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, and PHIL BERGER, *et al.*, Intervenor-Defendants.	)	Case No. 1:16-cv-00425

REPLY BRIEF IN SUPPORT OF PLAINTIFF UNITED STATES' MOTION TO PARTIALLY QUASH AND MODIFY DEFENDANTS' SUBPOENAS DUCES TECUM AND FOR A PROTECTIVE ORDER

Plaintiff United States of America ("United States") respectfully submits this Reply in Support of its Motion to Partially Quash and Modify the September 30, 2016 Subpoenas Duces Tecum and for a Protective Order.

INTRODUCTION

The State has served sweeping requests for medical and mental health records on all of the United States' transgender witnesses, who assert no claims in this litigation. The United States has reasonably offered to disclose relevant information—namely birth certificates and documentation sufficient to show a diagnosis of and medical treatment for gender dysphoria, if such exists. Yet, the State continues to demand expansive disclosure of medical records dating back ten years, without articulating a valid basis for the records' relevance. This Court should limit the information the State may obtain and the questions it may ask to protect witnesses' privacy interests.

ARGUMENT

I. Medical Records Are Not Relevant to the United States' Claims and Defenses.

The State urges this Court to open ten years of medical and mental health records to inspection, thereby exposing the most private aspects of transgender witnesses' lives, arguing that the medical histories of transgender non-party witnesses are relevant for three reasons,[1] none of which have merit, and each of which rely on extraneous issues in an effort to shore up its sweeping requests.

[1] The State also argues that medical discovery is relevant to the *Carcaño* plaintiffs' Constitutional claims. Because the United States does not assert those claims, these additional bases do not apply to its transgender non-party witnesses.

First, the State asserts, without citation to authority, that "medical discovery is relevant to . . . the basis for the United States' statutory claims." ECF No. 212 at 11. The State goes on to ask a series of rhetorical questions, ostensibly meant to illustrate that they should be able to review medical and mental health records to challenge who is transgender and what it means to be transgender. However, the State fails to acknowledge that Section 1.3 of North Carolina Session Law 2016-3, House Bill 2 ("H.B. 2"), itself limits who may access bathrooms in terms of its own restrictive definition of "biological sex,"—that is, "[t]he physical condition of being male or female, which is stated on a person's birth certificate." By its own terms, H.B. 2 applies to all transgender individuals who have not changed their birth certificates, regardless of their medical or therapeutic history. The United States has reasonably offered to produce for each witness a birth certificate and these witnesses may be deposed about their transitions. Although a diagnosis of gender dysphoria is not necessary to show that a particular person is transgender, the United States has offered documentation sufficient to show a diagnosis of and medical treatment for gender dysphoria, if such exists. *See* ECF No. 78-35, ¶ 23 (Decl. of Dr. Brown) (being transgender is not a medical or psychiatric diagnosis, it is an "umbrella concept . . . used to describe people who have transitioned to living as a gender different from what they were assigned at birth . . . .")

Moreover, to the extent the State seeks to probe what it means to be transgender, this is appropriately established by the medical experts, who have the scientific knowledge to opine on what gender identity and gender dysphoria are and how they relate to sex. *See* Fed. R. Evid. 702. The State may test these assertions through cross-

examination and by submitting their own expert testimony, which it has done. There is simply no reason to delve into the private, medical histories of non-party witnesses when no individual's medical history can prove or disprove the claims in this case.

Second, the State argues that transgender non-party witnesses' medical and mental health records are relevant to the United States' claims that "sex" includes "gender identity" under the Violence Against Women Act, 42 U.S.C. § 13925(b)(13) ("VAWA"), Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.* ("Title IX"); and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*. ("Title VII"). ECF No. 212 at 12. In support of their argument, the State claims that the United States proposes to restrict cross-examination into transgender non-party witnesses' gender expression. ECF No. 212 at 12. This is not the case. The United States has proposed reasonable limitations on deposition questions to avoid humiliation, embarrassment, and oppression where the information is irrelevant to the claims and defenses at issue. The United States has not suggested that the State may not ask a non-party witness during depositions or trial about his or her gender identity, gender expression, or social transition, including whether he or she uses bathrooms consistent with his or her gender identity now or before the passage of H.B. 2.[2] But such an inquiry does not necessitate production of those witnesses' medical and mental health records and the State has failed to establish how their broad and invasive requests for private medical records are related

[2] The State Defendants argue that the Court should not "preemptively limit[] normal questioning in civil litigation" by entering a protective order to limit certain categories of questions at deposition. ECF No. 212 at 19. However, this is precisely the function of a protective order pursuant to Fed. R. Civ. P. 26(c), which preserves judicial and party resources by limiting questions of marginal relevance that are meant to annoy, embarrass, or oppress the deponent.

to any parties' claims or defenses. The United States, in contrast, has made a clear showing that the witnesses will suffer real, irreparable harm if forced to disclose their most intimate medical records in a case where they are not a party, have no claims, and are participating only to inform this Court about the impact of H.B. 2 on transgender individuals in North Carolina. As discussed more fully in the opening memorandum, transgender non-party witnesses' medical and mental health records are extraneous to the question of whether H.B. 2 violates federal discrimination prohibitions.

Third, the State argues that non-party witnesses' medical and mental health records 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 H.B. 2." ECF No. 212 at 13. To support this argument, the State cites exclusively to cases that involve discovery of medical records of plaintiffs who assert monetary claims for emotional distress. *See, e.g.*, *EEOC v. Sheffield Fin. LLC*, No. 1:06CV889, 2007 WL 1726560 (M.D.N.C. June 13, 2007); *EEOC v. Smith Bros. Truck Garage, Inc.*, No. 7:09-CV-00150-H, 2011 WL 102724 (E.D.N.C. Jan. 11, 2011). These cases do not remotely support the proposition that non-party witnesses who assert no claims should have to disclose their medical and mental health records. In fact, the State fails to support with case law the proposition that non-party witnesses with no claims and plaintiffs with monetary claims are judged by the same standard when determining whether a defendant can discover personal medical information.

Just as witnesses testify about the effect of other types of discriminatory laws, transgender non-party witnesses should be able to discuss the effect of H.B. 2 on their

day-to-day lives without exposing ten years of medical and mental health records to a fishing expedition. *See Sharp v. Baltimore City Police Dep't,* No. CIV. CCB-11-2888, 2013 WL 937903, at *2 (D. Md. Mar. 1, 2013) ("[R]elevancy under the federal rules is very broadly defined. Nonetheless, it is not unlimited, and may not unnecessarily intrude into the private matters of the parties.") (citing *Avianca v. Corriea,* 705 F. Supp. 666, 677 (D.D.C.1989)). Indeed, A.N., D.B., and A.K.'s declarations contain only general concerns about feeling anxious and nervous following H.B. 2's passage and apprehension about using facilities designated for one gender when they look and present as another gender. It would be unprecedented to hold that a defendant could discover ten years of medical records simply because a witness claimed he or she has "trouble sleeping," ECF No. 76-45 (Decl. of H.K.); has a "big ball of stress," ECF No. 76-41 (Decl. of A.N.); or feels "nervous and anxious," ECF No. 76-44 (Decl. of D.B.) because of a discriminatory law. *See Adkins v. CMH Homes Inc.*, No. 3:13-CV-32123, 2014 WL 4470539, at *4 (S.D. W. Va. Sept. 10, 2014) (defendants are not entitled to medical records where plaintiffs do not seek damages for emotional distress and merely assert they have "suffered annoyance, inconvenience, and fear of loss of home").

Finally, in the opening paragraphs of the response, the State argues that "the United States has plainly taken the position that . . . H.B. 2 is causing transgender individuals 'acute psychological damage,' 'anguish and a diminished sense of self,' and a risk of 'medical complications.'"[3] ECF No. 212 at 10. Even though the United States'

[3] The State Defendants also claim that the United States' "initial disclosures make clear that the information contained within these declarations is the kind of evidence the United States intends

medical experts have asserted that requiring a transgender person to use a bathroom that is not consistent with his or her gender identity causes "acute psychological damage," this speaks to the effect of H.B. 2. However, the transgender witnesses do not assert claims for damages for any sort of psychological distress they have experienced because of H.B. 2. It does not follow that because medical experts have opined that using a bathroom that does not match one's gender may cause psychological damage, this Court should open all transgender witnesses' medical and mental health records to scrutiny. *See Adkins*, 2014 WL 4470539, at *4 ("[I]n the absence of a claim seeking damages for emotional distress, Defendants are hard-pressed to demonstrate a genuine need for [plaintiff's] medical records.")

Likewise, the transgender witnesses may explain that because of H.B. 2, they have avoided using the bathroom without opening themselves up to having to disclose their medical records. The United States has not sought to establish that any one of the transgender witnesses has experienced "medical complications" and makes no claim for compensatory damages related to a risk of such complications. *See id*. Allegations that the witnesses feel "anguish and a diminished sense of self" are akin to the generalized stigma felt by persons who are discriminated against and does not warrant disclosure of ten years of medical records. *See Smith Bros. Truck Garage, Inc.*, 2011 WL 102724, at *2 (reducing medical records request from ten to two years as overbroad, even where the EEOC sought emotional damages). Moreover, resisting disclosure of these personal

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to offer at trial." ECF No. 212 at 10. However, the initial disclosures simply state that they set forth information related to the claims in this litigation.

matters does not make the witnesses' testimony about the effect of H.B. 2 irrelevant, as the State argues, it simply means that there should be reasonable limits to discovery of intimate medical information. *See* Fed. R. Civ. P. 26 (b)(2).

II. The Witnesses Have Not Waived the Psychotherapist-Patient Privilege.

The State largely agrees with the United States as to the application of the psychotherapist-patient privilege to this case. All parties agree that the privilege can be waived if a patient's mental health is placed "at issue," a plaintiff who seeks damages for emotional distress or mental anguish places his or her mental health at issue, and the privilege protects only confidential communications between a patient and mental health provider.[4] The only point of disagreement is that State alleges, without citation to authority, that the witnesses "have put their medical or mental conditions at issue in this litigation by repeatedly alleging significant psychological and emotional harm" and have thus waived the psychotherapist-patient privilege. ECF No. 212 at 16.

However, case law does not establish that an allegation of some harm puts a medical or mental condition "at issue" or waives the psychotherapist-patient privilege. To the contrary, as the United States pointed out in its opening memorandum, courts have found that an allegation of "garden variety" emotional distress, without an accompanying

[4] Defendants argue that the United States should be required to produce a privilege log for all documents protected by the therapist-patient privilege. ECF No. 212 at 17. However, it would be a waste of resources to do so preemptively, before a ruling this Court has an opportunity to rule that medical and mental health records should be produced at all. Moreover, the United States is not in possession of the witnesses' medical records. To the extent that Defendants suggest that the United States should have already provided a privilege log, Defendants did not serve the subpoenas on the witnesses until September 30, 2016, less than three weeks before the United States' motion was due to the Court.

claim for damages for the same, does not waive the psychotherapist-patient privilege. *See* ECF No. 205 at 14. The State provides no substantive argument to counter the case law cited by the United States. Instead, the State relies on *Coffin v. Bridges*, in which a married couple sought compensatory damages for bodily injuries and mental anguish and brought claims for negligence and loss of consortium resulting from a car accident between the husband and the defendant. The case stands for the inapposite proposition that the husband's mental condition was at issue because harm is an element of the negligence claim and the plaintiffs sought damages for mental anguish. 72 F.3d 126 (decision without opinion), 1995 WL 729489, *3 (4th Cir. Dec. 11, 1995). Moreover, the phrase "garden variety" appears only once in the State's response, as they assert, again without citation, that "[c]ontrary to plaintiffs' briefs, the . . . allegations [made by the witnesses in their declarations] constitute more than 'anecdotal' or 'garden-variety' assertions of harm." ECF No. 212 at 10. Unlike the United States' detailed discussion of case law on the waiver of psychotherapist-patient privilege and its application to this case, *see* ECF No. 205 at 13–16, the State merely quotes the declarations of the transgender witnesses and asserts that these allegations are sufficient to waive the psychotherapist-patient privilege. As discussed in detail in the United States' memorandum, the witnesses' statements of fear and anxiety as a result of H.B. 2 do not waive the psychotherapist-patient privilege as they are *at most*, akin to "garden variety" emotional distress allegations and there is no claim for damages for emotional distress.

See ECF No. 205 at 14–15. The State cites no authority to the contrary and its assertion that the witnesses have waived the privilege should be rejected outright.[5]

III. The United States has Standing to Quash the Subpoenas.

Finally, the State argues that despite the Court's order for briefing from the parties, including the United States, on medical information concerns, the United States lacks standing to quash the subpoenas served on its witnesses because it has failed to allege a personal right or privilege in the information sought therein. ECF No. 212 at 20. However, in its opening memorandum, the United States asserted that the State's overbroad request for irrelevant medical and mental health records could "embarrass and harm those witnesses and potentially dissuade participation in this litigation." ECF No. 205 at 1. The United States has an interest in protecting its witnesses from undue burdens that may dissuade them from participating in enforcement proceedings and ensuring those individuals who participate in proceedings pursuant to its civil rights enforcement authority are not intimidated from doing so through overbroad requests that

[5] The State asserts that it should have access to medical and mental health records because the protective order protects transgender non-party witnesses' privacy. ECF No. 212 at 17-18. This argument is a red herring. There is no reason to require production of personal medical information that is otherwise irrelevant to the claims and defenses at issue and privileged just because the parties prospectively negotiated a protective order.

Likewise, the Court should reject the State's argument that it would not be overly burdensome to produce ten years of medical and mental health records because the United States or the transgender non-party witnesses can "shift this burden to Defendants by executing releases for medical records." ECF No. 212 at 18. "[T]he 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). The burden these witnesses face is having to expose their medical information and potentially relive painful memories of personal experiences unrelated to this litigation. The State fails to demonstrate how their need for this information outweighs this burden. *See id.* Accordingly, the Court should not require the production of these records on this basis.

seek intimate information that is not relevant to the claims and defenses at issue. *See Fed. Trade Comm'n v. DIRECTV, Inc.*, No. 15-CV-01129-HSG(MEJ), 2015 WL 8302932, at *3 (N.D. Cal. Dec. 9, 2015) (FTC has standing to seek a protective order in favor of the consumers it protects) (citations omitted); *see also EEOC v. Serramonte*, 237 F.R.D. 220, 223 (N.D. Cal. 2006) (pursuant to Rule 26(c), plaintiff federal agency may move to quash nonparty subpoenas); 28 C.F.R. § 54.605 (incorporating Title VI's prohibition against intimidating individuals who participate in civil rights investigations, 28 C.F.R § 42.107).

Furthermore, each transgender non-party witness who is represented by counsel has joined in the United States' motion. *See* ECF Nos. 207, 211, 215. The two witnesses who are not represented have filed declarations asserting their personal interest in not disclosing their medical and mental health records and explaining that they may not participate as witnesses if they are forced to comply with these overbroad requests. Ex. 1 (Decl. of H.K.); Ex. 2 (Decl. of C.W.). The United States has specifically asserted that the medical and mental health records the State seeks are protected by the psychotherapist-patient privilege and disclosure of the records would compromise the witnesses' access to confidential mental health services. ECF No. 205 at 1. Certainly, the witnesses themselves have standing to challenge the subpoenas and may join a motion filed by the United States. *See Kinder v. White*, 609 F. App'x. 126 (4th Cir. 2015). The Court should reject the State's argument that standing is not met here.

CONCLUSION

For the foregoing reasons, the subpoenas 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 14th day of November, 2016.

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CERTIFICATE OF SERVICE

I certify that on November 14, 2016, I electronically filed the Reply Brief in Support of Plaintiff United States' Motion for Preliminary Injunctive Relief 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:

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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, and PHIL BERGER, *et al.*, Intervenor-Defendants.	)	Case No. 1:16-cv-00425-TDS-JEP

DECLARATION OF H.K.

I, H.K., declare as follows:

1. I signed a declaration that the United States submitted in support of its Motion for Preliminary Injunctive Relief. *See* ECF No. 76-45. In that declaration, I discussed the effect that H.B. 2 has had on me as a transgender woman.

2. On September 30, 2016, I was served with a subpoena that requires me to produce:

> 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.

3. I do not want to produce all of my medical records for the last ten years because they contain deeply sensitive and private information.

4. I do not understand why my talking about my gender identity and how H.B. 2 affects me, means that I have to then disclose 10 years of my medical records. Nothing in my medical records will change the fact that H.B. 2 means that I can't use the bathroom consistent with my gender identity. Nothing in my medical records will change the fear I feel about possibly having to walk into a bathroom that is not consistent with my gender identity.

5. I understand that I must make myself available for a deposition in this case. And I understand I must answer questions about what it means to me to be transgender, questions about my transition, and questions about why access to bathrooms and

questions about my transition, and questions about why access to bathrooms and changing facilities consistent with my gender identity is so important to me. But I am very concerned that Defendants will ask incredibly personal and sensitive questions about my family, my childhood, my relationships, and other things that have nothing to do with H.B. 2.

6. I decided to be a witness in this case because this is an issue that deeply affects me personally and my community. Although it will be a very difficult decision to make, if I am required to produce all of my medical records from the last ten years to Defendants, or be open to very personal questions unrelated to what it means to me to be transgender, questions about my transition, and questions about why access to bathrooms and changing facilities consistent with my gender identity is so important to me, I will consider ending my participation in this case as a witness.

7. I have felt very proud to be a witness in this case and to speak up on behalf of the many transgender individuals who are too afraid to come forward. I really hope I won't have to make a choice whether to continue to speak up and share my story.

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

Executed on 11/14/2016 H.K.

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DECLARATION OF C.W.

I, C.W., declare as follows:

1. I signed a declaration that the United States submitted in support of its Motion for Preliminary Injunctive Relief. *See* ECF No. 76-39. In that declaration, I discussed the effect that H.B. 2 had on me as a transgender man.

2. On September 30, 2016, I was served with a subpoena that requires me to produce:

> 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.

3. I do not want to produce all of my medical history for the last ten years because it contains very personal and private information that does not seem relevant to my need to use the bathroom appropriate for my gender identity. Nothing in that history will change the fact that state law says I am supposed to use a bathroom that is not consistent with my gender identity or change how H.B. 2 affects me.

4. I am especially concerned about producing records from my therapist because, like anyone who sees a counselor for any reason, I consider everything I discuss

in those sessions incredibly private. I need to know that my sessions with my therapist are confidential in order to obtain the medical care I need.

5. I decided to be a witness in this case because I think it is important to help people and I think putting my story out there might help keep other transgender people safe. Although it will be a hard decision, I will seriously consider ending my participation in this case if I am required to produce all of my medical records from the last ten years. I understand that as a witness, I have agreed to make myself available for a deposition in this case. As part of that, I know that I will have to answer questions about what it means to be a transgender man, questions about my transition, and questions about why access to bathrooms and changing facilities consistent with my gender identity is so important to me. But I am very concerned that Defendants will ask unrelated personal questions about my childhood, my family, my intimate relationships, and other things that have nothing to do with H.B. 2.

6. I have felt very proud to be a witness in this case and believe it is important to come forward, as change doesn't happen from inaction. I really hope I won't have to make a choice whether to continue to share my story.

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

Executed on 11/14/2016 C.W.