UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA Plaintiff, v. STATE OF NORTH CAROLINA; PATRICK MCCRORY, in his official capacity as Governor of North Carolina; NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY; UNIVERSITY OF NORTH CAROLINA; and BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA, Defendants.	)	1:16-CV-00425-TDS-JEP

UNITED STATES' MEMORANDUM IN SUPPORT OF ITS MOTION TO PARTIALLY QUASH AND MODIFY DEFENDANTS' SUBPOENA DUCES TECUM AND FOR A PROTECTIVE ORDER

Plaintiff United States of America ("United States") respectfully submits this Memorandum in Support of its Motion to Partially Quash and Modify the September 30, 2016 Subpoenas Duces Tecum served by Defendants State of North Carolina, Governor Patrick McCrory, the North Carolina Department of Public Safety, and Intervenor-Defendants President Pro Tempore Phil Berger and Speaker Tim Moore (together, "the State Defendants") on the United States' non-party transgender witnesses Alaina Kupec, A.N., A.T., C.W., D.B., H.K., and Paige Dula, and for a Protective Order to limit the scope of the deposition questions that may be asked of these witnesses.

The State Defendants have issued an overbroad subpoena for all of the transgender non-party witnesses' medical and mental health records, without limitation, for the past ten years. Broad disclosure of such irrelevant records, which are protected by the therapist-patient privilege, would compromise the witnesses' access to confidential mental health services, embarrass and harm those witnesses, and potentially dissuade participation in this lawsuit. The United States has offered to produce some medical documentation—namely, for each witness, a birth certificate and documentation sufficient to show a diagnosis of gender dysphoria and medical treatment for gender dysphoria (such as hormone therapy or surgery), if such diagnosis or treatment exists. The State Defendants have not agreed and have not offered any valid explanation of the relevance of further disclosure of confidential medical records or offered any other proposal that properly balances the parties' and non-party witnesses' interests. Likewise, the United States has proposed some topical limitations on the witnesses' depositions in light of the State Defendants' apparent interest in probing irrelevant, private matters, but

the State Defendants have refused to agree to any limitations on the ground that they would be impracticable and would hamper their ability to cross-examine the witnesses.

The State Defendants' broad request for medical records should be limited and a protective order should be issued to ensure that deposition questions do not become a means to circumvent any ruling by this Court on the proper balancing of the State Defendants' need for relevant information with the invasion of privacy of these important non-party witnesses.

BACKGROUND

In this lawsuit, the United States seeks declaratory and injunctive relief to halt compliance with North Carolina House Bill 2 ("H.B. 2"), and end discrimination against transgender individuals who have been denied access to multi-occupancy restrooms and changing facilities consistent with their gender identity, in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*; and the Violence Against Women Act, 42 U.S.C. § 13925(b)(13). To demonstrate how H.B. 2 discriminates against transgender people, the United States has offered the anecdotal testimony of several transgender students and employees who are affected by H.B. 2's discriminatory mandate. The United States does not seek damages on behalf of these witnesses.

Nevertheless, the State Defendants have sought access to all of the witnesses' medical and mental health records from the past ten years. The subpoenas seek:

> Any and all records [] for the prior ten (10) years, in any way pertaining to his/her 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, printer or other written or graphic data of him/her.

Ex. 1 (Subpoenas to United States' Witnesses, Attachment A). The subpoenaed information was identical for each of the United States' transgender witnesses regardless of the information the witness disclosed or testified to in his or her declaration. The State Defendants' request for unlimited access to ten years' worth of medical and mental health records is untethered from any claim or defense raised in the United States' case. Such a request is plainly overbroad.

The United States has proffered testimony from non-party witnesses to demonstrate the impact of H.B. 2 on transgender individuals in North Carolina. Because of this, during the meet and confer process, the United States offered to provide the following information for each witness to establish that the witness is impacted by H.B. 2: birth certificates; medical or other documentation sufficient to show diagnosis of gender dysphoria, if such diagnosis exists; and medical or other documentation sufficient to show medical treatment for gender dysphoria (which may include hormone therapy or surgery), if such exists. Ex. 2 (Oct. 6, 2016 email from Scott Wilkens).[1] The State

[1] The United States and the *Carcaño* Plaintiffs issued a joint response to Defendants' subpoenas/document requests.

Defendants rebuffed this proposal asserting that it "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." Ex. 3 (Oct. 12, 2016 email from Robert Driscoll). The State Defendants have further asserted that they need medical and mental health history regarding the "basis" of a diagnosis of gender dysphoria and any "co-occurring conditions" for each non-party transgender witness to explore whether any harm experienced by witnesses post-H.B. 2 could have an alternative source or explanation. *See id.*; Ex. 4 (Sept. 20, 2016 email from Robert Driscoll). The United States and the *Carcaño* Plaintiffs also proposed limits on topics for the depositions of the transgender witnesses, but the State Defendants have been unwilling to agree to any limitations. *See* Ex. 3 (Oct. 12, 2016 email from Robert Driscoll); Ex. 2 (Oct. 6, 2016 email from Scott Wilkens).

The United States' non-party witnesses assert no claims and seek no damages. There is no allegation that the State Defendants' actions *caused* any witnesses' gender dysphoria or co-occurring conditions. The State Defendants cannot justify the sweeping scope of medical and mental health records subpoenaed from non-party witnesses in a case involving claims of a facially discriminatory policy based on sex and gender identity discrimination. The subpoenas should be partially quashed and modified.

ARGUMENT

I. The State Defendants' Subpoenas Should be Modified and Related Lines of Questioning Should be Barred as They Seek Irrelevant Information that is Protected by Privilege and They are Unduly Burdensome and Designed to Embarrass the United States' Non-Party Witnesses.

The State Defendants' subpoenas should be partially quashed and modified for three reasons. First, because there is no information in the medical or mental health records of any transgender individual that could bear on the issue of whether H.B. 2 violates Title VII, Title IX, or VAWA, the medical and mental health records of non-party transgender witnesses who testify to how H.B. 2 discriminates against them in their daily lives are simply not relevant to the claims or defenses in this case. Thus, they are not discoverable under Rule 26, which limits discovery to information "relevant to any party's claim or defense and proportional to the needs of the case, considering [*inter alia*] . . . the importance of the discovery in resolving the issues." Fed. R. Civ. P. 26(b)(1). Second, the mental health records are protected by the therapist-patient privilege. Federal Rule of Civil Procedure 45(c)(3)(A)(iii) provides that the court shall quash a subpoena if it requires disclosure of privileged matters. Finally, even if the records were relevant and not privileged the discovery should be limited under Fed. R. Civ. P. 26(c)(1)(D), as any purported relevance of this information is significantly outweighed by the harm to the individual witnesses and the United States' ability to present testimony about how H.B. 2 affects individual transgender people.[2]

A. The Requested Medical Records and Related Lines of Questioning are not Relevant to the Claims and Defenses in this Case.

The Federal Rules of Evidence define "relevant information" as evidence having any tendency to make the existence of any fact that is of consequence to the

[2] Similarly, under Fed. R. Civ. P. 30(d)(3)(A), a deponent or a party may move to terminate or limit the deposition on the ground that it is being conducted in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party.

determination of the action more or less probable than it would be without the evidence. Fed. R. Evid. 401. The district court has "broad discretion" in the determination of relevance for discovery purposes. *Watson v. Lowcountry Red Cross*, 974 F.2d 482, 489 (4th Cir. 1992).

The non-party witnesses' medical histories have no relationship to any fact relevant to the claims or defenses in this action. As noted above, the State Defendants have offered two theories for the relevance of this information: first, that the United States has put these witnesses' medical and mental health conditions at issue, such that the State Defendants need to probe other causes of medical or mental health harm to these witnesses to defend against the claim that H.B.2 causes harm; and second, that the State Defendants need to probe the reasons for these witnesses' diagnosis of gender dysphoria. Both of these theories are wrong, as explained below. And even if these theories had merit, which they do not, the State Defendants' request for ten years of medical records unlimited by subject and untethered to the specific testimony offered by the witnesses would be plainly overbroad.

1. The United States has not put the Non-Party Witnesses' Medical or Mental Health History at Issue.

In the Fourth Circuit, a plaintiff's medical records are relevant and discoverable when information contained in them is dispositive to the plaintiff's claims or when the plaintiff seeks damages for mental/emotional distress. *See, e.g.*, *Mezu v. Morgan State Univ.*, 495 F. App'x 286, 289-90 (4th Cir. 2012) (medical records found relevant to prove a mental or physical disability for FMLA coverage); *Coffin v. Bridges*, No. 95–1781, 72

F.3d 126 (decision without opinion), 1995 WL 729489, at *1, 3–4 (4th Cir. Dec. 11, 1995) (unpublished) (medical records discoverable because damages sought for mental/emotional distress).

The transgender people who the State Defendants have subpoenaed are not plaintiffs, and have no claims. They offer anecdotal testimony about how H.B. 2's discrimination affects the lives of people who are transgender. Nonetheless, the State Defendants assert that they need a decade's worth of these witnesses' medical and psychotherapy records to "explore whether any harm allegedly caused by HB 2 might have another cause, in whole or part." Ex. 4 (Sept. 20, 2016 email from Robert Driscoll). However, neither the United States nor its witnesses are seeking damages for mental or emotional distress and "in the absence of a claim seeking damages for emotional distress, Defendants are hard-pressed to demonstrate a genuine need for [plaintiff's] medical records." *Adkins v. CMH Homes Inc.*, No. 3:13-cv-32123, 2014 U.S. Dist. LEXIS 126797, at *10-11 (S.D. W. Va. Sept. 10, 2014)).

As for any impact that a witness alleges that he or she experiences as a result of H.B. 2, even if the State Defendants could prove that there are other contributing factors, it would not disprove that H.B. 2 is negatively affecting transgender people in North Carolina. None of these witnesses will testify, and the United States is not seeking to establish, that H.B. 2 is the only cause of distress in their lives, nor do these witnesses or the United States seek to quantify or monetize the amount of distress caused by H.B. 2. The State Defendants cannot disprove H.B. 2's harm to the transgender community by establishing that some transgender people also experience harm from other sources.

Nor is there any basis for suggesting that the individual witnesses' medical records are probative of the questions about the meaning of sex discrimination at issue here. All parties' medical experts have offered opinions about the relationship between gender identity and sex, but the Court has already dispensed with the notion that the witnesses' medical records are relevant in any way to expert testimony, as all expert reports have already been submitted. *See* ECF No. 203 (Tr. of Status Conference (Sept. 30, 2016)) at 41, 44.

2. It is Irrelevant why the Non-Party Witnesses are Transgender.

It is equally unnecessary and irrelevant to probe into the reason that the United States' witnesses are transgender (and thus are protected under federal law) and the State Defendants have offered no justification for seeking medical information for this purpose.

The United States does not allege, and does not need to establish, that H.B. 2 *caused* any witness's gender dysphoria or any other medical or mental health condition. Experts in this case will offer testimony about what transgender status means, what gender identity and gender dysphoria are, and how they relate to sex. *See* ECF Nos. 76-35 (Expert Decl. of George R. Brown, MD, DFAPA), 76-36 (Expert Decl. of Lin Fraser), 76-37 (Expert Decl. of Scott F. Leibowitz, MD), 149-9 (Expert Decl. of Paul W. Hruz, M.D., Ph.D), 149-10 (Decl. of Quentin L. Van Meter, MD), 149-11 (Decl. of Allan M. Josephson, M.D.), 149-12 (Decl. of Lawrence S. Mayer, MD, MS, PhD), 149-13 (Decl. of Walt Heyer). The medical records of some individual transgender people who happen to be witnesses in this case are not probative of these questions.

The United States does not dispute that it matters that the witnesses are transgender and, thus, are discriminated against by H.B. 2, and has offered medical records and deposition testimony sufficient to allow the State Defendants to verify those facts. But medical records demonstrating the "basis for the diagnos[i]s" of gender dysphoria are extraneous to the United States' claims and thus are irrelevant to the State Defendants' attempts to defend against the United States' discrimination claims. *See Roberts v. Clark County Sch. Dist.*, 312 F.R.D. 594, 606 (D. Nev. 2016) (Defendant "simply does not need to know the intimate details of [plaintiff's] transgender transition process to defend itself.").

The State Defendants have made no showing sufficient to challenge the basis of any individual transgender witness's diagnosis of gender dysphoria, and have no grounds for demanding the full body of medical information that underlies any such diagnosis, which would presumably be for the purpose of conducting a series of wasteful mini-trials on individual witnesses' diagnoses. Even in cases involving discrimination under the Americans with Disabilities Act (ADA)—where existence of a mental or physical condition is a material fact—plaintiffs need not prove *how* they came to have their specific impairment. *See* EEOC Compliance Guidance §902.2(e) (2009) ("The cause of a condition has no effect. . . ."). ADA regulations adopt core provisions of the Rehabilitation Act, 29 CFR § 1630 App.; 29 CRF 1630.2, which "contains no language suggesting that its protection is linked to *how* an individual became impaired," *Cook v. Dep't of Mental Health, Retardation, & Hosps.*, 10 F.3d 17, 24 (1st Cir. 1993). For example, the ADA does not require proof that a paraplegic was born with the condition as

opposed to being injured in a car accident. *See E.E.O.C. v. Res. for Human Dev., Inc.*, 827 F. Supp. 2d 688, 694 (E.D. La. 2011) ("noting that the EEOC has never required a party with a disability "to prove the underlying basis of their impairment"). The cause of the impairment is not relevant.

Probing into the reason that a particular individual is transgender is irrelevant, unnecessary, and harmful. It would be nonsensical to allow the State Defendants to compel non-party witnesses who seek no damages in a case challenging a facially discriminatory policy to reveal more about their physical and mental state than a plaintiff seeking damages for discrimination claims in an ADA case.

3. Even if there was any Basis for the Subpoenas, the Scope of the State Defendants' Request for Medical Records Would Be Overbroad.

Even if the State Defendants' relevance claims had any merit, which they do not, their unfettered request for ten years of all medical and mental health records would be far too broad and should be significantly limited in scope and time on a witness-by-witness basis. Even in cases where plaintiffs actually sought damages for emotional distress, courts have rejected such broad requests. *See, e.g.*, *Scates v. Shenandoah Mem. Hosp.*, No. 5:15-cv-32, 2016 U.S. Dist. LEXIS 51844, at *1 (W.D. Va. Apr. 18, 2016) (in case in which plaintiff sought damages for emotional distress, 10-year request for medical records overbroad and production limited to three years); *Cappetta v. GC Servs. Ltd. P'ship*, 266 F.R.D. 121, 126 (E.D. Va. 2009) (in case in which plaintiff sought damages for emotional distress, holding that a subpoena seeking "all medical records, regardless of content" for the past ten years was too broad and only "records relating to

Plaintiff's mental and emotional state for the two years prior to the filing of this federal action" must be produced) (internal citation omitted); *see also infra* Section I.B.2.

B. The Requested Mental Health Records are Protected by the Therapist-Patient Privilege.

The State Defendants' subpoenas specifically request records of "psychiatric, or psychological treatment including, without restriction, all . . . psychiatric/psychological records [and] counseling records." Ex. 1 (Subpoenas to United States' Witnesses, Attachment A). These records are protected by the therapist-patient privilege, which protects against the involuntary disclosure of confidential communications between a patient and psychotherapist, psychologist, social worker, or counselor related to mental health. *Jaffee v. Redmond*, 518 U.S. 1, 15-17 (1996). The therapist privilege offers protection for patients who consult a therapist for diagnosis and treatment. *United States v. Bolander*, 722 F.3d 199, 223 (4th Cir. 2013). This protection extends to medical records that reflect communications between therapists and patients and diagnoses from therapists. *Kinder v. White*, 609 F. App'x 126, 128-29 (4th Cir. 2015). The State of North Carolina also provides statutory protection for communications between a psychologist and patient that closely resembles the federal common law privilege. N.C. Gen. Stat. § 8-53.3. The individual witnesses, in agreeing to testify about how H.B. 2's discrimination affects their day to day lives, have not waived this privilege.

1. The Policy Reasons Behind the Therapist Privilege Apply.

The Supreme Court has recognized that the assurance of confidentiality is necessary for the appropriate treatment of mental or emotional problems and that the

absence of a therapist privilege would likely give rise to a chilling effect of mental health treatment. *Jaffee*, 518 U.S. at 10-12. The Supreme Court has rejected any "balancing component of the privilege,"[3] opining that a privilege that is not certain "is little better than no privilege at all." *Id.* at 18 (citing *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981)); *see also Kinder*, 609 F. App'x at 131 (noting that "now that the psychotherapist privilege has been recognized, it would be both counterproductive and unnecessary for a court to weigh the opponent's evidentiary need for disclosure any time the privilege is invoked"). Similarly, North Carolina's statutory recognition of a therapist-patient privilege weighs heavily in favor of non-disclosure to promote the public interest in encouraging those facing mental or emotional challenges to seek out and fully cooperate in appropriate counseling. *Flora v. Hamilton*, 81 F.R.D. 576, 579 (M.D.N.C. 1978) (citations omitted); *see* N.C. Gen. Stat. § 8-53.3. This case exemplifies exactly why the therapist privilege is vital. Courts have long recognized that gender dysphoria is "a very complex medical and psychological" condition which must be treated like any other psychiatric condition as it constitutes a "serious medical need." *Meriwether v. Faulkner*, 821 F.2d 408, 412-13 (7th Cir. 1987) (citations omitted). Therefore, it is critical that individuals with gender dysphoria are able to obtain counseling which they can be assured will remain confidential, given that it deals with a particularly private and sensitive area of one's life. Disclosing the witnesses' therapy records would deeply

[3] Even when no privilege exists under *Jaffee*, state law privileges or other legitimate interests (such as privacy and confidentiality) must be weighed against the record's value to the requesting party. *In re: Sealed Case (Medical Records)*, 381 F.3d 1205, 1215-17 (D.C. Cir. 2004); *see also infra* Section I.C.

violate the confidentiality that is a necessary part of effective therapy. The assurance of confidentiality encourages a patient's willingness and ability to speak freely during therapy sessions without fear of embarrassment or disgrace. *Jaffee*, 518 U.S. at 10.

2. The Witnesses Have Not Waived the Therapist Privilege.

The Fourth Circuit has recognized that the therapist privilege, like other evidentiary privileges, is subject to waiver by the privilege holder. *Bolander*, 722 F.3d at 223. An individual may waive privilege by knowingly and voluntarily relinquishing it. *Id.* (citation omitted). Waiver may occur, for example, when a patient discloses the substance of his or her therapy sessions to unrelated third parties, when a plaintiff "intends to use affirmatively her psychotherapist's testimony or records," or when a party alleges severe or extreme emotional distress or a claim of negligent or intentional infliction of emotional distress. *Cappetta v. GC Servs. L.P.*, 266 F.R.D. 121, 128-29 (E.D. Va. 2009) (citations omitted); *see also Koch v. Cox*, 489 F.3d 384, 391 (D.C. Cir. 2007) ("A plaintiff who makes no claim for recovery based upon injury to his mental or emotional state" would nevertheless waive that privilege if he is "basing his claim upon the psychotherapist's communications with him" or is "selectively disclos[ing] part of a privileged communication in order to gain an advantage in litigation" (citation omitted)).

The United States' non-party witnesses have not waived their therapist privilege because none of the witnesses seek damages, none of the witnesses have claims based on any emotional distress caused by H.B. 2, and none of the witnesses have asserted that their transgender status or gender dysphoria (or any other diagnosed mental health condition) is caused by the State Defendants. The witnesses have merely testified as to

how H.B. 2 discriminates against them in order to support the United States' claim of injunctive relief to enjoin a discriminatory statute. They have no more waived their therapist privilege than any other witness who testifies that they were affected by a facially discriminatory employment or educational policy, but does not advance any specific claim of emotional or psychological distress.

Even if the non-party witnesses' testimony in their declarations could be construed as similar to emotional distress claims, courts agree that "a mere allegation of incidental 'garden variety' emotional distress claims, *without seeking to recover damages for the same*, will not waive the privilege." *Cappetta*, 266 F.R.D. at 128 (citations omitted) (emphasis added); *see also Koch*, 489 F.3d at 391 ("[W]e hold that a plaintiff does not put his mental state in issue merely by acknowledging he suffers from depression, for which he is not seeking recompense."). "Garden variety" emotional distress claims include claims that a plaintiff "had difficulty sleeping, suffered from anxiety and stress, lost weight, did not want to interact with others, and felt like an outcast [and] that she felt humiliated and 'raped of [her] human rights' as a result of the Defendant's conduct." *EEOC v. Maha Prabhu, Inc.*, No. 3:07-cv-111, 2008 U.S. Dist. LEXIS 74393, at *9-10 (W.D.N.C. June 23, 2008); s*ee also Flowers v. Owens*, 274 F.R.D. 218, 227 (N.D. Ill. 2011) (finding that plaintiff's testimony that she suffered "humiliation, embarrassment, anger, and [felt] depressed, anxious and dejected" as a result of the defendants' actions described garden variety emotional distress). Even assuming the witnesses' testimony is akin to a plaintiff's emotional distress allegations, which it is not for the reasons discussed in Section I.A., *supra*, such testimony would not waive the privilege because

the impact of H.B. 2 discussed in the declarations would be analogous to incidental "garden variety" emotional distress and neither the witnesses nor the United States are seeking damages for this emotional distress.

Some witnesses' declarations do not even contain statements that approximate what would be considered garden variety emotional distress allegations, further illustrating how unprecedented it would be if the Court were to order that their participation as witnesses in this case constitutes waiver of the therapist privilege.[4] For example, D.B. merely states that he was "nervous and anxious" about entering a women's bathroom, which he did to comply with H.B. 2, that he is concerned about entering women's bathrooms because he looks like a man, and that he worries about his safety if he were to continue to do so. ECF No. 76-44 (Decl. of D.B.) ¶¶ 14-16. Like D.B., A.N. expressed concerns for her safety, stating: "H.B. 2 puts me in danger because it requires me to go into a men's bathroom even though I am a woman and look like a woman. I am also scared that if I were to use the men's room I could be assaulted or even raped." ECF No. 76-41 (Decl. of A.N.) ¶ 19. She noted that "[t]he idea of having to follow H.B. 2 gives me a big ball of stress and anxiety that is difficult to describe" and that she "worr[ies] about whether or when someone will call [her] out or cause trouble for [her] because [she is] transgender." *Id.* ¶ 25. H.K. stated that since H.B. 2 was passed, she has "trouble sleeping and regularly feel[s] anxious and afraid" and that H.B. 2 makes her

[4] This point also further illustrates how, even if the State Defendants' were permitted to pierce the therapist privilege at all, which they should not be, an individualized witness-by-witness analysis would have to be performed to determine whether each witnesses' allegations are sufficient to waive the privilege.

"afraid" of what would happen if she used a women's bathroom. ECF No. 76-45 (Decl. of H.K.) ¶¶ 12, 19. D.B., A.N., and H.K. have alleged no emotional distress more serious than this type of fear and anxiety.

The United States' witnesses' statements can be likened to statements asserting that "[a]s a result of Defendants' acts, Plaintiffs have suffered annoyance, inconvenience, and fear of loss of home." A court has found that such statements"[do] not rise to the level of even a 'garden variety' emotional distress claim" because the plaintiffs were not seeking damages for mental distress or anguish. *Adkins*, 2014 U.S. Dist. LEXIS 126797, at *10. It would be inconsistent with the important purposes underlying the therapist-patient privilege and undermine the ability of victims of discrimination to participate in the enforcement of civil rights laws if a witness who is not seeking damages, or even providing testimony to support a claim for damages, could not declare that they feel worried, anxious, stressed, or afraid without opening up access to all of their mental health records.

C. The Request for These Records and the Anticipated Line of Questioning Will Embarrass Witnesses, Cause the Witnesses Harm, and be Unduly Burdensome.

As the Fourth Circuit has made clear, "[e]ven assuming that . . . information is relevant (in the broadest sense), the simple fact that requested information is discoverable . . . does not mean that discovery must be had." *Nicholas v. Wyndham Int'l Inc.*, 373 F.3d 537, 543 (4th Cir. 2004) (upholding district court's affirmance of magistrate's order denying discovery from non-party and granting protective order). Under Rule 26, a district court may limit discovery if it concludes that the burden or expense of the

proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(2). Further, the court may "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense," including an order that the discovery not be had. Fed. R. Civ. P. 26(c); *see also McDougal–Wilson v. Goodyear Tire & Rubber Co.*, 232 F.R.D. 246, 249 (E.D.N.C. 2005) (discovery is not limitless and the court has the discretion to protect a party from oppression or undue burden or expense); *Burke v. N.Y. City Police Dep't*, 115 F.R.D. 220, 224 (S.D.N.Y. 1987) (broad disclosure disfavored where potential for harm exists and discovery is of marginal relevance). In order to determine whether to enter a protective order, "the Court must weigh the need for the information versus the harm in producing it." *UAI Tech., Inc. v. Valutech, Inc.*, 122 F.R.D. 188, 191 (M.D.N.C. 1988).

As discussed above, the State Defendants ask this Court to expose the non-party witnesses' medical and mental health history, including any counseling and treatment related to the struggles those witnesses had after recognizing that their gender identity did not match the sex they were assigned at birth. Such records could include intensely personal and sensitive information such as rejection by family members, discussions related to sexual identity, or suicide attempts related to gender dysphoria. Forcing the witnesses to expose and then re-live these painful memories would be oppressive and harmful. For some witnesses, probing into their counseling visits will revisit very painful memories that required that mental health counseling in the first place. It may also serve to chill their willingness to come forward to relay their stories about the effect of H.B. 2 on their lives.

Because there are no allegations that the State Defendants' actions *caused* any witness' gender dysphoria or co-occurring conditions, there is no need to examine the records to probe whether or not the related counseling or treatment was traceable to the State Defendants' actions. Notably, the State Defendants have also offered witnesses who allege they experience distress at the prospect of transgender individuals using restrooms consistent with their gender identity. It is no more justified to open the transgender individuals' medical and mental health history to scrutiny than it would these witnesses, and arguably even less justified given the particular harm to transgender people who may rely on confidential counseling to discuss especially sensitive issues.

Courts in this Circuit have limited relevant discovery because the countervailing privacy considerations for non-party witnesses around medical and mental health records outweigh the interests in disclosure. *See, e.g.*, *A Helping Hand, LLC v. Balt. Cty., Md.*, 295 F. Supp. 2d 585, 587 (D. Md. 2003) (granting protective order to operator of drug and alcohol treatment program for non-party patient medical records in case where ADA violations were alleged in connection with county's efforts to thwart opening of methadone treatment clinic). As with the transgender non-party witnesses in the present case, the information sought in *A Helping Hand* was "extremely sensitive." *Id.* at 592. The court observed that "[r]ecovering heroin addicts are likely to face difficult medical and personal issues, as well as a significant social stigma. They might be particularly uncomfortable having their files reviewed by these defendants, who have discriminated against them in the past." The non-party witnesses in this matter face similar difficult medical and personal issues, often experience social stigma, and are facing having their

files reviewed by the very individuals who they allege discriminated against them. The Court noted that "discovery involving this information is almost certain to involve "annoyance, embarrassment, oppression, or undue burden or expense" on the part of the patients. *Id.*

Also similar to the present case, the court noted that it was "not clear that the defendants will need individualized patient data to defend against the suit" "given that Helping Hand is alleging discrimination based on its association with a population of disabled individuals, rather than discrimination against some individual in particular." *Id.* at 592-93. The United States' claims are based on H.B. 2's effect on all transgender individuals in the State of North Carolina and are not just based on the individual non-party witnesses. Even if the State Defendants were somehow able to use medical records and related deposition questioning to show that every single one of the United States' non-party witnesses did not suffer from "genuine" gender dysphoria, were untruthful in their testimony, or were otherwise unaffected by H.B. 2, the United States' claims will still stand.

Finally, it is fair to say that producing ten years of medical and mental health records, without limitation, involves a massive scope and number of documents. The burden of collecting, reviewing, and producing them would far outweigh any relevance to the State Defendants. The combination of this burden with the embarrassment, oppression, and harm that will be caused by the discovery sought, and ultimately the State Defendants' lack of need for the information, strongly counsels in favor of partially quashing and modifying the subpoena and entering a protective order.

II. The United States Will Produce all Medical Documentation Relevant to the Claims and Defenses in this Case and Will Make Witnesses Available for Relevant Questions that do not Harm or Embarrass the Witnesses.

As discussed above, the United States has made a reasonable offer to provide all medical documentation relevant to this case and to make the witnesses available for deposition on topics that will not harm or embarrass the witnesses. The United States seeks a protective order prohibiting deposition questions of non-party transgender witnesses into any hypothesized cause of a transgender witness's transgender status, including but not limited to questions related to past sexual abuse; emotional trauma; physical harm; childhood pain/trauma; the marital status or relationship history of one's parents; questioning designed to elicit information about or that could be used to diagnose untreated allegedly co-occurring disorders (such as but not limited to depression, bipolar disorder, obsessive compulsive disorder, dissociative disorder, anxiety disorder, schizophrenia, or body dysmorphic disorder); or suggestions that transgender status is not real or that the witness is delusional. The United States requests that the Court grant its motion to partially quash and modify the subpoenas and issue a protective order consistent with those parameters.

CONCLUSION

For the foregoing reasons, the subpoena should be partially quashed and modified to exclude all records which are irrelevant, privileged, or harmful, and the production of which would not be proportional to the case and a protective order should be granted guarding against harmful, oppressive, or embarrassing questions at depositions.

Respectfully submitted, this 18th day of October, 2016.

RIPLEY RAND

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Middle District of North Carolina
United States Department of Justice
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/s/ Taryn Wilgus Null
Taryn Wilgus Null
DC Bar Number: 985724
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United States Department of Justice
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950 Pennsylvania Avenue, NW
Washington, DC 20530
(202) 616-3874
taryn.null@usdoj.gov

Counsel for Plaintiff United States

CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2016, I electronically filed the foregoing United States' Memorandum in Support of its Motion to Partially Quash and Modify Defendants' Subpoena Duces Tecum and for a Protective Order with the Clerk of the Court 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 and mailed to the following non-CM/ECF participant:

Elizabeth Ording
219 S. Limestone
Lexington, KY 40508

Respectfully submitted,

/s/ Taryn Wilgus Null
Taryn Wilgus Null

EXHIBIT 1

HIGHLY CONFIDENTIAL

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA, Plaintiff, vs. STATE OF NORTH CAROLINA et al., Defendants.	)	CASE NO. 1:16-CV-00425-TDS-JEP

DEFENDANT GROUP'S NOTICE OF SUBPOENA TO NON-PARTY

To: All Counsel of Record

PLEASE TAKE NOTICE that pursuant to Rule 45 of the Federal Rules of Civil Procedure, defendants, the State of North Carolina, Governor Patrick McCrory, the North Carolina Department of Public Safety, and intervenor-defendants, President Pro Tempore Phil Berger and Speaker Tim Moore, by their attorneys, intend to serve the attached subpoenas upon the noted witnesses.

This the 29th day of September, 2016.

By: /s/ Karl S. Bowers, Jr.
Karl S. Bowers, Jr.*
Federal Bar #7716
Counsel for the State of North Carolina, Governor McCrory, and the North Carolina Department of Public Safety
BOWERS LAW OFFICE LLC
P.O. Box 50549
Columbia, SC 29250
Telephone: (803) 260-4124
E-mail: butch@butchbowers.com
*appearing pursuant to Local Rule 83.1(d)

By: /s/ Robert N. Driscoll
Robert N. Driscoll*
Counsel for the State of North Carolina, Governor McCrory, and the North Carolina Department of Public Safety

By: /s/ Robert C. Stephens
Robert C. Stephens (State Bar #4150)
Counsel for the State of North Carolina and Governor McCrory
General Counsel
Office of the Governor of North Carolina
20301 Mail Service Center
Raleigh, NC 27699
Telephone: (919) 814-2027
E-mail: bob.stephens@nc.gov
*appearing as Local Rule 83.1 Counsel

By: /s/ William W. Stewart, Jr.
William W. Stewart, Jr. (State Bar #21059)
Frank J. Gordon (State Bar #15871)
B. Tyler Brooks (State Bar #37604)
Counsel for the State of North Carolina, Governor McCrory, and the North

MCGLINCHEY STAFFORD
1275 Pennsylvania Avenue NW
Suite 420
Washington, DC 20004
Telephone: (202) 802-9950
E-mail: rdriscoll@mcglinchey.com
*appearing pursuant to Local Rule 83.1(d)

By: /s/ S. Kyle Duncan
S. Kyle Duncan* (DC Bar #1010452)
Lead Counsel for President Pro Tempore Phil Berger and Speaker Tim Moore
Gene Schaerr* (DC Bar #416638)
Counsel for President Pro Tempore Phil Berger and Speaker Tim Moore
SCHAERR-DUNCAN LLP
1717 K Street NW, Suite 900
Washington, DC 20006
Telephone: (202) 714-9492
Fax: (571) 730-4429
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gschaerr@schaerr-duncan.com
*appearing pursuant to Local Rule 83.1(d)

Carolina Department of Public Safety
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Email: bstewart@mgsattorneys.com
fgordon@mgsattorneys.com
tbrooks@mgsattonreys.com

By: /s/Robert D. Potter, Jr.
Robert D. Potter, Jr. (State Bar #17553)
Attorney at Law
Counsel for President Pro Tempore Phil Berger and Speaker Tim Moore
2820 Selwyn Avenue, #840
Charlotte, NC 28209
Telephone: (704) 552-7742
Email: rdpotter@rdpotterlaw.com

HIGHLY CONFIDENTIAL

CERTIFICATE OF SERVICE

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

This the 29th day of September, 2016.

By: /s/ William W. Stewart, Jr.
William W. Stewart, Jr. (State Bar #21059)
Counsel for the State of North Carolina, Governor McCrory, and the North Carolina Department of Public Safety
MILLBERG GORDON STEWART PLLC
1101 Haynes Street, Suite 104
Raleigh, NC 27604
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Email: bstewart@mgsattorneys.com

HIGHLY CONFIDENTIAL

AO 88B (Rev. 02/14) Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action

UNITED STATES DISTRICT COURT

for the

Middle District of North Carolina

UNITED STATES OF AMERICA

Plaintiff

v.

STATE OF NORTH CAROLINA, ET AL.

Defendant

Civil Action No. 1:16-CV-00425-TDS-JEP

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION

To: Alaina Kupec, 212 Glenmore Road, Chapel Hill, NC
C/o Anne M. Tompkins, Cadwalader, Wickersham & Taft LLP, 227 West Trade Street, Charlotte, NC 28802

(Name of person to whom this subpoena is directed)

☑ *Production:* **YOU ARE COMMANDED** to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection, copying, testing, or sampling of the material:

SEE "ATTACHMENT A"

Place:	Date and Time:
MILLBERG GORDON STEWART PLLC 1101 HAYNES STREET, SUITE 104 RALEIGH, NC 27604	10/17/2016 12:00 pm

☐ *Inspection of Premises:* **YOU ARE COMMANDED** to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place:	Date and Time:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 09/29/2016

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

/s/ William W. Stewart, Jr.
Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* STATE OF NORTH CAROLINA, GOV. PATRICK MCCRORY, and NCDPS, who issues or requests this subpoena, are:

William W. Stewart, Jr., 1101 Haynes St., Ste. 104, Raleigh, NC 27604; 919-836-0090; bstewart@mgsattorneys.com

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. 1:16-CV-00425-TDS-JEP

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____

on *(date)* _____ .

❒ I served the subpoena by delivering a copy to the named person as follows: _____

_____ on *(date)* _____ ; or

❒ I returned the subpoena unexecuted because: _____

_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of $ _____ .

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)

(c) Place of Compliance.

(1) ***For a Trial, Hearing, or Deposition.*** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person

(i) is a party or a party's officer; or

(ii) is commanded to attend a trial and would not incur substantial expense.

(2) ***For Other Discovery.*** A subpoena may command:

(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and

(B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) ***Command to Produce Materials or Permit Inspection.***

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) ***Producing Documents or Electronically Stored Information.*** These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) ***Claiming Privilege or Protection.***

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

For access to subpoena materials, see Fed. R. Civ. P. 45(a) Committee Note (2013).

HIGHLY CONFIDENTIAL

ATTATCHMENT A

Any and all records of Alaina Kupec, for the prior ten (10) years, in any way pertaining to his/her 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 him/her.

If the person responding to this subpoena wishes to designate any responsive document as "Protected Confidential Information," as defined by the Court in this case, that person 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, copies of which are attached.

EXHIBIT 2

From: Wilkens, Scott B. [mailto:SWilkens@jenner.com]
Sent: Thursday, October 06, 2016 6:37 PM
To: Null, Taryn Wilgus (CRT); Driscoll, Robert; Duncan, Kyle; Bowers, Karl; Stephens, Bob; Stewart, William; Schaerr, Gene
Cc: Stoughton, Corey (CRT); Lareau, Alyssa (CRT); Tara Borelli; Elizabeth Gill; Pellegrino, Whitney (CRT); Cummings, Torey (CRT); Carney, Chris (CRT); Kisch, Lori (CRT); Monahan, Camille (CRT)
Subject: Plaintiffs' counter-proposal regarding medical records

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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Suite 900, Washington, DC 20001-4412 | jenner.com
+1 202 639 6072 | TEL
SWilkens@jenner.com
Download V-Card | View Biography

EXHIBIT 3

From: Driscoll, Robert [mailto:rdriscoll@mcglinchey.com]
Sent: Wednesday, October 12, 2016 11:45 AM
To: Kisch, Lori (CRT); Butch Bowers; Wilkens, Scott B.
Cc: Null, Taryn Wilgus (CRT); 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

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

direct: (202) 802-9950
fax: (202) 403-3870
email: rdriscoll@mcglinchey.com
office: 1275 Pennsylvania Avenue, Suite 420 | Washington, DC 20004

McGLINCHEY STAFFORD®

bio | vcard | www.mcglinchey.com | www.cafalawblog.com

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.

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Topic areas for depositions:

1. Education/career history
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3. Steps taken to transition, socially and medically
4. What it means to live as a transgender individual
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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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SWilkens@jenner.com
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EXHIBIT 4

From: Driscoll, Robert [mailto:rdriscoll@mcglinchey.com]
Sent: Tuesday, September 20, 2016 12:39 PM
To: Kisch, Lori (CRT); Wilkens, Scott B.; Bowers, Karl; Stephens, Bob; Stewart, William; Duncan, Kyle; Schaerr, Gene
Cc: Stoughton, Corey (CRT); Lareau, Alyssa (CRT); Tara Borelli; Elizabeth Gill; Pellegrino, Whitney (CRT); Null, Taryn Wilgus (CRT); Cummings, Torey (CRT); Stoughton, Corey (CRT); Monahan, Camille (CRT)
Subject: RE: Defendants' (Governor McCrory's & Intervenors') Request for Medical Records

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 diagnoses 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

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