Plaintiffs further object to the definition of "You" to the extent that it includes Jenner & Block LLP, Lambda Legal Defense and Education Fund, American Civil Liberties Union Foundation of North Carolina Legal Foundation, or the American Civil Liberties Union Foundation in their capacity as counsel to other named plaintiffs or counsel or potential counsel to other individuals or organizations or clients not named in this lawsuit.

9. Plaintiffs object to the definition of "Other Relevant Lawsuits" insofar as it incorporates civil litigation or administrative suits in which "any entity or organization with which you are affiliated has ever been a party." The named plaintiffs are separate, distinct people and organizations, and construe Defendants' requests to apply to the named plaintiffs only, and not to any affiliated or connected entity. Moreover, Plaintiffs object to the definition of "Other Relevant Lawsuits" including proceedings in which

Plaintiffs have “filed an amicus curiae brief or otherwise submitted information to a court or tribunal” as overbroad, unduly burdensome, and not seeking relevant information.

10. By agreeing to search for and produce documents responsive to any particular request, Plaintiffs do not represent that such documents exist or that they are in the possession, custody, or control of Plaintiffs, or that all documents responsive to the request fall within the permissible scope of discovery or will be produced.

11. Plaintiffs object to any document request to the extent that it seeks documents not in Plaintiffs’ possession, custody, or control.

12. Plaintiffs do not concede admissibility, relevance, or completeness of any documents produced, and reserve any and all objections to the use or admissibility in any proceedings of any information, material, documents, or communications identified, produced, or disclosed in response to these requests.

13. Plaintiffs object to any document request to the extent that it seeks to require the creation of documents or the compilation of documents in a manner different from the manner in which they are ordinarily maintained.

14. Plaintiffs object to the extent any document request contains factually inaccurate information and statements, is argumentative, is predicated on erroneous assumptions, or states or assumes legal conclusions. Plaintiffs object to any factual assertions and assumptions in these document requests, and by responding to these requests Plaintiffs do not admit that Defendants’ characterizations or assumptions are accurate or true.

15. Plaintiffs object to the extent the requests seek “all documents or communications” as being overbroad, vague, unduly burdensome, and not seeking relevant information. Subject to objections, and as set forth below, Plaintiffs will produce non-privileged, relevant, responsive documents that they have been able to gather in response to Defendants’ discovery requests after a reasonable search conducted in good faith.

16. Plaintiffs object to the time period for the requests beginning on January 1, 2012, as overly broad, burdensome, and not likely to lead to the discovery of admissible evidence, and will instead produce any non-privileged, responsive documents beginning on January 1, 2014.

17. Plaintiffs object to “Instructions” and “Definitions” to the extent that they instruct Plaintiffs to organize, label, or produce documents or electronically-stored information in a manner that purports to impose discovery obligations beyond those imposed by applicable laws and rules or that is unduly burdensome.

18. Plaintiffs object to any document request to the extent that it seeks documents that contain personally identifying information, medical information, or other information of a confidential or sensitive nature or that, if released, might subject Plaintiffs to harassment. Subject to any other General or Specific objection, and without waiving their rights to redact any such personally identifying information, medical information, or other confidential or sensitive information, Plaintiffs are willing to

produce such documents to the extent that they are responsive and that an appropriate Protective Order limiting the disclosure of such documents is entered by the Court.

19. Plaintiffs object to any document request to the extent that it is premature or that it imposes discovery obligations on a more accelerated timeline than set forth by the Court in its Pretrial Scheduling Order (ECF No. 96), and Plaintiffs reserve the right to supplement their document productions with documents identified beyond the time allotted for discovery.

20. Plaintiffs object to any document request as overbroad and unduly burdensome to the extent that it seeks drafts, temporary or system copies, or other unfinished or non-public versions of documents.

21. Subject to and without waiving the foregoing general objections, Plaintiffs set forth below specific responses and objections to the requests.

* * *

SPECIFIC OBJECTIONS AND RESPONSES

Request No. 1. Any and all documents reviewed or relied upon by any witness you intend to call as an expert witness in this Lawsuit, including any articles, texts, treatises, rules, policies, and regulations.

RESPONSE: Plaintiffs object to this request as overbroad, vague, and unduly burdensome to the extent that it encompasses documents reviewed or relied upon in other litigation. Subject to the General and Specific objections, Plaintiffs will produce documents reflecting facts or data reviewed or relied upon by any witness they intend to call as an expert witness, to the extent that the documents were reviewed or relied upon in forming the expert witness's opinions in this litigation, and to the extent that such documents have not already been produced by any Defendant or Intervenor-Defendant in this litigation.

Request No. 2. Any and all items, documents, and things, including any audio and/or video recordings, photographs, electronic documents, data, and summaries, that you intend or reserve the right to introduce into evidence at any hearing or trial in this Lawsuit.

RESPONSE: Subject to the General objections, Plaintiffs will produce documents responsive to this request.

Request No. 3. Any and all items, documents, and things, including any audio and/or video recordings, photographs, electronic documents, data, and summaries, reviewed by any witness prior to testifying at any deposition, hearing, or trial in this Lawsuit.

RESPONSE: Plaintiffs object to this request as overbroad, vague, and unduly burdensome. Plaintiffs further object to the extent the request seeks documents protected by the attorney-client privilege or the attorney work-product doctrine. Subject to the General and Specific objections, Plaintiffs will provide copies of any documents used to refresh the recollection of any witness, to the extent they are not protected by the attorney-client privilege or attorney work-product doctrine.

Request No. 4. A copy of any and all document retention policies utilized by the American Civil Liberties Union of North Carolina.

RESPONSE: Subject to the General objections, Plaintiffs will produce documents responsive to this request.

Request No. 5. All documents obtained from third parties, whether by subpoena or otherwise, in connection with this Lawsuit.

RESPONSE: Plaintiffs object to this request as overbroad, vague, and unduly burdensome. Plaintiffs further object to this request to the extent it seeks documents protected by the common interest attorney-client privilege or common interest attorney work-product doctrine. Subject to the General and Specific objections, Plaintiffs will produce to all Defendants and Intervenor-Defendants, any document that is produced by one Defendant or Intervenor-Defendant to the extent that it is not produced to any other Defendant or Intervenor-Defendant, and any document they obtain from a third party by subpoena through discovery in this case.

Request No. 6. All documents relating to treatment for any gender, sexuality-, or reproductive-system-related medical or mental health condition, for the following named individuals:

- a. Joaquin Carcaño;**
- b. Payton Grey McGarry;**
- c. H.S.;**
- d. Angela Gilmore;**
- e. Kelly Trent;**
- f. Beverly Newell.**

RESPONSE: Plaintiffs object to this request as overbroad and unduly burdensome. Plaintiffs further object to the inclusion of Angela Gilmore, Kelly Trent, and Beverly Newell in this request; Angela Gilmore’s medical history is not at issue in this case, and Kelly Trent and Beverly Newell intend to no longer be plaintiffs in this case. Any “gender, sexuality-, or reproductive-system-related medical or mental health condition” of Plaintiffs Carcaño, McGarry, and H.S. apart from gender dysphoria is not at issue in this case. Subject to the General and Specific objections, Plaintiffs will produce documents sufficient to show Joaquín Carcaño’s, Payton Grey McGarry’s, and H.S.’s diagnosis of gender dysphoria.

Request No. 7. All documents relating to any written or oral complaints made by you or anyone else to any local, state, or federal government entity, or any non-governmental entity or organization, regarding any provision of H.B. 2.

RESPONSE: Plaintiffs object to this request as overbroad and vague. Plaintiffs further object to this request to the extent it seeks complaints made by “anyone else” or

that are not in Plaintiffs' possession, custody, or control. Subject to the General and Specific objections, Plaintiffs will produce responsive documents.

Request No. 8. All documents relating to your contention that transgender individuals have experienced systematic historical discrimination.

RESPONSE: Plaintiffs object to this request as overbroad and unduly burdensome. Plaintiffs further object to this request to the extent it seeks information in the public domain to which Defendants have access. Subject to the General and Specific objections, Plaintiffs will produce responsive documents.

Request No. 9. All documents relating to any federal court or administrative body which has interpreted the word "sex" in Title VII or Title IX to cover "gender identity," as you define the term in your Amended Complaint or as defined in any other way, or has determined that "gender identity" is protected under Title IV or the Equal Protection Clause of the United States Constitution.

RESPONSE: Plaintiffs object to this request as overbroad, unduly burdensome, and seeking documents not in Plaintiffs' custody or control. Plaintiffs further object to this request as seeking publicly available legal authority.

Request No. 10. All documents relating to your claim that "gender identity," as you define the term in your Amended Complaint or as defined in any other way, is protected by the prohibition against discrimination on the basis of "sex" contained in Title IX or the Equal Protection Clause of the United States Constitution or is protected under Title IV.

RESPONSE: Plaintiffs object to this request as overbroad, unduly burdensome, and seeking documents not in Plaintiffs' custody or control. Plaintiffs further object to this request as seeking publicly available legal authority.

Request No. 11. All documents relating to any communication, whether written or oral, between you and any third party regarding the case captioned, G.G., by his next friend and mother, Deirdre Grimm v. Gloucester County School Board, whether denominated by the Eastern District of Virginia case number 4:15cv54, or the United States Court of Appeals appeal number 15-2056, or the United States Supreme Court number 16A52.

RESPONSE: Plaintiffs object to this request as overbroad, unduly burdensome, and seeking irrelevant information. Plaintiffs further object to the request to the extent it seeks information protected by the attorney-client privilege or the attorney work-product doctrine.

Request No. 12. All documents evidencing or relating to your communications with schools, school districts, colleges and universities, or any other educational institution regarding the scope of Title IX's prohibition against discrimination on the basis of sex.

RESPONSE: Subject to the General objections, Plaintiffs will produce documents responsive to this request.

Request No. 13. All documents relating to any decision or determination you have made to define "gender" or "gender identity" as encompassing any category or designation other than "male" or "female."

RESPONSE: Plaintiffs object to this request to the extent it seeks information from the United States, rather than documents in Plaintiffs' custody and control. Subject to the General and Specific objections, Plaintiffs will produce documents responsive to this request.

Request No. 14. All documents developed or submitted by you relating to the development and promulgation of any policy of any federal agency, educational institution, or other instrumentality regarding transgender or intersex individuals, including but not limited to their access to bathrooms, locker rooms, and showers.

RESPONSE: Plaintiffs object to this request as overbroad and unduly burdensome. Subject to the General and Specific objections, Plaintiffs will produce documents responsive to this request.

Request No. 15. All documents containing or relating to any communication between you and any member of the North Carolina Legislature pertaining in any way to the Charlotte non-discrimination ordinance referenced your Amended Complaint or pertaining to H.B. 2.

RESPONSE: Plaintiffs object to this request as overbroad and unduly burdensome. Subject to the General and Specific objections, Plaintiffs will produce documents responsive to this request.

Request No. 16. All documents containing or relating to any communication between you and any member of the Charlotte City Council pertaining in any way to the Charlotte non-discrimination ordinance referenced in your Amended Complaint or pertaining to H.B. 2.

RESPONSE: Plaintiffs object to this request as overbroad and unduly burdensome. Subject to the General and Specific objections, Plaintiffs will produce documents responsive to this request.

Request No. 17. All documents containing or relating to any communication between you and Jennifer Roberts or Daniel G. Clodfelter pertaining in any way to the Charlotte non- discrimination ordinance referenced in your Amended Complaint or pertaining to H.B. 2.

RESPONSE: Plaintiffs object to this request as overbroad and unduly burdensome. Subject to the General and Specific objections, Plaintiffs will produce documents responsive to this request.

Request No. 18. All documents containing or relating to any communication between you and any employee of the City of Charlotte pertaining in any way to the Charlotte non- discrimination ordinance referenced in your Amended Complaint or pertaining to H.B. 2.

RESPONSE: Plaintiffs object to this request as overbroad and unduly burdensome. Subject to the General and Specific objections, Plaintiffs will produce documents responsive to this request.

Request No. 19. All documents containing or relating to any communication between you and any employee of the United States government pertaining in any way to the Charlotte non-discrimination ordinance referenced in your Amended Complaint or pertaining to H.B. 2.

RESPONSE: Plaintiffs object to this request as overbroad, unduly burdensome, and seeking irrelevant information. Plaintiffs further object to this request as seeking

documents protected by the attorney-client privilege and the attorney work-product doctrine.

Request No. 20. All documents containing or relating to any communication between you and any employee of the United States Government pertaining in any way to the withdrawal or suspension of federal funding from North Carolina because of H.B. 2 or because of its position on transgender access to public facilities.

RESPONSE: Plaintiffs object to this request as overbroad, unduly burdensome, and seeking irrelevant information. Plaintiffs further object to this request as seeking documents protected by the attorney-client privilege and the attorney work-product doctrine.

Request No. 21. All documents containing or relating to any communication between you and any employee of the United States government pertaining in any way to the withdrawal or suspension of federal funding from any other state, educational institution, or school district because of its position on transgender access to restrooms, locker rooms, or shower facilities.

RESPONSE: Plaintiffs object to this request as overbroad, unduly burdensome, and seeking irrelevant information. Plaintiffs further object to this request as seeking documents protected by the attorney-client privilege and the attorney work-product doctrine.

Request No. 22. All documents concerning any communications or documents identified in your response to any interrogatory propounded by the 425/236 Defendant Group during the course of this action.

RESPONSE: Plaintiffs object insofar as no interrogatories have been served, and will reserve the right to respond and object if and when it is served any interrogatories in this case.

Request No. 23. All documents produced to you or produced by you in discovery, or otherwise, in connection with any Other Relevant Lawsuit.

RESPONSE: Plaintiffs object to the request as overbroad, unduly burdensome, and not seeking relevant information. Subject to the General and Specific objections, including Plaintiffs' General Objections to the definitions of "You" and "Other Relevant Lawsuits," Plaintiffs will produce documents responsive to this request.

Request No. 24. All transcripts of depositions taken in connection with any Other Relevant Lawsuit.

RESPONSE: Plaintiffs object to the request as overbroad, unduly burdensome, and not seeking relevant information. Subject to the General and Specific objections, including Plaintiffs' General objections to the definitions of "You" and "Other Relevant Lawsuits," Plaintiffs will produce documents responsive to this request.

Request No. 25. All pleadings, discovery requests (including, but not limited to, requests for the production of documents, interrogatories, and requests for admissions), and responses thereto in connection with any Other Relevant Lawsuit.

RESPONSE: Plaintiffs object to the request as overbroad, unduly burdensome, and not seeking relevant information. Subject to the General and Specific objections,

including Plaintiffs' General objections to the definitions of "You" and "Other Relevant Lawsuits," Plaintiffs will produce documents responsive to this request.

Request No. 26. All expert reports, exhibits, and other disclosures produced, served, or filed in connection with any Other Relevant Lawsuit.

RESPONSE: Plaintiffs object to the request as overbroad, unduly burdensome, and not seeking relevant information. Subject to the General and Specific objections, including Plaintiffs' General objections to the definitions of "You" and "Other Relevant Lawsuits," Plaintiffs will produce documents responsive to this request.

Request No. 27. The employer personnel files of the following plaintiffs:

- a. Joaquin Carcaño**
- b. Payton Grey McGarry;**
- c. Angela Gilmore;**
- d. Kelly Trent;**
- e. Beverly Newell.**

RESPONSE: Plaintiffs object to the request as overbroad, unduly burdensome, and not seeking relevant information. The personnel files of Joaquin Carcaño are not in plaintiffs' custody or control, but rather are in the custody and control of the UNC Defendants in this case. The personnel files of Joaquín Carcaño, Payton Grey McGarry, and Angela Gilmore are not relevant to any claim or defense in this case. Kelly Trent and Beverly Newell no longer intend to be plaintiffs in this case.

Request No. 28. The academic files or other similar files maintained by any educational institution attended by either Payton Grey McGarry or H.S. that refer to either such individual.

RESPONSE: Plaintiffs object to this request as overbroad, vague, unduly burdensome, seeking irrelevant information, and seeking information the request itself notes are maintained by educational institutions, and therefore not in Plaintiffs' custody and control.

Request No. 29. Any and all communications, including press releases and public statements, sent to or by you concerning the Charlotte Ordinance referenced in your Amended Complaint.

RESPONSE: Plaintiffs object to this request as overbroad, vague, and unduly burdensome. Subject to the General and Specific objections, Plaintiffs will produce documents responsive to this request.

Request No. 30. Any statement in your possession, including press releases, interviews, and audio and/or visual recordings, which you contend is a statement made by any of the Defendants regarding H.B. 2 or that you contend represents evidence of any illegal animus or prejudice relevant to the passage and enforcement of H.B. 2.

RESPONSE: Subject to the General objections, and to the extent that such documents are in their possession, custody, or control, Plaintiffs will produce documents sufficient to show statements made by Defendants regarding H.B. 2 that evidence animus or prejudice relevant to the passage and enforcement of H.B. 2.

Request No. 31. Any other document in your possession that has not already been requested above that relates to your allegations or claims in the Lawsuit.

RESPONSE: Plaintiffs object to this request as overbroad, vague, insufficiently specific or tailored, and unduly burdensome.

Request No. 32. Any document, item, or thing produced to any other party as part of discovery in the Lawsuit.

RESPONSE: Subject to the General objections, Plaintiffs will produce to all Defendants and Intervenor-Defendants any document that Plaintiffs produce to any other party through discovery in this case.

* * *

Dated: August 26, 2016

Respectfully submitted,

/s/ Scott B. Wilkens

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Counsel for Plaintiffs

* Appearing by special appearance pursuant to L.R. 83.1(d).

CERTIFICATE OF SERVICE

I, Scott B. Wilkens, hereby certify that on August 26, 2016, I caused a copy of PLAINTIFFS' OBJECTIONS AND RESPONSES TO DEFENDANT MCCRORY'S AND INTERVENOR-DEFENDANTS BERGER AND MOORE'S FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS to be distributed via electronic mail to all parties of record in case numbers 1:16-cv-00236, 1:16-cv-00425, and 1:16-cv-00845.

/s/ Scott B. Wilkens
Scott B. Wilkens

EXHIBIT C to MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PROTECTIVE ORDER

From: [Driscoll, Robert](#)
To: [Lori Kisch](#); [Wilkins, Scott B.](#); [Bowers, Karl](#); [Stephens, Bob](#); [Stewart, William](#); [Duncan, Kyle](#); [Schaerr, Gene](#)
Cc: [Corey Stoughton](#); [Alyssa Lareau](#); [Tara Borelli](#); [Elizabeth Gill](#); [Whitney Pellegrino](#); [Taryn Null](#); [Torey Cummings](#); [Corey Stoughton](#); [Monahan, Camille \(CRT\)](#)
Subject: RE: Defendants" (Governor McCrory"s & Intervenors") Request for Medical Records
Date: Tuesday, September 20, 2016 12:40:23 PM

Lori:

I write to help set the table for a productive meet and confer order on the issue of medical records. In some respects, it is strange as defense counsel to be setting forth these justifications, as plaintiffs and DOJ are in control of what had been alleged, which is what drives discovery. Regardless, here are the types of medical records we would seek from all witness who would testify about any harm HB2 has caused them.

1. Records related to any diagnoses of gender dysphoria and treatment for gender dysphoria, including the basis for the diagnoses.
2. Records related to any diagnoses of a sex development disorder, recognized by DSM V as one possible basis for a gender dysphoria diagnosis.
3. Records related to any co-occurring mental health or physical disorders.
4. Records sufficient to explore whether any harm allegedly caused by HB2 might have another cause, in whole or in part. Thus, if a witness is "afraid" to use the bathroom, allegedly due to HB2, it would be relevant if, hypothetically, he or she were previously diagnosed with Generalized Anxiety Disorder or other conditions that may cause fear and anxiety.
5. As for questions, it is impossible, in advance of depositions to know what will come up, but I think it is safe to say alternative causes of any harm will be explored if a witness alleges harm. Thus, "have you been diagnosed or are you being treated for any other mental health issues" or some formulation thereof, would be a fair question if mental anguish is alleged. "Have you previously been treated for kidney or urinary tract issues" would be appropriate if kidney damage were alleged. I could give more examples, but I'm sure you understand.
6. Additionally, for those who allege that they have gender dysphoria, questions such as, "what stage of transition are you?" , "are you taking cross-sex hormones and for how long?" , "are you under a doctor's care for gender dysphoria?" , or "is using a particular bathroom part any treatment plan?" would be appropriate.
7. We still need contact information (or name of lawyer) for HK, AT, CW, DB, AN, Paige Dula, and Alaina Kupec. Also we need confirmation that Beverly Newell and Kelly Trent will not be witness (we understand that have withdrawn as plaintiffs).

We are free tomorrow afternoon for a meet and confer. Let me know if you want me to send a call-

in to this group,

Bob

From: Kisch, Lori (CRT) [mailto:Lori.Kisch@usdoj.gov]

Sent: Monday, September 19, 2016 3:37 PM

To: Wilkens, Scott B. <SWilkens@jenner.com>; Bowers, Karl <butch@butchbowers.com>; Stephens, Bob <bob.stephens@nc.gov>; Driscoll, Robert <rdriscoll@mcglinchey.com>; Stewart, William <bstewart@mgsattorneys.com>; Duncan, Kyle <KDuncan@Schaerr-Duncan.com>; Schaerr, Gene <GSchaerr@Schaerr-Duncan.com>

Cc: Stoughton, Corey (CRT) <Corey.Stoughton@usdoj.gov>; Lareau, Alyssa (CRT) <Alyssa.Lareau@usdoj.gov>; Tara Borelli <tborelli@lambdalegal.org>; Elizabeth Gill <egill@aclunc.org>; Pellegrino, Whitney (CRT) <Whitney.Pellegrino@usdoj.gov>; Null, Taryn Wilgus (CRT) <Taryn.Null@usdoj.gov>; Cummings, Torey (CRT) <Torey.Cummings@usdoj.gov>; Stoughton, Corey (CRT) <Corey.Stoughton@usdoj.gov>; Monahan, Camille (CRT) <Camille.Monahan@usdoj.gov>

Subject: RE: Defendants' (Governor McCrory's & Intervenors') Request for Medical Records

All,

Following up on the email sent by the Carcano Plaintiffs this morning, the United States requests that Defendants provide the United States with information regarding any medical records Defendants intend to seek from the United States' non-party witnesses. In light of Judge Peake's instruction that any issue before her on medical records should directly relate to the specific issues in dispute, rather than a general discussion of the issues, the United States requests that Defendants share any specific requests Defendants intend to seek from the non-party witnesses. Additionally, should Defendants intend to ask questions of these non-party witnesses in their depositions regarding medical issues which are different in scope from any medical records it seeks to request, the United States requests that Defendants provide information regarding such issues as well, so that we may have a productive meet and confer and raise such issues with the Court, as necessary.

The United States requests that Defendants share such information by 2:00 pm tomorrow and requests a meet and confer on Wednesday at 1:00. Please let us know if that time does not work for everyone for a meet and confer.

Thank you.

Lori

From: Wilkens, Scott B. [mailto:SWilkens@jenner.com]

Sent: Monday, September 19, 2016 10:09 AM

To: Bowers, Karl <butch@butchbowers.com>; Stephens, Bob <bob.stephens@nc.gov>; Driscoll, Robert <rdriscoll@mcglinchey.com>; Stewart, William <bstewart@mgsattorneys.com>; Duncan,

Kyle <KDuncan@Schaerr-Duncan.com>; Schaerr, Gene <GSchaerr@Schaerr-Duncan.com>
Cc: Stoughton, Corey (CRT) <Corey.Stoughton@crt.usdoj.gov>; Kisch, Lori (CRT) <Lori.Kisch@crt.usdoj.gov>; Lareau, Alyssa (CRT) <Alyssa.Lareau@crt.usdoj.gov>; Tara Borelli <tborelli@lambdalegal.org>; Elizabeth Gill <egill@aclunc.org>

Subject: Defendants' (Governor McCrory's & Intervenors') Request for Medical Records

Dear All,

I write to begin the meet and confer process regarding medical records, which under the parties' joint Rule 26(f) report is due to be concluded by September 23. Given that Defendants raised medical records as an issue, it is frankly troubling that Defendants have not yet initiated this meet and confer process, which was due to start on September 12.

While the Carcaño Plaintiffs are willing to meet and confer by phone as appropriate, we believe strongly that some basic information needs to be provided in writing before such a call would be productive or efficient.

Below is the Governor & Legislator Defendants' document request relating to medical records and the Carcaño Plaintiffs' August 26 objections and responses. Notably, the parties have not yet conducted any meet and confer as to this request.

Request No. 6. All documents relating to treatment for any gender, sexuality-, or reproductive-system-related medical or mental health condition, for the following named individuals:

- a. Joaquin Carcaño;
- b. Payton Grey McGarry;
- c. H.S.;
- d. Angela Gilmore;
- e. Kelly Trent;
- f. Beverly Newell.

RESPONSE: Plaintiffs object to this request as overbroad and unduly burdensome. Plaintiffs further object to the inclusion of Angela Gilmore, Kelly Trent, and Beverly Newell in this request; Angela Gilmore's medical history is not at issue in this case, and Kelly Trent and Beverly Newell intend to no longer be plaintiffs in this case. Any "gender, sexuality-, or reproductive-system-related medical or mental health condition" of Plaintiffs Carcaño, McGarry, and H.S. apart from gender dysphoria is not at issue in this case. Subject to the General and Specific objections, Plaintiffs will produce documents sufficient to show Joaquín Carcaño's, Payton Grey McGarry's, and H.S.'s diagnosis of gender dysphoria.

Given that Plaintiffs' Second Amended complaint will shortly be operative and Kelly Trent and Beverly Newell will no longer be plaintiffs, we will assume that your request does not apply to them. As we made clear in our objections, we also believe there is no basis for you to seek any medical records as to Angela Gilmore. Thus, we interpret your request as directed at the three transgender plaintiffs, listed as a-c in your request.

Although your request is objectionable in many respects, including its vagueness, overbreadth and lack of relevance, we agreed in good faith to "produce documents sufficient to show Joaquín Carcaño's, Payton Grey McGarry's, and H.S.'s diagnosis of gender dysphoria."

Beyond those records, we frankly do not understand what other medical records could possibly be relevant to this case. Moreover, given the vagueness of the request, we do not understand what other types of records you actually seek.

In light of the foregoing, please provide the following information as soon as possible, and not later than Tuesday, September 20:

1. Do you believe that medical records beyond those we have agreed to produce are relevant to this case, and if so, why?
2. Which specific categories of medical records are you seeking and, for each category, why do you believe those records are relevant? In answering this question, for each category of records please also specify the elements of Plaintiffs' claims and/or your defenses that you contend provide the basis for your claim of relevance.
3. Are there any ways that you would offer to narrow the request, in light of Plaintiffs' objections? If so, please specify how you would narrow the request.

Thanks much,
Scott

Scott B. Wilkens

Jenner & Block LLP

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[Download V-Card](#) | [View Biography](#)

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**EXHIBIT D to MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR PROTECTIVE ORDER**

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

JOAQUIN CARCANO, <u>et al.</u> ,)	
)	
Plaintiffs,)	
)	
vs.)	Case No. 1:16-cv-00236-TDS-JEP
)	
PATRICK MCCRORY, in his official capacity)	
as Governor of North Carolina, <u>et al.</u> ,)	
)	
Defendants.)	

**425/236 DEFENDANT GROUP'S SECOND SET OF
REQUESTS FOR PRODUCTION OF DOCUMENTS
TO PLAINTIFFS IN CASE NO. 1:16-CV-00236**

Pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure and Rule 26.1 of the Rules of Practice and Procedure of the United States District Court for the Middle District of North Carolina (“Local Rules”), Defendants State of North Carolina, Patrick McCrory (in his official capacity of Governor of North Carolina), the North Carolina Department of Public Safety (“DPS”), along with Tim Moore (in his official capacity as Speaker of the North Carolina House of Representatives), and Phil Berger (in his official capacity as President Pro Tempore of the North Carolina Senate) (collectively, “425/236 Defendant Group”), hereby request that Plaintiffs Joaquín Carcaño, Payton Grey McGarry, H.S. (by her next friend and mother Kathryn Schafer and her next friend and father MacHenry George Schafer II), Angela Gilmore, and the American Civil Liberties Union of North Carolina produce the documents described below for inspection and copying at the offices of **Millberg Gordon Stewart PLLC, 1101 Haynes Street, Suite 104, Raleigh, NC 27604** in accordance with the schedule established by the Court in its

September 20, 2016 scheduling order, or at such other place and date as set forth by the Court or by agreement of the parties. Your responses and/or objections must conform to the requirements of Federal Rule of Civil Procedure 34(b)(4).

DEFINITIONS

1. The following definitions apply to the extent they are consistent with the definitions contained in the E-Discovery Stipulation (Doc. #149) signed by the Court on September 20, 2016, or any superseding E-Discovery stipulation. If definitions contained within this document are inconsistent with the definitions contained in the currently operative E-Discovery stipulation, the definitions in the currently operative E-Discovery stipulation control.
2. “Communication” refers to all inquiries, discussions, conversations, negotiations, agreements, understandings, meetings, telephone conversations, voicemail messages, instant messages, text messages, emails, letters, notes, telegrams, advertisements, correspondence, memoranda, and other forms of verbal, written or electronic contact, including drafts, facsimiles, and copies, as well as originals.
3. “Concerning” means relating to, referring to, describing, evidencing, or constituting.
4. “Document” shall have definition appearing in ¶ 1 of the E-Discovery Stipulation (Doc. #149) signed by the Court on September 20, 2016, or the definition appearing in any superseding E-Discovery stipulation filed with the Court. The term “document” has the broadest meaning possible consistent with the terms of the applicable Federal Rules of Civil Procedure.

5. “Electronically stored information” or “ESI” shall have the definition agreed upon by the parties in ¶ 2 of the E-Discovery Stipulation (Doc. #149) signed by the Court on September 20, 2016 or any superseding E-Discovery stipulation filed with the Court.
6. “Person” refers to, without limitation, any natural person, firm, association, partnership, corporation, or any other form of legal entity.
7. “You” and “your” refer to Joaquín Carcaño, Payton Grey McGarry, H.S. (by her next friend and mother Kathryn Schafer and her next friend and father MacHenry George Schafer II), Angela Gilmore, and the American Civil Liberties Union of North Carolina, both individually and collectively. It also includes any party that may be added as a plaintiff in Case No. 1:16-cv-00236. Furthermore, with respect to the American Civil Liberties Union of North Carolina, “you” and “your” refer to any and all employees of the American Civil Liberties Union of North Carolina. “You” and “your” also include any other organization that is affiliated, allied, or connected with the American Civil Liberties Union of North Carolina, whether as a parent, subsidiary, affiliate, or otherwise, as well as those organizations’ employees.
8. The connectives “and” and “or” shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the request as much information as possible and shall not be interpreted to exclude information otherwise within the scope of the request. To effectuate this purpose, both conjunctives include the meaning “and/or.”

9. Any term that is not defined herein has its usual and customary meaning.

INSTRUCTIONS

The preceding definitions apply to the request below for production of documents and any subsequent requests for production of documents unless specifically indicated otherwise. The following instructions apply to the extent they are consistent with the instructions contained in the E-Discovery Stipulation (Doc. #149) signed by the Court on September 20, 2016, or any superseding E-Discovery stipulation filed with the Court. If instructions contained within this document are inconsistent with the instructions contained in the currently operative E-Discovery stipulation, the instructions in the currently operative E-Discovery stipulation control.

1. You are required to obtain and furnish all information available to you and to any of your representatives, agents, employees, officers, accountants, or attorneys, and to obtain and furnish all information that is in your actual or constructive possession, custody, or control, or in the actual or constructive possession, custody, or control of any of your representatives, agents, employees, officers, accountants, or attorneys.

2. You are requested to produce each document in its entirety. If a document that is responsive to any request cannot be produced in full, it should be produced to the extent possible with an explanation of why production of the remainder is not possible.

3. These document productions are made subject to, and shall comply with, any and all protective orders and stipulations that are in effect in the Lawsuit at the time a production of documents is made as well as with the requirements of the Local Rules.

4. Documents should be produced by source, as kept in the ordinary course of business. Documents produced should be clearly identified so as to reflect their owner and custodian and the location from which they were produced.

5. If a document is no longer in your possession, custody, or control, identify the following: its date, author(s), recipient(s), subject matter(s), when such document was most recently in your possession, custody, or control, what disposition was made of the document, and the person or entity (if any) currently in possession, custody, or control of the document. If a document has been destroyed, identify its date of destruction, the person who destroyed the document, the person who directed that the document be destroyed, and the reason for its destruction.

6. Each request is continuing in nature. If, after responding to these requests, you obtain or become aware of additional documents responsive to any request, such documents should be produced promptly in accordance with Fed. R. Civ. P. 34 and these definitions and instructions.

7. If a claim of privilege is asserted in response to any request, and a document is not provided on the basis of such assertion, you must enter that document on a privilege log if the currently operative scheduling order and/or the currently operative E-Discovery stipulation require the creation of a privilege log entry for that document. The privilege log shall comply with the provisions of the currently operative E-Discovery stipulation. If a portion of any responsive document is claimed to be protected from disclosure by any privilege or other protection, any such document should be produced

with appropriate redactions, and a privilege log entry created with respect to those redactions if and as required by the currently operative E-Discovery stipulation.

8. If you object to any request, your objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest.

9. Some of the requests may overlap. No inference is to be drawn from the fact that two or more requests (or parts of requests) might appear to request the same documents or tangible things.

10. The singular form of a word should alternatively be interpreted as the plural form (and vice versa) whenever necessary to bring documents or tangible things within the scope of a request that might otherwise be construed to be outside its scope.

11. These requests call for documents or tangible things created, modified, sent, or received **on or after October 4, 2006**.

12. If you encounter any ambiguity in construing a request, or any definition or instruction relevant to a request, you should set forth the matter deemed ambiguous and the construction you adopted to respond to the request.

13. All communications and documents produced should conform to the requirements set forth in the currently operative E-Discovery stipulation, unless the parties mutually agree to alternative forms of production. For hard-copy scanned documents, production shall be in the form of images delivered in single-page 300-dpi-resolution Group IV TIF format (“TIFF”). Each scanned hard copy image should have a

unique file name and should be named with the beginning Bates number assigned to it. Image file names should not contain spaces.

14. If you wish to designate any responsive document as "Protected Confidential Information," as defined by the Court in this case, you may do so in the manner set forth by the Stipulated Confidentiality Agreement and Protective Order entered on September 20, 2016, and the Supplemental Protective Order entered on September 21, 2016.

DOCUMENTS TO BE PRODUCED

33. Any and all records of individual named plaintiffs Joaquín Carcaño, Payton Grey McGarry, and H.S. (by her next friend and mother Kathryn Schafer and her next friend and father MacHenry George Schafer II) in any way pertaining to or concerning each individual named plaintiff's medical, psychiatric, or psychological treatment including, without restriction, all histories, records, reports, summaries, diagnoses, prognoses, progress sheets, order sheets, nurses daily notes, psychiatric/psychological records, counseling records, records of treatment and medication ordered and given, operative notes, pathology reports, tests and test results, imaging (films or electronic), records of in- or out-patient substance abuse treatment facilities, and all other written notes, entries, reports or other written or graphic data prepared, kept or maintained which pertain to him/her and any office visit or hospital confinement, including all outpatient treatment subsequent to the last discharge and any other periods of hospitalization; said records to include all written, printed or other written or graphic data of each individual named plaintiff.

34. All documents or other information received, reviewed, consulted, or relied upon by Acting Executive Director of the American Civil Liberties Union of North Carolina Sarah Preston concerning the Declaration she submitted in support of your Motion for Preliminary Injunction dated May 16, 2016 (Docs. 21, 22, & 23). This request specifically includes, without limitation, all documents or information Ms. Preston received, reviewed, consulted, or relied upon concerning the assertions she makes in paragraphs 13-23 (regarding "I.C."), paragraphs 24-38 (regarding Charlie Wright), and paragraphs 29-32 (regarding Lisa Lawson) of her Declaration.

Respectfully submitted, this 4th day of October, 2016.

By: /s/ Karl S. Bowers, Jr.
Karl S. Bowers, Jr.*
Federal Bar #7716
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*appearing pursuant to Local Rule 83.1(d)

By: /s/ Robert N. Driscoll
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CERTIFICATE OF SERVICE

I hereby certify that, on this date, I served the foregoing document upon all counsel of record.

This the 4th day of October, 2016.

By: /s/ William W. Stewart, Jr.
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EXHIBIT E to MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PROTECTIVE ORDER

From: [Wilkins, Scott B.](#)
To: ["Driscoll, Robert"](#); [Lori Kisch](#); [Bowers, Karl](#)
Cc: [Taryn Null](#); [Duncan, Kyle](#); [Stephens, Bob](#); [Stewart, William](#); [Schaerr, Gene](#); [Corey Stoughton](#); [Alyssa Lareau](#); [Tara Borelli](#); [Elizabeth Gill](#); [Whitney Pellegrino](#); [Torey Cummings](#); [Carney, Chris \(CRT\)](#); [Monahan, Camille \(CRT\)](#)
Subject: RE: Plaintiffs' counter-proposal regarding medical records
Date: Friday, October 14, 2016 5:09:08 PM

Bob,

We are certainly willing to engage in a meet and confer. In advance, it would be helpful if you would provide some clarifications on Defendants' positions, because the email below seems to have taken a number of steps back from where we thought we were heading in the meet and confer process.

First, based on your email below, it appears that Defendants refuse to narrow in any way their request for all medical and mental health records of any kind over a 10 year period. Is that correct, and if so, why? We had understood from an earlier email you sent that you were specifically seeking four categories of documents. While those were broad – especially the category concerning co-occurring conditions – it now appears that you have withdrawn from that earlier position and are simply insisting on everything. This request is objectionable on many grounds, not least because it would invade the psychotherapist patient privilege. *See Jaffee v. Redmond*, 518 U.S. 1 (1996). Also, with respect to the Carcano plaintiffs you have greatly expanded the time period covered by the request from 4 years to 10 years. Are Defendants insisting on the 10 year period, or is there some shorter period they would consider?

Second, based on your email below, it now appears that Defendants are unwilling to try to reach agreement on medically related deposition topics, and instead are insisting on *carte blanche* to ask about any medical or mental health-related information. Is that correct? We thought that your initial proposal regarding the types of deposition questions you would like to pursue was a fruitful way to proceed and we have tried to continue down that path. It now appears that you are unwilling to discuss limiting medically related deposition topics. Please confirm.

We disagree with your characterization of Plaintiffs' position that "the medical and physical conditions of the named plaintiffs (and of certain witnesses) are relevant to plaintiffs' claims." If that is an attempt to claim that Plaintiffs' have put all medical and mental health records at issue, that is simply incorrect. The harm caused by H.B. 2 is relevant to Plaintiffs' claims, and that harm manifests itself in many ways. By forcing transgender individuals to use facilities inconsistent with their gender identity, H.B. 2 causes transgender individuals to fear for their safety, and it causes them the kind of anxiety and distress one would naturally experience from being segregated out of communal spaces, and potentially being forced to use the wrong restroom. Defendants' request for medical records going back 10 years is not in any way related to the harms H.B. 2 has caused since its enactment in late March 2016.

Notwithstanding your assurances that you will not ask harassing questions in depositions, that is of little comfort. The remarkable breadth of medical and mental health records you seek is itself harassing and has the effect of intimidating transgender plaintiffs and witnesses from seeking to vindicate their rights.

Thank you,

Scott

From: Driscoll, Robert [mailto:rdriscoll@mcglinchey.com]

Sent: Wednesday, October 12, 2016 11:45 AM

To: Lori Kisch <lori.kisch@usdoj.gov>; Bowers, Karl <butch@butchbowers.com>; Wilkens, Scott B. <SWilkens@jenner.com>

Cc: Taryn Null <Taryn.Null@usdoj.gov>; Duncan, Kyle <KDuncan@Schaerr-Duncan.com>; Stephens, Bob <bob.stephens@nc.gov>; Stewart, William <bstewart@mgsattorneys.com>; Schaerr, Gene <GSchaerr@Schaerr-Duncan.com>; Corey Stoughton <corey.stoughton@usdoj.gov>; Alyssa Lareau <alyssa.lareau@usdoj.gov>; Tara Borelli <tborelli@lambdalegal.org>; Elizabeth Gill <egill@aclunc.org>; Whitney Pellegrino <Whitney.Pellegrino@usdoj.gov>; Torey Cummings <Torey.Cummings@usdoj.gov>; Carney, Chris (CRT) <Chris.Carney2@usdoj.gov>; Monahan, Camille (CRT) <Camille.Monahan@usdoj.gov>

Subject: RE: Plaintiffs' counter-proposal regarding medical records

Scott and Lori,

We appreciate your sending proposed categories of medical records for our consideration, and we remain open to having a meet and confer on these issues later this week. However, after carefully considering your proposal, we remain concerned that limiting discovery into medical issues in the manner proposed by the plaintiffs poses serious risks to our ability to test the plaintiffs' claims.

More specifically, we understand from your email and from our continued discussions on these matters that the plaintiffs (both the Carcaño plaintiffs and, evidently, the United States) take the position that the medical and physical conditions of the named plaintiffs (and of certain witnesses) are relevant to the plaintiffs' claims. Those conditions have therefore been put at issue in these matters. If that is accurate, then we can see no alternative than to test the nature and extent of those medical conditions through the normal processes of discovery. Naturally, we intend to do that with the utmost care and consideration for the possibly vulnerable position of some of the plaintiffs' witnesses, and as we have repeatedly stated we have no intention of harassing any of the plaintiffs or witnesses in any way.

In light of that, we are concerned that your list of document categories would seriously compromise our ability to test the plaintiffs' claims. For instance, you propose to share documents "sufficient to" demonstrate a diagnosis of gender dysphoria. It is not clear what that limiting language means, but it does seem clear to us that such a limitation would risk depriving the defendants of the ability to develop a complete picture of the mental condition of the plaintiffs and witnesses, something that forms a major part of their claims. Furthermore, these kinds of proposed limitations would also make it impossible for us to determine if the harm plaintiffs allege was caused by something other than the challenged law.

Finally, we cannot agree to limit deposition topics along the lines you suggest. Even if we thought it was practicable to limit questions to the named topics (which we doubt), the defendants cannot know ahead of time how the witnesses will answer any particular question and whether their

answers would require exploring some topic beyond the named topics. Thus, agreeing ahead of time to limit questions to particular topic areas is simply not practicable and would unduly hamper defendants' ability to ask cogent questions designed to elicit information relevant to the witnesses' medical condition and experiences. Instead of limiting deposition topics in this way, defendants believe the better course is the one normally taken in depositions—including depositions involving sensitive medical issues—which is for the defending attorney to make an objection during the deposition on the grounds of relevance but then allow the deponent to answer the question to the best of his or her ability.

As we have repeatedly said, and now repeat again, it is not the defendants' intention to ask harassing questions of any witness at a deposition. We frankly find it puzzling that we have to continue to assert that we will abide by the normal rules of professional ethics and courtesy. However, we are also under a professional obligation to defend our clients' interests in these cases—and to defend the challenged North Carolina law—and so we have no choice but to test the plaintiffs' claims, which—as appears evident—rely in large part on the mental and physical condition of the named plaintiffs and other witnesses.

Thank you for your continued courtesy,

Bob

Robert Neil Driscoll

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From: Kisch, Lori (CRT) [<mailto:Lori.Kisch@usdoj.gov>]
Sent: Saturday, October 08, 2016 4:21 PM
To: Butch Bowers; Wilkens, Scott B.
Cc: Null, Taryn Wilgus (CRT); Driscoll, Robert; Duncan, Kyle; Stephens, Bob; Stewart, William; Schaerr, Gene; Stoughton, Corey (CRT); Lareau, Alyssa (CRT); Tara Borelli; Elizabeth Gill; Pellegrino, Whitney (CRT); Cummings, Torey (CRT); Carney, Chris (CRT); Monahan, Camille (CRT)
Subject: RE: Plaintiffs' counter-proposal regarding medical records

Butch,

From the United States' perspective, the parties have had several conversations on our difference of opinion regarding the scope of the medical records requested by Defendants. We provided our reasons during the meet and confer, and after having those discussions, Defendants requested that the Plaintiffs provide the topics and documents which we could agree to as part of a compromise. We understood that Defendants would then respond with the topic areas to which they would agree. Having provided the email below, we hope

to hear from Defendants to understand where any disagreement remains so that we can narrow the issues in dispute and see where any progress may be made in reaching a resolution.

Thank you and we look forward to hearing back on this issue.

Lori

Lori B. Kisch
Special Litigation Counsel
Civil Rights Division
U.S. Department of Justice
601 D Street, N.W.
Washington, D.C. 20579
(202) 305-4422

From: Butch Bowers [<mailto:Butch@ButchBowers.com>]
Sent: Thursday, October 06, 2016 8:08 PM
To: Wilkens, Scott B. <SWilkens@jenner.com>
Cc: Null, Taryn Wilgus (CRT) <Taryn.Null@crt.usdoj.gov>; Driscoll, Robert <rdriscoll@mcglinchey.com>; Duncan, Kyle <KDuncan@Schaerr-Duncan.com>; Stephens, Bob <bob.stephens@nc.gov>; Stewart, William <bstewart@mgsattorneys.com>; Schaerr, Gene <GSchaerr@Schaerr-Duncan.com>; Stoughton, Corey (CRT) <Corey.Stoughton@crt.usdoj.gov>; Lareau, Alyssa (CRT) <Alyssa.Lareau@crt.usdoj.gov>; Tara Borelli <tborelli@lambdalegal.org>; Elizabeth Gill <egill@aclunc.org>; Pellegrino, Whitney (CRT) <Whitney.Pellegrino@crt.usdoj.gov>; Cummings, Torey (CRT) <Torey.Cummings@crt.usdoj.gov>; Carney, Chris (CRT) <Chris.Carney@crt.usdoj.gov>; Kisch, Lori (CRT) <Lori.Kisch@crt.usdoj.gov>; Monahan, Camille (CRT) <Camille.Monahan@crt.usdoj.gov>
Subject: Re: Plaintiffs' counter-proposal regarding medical records

Thanks Scott. This is useful, although I don't think it gets us anywhere close to a resolution of this issue. It would help if you could provide us with the legal foundation for your objections. Thanks,

Butch

On Oct 6, 2016, at 6:37 PM, Wilkens, Scott B. <SWilkens@jenner.com> wrote:

All,

The Carcaño Plaintiffs and United States ("Plaintiffs") intend to file a motion for protective order to protect from disclosure to Defendants the medical and mental health information related to Plaintiffs' witnesses. Plaintiffs object to

the disclosure of medical and mental health history relating to the “basis,” “co-occurring conditions,” and hypothesized cause of an individual’s transgender status. Plaintiffs also object to the production of additional medical records documents, including notes from the witnesses’ medical and mental health providers. In conjunction with the meet and confer process and to try and reach resolution of the parties’ disagreement over the scope of records and information requested by Defendants, Plaintiffs provide the areas/topics below to which we do not object. There may also be additional reasonable lines of inquiry at depositions and invite Defendants to provide any additional areas that you intend to inquire into.

Plaintiffs propose to provide the following information for the Carcaño individual transgender plaintiffs and the United States’ individual transgender non-party witnesses:

1. Birth certificate
2. Medical or other documentation sufficient to show diagnosis of gender dysphoria, if such diagnosis exists
3. Medical or other documentation sufficient to show medical treatment for gender dysphoria (which may include hormone therapy or surgery), if such exists.

Topic areas for depositions:

1. Education/career history
2. Diagnosis of and treatment for gender dysphoria
3. Steps taken to transition, socially and medically
4. What it means to live as a transgender individual
5. Factual information about harms experienced due to H.B. 2
6. History of using multiple-occupancy, sex segregated bathrooms and changing facilities and experiences related to that use.
7. History of using single-occupancy bathrooms and changing facilities and experiences related to that use.

The Carcaño Plaintiffs will separately serve their responses and objections to Defendants’ newly served document request Nos. 33 and 34, including Request No. 33 concerning medical records. The Carcaño Plaintiffs expressly reserve all rights to object and/or respond to those requests, and the above counterproposal has no effect on those rights. It is the Carcaño Plaintiffs understanding that Defendants’ Request No. 33 supersedes Request No. 6, which Defendants have now withdrawn.

Thanks,
Scott

Scott B. Wilkens

Jenner & Block LLP

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