

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

JOAQUÍN CARCAÑO et al.,)
)
Plaintiffs,)
)
vs.) CASE NO. 1:16-CV-00236-TDS-JEP
)
PATRICK MCCRORY, in his official)
capacity as Governor of North Carolina et al.,)
)
Defendants.)

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

**DEFENDANTS AND INTERVENOR-DEFENDANTS’
RESPONSE IN OPPOSITION TO MOTIONS TO
QUASH AND FOR PROTECTIVE ORDERS**

Defendants State of North Carolina, Governor Patrick L. McCrory, and the North Carolina Department of Public Safety, along with Intervenor-Defendants President pro tempore Phil Berger and Speaker Tim Moore (collectively “Defendants”), submit this Response in Opposition to the following motions:

1. Motion for Protective Order filed by the *Carcaño* plaintiffs (236 Doc. 168)
2. United States’ Motion to Partially Quash and Modify Defendants’ Subpoenas Duces Tecum (425 Doc. 204);

3. Non-Party’s Witness Stephanie Paige Dula’s Motion to Join United States’ Motion to Partially Quash and Modify Defendants’ Subpoenas Duces Tecum and for a Protective Order (236 Doc. 172; 425 Doc. 211); and
4. Motion of Non-Party Witnesses [A.T., A.N. and Alaina Kupec] to Join United States’ Motion to Partially Quash and Modify Defendants’ Subpoenas Duces Tecum and for a Protective Order (236 Doc. 167; 425 Doc. 207).¹

At issue in these motions are the discovery requests and subpoenas *duces tecum* served by Defendants for certain medical records, as well as a dispute regarding anticipated deposition topics involving the medical histories of the individual *Carcaño* plaintiffs and the United States’ transgender witnesses. Both sets of plaintiffs have made allegations about the medical basis for transgenderism and the appropriate treatment for gender dysphoria, including specific allegations about the medical histories, treatment protocols, and ongoing needs of their transgender witnesses. As will be shown, medical discovery is relevant to allegations of harm alleged by the individual plaintiffs and the United States’ third-party transgender witnesses, to the plaintiffs’ argument about what “sex” and “transgender” means, to the *Carcaño* plaintiffs’ theory that transgender people are a protected class under the Equal Protection Clause, and to the *Carcaño* plaintiffs’ Due Process claims that HB2 requires them to disclose their transgender status and undergo unnecessary medical procedures.

¹ Only four of the United States’ seven transgender witnesses—A.T., A.N., and Alaina Kupec, and Paige Dula—have filed their own motions, namely motions to join in and adopt the arguments made in the United States’ motion to quash.

ARGUMENT

I. Plaintiffs Make Numerous, Detailed Allegations About The Medical Histories, Treatments, And Ongoing Medical Needs Of Their Transgender Witnesses.

Contrary to the impression given by Plaintiffs' memoranda in support of their motions, the allegations of harm asserted by their transgender witnesses are not limited to mere dignitary harm. Nor are their medical allegations targeted narrowly to "the diagnosis of gender dysphoria in general and its typical appropriate treatment." *See* 236 Doc. 170, at 2. To the contrary, the *Carcaño* plaintiffs specifically allege that "medical treatment for gender dysphoria must be individualized for the medical needs of each patient." 236 Doc. 151 at ¶29. Accordingly, plaintiffs have made specific medical assertions about each individual plaintiff and non-party transgender witness. They have repeatedly invoked detailed allegations about significant mental and emotional injury as a factual basis for the relief they seek. They describe in detail their witnesses' medical histories, their courses of treatment, and their ongoing medical needs in support of their claims. Defendants clearly must be entitled to explore these allegations through the customary means of civil discovery.

Allegations in *Carcaño v. McCrory*

In the *Carcaño* plaintiffs' Second Amended Complaint, it is alleged that use of a transgender individual's preferred restroom is "critical" for his or her "social transition." 236 Doc. 151 at ¶37. The *Carcaño* complaint is rife with general medical allegations about the existence, nature, and treatment of "gender dysphoria" as well as particularized medical allegations about the medical histories, treatments, and ongoing symptoms of

each plaintiff. Generally, they allege that “[g]ender dysphoria is a serious medical condition that, if left untreated, can lead to clinical distress, debilitating depression, and even suicidal thoughts and acts.” 236 Doc. 151 at ¶37. Treatment, they allege, “includes living one’s life consistent with one’s gender identity, including when accessing single-sex spaces such as restrooms and locker rooms.” 236 Doc. 151 at ¶30. Further, they allege: “The goal of such treatment is to alleviate distress by helping a person live congruently with the person’s gender identity, the primary determinant of sex” and that using the individual’s preferred restroom is “critical” to his treatment. In their brief in support of their motion for preliminary injunction—a motion on which they obtained relief from this Court—the *Carcaño* plaintiffs asserted that, since passage of HB2, “they have suffered significant mental and emotional distress due to H.B.2’s bar on them using ... restrooms in schools and other government buildings” that accord with their gender identities. 236 Doc. 22 at 6. These allegations are not only asserted broadly, but are particularized for each of the transgender individuals bringing suit.

For example, plaintiff Joaquin Carcaño alleges that he “has been in the continuous care of a licensed mental health clinician” since 2013. 236 Doc. 151 at ¶34. Further, he alleges that his “therapist ... specifically recommended that he use only the men’s restroom. She was concerned that using the women’s restroom could compromise his *mental health*, well-being, and safety.” 236 Doc. 151 at ¶41 (emphasis added). In addition, he alleges that his “physician recommended and prescribed hormone treatment” that had the “therapeutic benefits” that “helped alleviate the distress Mr. Carcaño experienced” due to gender dysphoria. 236 Doc. 151 at ¶39.

The Second Amended Complaint goes on to allege that Mr. Carcaño “is now comfortable with the status of his treatment and, with the exception of the distress now caused by passage of H.B.2, his distress has been managed through the clinically recommended treatment he has received.” *Id.* at ¶42. Indeed, the pleading even states that Carcaño cannot use a women’s restroom because doing so would cause “substantial harm to his mental health and well-being” and the idea of using a women’s restroom causes him “to experience significant anxiety, as he knows it would be distressing for him[.]” *Id.* at ¶¶45-46. These allegations are reiterated in the declaration under penalty of perjury that Carcaño submitted in support of a preliminary injunction. *See* 236 Doc. 22-4 at ¶¶17, 22, 24 (describing his “distress” and stating, *inter alia*, that Carcaño “plans to continue [his] treatment under the supervision of medical professionals based on [his] medical needs” and that the idea of using a women’s room “causes significant anxiety and emotional distress” and such use “would create significant mental and emotional distress”). Lest these assertions be dismissed as merely background information, plaintiffs’ Initial Disclosures describe the anticipated subjects of Carcaño’s testimony as the “effect and enforcement of House Bill 2” and the “issues addressed in [his] declaration submitted in support of motion for preliminary injunction.” *See* Ex. A.

The same holds true for plaintiff H.S., a minor transgender girl, who alleges that prior to HB2 she used women’s facilities. As with Mr. Carcaño, the Second Amended Complaint alleges that using the facilities designated for her natal sex would “cause substantial harm to her mental health and well-being.” 236 Doc. 151 at ¶107. H.S. specifically alleges that “surgery is not medically necessary for her . . .”; that “hormone

blockers greatly reduced her suffering,” and that using the boy’s or men’s restroom would be “particularly” hard for her because she has “a traditionally feminine appearance” due to the fact that “she never went through puberty as a boy and began estrogen treatment earlier this year.” 236 Doc. 151 at ¶¶222, 94, 106. She further alleges that because surgery “is not medically necessary for her,” she “has not been able” to amend her birth certificate. 236 Doc. 151 at ¶222. Contrary to the *Carcaño* plaintiffs’ assertion that “possible childhood abuse, depression, and suicidal thoughts,” are “totally unrelated to gender dysphoria,” Doc. 170 at 17, H.S. *expressly injected* her own childhood psychological history by alleging that the idea of using a men’s room would cause her “to experience significant anxiety and bring[] up *painful memories and anxiety from her earlier childhood.*” 236 Doc. 151 at ¶108 (emphasis added). Her declaration in support of the motion for preliminary injunction supports these allegations by stating that using a men’s facility would make her feel “inferior” and would create “significant mental and emotional distress.” 236 Doc. 22-8 at ¶¶28, 30; *see also id.* ¶31 (describing “emotional distress”). Like *Carcaño*, the initial disclosure identifying H.S. indicates that she will testify as to the “effect and enforcement of House Bill 2” and the “issues addressed” in her declaration. *See* Ex. A.

The allegations and evidence offered as to the third transgender plaintiff, Peyton McGarry, similarly implicate medical and psychological conditions. McGarry describes in detail his care and treatment by a clinical social worker and an endocrinologist, including how “his voice has deepened and his face and body have become more traditionally masculine in appearance.” 236 Doc. 151 at ¶77. He alleges that these

changes would alert others to his transgender status should he be required to use women’s restrooms. *Id.* at 78. McGarry alleges that he cannot use women’s facilities because it would be “stigmatizing” and “would also cause substantial harm to his *mental health and well-being.*” 236 Doc. 151 at ¶¶76, 78 (emphasis added). The idea of using a women’s restroom causes him “significant anxiety, as he knows it would be distressing[.]” *Id.* ¶79. McGarry has also submitted two separate declarations elaborating on these allegations of harm. In one, it is averred that using a women’s room “would create significant mental and emotional distress” and the idea “causes significant anxiety and distress.” 236 Doc. 22-9 at ¶¶27, 29. In another declaration, McGarry alleges that “enactment of H.B. 2 has impacted and continues to impact [his] daily life, including through *recent health problems* that have stemmed from avoiding use of the restroom.” 236 Doc. 73-1 at ¶1 (emphasis added). The initial disclosures confirm that McGarry’s intended testimony includes the “effects” of HB2 and the “issues addressed” in his declarations. *See* Ex. A.

Allegations in *United States v. State of North Carolina*

The United States and its third-party witnesses also make numerous specific, individualized assertions about their medical histories, treatment, and ongoing needs, as well as generalized allegations about the alleged medical basis for transgenderism and the appropriate criteria for defining “sex.” In its complaint, the United States alleges that transgender individuals “have suffered and continue to suffer injury, including, without limitation, emotional harm, mental anguish, distress, humiliation, and indignity as a direct and proximate result of compliance with and implementation of H.B. 2.” 425 Doc. 2 at ¶46. The United States’ motion for preliminary injunction alleges that HB2 “causes

particularly acute *psychological* damage, as it interferes with *medically necessary treatment*,” 425 Doc. 2 at ¶49 (emphasis added). It also makes the psychological assertion that “[g]ender identity is innate and external efforts to change a person’s gender identity can be harmful to a person’s health and well-being.” 425 Doc. 2 at ¶36. In its preliminary injunction motion, the United States alleges that HB2 “causes particularly acute psychological damage” and “is causing significant psychological, stigmatic, economic, social, and physical harm to transgender people.” 425 Doc. 76 at 29, 53. In addition, the United States offered *seven* different declarations from transgender individuals to support its request for a preliminary injunction, and in each case the declarant makes claims of mental and emotional harm allegedly traceable to HB2.²

In her declaration, transgender witness Paige Dula provides extensive testimony about her psychological history. For instance, she describes a history of anxiety, depression, suicidal thoughts, and depression. 425 Doc. 76-32 at ¶6. According to Dula, “until H.B. 2 was enacted, [she] no longer suffered from anxiety, depression, or insomnia.” *Id.* at ¶8. She further alleges that she has started taking the anti-anxiety medication Xanax again, which she had not used for many years, and that HB2 has “brought back anxieties from when [she] was previously harassed for being transgender.” *Id.* at ¶¶9, 11.

² The third party transgender witnesses identified by the United States have put their mental and psychological conditions at issue because they have submitted detailed declarations in support of the government’s allegations that HB2 causes harm, have alleged that they have suffered emotional and psychological harm as a result of HB2, and have indicated that they will testify regarding these allegations at trial. In point of fact, these witnesses are technically not plaintiffs solely because of the United States’ unique litigating position, but they are individuals the government intends to use to prove harm as a requirement of making its case. Thus, they are in the same position as the *Carcaño* plaintiffs.

The declarations of the United States' other witnesses are similar in linking gender dysphoria, significant anxiety, and other conditions to HB2:

- H.K., a transgender woman, alleges that, since HB2, she has suffered from “anxiety and fear,” that her gender dysphoria “has worsened since H.B. 2 passed,” and that she has “trouble sleeping and regularly feel[s] anxious and afraid.” 425 Doc. 76-45 at ¶¶18-19.
- Alaina Kupec, a transgender woman, describes her history of “anxiety” and “depression” and alleges that HB2 makes her “anxious” using women’s restrooms in public and that the law “has brought back anxieties” from being harassed previously. 425 Doc. 76-34 at ¶¶6, 8-9. Indeed, she alleges that HB2 “has brought back these painful memories and has taken an unbelievable emotional toll” on her. *Id.* at ¶9. Even being in the State of North Carolina is “anxiety-producing,” she says, and HB2 makes her want to move out of state. *Id.* at ¶14.
- Transgender man A.T. alleges that HB2 makes him “often ... feel anxious and scared” and that it might even lead to committing suicide. 425 Doc. 76-40 at ¶22. If he were able to use men’s facilities, he contends, he “would feel less depressed and experience less [gender] dysphoria.” *Id.* at ¶21.
- Transgender man C.W. alleges that he has a history of “anxiety and depression stemming from ... gender dysphoria.” 425 Doc. 76-39 at ¶8. He alleges further that, since HB2, he has suffered at least one “panic attack” and that he has used anti-anxiety medication “much more frequently” as a result of HB2. *Id.* at ¶¶13, 15. Moreover, he alleges that his “anxiety and depression” are now worse, that he

does not “feel safe using any bathrooms anymore,” and that HB2 makes him feel “anxious and scared every day.” *Id.* at ¶¶16, 22, 26.

- Transgender man D.B. alleges that HB2 caused him to use the women’s restroom, which made him feel “very nervous and anxious.” 425 Doc. 76-44 at ¶14.
- Transgender woman A.N. alleges that HB2 causes her to feel “a big ball of stress and anxiety that is difficult to describe.” 425 Doc. 76-41 at ¶25. Using a men’s room, she says, would make her feel “horrible” and “scared.” *Id.* ¶19.

The United States’ motion for preliminary injunction is currently pending with the Court, and the United States has never sought to revise or withdraw any of these factual allegations. To the contrary, the United States has plainly taken the position that the Court may find that HB2 is causing transgender individuals “acute psychological damage,” “anguish and a diminished sense of self,” and a risk of “medical complications” on the basis of this evidence. 425 Doc. 76 at 29, 54, 59. Its initial disclosures likewise make clear that the information contained within these declarations is the kind of evidence the United States intends to offer at trial. *See* Ex. B. Contrary to plaintiffs’ briefs, the above allegations constitute more than “anecdotal” or “garden-variety” assertions of harm. Instead, they describe in detail individuals with a history of medical conditions for which they have sought or required some form of treatment.

II. Medical Discovery Is Relevant To Several Issues Raised By Plaintiffs’ Pleadings.

The fact that the *Carcaño* plaintiffs seek only nominal damages and equitable relief and that the United States seeks only equitable relief does not protect the testimony

of their transgender witnesses from scrutiny. If in fact, as the United States asserts, “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,” 425 Doc. 205, at 5, then their witnesses should be precluded from testifying and the allegations of their declarations, *which are based on their medical histories and treatment*, should be stricken. There is no provision in the rules of civil procedure for the admission of “anecdotal testimony” that is otherwise completely irrelevant.

Besides, damages is not the only issue on which Plaintiffs have made medical assertions. First, medical discovery is relevant to the grounds for the *Carcaño* plaintiffs’ equal protection claims, including standing, and the basis for the United States’ statutory claims. In order to establish an equal protection violation, the *Carcaño* plaintiffs must establish that they are members of a protected class, which *a priori* requires the Court to define what that class is. Both sets of plaintiffs offer expert medical testimony to explain the nature of gender dysphoria and its appropriate treatment, but there are different ways to define who might be included within the scope of that class of people. For example, must an individual have a diagnosis of gender dysphoria in order to be considered transgender? Must he undergo social transition, hormone therapy, and/or surgical alteration? North Carolina permits a change in “sex” designation, for example, on the basis of sex reassignment surgery—a criterion plaintiffs reject. Must the individual consistently express a gender different from natal sex, or can it be transitory? The United States admits that Defendants are entitled to know whether its witnesses are, in fact, transgender, 425 Doc. 205 at 8, but ignores that what constitutes “transgender” can be

disputed. The definition contained in the Diagnostic and Statistical Manual of Mental Disorders (5th edition), for example, includes elements that Plaintiffs appear to contest. Defendants must be permitted to explore whether each plaintiff and witness falls within the scope of the various possible definitions.

Second, medical discovery is relevant because the United States offers its transgender witnesses to bolster its argument that “sex” includes “gender identity” under Title VII, Title IX and VAWA. These witnesses want to tell the court that a transgender woman “is a woman,” for example, without allowing Defendants to cross-examine their beliefs or behavior with regard to their gender expression.

Finally, the due process claims by the *Carcaño* plaintiffs unquestionably implicate the medical histories, treatment, and alleged ongoing needs of the individual plaintiffs. As to their due process claims, plaintiffs assert that HB2 requires them to reveal their transgender status, which they imply cannot be detected otherwise due to physical changes their bodies have undergone through hormone therapy. Defendants should be allowed discovery to explore the extent and effects of this hormone treatment. In addition, they allege that HB2 would require them to undergo unnecessary medical procedures (i.e., sex reassignment surgery) in order to change their birth certificates. Plaintiffs cannot unilaterally declare that such surgery is “unnecessary,” while simultaneously claiming that bathroom access *is* medically necessary for their treatment. Defendants are entitled to question their assertions of medical necessity.

For both the *Carcaño* plaintiffs and the United States’ transgender witnesses, the Federal Rules of Civil Procedure allow for the discovery sought by the defendants. The

scope of permitted discovery in federal litigation is expansive: “Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case ... Information within this scope of discovery need not be admissible in evidence to be discoverable.” Fed. R. Civ. P. 26(b)(1). Rule 26 does not define relevance, but it has been “broadly construed to encompass any possibility that the information sought may be relevant to the claim or defense of any party.” *EEOC v. Sheffield Fin. LLC*, No. 1:06CV889, 2007 WL 1726560, at *3 (M.D.N.C. June 13, 2007) (quoting *Merrill v. Waffle House, Inc.*, 227 F.R.D. 467, 473 (N.D. Tex. 2005)). Furthermore, the rules of discovery, including Rule 26, are to be given a broad and liberal construction. *Herbert v. Lando*, 441 U.S. 153, 177 (1979); *Nemecek v. Bd. of Governors*, No. 2:98-CV-62-BO, 2000 WL 33672978, at *4 (E.D.N.C. Sept. 27, 2000). “[W]hen the discovery sought appears relevant ... the party resisting the discovery has the burden to establish the lack of relevance by demonstrating that the requested discovery (1) does not come within the broad scope of relevance as defined under [Rule 26(b)(1)], or (2) is of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor for broad disclosure.” *Sheffield Fin.*, 2007 WL 1726560, at *3 (citation omitted).

Defendants are entitled to know whether these allegations are supported by the evidence. In particular, the documents sought and subjects of deposition inquiry are relevant to whether there are any co-occurring or pre-existing conditions that may have caused the emotional distress the witnesses claim results from HB2. Such “information is ... relevant to the preparation of [a] defendant’s defenses ..., because [the plaintiff’s]

medical records may reveal stressors unrelated to defendants which may have affected plaintiff's emotional well being." *Sheffield Fin.*, 2007 WL 1726560, at *4 (M.D.N.C. June 13, 2007) (quoting *LeFave v. Symbios, Inc.*, No. CIV. A. 99-Z-1217, 2000 WL 1644154, at *2 (D. Colo. Apr. 14, 2000)); see *EEOC v. Smith Bros. Truck Garage, Inc.*, No. 7:09-CV-00150-H, 2011 WL 102724, at *1-2, 4 (E.D.N.C. Jan. 11, 2011) (where plaintiff sought compensation on behalf of charging party for emotional distress, inconvenience, loss of enjoyment of life, humiliation, and loss of self-esteem, defendant had right to explore medical records for other causes of emotional distress damages).

Knowing only that the *Carcaño* plaintiffs and third party witnesses are diagnosed with gender dysphoria and that they are currently receiving some sort of treatment for anxiety or related disorders is not sufficient. Such a course is in fact asking Defendants and the Court to accept Plaintiffs at their word about the cause of the alleged harm. The rules of civil procedure do not permit a plaintiff to cherry-pick evidence in this manner.

If the medical allegations offered by Plaintiffs are irrelevant, then they should admit as much and not ask the Court to use them as evidence in these matters. Plaintiffs cannot now seek to curtail inquiry into the very subjects they themselves broached while simultaneously reserving the right to present such proof again at trial. This is the very type of fundamental unfairness that the rules of civil discovery do not permit.

III. Any Psychotherapist-Patient Privilege Has Been Waived And, In Any Event, The Privilege Only Extends To Communications.

Though the *Carcaño* plaintiffs and third party transgender witnesses seek to rely on the psychotherapist-patient privilege, their actions in this litigation have resulted in the

waiver of any such privilege that might have been applicable. Like other testimonial privileges, the psychotherapist-patient privilege can be waived. *Jaffee v. Redmond*, 518 U.S. 1, 15 n.14 (1996); *United States v. Bolander*, 722 F.3d 199, 223 (4th Cir. 2013); see also *Koch v. Cox*, 489 F.3d 384, 391 (D.C. Cir. 2007) (a plaintiff “waives the psychotherapist-patient privilege when ... he does the sort of thing that would waive the attorney-client privilege”). When the patient places her mental health “at issue” in litigation, this constitutes a waiver of the psychotherapist-patient privilege. *Townsend v. Shook*, No. 5:06CV70, 2007 WL 1612657, at *2 (W.D.N.C. May 31, 2007) (citing *Vasconcellos v. Cybex Int’l, Inc.*, 962 F. Supp. 701 (D. Md. 1997)).

For example, in *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), the Fourth Circuit affirmed a district court’s determination that medical records were subject to discovery where the plaintiff sought damages for mental and emotional damages. In that case, the plaintiffs brought an action for negligence and loss of consortium resulting from an automobile accident, including a request for compensatory damages for bodily injuries and mental anguish. The defendant sought production of medical records, including mental health care records. The plaintiffs refused to release the mental health records asserting that they were privileged and not otherwise discoverable because mental condition had not been introduced as an element of a claim. The district court ordered the plaintiffs “to provide [defense counsel] with certain records of treatment or an authorization to obtain the same,” and ultimately dismissed the case when the plaintiffs refused to comply with the order. The Fourth Circuit affirmed the dismissal, and

explained that the plaintiffs put their mental condition at issue in the case by seeking damages for mental anguish and because “harm” is an element of a negligence claim. Similarly, in *McCrea v. Johns Hopkins Universities*, No. JKB-15-579, 2016 WL 4013639, at *2-3 (D. Md. July 27, 2016), the court held that the plaintiff waived her right to invoke the psychotherapist-patient privilege by placing her physical and mental health at issue in the case because her claims required her to produce evidence of PTSD. *See also Carr v. Double T Diner*, Civil Action No. WMN-10-CV-00230, 2010 WL 3522428, at *1-3 (D. Md. Sept. 8, 2010) (granting motion to compel mental health records related where plaintiff placed mental health at issue by seeking damages for emotional distress); *Teague v. Target Corp.*, No. 3:06CV191, 2006 WL 3690642, at *1-2 (W.D.N.C. Dec. 11, 2006) (granting motion to compel discovery regarding health care treatment along with records where plaintiff sought damages for emotional distress).

Here, both the *Carcaño* plaintiffs and the third party transgender witnesses have put their medical or mental conditions at issue in this litigation by repeatedly alleging significant psychological and emotional harm. In fact, they have affirmatively made these allegations relevant, without any prompting from Defendants, by their various pleadings and declarations already on file with the Court. Therefore, they have waived any privilege that might otherwise have attached to the records and subject matter.

Additionally, like the attorney-client privilege, the patient-psychotherapist privilege covers only “confidential communications,” not all records. As such, insofar as not all of the records and testimony sought are “communications,” they are not covered by the privilege. *See Doe v. Mulcahy, Inc.*, No. 08-306, 2008 WL 4572515, at *5 (D.

Minn. Oct. 14, 2008) (noting that identities of providers, dates of treatment, and nature of treatment not covered by privilege “because only actual communications between therapists and patients are covered”) (citing *Jaffee*, 518 U.S. at 15). Therefore, even if the Court finds that the psychotherapist-patient privilege protects some of the documents and testimony being sought from disclosure, the other records that are not covered by the psychotherapist-patient privilege are still discoverable. In *McAfee v. Boczar*, No. 3:11CV646, 2012 WL 2374173, at *4 (E.D. Va. June 22, 2012), the court modified the subpoena for all medical records to exclude documents protected by the psychotherapist-patient privilege. The court required the plaintiff to expressly claim that psychotherapist-patient privilege for any documents withheld and, quoting Rule 45, further required the movant to “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.” Here, plaintiffs should likewise be required to make these express, detailed claims of privilege, which they have not yet done. *See* Fed. R. Civ. P. 26(b)(5)(A); Fed. R. Civ. P. 45(e)(2)(A)(ii).

IV. The Privacy Of The *Carcaño* Plaintiffs And Third-Party Transgender Witnesses Can Be Protected Without Denying Defendants’ Discovery.

In claiming that the discovery sought will “expose” the witnesses’ medical and mental health histories, Plaintiffs ignore the very strict Protective Order that the parties’ negotiated, and the Court approved, to protect medical information about witnesses on both sides. *See* 236 Doc. 148; 425 Doc. 179. That order governs “the disclosure by any Party of any non-public confidential information produced, obtained, or exhibited” in the

action, including “particularly sensitive and highly personal information of individuals identified or disclosed by Plaintiff United States, the *Carcaño* Plaintiffs,” and includes in the definition of “Protected Confidential Information” “medical records and any other documents or information relating to individuals’ medical conditions or treatment.” The order further provides that Protected Confidential Information “shall be used solely for the purposes of this Litigation.” The order provides even greater protections for certain third-party witnesses identified by the United States. If plaintiffs feel that the existing order does not adequately address medical records, one way to address these privacy concerns would be to provide limits on who can see the records. *See Sheffield Fin., LLC*, 2007 WL 1726560 at 6 (rejecting argument that medical records should not be produced because of privacy concerns due to existence of protective order between the parties); *Carr*, 2010 WL 3522428 at *3 (granting motion to compel production of medical records and noting that parties could “stipulate to a protective order” to address privacy concerns); *see also McAfee*, 2012 WL 2374173 at *5.

It is likewise unavailing to argue that producing records would be overly burdensome because Plaintiffs can easily shift this burden to Defendants by executing releases for medical records. This, of course, is routinely done in civil litigation. In point of fact, Plaintiffs have failed to establish that producing these records would be so burdensome as to outweigh any benefit. *See Sheffield Fin.*, 2007 WL 1726560 at *3. The scope of records sought is hardly unusual for a civil case involving allegations of harm. Plaintiffs should not be permitted to make the contradictory argument that their prior medical records are both so voluminous as to preclude production of a typical time

span of prior records and also that these records cannot possibly contain information that would fall within the scope of discoverable information under Rule 26.

Finally, Plaintiffs' unreasonable request to limit deposition questioning prospectively should also be rejected. The permissible and, according to Plaintiffs, impermissible topics are so inextricably intertwined that there is no feasible way to separate them in advance. The Federal Rules of Civil Procedure provide a means for handling these issues. *See* Fed. R. Civ. P. 30(d)(3). Counsel can simply object at depositions. If something is truly privileged, counsel may instruct a witness not to answer. Furthermore, the parties can always seek intervention from the Court, as contemplated by the rules. The rules have made provision for these situations, should they arise. Plaintiffs have offered no basis for their alarmism about deposition questions and moreover have not sought to individualize their request as to any particular party or witness. Simply being transgender cannot be sufficient grounds for preemptively limiting normal questioning in civil litigation, but such is the position Plaintiffs have here adopted. Having failed to make any individualized showing about potential harm from deposition questioning, Plaintiffs have failed to establish their burden under the rules.

V. The United States Lacks Standing To Object To These Third Party Subpoenas.

“A party generally has no standing to file a motion to quash a subpoena issued to a third-party based upon Rule 45(c).” *Walker v. White*, No. 1:06cv350, 2010 WL 1957291, at *1 (W.D.N.C. May 14, 2010) (quoting *Carolina Materials, LLC v. Cont'l Cas. Co.*, 2009 WL 4611519, at *3 (W.D.N.C. Dec. 1, 2009)). Indeed, “[t]he Fourth Circuit has

held that a party lacks standing to move to quash a subpoena issued to a nonparty when the party seeking to challenge the subpoena fails to show a personal right or privilege in the information sought by the subpoena.” *Id.* (citing *United States v. Idema*, No. 04-6130, 118 F. App’x 740, 2005 WL 17436, at *3 (4th Cir. Jan. 4, 2005)). Here, the United States fails to allege, much less establish, a personal right or privilege in the information sought by the subpoenas. Accordingly, it lacks standing to quash the subpoenas.

CONCLUSION

The *Carcaño* plaintiffs and the United States have filed actions seeking to have this Court recognize transgender status as a protected class under the United States Constitution and several federal statutes. The legal theories presented are novel. In apparent recognition of this novelty, the *Carcaño* plaintiffs and the United States have filed voluminous amounts of medical proof, including extensive declarations from individuals discussing in detail their transgender status and the harms they allegedly suffer due to HB2. Now that Defendants would like to explore this proof through the normal modes of civil discovery, however, objection is raised to the relevancy and propriety of medical discovery. Because Plaintiffs have placed individual medical conditions squarely at issue in these actions, they cannot now contest Defendants’ reasonable efforts to explore that evidence through requests for production of documents and deposition questioning. Accordingly, the motions to quash and for protective orders should be denied.

Respectfully submitted, this 1st day of November, 2016.

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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 1st day of November, 2016.

By: /s/ William W. Stewart, Jr.
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EXHIBIT A

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' INITIAL DISCLOSURES AND
IDENTIFICATION OF EXPERT WITNESSES**

Pursuant to Rule 26(a) of the Federal Rules of Civil Procedure, Plaintiffs Joaquín Carcaño; Payton Grey McGarry; H.S., by her next friend and mother, Kathryn Schafer; Angela Gilmore; Kelly Trent; Beverly Newell; and American Civil Liberties Union of North Carolina (collectively, "Plaintiffs"), by their attorneys, hereby provide to Defendants and Intervenor-Defendants the following initial disclosures, based upon information currently known to Plaintiffs after a reasonable inquiry.

I. Rule 26(a)(1)(A)(i) – Persons Likely to Have Discoverable Information

The persons identified below are likely to have discoverable information that Plaintiffs may use to support their claims, in addition to Plaintiffs' expert witnesses.

Pursuant to Rule 26(a)(1)(A)(i), Plaintiffs list the address and phone number for the individuals (unless represented by or accessible through counsel in this action), if known.

1. Patrick McCrory
Governor of North Carolina
c/o Counsel for Defendant McCrory
Subjects: state interests in enacting House Bill 2; effect and enforcement of House Bill 2 (including the use of single-sex facilities by transgender individuals before and after House Bill 2); Executive Order No. 93
2. Tim Moore
Speaker, North Carolina House of Representatives
c/o Counsel for Intervenor-Defendants
Subjects: state interests in enacting House Bill 2; legislative history of House Bill 2; North Carolina legislative process
3. Phil Berger
President Pro Tempore, North Carolina Senate
c/o Counsel for Intervenor-Defendants
Subjects: state interests in enacting House Bill 2; legislative history of House Bill 2; North Carolina legislative process
4. Sarah Lang
Principal Clerk, North Carolina Senate
16 W. Jones Street, Room 2020 LB; Raleigh, NC 27601
(919) 733-7761
Subjects: legislative history of House Bill 2; North Carolina legislative process
5. Denise G. Weeks
Principal Clerk, North Carolina House of Representatives
16 W. Jones Street, Room 2320 LB; Raleigh, NC 27601
(919) 733-7760
Subjects: legislative history of House Bill 2; North Carolina legislative process
6. Dan Blue
Minority Leader, North Carolina Senate
16 W. Jones Street, Room 1129; Raleigh, NC 27601
(919) 733-5752

Subjects: state interests in enacting House Bill 2; legislative history of House Bill 2; North Carolina legislative process

7. Andrew C. Brock
Senator, North Carolina Senate
300 N. Salisbury Street, Room 523; Raleigh, NC 27603
(919) 715-0690
Subjects: state interests in enacting House Bill 2; legislative history of House Bill 2; North Carolina legislative process
8. David L. Curtis
Senator, North Carolina Senate
300 N. Salisbury Street, Room 410; Raleigh, NC 27603
(919) 715-3038
Subjects: state interests in enacting House Bill 2; legislative history of House Bill 2; North Carolina legislative process
9. Ralph Hise
16 W. Jones Street, Room 1026; Raleigh, NC 27601
(919) 733-3460
Subjects: state interests in enacting House Bill 2; legislative history of House Bill 2; North Carolina legislative process
10. E.S. "Buck" Newton
Senator, North Carolina Senate
300 N. Salisbury Street, Room 621; Raleigh, NC 27603
(919) 715-3030
Subjects: state interests in enacting House Bill 2; legislative history of House Bill 2; North Carolina legislative process
11. Bob Rucho
Senator, North Carolina Senate
300 N. Salisbury Street, Room 300-A; Raleigh, NC 27603
(919) 733-5655
Subjects: state interests in enacting House Bill 2; legislative history of House Bill 2; North Carolina legislative process
12. Tom Apodaca
Former Senator (resigned effective July 15, 2016), North Carolina Senate
[REDACTED]
Subjects: state interests in enacting House Bill 2; legislative history of House Bill 2; North Carolina legislative process

13. Dean Arp
Deputy Majority Whip, North Carolina House of Representatives
300 N. Salisbury Street, Room 531; Raleigh, NC 27603
(919) 715-3007
Subjects: state interests in enacting House Bill 2; legislative history of House Bill 2; North Carolina legislative process
14. Dan Bishop
Representative, North Carolina House of Representatives
300 N. Salisbury Street, Room 607; Raleigh, NC 27603
(919) 715-3009
Subjects: state interests in enacting House Bill 2; legislative history of House Bill 2; North Carolina legislative process
15. John M. Blust
Representative, North Carolina House of Representatives
16 W. Jones Street, Room 2208; Raleigh, NC 27601
(919) 733-5781
Subjects: state interests in enacting House Bill 2; legislative history of House Bill 2; North Carolina legislative process
16. Mark Brody
Representative, North Carolina House of Representatives
16 W. Jones Street, Room 2219; Raleigh, NC 27601
(919) 715-3029
Subjects: state interests in enacting House Bill 2; legislative history of House Bill 2; North Carolina legislative process
17. Mike Hager
Majority Leader, North Carolina House of Representatives
300 N. Salisbury Street, Room 301F; Raleigh, NC 27603
(919) 733-5749
Subjects: state interests in enacting House Bill 2; legislative history of House Bill 2; North Carolina legislative process
18. Larry D. Hall
Minority Leader, North Carolina House of Representatives
300 N. Salisbury Street, Room 506; Raleigh, NC 27603
(919) 733-5872
Subjects: state interests in enacting House Bill 2; legislative history of House Bill 2; North Carolina legislative process

19. Pricey Harrison
Representative, North Carolina House of Representatives
16 W. Jones Street, Room 1218; Raleigh, NC 27601
(919) 733-5771
Subjects: state interests in enacting House Bill 2; legislative history of House Bill 2; North Carolina legislative process
20. D. Craig Horn
Representative, North Carolina House of Representatives
300 N. Salisbury Street, Room 305; Raleigh, NC 27603
(919) 733-2406
Subjects: state interests in enacting House Bill 2; legislative history of House Bill 2; North Carolina legislative process
21. Darren Jackson
Representative, North Carolina House of Representatives
16 W. Jones Street, Room 1013; Raleigh, NC 27601
(919) 733-5974
Subjects: state interests in enacting House Bill 2; legislative history of House Bill 2; North Carolina legislative process
22. Charles Jeter
Former Conference Chair (resigned July 25, 2016), North Carolina House of Representatives

Subjects: state interests in enacting House Bill 2; legislative history of House Bill 2; North Carolina legislative process
23. David R. Lewis
Representative, North Carolina House of Representatives
16 W. Jones Street, Room 2301; Raleigh, NC 27601
(919) 715-3015
Subjects: state interests in enacting House Bill 2; legislative history of House Bill 2; North Carolina legislative process
24. Chuck McGrady
Representative, North Carolina House of Representatives
300 N. Salisbury Street, Room 304; Raleigh, NC 27603
(919) 733-5956
Subjects: state interests in enacting House Bill 2; legislative history of House Bill 2; North Carolina legislative process

25. Paul Stam
Speaker Pro Tempore, North Carolina House of Representatives
300 N. Salisbury Street, Room 612; Raleigh, NC 27603
(919) 733-2962
Subjects: state interests in enacting House Bill 2; legislative history of House Bill 2; North Carolina legislative process
26. Rick Glazier
Executive Director, North Carolina Justice Center
224 S. Dawson St.; Raleigh, NC 27601
(919) 856-2570
Subjects: North Carolina legislative process; legislative history of House Bill 2
27. W. Louis Bisette, Jr.
Chairman, Board of Governors of the University of North Carolina
c/o Counsel for UNC Defendants
Subjects: effect and enforcement of House Bill 2 with respect to the University of North Carolina (including the use of single-sex facilities by transgender individuals before and after House Bill 2); policies and practices of the University of North Carolina with respect to transgender individuals
28. Margaret Spellings
President, University of North Carolina
c/o Counsel for UNC Defendants
Subjects: effect and enforcement of House Bill 2 with respect to the University of North Carolina (including the use of single-sex facilities by transgender individuals before and after House Bill 2); policies and practices of the University of North Carolina with respect to transgender individuals
29. Tom Shanahan
Vice President and General Counsel, University of North Carolina
c/o Counsel for UNC Defendants
Subjects: effect and enforcement of House Bill 2 with respect to the University of North Carolina (including the use of single-sex facilities by transgender individuals before and after House Bill 2); policies and practices of the University of North Carolina with respect to transgender individuals

30. Carol L. Folt
Chancellor, The University of North Carolina at Chapel Hill
Office of the Chancellor, 103 South Building, Chapel Hill, NC 27599
(919) 962-1365
Subjects: effect and enforcement of House Bill 2 with respect to the University of North Carolina (including the use of single-sex facilities by transgender individuals before and after House Bill 2); policies and practices of the University of North Carolina with respect to transgender individuals
31. Franklin D. Gilliam, Jr.
Chancellor, The University of North Carolina at Greensboro
Office of the Chancellor, 303 Mossman Building, Greensboro, NC 27402
(336) 334-5266
Subjects: effect and enforcement of House Bill 2 with respect to the University of North Carolina (including the use of single-sex facilities by transgender individuals before and after House Bill 2); policies and practices of the University of North Carolina with respect to transgender individuals
32. M. Lindsay Bierman
Chancellor, University of North Carolina School of the Arts
Office of the Chancellor, 1533 South Main Street, Winston-Salem, NC 27127
(336) 770-3200
Subjects: effect and enforcement of House Bill 2 with respect to the University of North Carolina (including the use of single-sex facilities by transgender individuals before and after House Bill 2); policies and practices of the University of North Carolina with respect to transgender individuals
33. Elaine Pruitt
Interim Headmaster & Dean of High School Academics, University of North Carolina School of the Arts
1533 South Main Street, Winston-Salem, NC 27127
(336) 631-1561
Subjects: effect and enforcement of House Bill 2 with respect to the University of North Carolina (including the use of single-sex facilities by transgender individuals before and after House Bill 2); policies and practices of the University of North Carolina with respect to transgender individuals

34. Nick Tennyson
Secretary, North Carolina Department of Transportation
Transportation Building; 1 S. Wilmington Street; Raleigh, NC 27601
(919) 707-2800
Subjects: effect and enforcement of House Bill 2 with respect to highway rest stops, the North Carolina Division of Motor Vehicles, and other services provided by the North Carolina Department of Transportation (including the use of single-sex facilities by transgender individuals before and after House Bill 2); policies and practices of the North Carolina Department of Transportation and its subsidiary divisions with respect to transgender individuals
35. Kelly J. Thomas
North Carolina Commissioner of Motor Vehicles
c/o North Carolina Division of Motor Vehicles
1100 New Bern Avenue, Raleigh, NC 27697
(919) 861-3015
Subjects: effect and enforcement of House Bill 2 with respect to the North Carolina Division of Motor Vehicles (including the use of single-sex facilities by transgender individuals before and after House Bill 2); policies and practices of the North Carolina Division of Motor Vehicles with respect to transgender individuals
36. Robert E. Hagemann
City Attorney, City of Charlotte
600 East Fourth Street; Charlotte, NC 28202
(704) 336-2254
Subjects: effect of House Bill 2 on local non-discrimination ordinances
37. Joaquín Carcaño
c/o Counsel for Plaintiffs
Subjects: effect and enforcement of House Bill 2 (including the use of single-sex facilities by transgender individuals before and after House Bill 2); issues addressed in declaration submitted in support of motion for preliminary injunction
38. Payton Grey McGarry
c/o Counsel for Plaintiffs
Subjects: effect and enforcement of House Bill 2 (including the use of single-sex facilities by transgender individuals before and after House Bill 2); issues addressed in declarations submitted in support of motion for preliminary injunction and in opposition to motion to stay

39. H.S., by her next friend Kathryn Schafer
c/o Counsel for Plaintiffs
Subjects: effect and enforcement of House Bill 2 (including the use of single-sex facilities by transgender individuals before and after House Bill 2); issues addressed in declaration submitted in support of motion for preliminary injunction
40. Kathryn Schafer
c/o Counsel for Plaintiffs
Subjects: effect and enforcement of House Bill 2 (including the use of single-sex facilities by transgender individuals before and after House Bill 2)
41. Machenry Schafer II
c/o Counsel for Plaintiffs
Subjects: effect and enforcement of House Bill 2 (including the use of single-sex facilities by transgender individuals before and after House Bill 2)
42. Karen Anderson
Executive Director, American Civil Liberties Union of North Carolina
c/o Counsel for Plaintiffs
Subjects: effect and enforcement of House Bill 2 (including the use of single-sex facilities by transgender individuals before and after House Bill 2); membership of ACLU of North Carolina
43. Sarah Preston
Policy Director (former Acting Executive Director), American Civil Liberties Union of North Carolina
c/o Counsel for Plaintiffs
Subjects: effect and enforcement of House Bill 2 (including the use of single-sex facilities by transgender individuals before and after House Bill 2); membership of ACLU of North Carolina; issues addressed in declaration submitted in support of motion for preliminary injunction
44. Kevin Eason
Director of Operations, American Civil Liberties Union of North Carolina
c/o Counsel for Plaintiffs
Subjects: membership of ACLU of North Carolina
45. Stephen Clark
c/o Counsel for Plaintiffs

Subjects: effect and enforcement of House Bill 2 (including the use of single-sex facilities by transgender individuals before and after House Bill 2); issues addressed in paragraphs 13 to 23 of the declaration of Sarah Preston submitted in support of motion for preliminary injunction

46. Charlie Wright
c/o Counsel for Plaintiffs
Subjects: effect and enforcement of House Bill 2 (including the use of single-sex facilities by transgender individuals before and after House Bill 2); issues addressed in paragraphs 24 to 28 of the declaration of Sarah Preston submitted in support of motion for preliminary injunction
47. Lisa Lawson
c/o Counsel for Plaintiffs
Subjects: effect and enforcement of House Bill 2 (including the use of single-sex facilities by transgender individuals before and after House Bill 2); issues addressed in paragraphs 29 to 32 of the declaration of Sarah Preston submitted in support of motion for preliminary injunction
48. Angela Gilmore
c/o Counsel for Plaintiffs
Subjects: effect and enforcement of House Bill 2 (including the use of single-sex facilities by transgender individuals before and after House Bill 2)
49. Rebecca Chapin
Vice Chair, LGBT Center of Raleigh
324 South Harrington Street; Raleigh, NC 27603
(919) 832-4484
Subjects: use of single-sex facilities by transgender individuals prior to House Bill 2
50. Monica Walker
c/o Counsel for Plaintiffs
Subjects: use of single-sex facilities by transgender students in schools; issues addressed in declaration submitted in support of motion for preliminary injunction
51. Julie L. Hall-Panameno
Director, Educational Equity Compliance Office, Office of General Counsel, Los Angeles Unified School District
333 South Beaudry Ave., 20th Floor; Los Angeles, California 90017

(213) 241-7682

Subjects: use of single-sex facilities by transgender students in schools

52. Aran C. Mull

Assistant Chief of Police, New York State University Police
c/o Counsel for Plaintiffs;

Subjects: issues addressed in declaration submitted in support of motion for preliminary injunction

Plaintiffs expressly reserve their right to modify and supplement this list based upon investigation and discovery in this matter and to identify other persons likely to have discoverable information as necessary. Such persons may include any other witnesses identified or disclosed by Defendants, and any witnesses necessary to authenticate documents.

II. Rule 26(a)(1)(A)(ii) – Documents

The following documents in Plaintiffs' possession, custody or control, identified by category and location in accordance with Federal Rule of Civil Procedure 26(a)(1)(A)(ii), may be used by Plaintiffs to support their claims:

1. All declarations or exhibits in support thereof submitted in *Carcaño v. McCrory et al.* (1:16-cv-00236), including but not limited to:
 - a. declarations and exhibits provided in support of Plaintiffs' Motion for a Preliminary Injunction (ECF Nos. 22-1 to 22-19, 23-1 to 23-44, 73-1 to 73-8);
 - b. declarations and exhibits provided in support of UNC Defendants' Motion to Stay Proceedings (ECF Nos. 38-1 to 38-6);
 - c. declarations and exhibits provided in support of UNC Defendants' Response to Plaintiffs' Motion for a Preliminary Injunction (ECF Nos. 50-1 to 50-4); and

- d. declarations and exhibits provided in support of Plaintiffs' Response in Opposition to Motion to Stay Proceedings Against UNC Defendants (ECF Nos. 67-1 to 67-11)
2. Birth certificate of Joaquín Carcaño
Location: Possession of Joaquín Carcaño
3. Communications from University of North Carolina or its employees to Joaquín Carcaño regarding compliance with House Bill 2
Location: Possession of Joaquín Carcaño
4. Birth certificate of Payton Grey McGarry
Location: Possession of Payton Grey McGarry
5. Communications from University of North Carolina or its employees to Payton Grey McGarry regarding compliance with House Bill 2
Location: Possession of Payton Grey McGarry
6. Birth certificate of H.S
Location: Possession of H.S. or her parents

Plaintiffs expressly reserve their right to modify and supplement this list based upon investigation and discovery in this matter and to provide other documents, electronically stored information, and/or tangible things as necessary.

III. Rule 26(a)(1)(A)(iii) – Damages

Plaintiffs do not presently seek damages in this action. Plaintiffs reserve the right to seek costs or attorney's fees pursuant to 42 U.S.C. § 1988 or any other statute, regulation, or source of law.

IV. Rule 26(a)(1)(A)(iv) – Insurance Agreement

Based on information currently known to Plaintiffs, Plaintiffs state that they have no knowledge of any insurance agreement that might be implicated by Rule 26(a)(1)(A)(iv) of the Federal Rules of Civil Procedure.

V. Identification of Expert Witnesses

Pursuant to Paragraph 3 of the Pretrial Scheduling Order (1:16-cv-00236, ECF No. 96), Plaintiffs identify the following individuals as expert witnesses and the specific topic areas upon which it is anticipated that each expert may present evidence:

1. Deanna Adkins, M.D.

Fellowship Program Director of Pediatric Endocrinology, Duke University
School of Medicine
Director, Duke Center for Child and Adolescent Gender Care

Dr. Adkins is expected to present expert testimony on the following topics:

- What it means to be transgender.
- What it means to be intersex/have differences of sex development.
- The immutability of gender identity.
- Scientific research on the biological roots of gender identity.
- That being transgender itself indicates no limitation on the ability to contribute to society.
- Sex assignment or classification of individuals who are transgender or intersex/have differences of sex development.
- Medical consequences of avoiding restroom use for long periods of time when transgender people are excluded from using restrooms that match their gender identity.

2. Aran C. Mull

Assistant Chief of Police, New York State University Police

Assistant Chief Mull is expected to present expert testimony on the following topics:

- Law enforcement tools, techniques and practices.
- The effect of non-discrimination laws on public safety.
- Criminal activity in restrooms and other facilities, crimes committed against and by transgender individuals, and sexual assault.
- Community policing.

Plaintiffs will also rely on the testimony and declarations provided by the expert witnesses designated by the United States in *United States v. State of North Carolina*, No. 1:16-cv-00425, and incorporate herein by reference its expert disclosure. Plaintiffs expressly reserve their right to modify and supplement this list based upon investigation and discovery in this matter, including to identify rebuttal experts as provided in Paragraph 3 of the Pretrial Scheduling Order.

* * *

Dated: August 5, 2016

Respectfully submitted,

/s/ Scott B. Wilkens

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Paul M. Smith*
Luke C. Platzer*
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Christopher A. Brook
N.C. State Bar No. 33838
AMERICAN CIVIL LIBERTIES UNION FOR
NORTH CAROLINA LEGAL FOUNDATION
Post Office Box 28004
Raleigh, North Carolina 27611
Telephone: 919-834-3466
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James D. Esseks*
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125 Broad St., 18th Fl.
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cstrangio@aclu.org

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 5, 2016, I caused a copy of
PLAINTIFFS' INITIAL DISCLOSURES AND IDENTIFICATION OF EXPERT
WITNESSES 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 B

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

UNITED STATES OF AMERICA)	
)	
Plaintiff,)	
)	
v.)	1:16-CV-00425-TDS-JEP
)	
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.)	

PLAINTIFF UNITED STATES’ INITIAL DISCLOSURES

Pursuant to Fed. R. Civ. P. 26(a)(1) and the Rule 16 scheduling order entered in this case, Plaintiff United States of America (“United States”) makes the following initial disclosures. These disclosures do not waive any privilege or work-product protection, and are made without prejudice to any other issue or argument. The United States reserves the right to supplement and/or revise these disclosures, including as discovery progresses or as additional information becomes available.

I. Individuals Likely to Have Discoverable Information to Support Plaintiff United States’ Claims or Defenses.

The following individuals are likely to have discoverable information that the United States may use to support its claims and defenses in this matter. The United States retains the right to supplement these disclosures as discovery progresses. In addition, the United States

reserves the right to call at trial any necessary records custodians; any witness disclosed in the initial disclosures or discovery responses of any party in this case, *Carcaño v. McCrory*, Case No. 1:16-cv-00236-TDS-JEP, or *North Carolinians for Privacy v. U.S. Dep't of Justice*, Case No. 1:16-cv-00845-TDS-JEP; and/or any individual identified as a witness for trial by any party; and/or any witness necessary for rebuttal or impeachment.

A. **Transgender Students at Public Universities in North Carolina**

These individuals have knowledge concerning the United States' claims and defenses. More specifically, and without limitation, the information may relate to: (1) the harm that H.B. 2 causes transgender students at UNC campuses; (2) incidents of discrimination experienced by transgender individuals on UNC campuses, including as it relates to single-sex facilities; (3) the policies and practices of UNC related to single-sex facilities, including bathroom and changing room facility access for transgender individuals; and (4) compliance with and enforcement of H.B. 2. This list of individuals includes:

1. H.K.
Name and contact information will be provided subject to a protective order once it has been entered by the Court.

The declaration of H.K., filed with the United States' Motion for Preliminary Injunctive Relief on July 5, 2016 [ECF No. 76-45], sets forth the areas of knowledge held by H.K. relating to the claims in this litigation.

2. A.T.
Name and contact information will be provided subject to a protective order once it has been entered by the Court.

The declaration of A.T., filed with the United States' Motion for Preliminary Injunctive Relief on July 5, 2016 [ECF No. 76-40], sets forth the areas of knowledge held by A.T. relating to the claims in this litigation.

3. C.W.
Name and contact information will be provided subject to a protective order once it has been entered by the Court.

The declaration of C.W., filed with the United States' Motion for Preliminary Injunctive Relief on July 5, 2016 [ECF No. 76-39], sets forth the areas of knowledge held by C.W. relating to the claims in this litigation.

B. Transgender Employees in the State of North Carolina

These individuals have knowledge concerning the United States' claims and defenses.

More specifically, and without limitation, the information may relate to: (1) the harm that H.B. 2 causes transgender employees; (2) incidents of discrimination experienced by transgender individuals employed within the state of North Carolina, including as it relates to single-sex facilities; (3) the policies and practices of employers in North Carolina related to single-sex facilities, including bathroom and changing room facility access for transgender individuals; and (4) compliance with and enforcement of H.B. 2. This list of individuals includes:

1. D.B.

Name and contact information will be provided subject to a protective order once it has been entered by the Court.

The declaration of D.B., filed with the United States' Motion for Preliminary Injunctive Relief on July 5, 2016 [ECF No. 76-44], sets forth the areas of knowledge held by D.B. relating to the claims in this litigation.

2. A.N.

Name and contact information will be provided subject to a protective order once it has been entered by the Court.

The declaration of A.N., filed with the United States' Motion for Preliminary Injunctive Relief on July 5, 2016 [ECF No. 76-41], sets forth the areas of knowledge held by A.N. relating to the claims in this litigation.

3. Paige Dula

Contact information will be provided subject to a protective order once it has been entered by the Court.

The declaration of Paige Dula, filed with the United States' Motion for Preliminary Injunctive Relief on July 5, 2016 [ECF No. 76-32], sets forth the areas of knowledge held by Paige Dula relating to the claims in this litigation.

4. Alaina Kupec
Contact information will be provided subject to a protective order once it has been entered by the Court.

The declaration of Alaina Kupec, filed with the United States' Motion for Preliminary Injunctive Relief on July 5, 2016 [ECF No. 76-34], sets forth the areas of knowledge held by Alaina Kupec relating to the claims in this litigation.

C. Defendants and Intervenor-Defendants and Their Employees, Managers, and Supervisors

Defendants and Intervenor-Defendants and their employees, managers, and supervisors who have worked for Defendants and Intervenor-Defendants both prior to and after H.B. 2 was signed into law, may have discoverable information relating to: (1) the United States' claims that H.B. 2 violates Title VII, Title IX, and VAWA; (2) the harm that H.B. 2 causes transgender individuals; (3) the policies and practices of employers and agencies in North Carolina related to single-sex facilities, including bathroom and changing facility access for transgender individuals prior to and after H.B. 2; and (4) compliance with and enforcement of H.B. 2. This list of individuals includes:

1. Governor Patrick McCrory

Represented by:

Karl S. Bowers, Jr.
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II. Description of Documents, Electronically Stored Information, and Tangible Things In the United States' Possession, Custody, or Control It May Use to Support Its Claims and Defenses.

The United States may rely upon the following documents to support its claims and defenses in this case:

1. Andrew R. Flores, et al., Williams Institute: How many adults identify as transgender in the US? (2016)
2. Memorandum from Margaret Spellings, President, Univ. of N.C., to Chancellors 1 (Apr. 5, 2016)

3. Letter from Margaret Spellings, President, Univ. of N.C., to Shaheena Ahmad Simons, Acting Chief, U.S. Dep't of Justice, Civil Rights Div., Educ. Opportunities Section 3 (Apr. 13, 2016)
4. Blake Hodge, *UNC President Margaret Spellings Clarifies Stance on HB2*, CHAPELBORO (Apr. 8, 2016, 3:34 PM), available at <http://chapelboro.com/featured/unc-president-margaret-spellings-clarifies-stance-on-hb2>.
5. Jess Clark, *UNC Board Members Concerned About HB2*, WUNC (Apr. 16, 2016), available at <http://wunc.org/post/unc-board-members-concerned-about-hb2#stream/0>.
6. THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, MESSAGE FROM UNIVERSITY LEADERS: UPDATE ON HOUSE BILL 2 (Apr. 8, 2016), available at <http://www.unc.edu/campus-updates/message-university-leaders-update-house-bill-2/>.
7. APPALACHIAN STATE UNIVERSITY, AN UPDATE ON PUBLIC FACILITIES PRIVACY & SECURITY ACT (HB2) DEMONSTRATIONS (Apr. 12, 2016), available at <http://chancellor.appstate.edu/messages/id/86>.
8. Bradley Lucore, THE WESTERN CAROLINA JOURNALIST, *HB2 creates "chilling effect" on higher education* (Apr. 15, 2016), available at <http://www.thewesterncarolinajournalist.com/2016/04/15/hb2-creates-chilling-effect-on-higher-education/>.
9. NORTH CAROLINA STATE UNIVERSITY, HB2 UPDATE: IMPACTS ON NC STATE, available at <https://leadership.ncsu.edu/about/chancellor/letters/hb2-update-impacts-on-nc-state/>.
10. Public Statement from Margaret Spellings, President, Univ. of N.C (May 9, 2016)
11. Letter from Vanita Gupta, Principal Deputy Assistant Attorney Gen., U.S. Dep't of Justice, Civil Rights Div., to Pat McCrory, Governor, State of N.C. (May 4, 2016)
12. Letter from Vanita Gupta, Principal Deputy Assistant Attorney Gen., U.S. Dep't of Justice, Civil Rights Div., to Margaret Spellings et al., President, Univ. of N.C. (May 4, 2016)
13. Letter from Vanita Gupta, Principal Deputy Assistant Attorney Gen., U.S. Department of Justice, Civil Rights Div., to Frank L. Perry, Secretary, Dep't of Pub. Safety, State of N.C. (May 4, 2016)
14. Dear Colleague Letter, U.S. Departments of Justice and Education (May 13, 2016)
15. Letter from James A. Ferg-Cadima, OCR Acting Deputy Assistant Secretary of Policy (Jan. 7, 2015)

16. Resolution Agreement Between the Arcadia Unified School District, the U.S. Department of Education, Office for Civil Rights, and the U.S. Department of Justice, Civil Rights Division 3 (July 24, 2013)
17. U.S. Dep't of Educ. Office for Civil Rights, Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities 25 (Dec. 1, 2014)
18. U.S. Dep't of Educ. Office for Civil Rights, Questions and Answers on Title IX and Sexual Violence 5 (Apr. 29, 2014)
19. Jaime M. Grant et al., Injustice At Every Turn: A Report of the National Transgender Discrimination Survey, National Center for Transgender Equality and National Gay and Lesbian Task Force (NCTE Study), at 154 (2011)
20. Memorandum to Regional Administrators and State Designees from John B. Miles, Jr., Director of Compliance Programs, Regarding OSHA's Interpretation of 29 C.F.R. 1910.141(c)(1)(i): Toilet Facilities (Apr. 6, 1998)
21. HUD, Appropriate Placement for Transgender Persons in Single-Sex Emergency Shelters and Other Facilities at 3 (Feb. 20, 2015)
22. OPM, Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace
23. OPM and Merit Systems Protection Board, Addressing Sexual Orientation and Gender Identity Discrimination in Federal Civilian Employment: A Guide to Employment Rights, Protections, and Responsibilities (June 2015)
24. Equal Employment Opportunity Commission, Order 560.008 Question and Answers (June 22, 2016) at 5-6
25. Equal Employment Opportunity Commission, Fact Sheet: Bathroom Access Rights for Transgender Employees Under Title VII of the Civil Rights Act of 1964
26. OSHA, A Guide to Restroom Access for Transgender Workers, at 2 (June 1, 2015)
27. DOJ- OCR, Justice Programs, Nondiscrimination Grant Condition in the Violence Against Women Reauthorization Act of 2013 (April 9, 2014)
28. N.C. Exec. Order 93 § 3

29. Human Rights Campaign, Cities and Counties with Non-Discrimination Ordinances that Include Gender Identity, available at <http://www.hrc.org/resources/cities-and-counties-with-non-discrimination-ordinances-that-include-gender>
30. National Center for Transgender Equality, Know Your Rights: Public Accommodations, available at <http://www.transequality.org/know-your-rights/public-accommodations>
31. United States Department of Education, Examples of Policies and Emerging Practices for Supporting Transgender Students (May 2016), available at www2.ed.gov/oese/osh/emergingpractices.pdf.
32. Fox News Sunday, Gov. McCrory on Showdown Over NC's Transgender Bathroom Law (May 8, 2016), available at <http://video.foxnews.com/v/4884240153001/gov-mccrory-on-showdown-over-ncs-transgender-bathroom-law/?#sp=show-clips>.
33. Directive: Job Corps Program Instruction Notice NO. 14-31, Dept. of Labor Job Corps
34. GLSEN, *Educational Exclusion: Drop Out, Push Out, and the School-to Prison Pipeline among LGBTQ Youth* (2016), available at http://www.glsen.org/sites/default/files/Educational%20Exclusion_Report_6-28-16_v4_WEB_READY_PDF.pdf.
35. *Harassment of Transgender People in Bathrooms and Effects of Avoiding Bathrooms: Preliminary Findings from the 2015 U.S. Transgender Survey*, NAT'L CTR. FOR TRANSGENDER EQUAL. (July 2016), available at <http://www.ustranssurvey.org/preliminary-findings>.
36. Public statements made by government officials in North Carolina regarding H.B. 2.
37. Documents related to Office of Justice Programs grants awarded to educational institutions and public agencies in North Carolina.
38. Documents related to Office on Violence Against Women grants awarded to educational institutions and public agencies in North Carolina.

As this case progresses, the United States will continue searching for additional documents, including electronically stored information, and tangible things that the United States may use to support its claims. The United States may rely upon any documents produced or filed

in a court proceeding by any party in this litigation and/or which relates to bathroom or changing facility access by transgender individuals.

III. Computation of Damages by the United States

The United States is not seeking damages in this matter.

IV. Insurance Agreements for Judgment

The United States is not in possession of any insurance agreement applicable to this action that falls within the scope of Federal Rule of Civil Procedure 26(a)(1)(A)(iv).

Respectfully submitted, this 5th day of August, 2016.

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CERTIFICATE OF SERVICE

I certify that on August 5, 2016, I served a copy of the United States' Initial Disclosures

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