

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF ALABAMA,  
NORTHERN DIVISION**

**REV. PAUL A. EKNES-  
TUCKER; et al.;**

**Plaintiffs,**

**vs.**

**STEVE MARSHALL, in his  
official capacity as Attorney  
General of the State of Alabama;  
et al.;**

**Defendants.**

**Civil Action No.  
2:22-cv-00184-LCB**

**NON-PARTY SOUTHEAST LAW’S OBJECTION TO AND MOTION TO  
QUASH DOCUMENT SUBPOENA, OR IN THE ALTERNATIVE MOTION  
TO MODIFY SUBPOENA**

Southeast Law Institute (“SLI”), which is not a party to this case, hereby objects to and moves to quash the subpoena directed to it which was issued by the U.S. Attorney’s office and received by it on August 10, 2022. In the alternative, SLI moves the Court to modify the subpoena as discussed further below. A copy of the subpoena and cover letter received from Asst. U.S. Attorney Jason R. Cheek is attached hereto as Exhibit A. A copy of e-mail correspondence with Mr. Cheek extending SLI’s deadline to file the present objection and motion is attached as Exhibit B. The grounds for its objection and motions are as follows:

1. SLI is a non-profit Alabama corporation devoted to providing legal services without charge on the issues of sanctity of life, religious freedom, family issues and others. SLI has no employees and uses the services of volunteer lawyers. It is a 501(c)(3) organization under the U.S. Internal Revenue Code. See the Declaration of A. Eric Johnston (Exhibit C hereto).

2. SLI volunteer lawyers provide legal advice and legislative bill drafting assistance to Alabama Legislators. They have done so for over 30 years. SLI has never received a subpoena to produce its documents relating to this assistance, until the present case.

3. SLI lawyers frequently provide legal assistance to groups including Eagle Forum of Alabama. It did so on the Vulnerable Child Compassion and Protection Statute (“VCAP”), which is the subject of this lawsuit.

4. During the Alabama Legislature’s 2020, 2021, and 2022 sessions, a SLI lawyer, A. Eric Johnston, provided bill drafting assistance and legal research for VCAP. These efforts including discussions with Margaret Clark, General Counsel of Eagle Forum of Alabama, other lawyers and legislators. Except for published legal memoranda, these communications were privileged, work product and common legal interest.

5. As the Court is aware, the “VCAP” statute -- the constitutionality of which is the subject of this lawsuit -- was passed by both houses of the Alabama legislature during the 2022 legislative session, signed by Governor Kay Ivey, and became effective May 8, 2022. Again, SLI is not a party to this case, for the obvious reason that it engaged only in providing legal guidance through a volunteer lawyer and has no lawmaking capacity whatsoever. Indeed, this Court’s May 13, 2022, Opinion and Order (Doc. 107, pp. 4-6) recognizes that the VCAP statute was the product of the Alabama Legislature which made the findings and conclusions contained in the statute.

6. The non-party document subpoena to SLI in this case was issued by Asst. U.S. Attorney Jason R. Cheek on August 9, 2022, and received by SLI on August 10, 2022. The subpoena purports to require production from SLI of eleven (11) broad categories of documents of information, from January 1, 2017, through the present. In general terms, the requested documents are SLI’s own work product and privileged communications arising from its concerns about gender-altering medical treatment to minors and the legality of the VCAP legislation. The subpoena is objectionable and due to be quashed in its entirety on several grounds.

7. First, the subpoena at issue seeks documents which are outside the general scope of permissible discovery under Fed. R. Civ. P. 26(b)(1). As the Court is aware, that rule sets the outside limits of discovery as follows:

“... 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, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. ...”

The issues in this case are simply whether, and to what extent, the VCAP statute passed by the Alabama Legislature and signed into law by Governor Ivey is constitutional. SLI’s lawyer work product and privileged communications concerning gender-altering medical treatment to minors and the VCAP legislation are simply not relevant to this case in any way.

To the extent that the U.S. argues that these documents from SLI could somehow be relevant to the Alabama Legislature’s (or individual legislators’) intent in enacting the VCAP statute, there are three answers to such an argument. First, SLI’s documents would not in fact be relevant to such legislative intent, and the U.S. Attorney has not shown otherwise. Second, the intent of the Alabama Legislature, and individual legislators, itself is not relevant to this case. As the U.S. Supreme Court has historically and quite recently again recognized:

“[I]nquiries into legislative motives ‘are a hazardous matter.’ Even when an argument about legislative motive is backed by statements made by legislators who voted for a law, we have been reluctant to attribute those motives to the legislative body as a whole. ‘What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it.’”

Dobbs v. Jackson Women’s Health Org., 142 S. Ct. 2228, 2256 (2022) (quoting U.S. v. O’Brien, 391 U.S. 367, 384 (1968)).<sup>1</sup> Third, even assuming purely *arguendo* that the U.S. is able to show some slight, theoretical relevance to some of SLI’s documents, production of these documents -- particularly from a non-party<sup>2</sup> -- does not meet the proportionality test of Rule 26 under the factors underlined above.

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<sup>1</sup> Accord, e.g., CBS Inc. v. PrimeTime 24 Joint Venture, 245 F.3d 1217, 1222 (11th Cir. 2001) (“We have also said just as frequently that ‘[w]hen the import of words Congress has used is clear ... we need not resort to legislative history, and we certainly should not do so to undermine the plain meaning of the statutory language.’”) (internal citations omitted); and State v. 223,405.86, 203 So. 3d 816, 831 (Ala. 2016) (internal citations omitted) (“The intention of the Legislature, to which effect must be given, is that expressed in the statute, and the courts will not inquire into the motives which influenced the Legislature or individual members in voting for its passage ....” Likewise, “[t]he motives or reasons of an individual legislator are not relevant to the intent of the full legislature in passing the bill.”).

<sup>2</sup> When a subpoena is directed to a non-party, the scope of discovery “must be limited even more. ... Bystanders should not be drawn into the parties’ dispute without some good reason, even if they have information that falls within the scope of party discovery. ... A more demanding variant of the proportionality analysis therefore applies .... [C]ourts must give the recipient’s nonparty status ‘special weight,’ leading to an even more ‘demanding and sensitive’ inquiry than the one governing discovery generally.” Va. Dep’t of Corrs. v. Jordan, 921 F.3d 180, 189 (4<sup>th</sup> Cir. 2019) (quoting In re Pub. Offering PLE Antitrust Litig., 427 F.3d 49, 53 (1<sup>st</sup> Cir. 2005)). The Court must consider: (1) the requesting party’s need for the information sought, “meaning that the information likely (not just theoretically) ... offer[s] some value over and above what the requesting party already has”; (2) whether the requesting party can obtain the same or comparable information that would satisfy its needs from other sources; and (3) whether the request will impose a cognizable burden on the nonparty. Id. at 189-90.

8. Second, the subpoena is also due to be quashed under Fed. R. Civ.P. 45(d)(3)(iii) because compliance with the subpoena would require disclosure of privileged or other protected matter. There are two categories of privilege protection to consider here.

First, the entire set of documents sought by the U.S. from SLI is protected by First Amendment privilege. The United States Constitution guarantees a right to associate to engage in activities which the First Amendment protects, including speech, assembly, and the exercise of religion. See, e.g., Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984). National Ass'n for the Advancement of Colored People v. Alabama, 357 U.S. 449, 460-61 (1958). In the NAACP case, the Supreme Court noted as follows:

Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between freedom of speech and freedom of assembly. ... It is beyond debate that freedom to engage in association for advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. ... Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.

Id. (emphasis added). The Court went on hold that the NAACP (which the State had made a party to the case) was constitutionally protected from having to disclose its membership. NAACP, 357 U.S. at 460-67.

Nor is it just membership lists that are constitutionally protected from disclosure. In the context of discovery, the First Amendment creates a qualified privilege from disclosure of certain associational information. See Perry v. Schwarzenegger, 591 F.3d 1147, 1159-61 (9<sup>th</sup> Cir. 2010). The facts and background pertinent to the discovery dispute in Perry were as follows:

Proposition 8 amended the California Constitution to provide that only marriage between a man and a woman is valid or recognized in California. Two same-sex couples filed this action in the district court alleging that Proposition 8 violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The official proponents of Proposition 8 (“Proponents”) intervened to defend the suit. Plaintiffs served a request for production of documents on Proponents, seeking, among other things, production of Proponents’ internal campaign communications relating to campaign strategy and advertising. Proponents objected to disclosure of the documents as barred by the First Amendment.

Id. at 1152. In evaluating the Proponents’ assertion of First Amendment Privilege to disclosure of their internal campaign communications, the court in Perry applied a burden-shifting analysis. The party objecting to the subpoena must make a *prima facie* showing that the privilege applies by demonstrating that enforcement of the discovery requests “will result in (1) harassment, membership withdrawal, or

discouragement of new members, or (2) other consequences which objectively suggest an impact on, or ‘chilling’ of, the members’ associational rights.” Id. at 1160 (internal citations omitted). If such a *prima facie* showing is made by the objecting party, “the evidentiary burden will then shift to the government ... [to] demonstrate that the information sought through the [discovery] is rationally related to a compelling governmental interest ... [and] the ‘least restrictive means’ of obtaining the desired information.” Id. (internal citations omitted). Applying that standard to the facts before it, the court in Perry ruled that Proponents had shown that the requested discovery “would likely have a chilling effect on political association and the formulation of political expression” and granted Proponents’ petition for a writ of mandamus on the basis of First Amendment privilege.

Similarly, SLI has demonstrated that production of the documents sought by the U.S. in the non-party document subpoena at issue here are protected by First Amendment privilege because they would have a chilling effect on the efforts of SLI lawyers to provide legal guidance and engage in association with others in fully engaging in the political process and exercising their constitutional rights to free speech, assembly, and to petition the government. See the attached Declaration of A. Eric Johnston.

Second, in addition to the First Amendment privilege which should be a basis to quash the entire subpoena, a number of the documents sought by the non-party subpoena are covered or potentially covered by the attorney-client and/or work product privileges. See the attached Declaration of A. Eric Johnston. The subpoena should therefore also be quashed or modified on that basis.

9. In the alternative, to the extent the Court rules that any part of this document subpoena should be complied with, SLI requests that the subpoena also be modified as follows: (a) produce non-privileged documents responsive to only those categories, if any, of the subpoena that this Court deems relevant to the issues before it and proportional to the needs of the case; (b) allow for the redaction from the documents to be produced of all references to the names of witnesses, potential witnesses, and other private citizens with whom SLI communicated; (c) to not require production of documents referencing communications with single legislators or multiple legislators that were not provided to all members of the Alabama Legislature; and (d) to allow for more time for compliance – at least until twenty-one (21) days after the Court rules on SLI’s present objection and motions.

/s/ John M. Graham

John M. Graham

ASB-5616-G70J

Attorney for Southeast Law Institute

OF COUNSEL:

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Facsimile: (205) 716-5389

E-Mail: [john.graham@phelps.com](mailto:john.graham@phelps.com)

**CERTIFICATE OF SERVICE**

I hereby certify that this 7th day of September, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to counsel of record in this case.

/s/ John M. Graham

OF COUNSEL



**U.S. Department of Justice**

*Prim F. Escalona*  
*United States Attorney*  
*Northern District of Alabama*

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**Jason R. Cheek**  
*Assistant United States Attorney*  
(205) 244-2104  
jason.cheek@usdoj.gov

**Civil Division**  
1801 Fourth Avenue North  
Birmingham, AL 35203-2101  
(205) 244-2001  
FAX (205) 244-2181

August 9, 2022

**VIA FEDEX**

Registered Agent: A. Eric Johnston  
Southeast Law Institute  
1200 Corporate Drive, Suite 107  
Birmingham, AL 35242

Re: *Eknes-Tucker et al. v. Marshall et al.*, No. 2:22-cv-00184-LCB (M.D. Ala.)  
Subpoena to Produce Documents

Dear Mr. Johnston:

I represent the United States in the above-referenced litigation. As part of the pending lawsuit, the United States seeks information related to Alabama Senate Bill 184 (2022) (“SB 184”), House Bill 266 (2022) (“HB 266”), and any related predecessor bills. SB 184 resulted in a law known as the Alabama Vulnerable Child Compassion and Protection Act (“VCAP”), the subject of this litigation.

In April of this year, the United States—along with Private Plaintiffs—sought to enjoin the enforcement of VCAP. During the preliminary injunction hearing, the Court asked who drafted the bill that resulted in VCAP. Several public statements suggest that Southeast Law Institute staff may have had some involvement in drafting the legislation or its predecessor bills. As a result, the United States is issuing the enclosed subpoena for certain records in the Southeast Law Institute’s possession from January 1, 2017 through the present.<sup>1</sup>

Please note that the subpoena requests that you produce materials in native form when a document is ordinarily maintained in electronic form. So, for instance, I specifically request that you produce spreadsheets or emails in their native format (rather than converting them to PDF or some other format) when producing the documents.

I respectfully request that you produce the documentation responsive to this request to me on or before August 26, 2022, by emailing the material to me at jason.cheek@usdoj.gov. If email

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<sup>1</sup> According to records filed with the Alabama Secretary of State, you are listed as the registered agent for Southeast Law Institute.

August 9, 2022

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is impracticable, please send the documentation to the address below, via Federal Express, UPS, or other express courier.

Jason R. Cheek  
Assistant United States Attorney  
U.S. Attorney's Office  
Northern District of Alabama  
1801 Fourth Avenue North  
Birmingham, AL 35203  
(205) 244-2104

When responding to this request for records, **please include an original, signed declaration along with a list of documents produced (as attached to this correspondence or on your organization's letterhead)** stating whether the records produced were (1) made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters; (2) kept in the course of regularly conducted activity; and (3) made by the regularly conducted activity as a regular practice. This step may relieve your office from having to produce someone at a later date to testify in court as to the authenticity of the documents produced or the manner in which they are maintained.

Please feel free to call me at (205) 244-2104 should you have any questions or concerns. Thank you in advance for your cooperation.

Very truly yours,

A handwritten signature in black ink, appearing to read "Jason R. Cheek". The signature is fluid and cursive, with the first name "Jason" being more prominent than the last name "Cheek".

Jason R. Cheek  
Assistant United States Attorney

Enclosures

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

UNITED STATES DISTRICT COURT

for the

Middle District of Alabama

REV. PAUL A. EKNES-TUCKER et al.,

*Plaintiff*

v.

STEVE MARSHALL et al.,

*Defendant*

Civil Action No. 2:22-cv-00184-LCB (M.D. Ala.)

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

To:

Southeast Law Institute  
1200 Corporate Drive, Ste 107, Birmingham, AL 35242

*(Name of person to whom this subpoena is directed)*

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

Place: Office of the United States Attorney 1801 Fourth Avenue North Birmingham, AL 25203	Date and Time: 08/26/2022 10:00 am
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**Inspection of Premises:** **YOU ARE COMMANDED** to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

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

Date: 08/09/2022

CLERK OF COURT

OR



*Signature of Clerk or Deputy Clerk*

*Attorney's signature*

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* Plaintiff-Intervenor United States of America, who issues or requests this subpoena, are:

Jason R. Cheek, Assistant U.S. Attorney, (Address Listed Above), 205-244-2104, jason.cheek@usdoj.gov

**Notice to the person who issues or requests this subpoena**

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

AO 88B (Rev. 02/14) Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action (Page 2)

Civil Action No. 2:22-cv-00184-LCB (M.D. Ala.)

**PROOF OF SERVICE**

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

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

on *(date)* \_\_\_\_\_ .

I served the subpoena by delivering a copy to the named person as follows: \_\_\_\_\_

\_\_\_\_\_ on *(date)* \_\_\_\_\_ ; or

I returned the subpoena unexecuted because: \_\_\_\_\_

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

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

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

Date: \_\_\_\_\_

\_\_\_\_\_  
*Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc.:

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

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

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
  - (i) is a party or a party's officer; or
  - (ii) is commanded to attend a trial and would not incur substantial expense.

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

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises at the premises to be inspected.

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

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

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

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

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

- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

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

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

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

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

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

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

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

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

**(e) Duties in Responding to a Subpoena.**

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

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

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

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

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

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

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

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

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

**(g) Contempt.**

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

**ATTACHMENT A**

You are hereby commanded to produce the following documents or information **from January 1, 2017 through the present** in your possession, custody, or control.

When producing the documents identified below, please produce them **in native form** if such documents are maintained in electronic form in the ordinary course of business. For example, please do not convert emails or documents maintained as spreadsheets to PDF form.

**Definitions:**

The term “predecessor bills” refers to any legislation, draft legislation, proposed legislation, or model legislation predating Alabama Senate Bill 184 (2022) (“SB 184”) or Alabama House of Representatives Bill 266 (2022) (“HB 266”), relating to the provision of gender affirming care to minors in Alabama, including Senate Bill 5 (2022), House of Representatives Bill 150 (2022), Senate Bill 10 (2021), House of Representatives Bill 1 (2021), Senate Bill 219 (2020), and House of Representatives Bill 303 (2020).

The terms “minors” or “youth” refer to persons 19 years of age or younger.

The term “VCAP” refers to the Alabama Vulnerable Child Compassion and Protection Act.

**Requested Documents or Information:**

1. Any draft legislation, proposed legislation, or model legislation relating to VCAP, SB 184, HB 266, or their predecessor bills that Southeast Law Institute wrote, assisted in writing, provided feedback on, or reviewed.
2. Any materials considered by Southeast Law Institute in preparing legislation, draft legislation, proposed legislation, or model legislation relating to VCAP, SB 184, HB 266, or their predecessor bills, including (1) any model or sample legislation from other third-party organizations or jurisdictions; and (2) medical studies, opinions, or evidence.
3. Any documents concerning Southeast Law Institute’s legislative or policy goals, initiatives, and/or strategies relating to medical care or treatment of transgender minors, or minors with gender dysphoria.
4. Any documents provided to the Alabama State Legislature or any employee or member thereof in support of VCAP, SB 184, HB 266, or any predecessor bills, including written testimony, letters, emails, draft legislation, model legislation, or proposed legislation, reports, summaries, analyses, fact sheets, and/or talking points.

5. Any communications between Southeast Law Institute and any employee, agent, assign, or member of the Alabama State Legislature, Alabama Governor's office, Alabama Lieutenant Governor's office, Alabama Attorney General's office, or any employee, agent, or assign of a District Attorney's office within Alabama concerning VCAP, SB 184, HB 266, and/or any predecessor bills.
6. Any communications between Southeast Law Institute and any other nongovernmental organization, consultant, or lobbyist concerning VCAP, SB 184, HB 266, and/or any predecessor bills.
7. Any records or minutes of meetings concerning VCAP, SB 184, HB 266, and/or any predecessor bills.
8. Any polling or public opinion data related to or concerning VCAP, SB 184, HB 266, predecessor bills, and/or legislation relating to medical care or treatment for transgender minors or youth.
9. Any records or documents relating to presentations, videos, interviews, and/or speeches Southeast Law Institute representatives have given or participated in regarding medical care or treatment related to gender identity, transgender minors or youth, "trans-identifying" minors or youth, or minors or youth with gender dysphoria.
10. Any mass letters, newsletters, or emails that Southeast Law Institute sent to members of a mailing or email list related to or concerning VCAP, SB 184, HB 266, and/or any predecessor bills.
11. Any social media postings that Southeast Law Institute issued concerning VCAP, SB 184, HB 266, and/or any predecessor bills.

**John Graham (7235)**

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**From:** John Graham (7235)  
**Sent:** Monday, August 22, 2022 10:32 AM  
**To:** 'Cheek, Jason (USAALN)'  
**Subject:** RE: Eagle Forum of AL and Southeast Law Institute in Eknes-Tucker v. Marshall, No. 2:22cv184LCB (MDAL)

Thanks, I did (little less legal work involved given your courteous extension), and I hope you did also.

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**From:** Cheek, Jason (USAALN) <Jason.Cheek@usdoj.gov>  
**Sent:** Monday, August 22, 2022 8:19 AM  
**To:** John Graham (7235) <John.Graham@phelps.com>; Mike Hurst (3330) <Mike.Hurst@phelps.com>  
**Subject:** RE: Eagle Forum of AL and Southeast Law Institute in Eknes-Tucker v. Marshall, No. 2:22cv184LCB (MDAL)

Thanks, John. I appreciate the heads-up. Hope you had a nice weekend.

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Jason R. Cheek  
Deputy Chief, Civil Division  
Assistant United States Attorney  
Northern District of Alabama  
(205) 244-2104

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**From:** John Graham (7235) <John.Graham@phelps.com>  
**Sent:** Monday, August 22, 2022 6:20 AM  
**To:** Cheek, Jason (USAALN) <JCheek@usa.doj.gov>; Mike Hurst (3330) <Mike.Hurst@phelps.com>  
**Subject:** [EXTERNAL] RE: Eagle Forum of AL and Southeast Law Institute in Eknes-Tucker v. Marshall, No. 2:22cv184LCB (MDAL)

Jason, I appreciate this courtesy. We do plan to object to and move to quash the subpoenas, and will plan to file those by September 7<sup>th</sup>. Thanks again.

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**John M. Graham**  
Phelps Dunbar LLP  
2001 Park Place North  
Suite 700  
Birmingham, AL 35203  
Direct: 205-716-5235  
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**From:** Cheek, Jason (USAALN) <[Jason.Cheek@usdoj.gov](mailto:Jason.Cheek@usdoj.gov)>  
**Sent:** Saturday, August 20, 2022 3:05 PM  
**To:** Mike Hurst (3330) <[Mike.Hurst@phelps.com](mailto:Mike.Hurst@phelps.com)>  
**Cc:** John Graham (7235) <[John.Graham@phelps.com](mailto:John.Graham@phelps.com)>  
**Subject:** RE: Eagle Forum of AL and Southeast Law Institute in Eknes-Tucker v. Marshall, No. 2:22cv184LCB (MDAL)

Mike,

Thanks so much for the clarification. I did get the impression from our prior conversation that documents would be produced in response to the subpoena. I appreciate you being up front.

In light of the possibility that the third-parties' responses may challenge the entirety of the subpoena, can you please provide me with your clients' responses to the subpoena on September 7?

I look forward to working with you.

Thanks,  
Jason

.....  
Jason R. Cheek  
Deputy Chief, Civil Division  
Assistant United States Attorney  
Northern District of Alabama  
(205) 244-2104

---

**From:** Mike Hurst (3330) <[Mike.Hurst@phelps.com](mailto:Mike.Hurst@phelps.com)>  
**Sent:** Friday, August 19, 2022 5:13 PM  
**To:** Cheek, Jason (USAALN) <[JCheek@usa.doj.gov](mailto:JCheek@usa.doj.gov)>; Mike Hurst (3330) <[Mike.Hurst@phelps.com](mailto:Mike.Hurst@phelps.com)>  
**Cc:** John Graham (7235) <[John.Graham@phelps.com](mailto:John.Graham@phelps.com)>  
**Subject:** [EXTERNAL] Re: Eagle Forum of AL and Southeast Law Institute in Eknes-Tucker v. Marshall, No. 2:22cv184LCB (MDAL)

Hey Jason, thanks again for your response. John raised a good point with me, and we want to make sure we're clear and up front as to what I was requesting.

In my requesting an extension to respond to the subpoena, our response will most likely include our objection to the subpoena and it's request for improper items.

Again, we just got the case, so we have more research to do, but our initial reaction to reading it was that we would need to challenge some, if not all, of the subpoena on behalf of the clients.

I'm sorry if my previous email wasn't clear, as I didn't want to leave the wrong impression that "response" necessarily meant "producing." Just wanted to clarify.

Thanks and have a great weekend.

Mike

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**From:** Cheek, Jason (USAALN) <[Jason.Cheek@usdoj.gov](mailto:Jason.Cheek@usdoj.gov)>  
**Sent:** Friday, August 19, 2022 4:36 PM  
**To:** Mike Hurst (3330) <[Mike.Hurst@phelps.com](mailto:Mike.Hurst@phelps.com)>  
**Cc:** John Graham (7235) <[John.Graham@phelps.com](mailto:John.Graham@phelps.com)>  
**Subject:** RE: Eagle Forum of AL and Southeast Law Institute in Eknes-Tucker v. Marshall, No. 2:22cv184LCB (MDAL)

Mike,

Very glad we connected. I'll get with my team and will be in touch early next week.

Hope you have a nice weekend,  
Jason

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Jason R. Cheek  
Deputy Chief, Civil Division  
Assistant United States Attorney  
Northern District of Alabama  
(205) 244-2104

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**From:** Mike Hurst (3330) <[Mike.Hurst@phelps.com](mailto:Mike.Hurst@phelps.com)>  
**Sent:** Friday, August 19, 2022 4:10 PM  
**To:** Cheek, Jason (USAALN) <[JCheek@usa.doj.gov](mailto:JCheek@usa.doj.gov)>  
**Cc:** John Graham (7235) <[John.Graham@phelps.com](mailto:John.Graham@phelps.com)>  
**Subject:** [EXTERNAL] Eagle Forum of AL and Southeast Law Institute in Eknes-Tucker v. Marshall, No. 2:22cv184LCB (MDAL)

Jason,  
Great talking with you this afternoon. Thanks again for the call back. And I appreciate your kind consideration of our request for an extension to respond to subpoenas to our two clients above. I look forward to hearing back from you on whether our new deadline will be September 2nd or 9th.

My contact info is below, and you have my cell if you need me: 601-665-3322.

Thanks again and have a great weekend.

Mike

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**Mike Hurst**  
Phelps Dunbar LLP  
4270 I-55 North  
Jackson, MS 39211  
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Fax: 601-360-9777  
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**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF ALABAMA,  
NORTHERN DIVISION**

**REV. PAUL A. EKNES- )  
TUCKER; et al.; )**

**Plaintiffs, )**

**Civil Action No.  
2:22-cv-00184-LCB**

**vs. )**

**STEVE MARSHALL, in his )  
official capacity as Attorney )  
General of the State of Alabama; )  
et al.; )**

**Defendants. )**

**DECLARATION OF A. ERIC JOHNSTON**

I, A. Eric Johnston, pursuant to 28 U.S.C.A. § 1746 (pertaining to declarations), declare under penalty of perjury that the following statements by me are true and correct to the best of my knowledge:

1. I am A. Eric Johnston, and I am over the age of nineteen (19) years and in no way disqualified from making this declaration, which is made from personal knowledge. I am a licensed Alabama attorney in private practice.

2. Since 2000, I have served in a volunteer role as President of Southeast Law Institute (“SLI”). SLI is an Alabama non-profit corporation qualified as a 501(c)(3) organization under the Internal Revenue Code. SLI is not itself a party or

entity to any proceeding. It provides through its participating attorneys legal representation and assistance without charge to churches, non-profit organizations, some for-profit businesses, and individuals, including legislators. Specifically for legislators, attorneys who participate with SLI have provided advice and bill drafting assistance for over thirty years. These are private practice attorneys who volunteer their services in certain areas of law for which they are competent. This usually includes constitutional issues related to parental rights, individual liberties, health care, education, etc.

3. Legislators have long asked assistance of these attorneys. They know they can do so and receive counsel and advice on constitutional issues which will be informed, unbiased and confidential. Legislators interested in these issues must believe they can receive this legal assistance without fear of their consultations being open to public comment. Alabama Legislators do not have the luxury of large staffs, although they have the assistance from the Legislative Services Agency. On specialized issues, legislators often ask SLI to provide legal advice.

4. Eagle Forum of Alabama was very concerned about the provision of gender-altering medical treatment to minors in Alabama with gender dysphoria, and the permanent and adverse effects of such medical procedures on those minors. Eagle Forum of Alabama and the Senate and House legislative sponsors contacted

me to assist in the legal research and drafting of a bill to address its concerns. These efforts by Eagle Forum of Alabama and other grassroots organizations occurred over several years and particularly during the Alabama Legislature's sessions in 2020, 2021, and 2022. As the Court is aware, the "VCAP" statute (Alabama Vulnerable Child Compassion and Protection Act) is the subject of this lawsuit was passed by both houses of the Alabama legislature during the 2022 legislative session, signed by Governor Kay Ivey, and became effective May 8, 2022.

5. As volunteer lawyer for SLI, I was involved in communications with Alabama legislators on this subject during this several-year effort, working on drafts of possible legislation to be considered by legislators, and advising on the legislative process. Except for legal memoranda published to legislators generally or otherwise made public, these documents are my work product and covered by the attorney-client and work product privileges. Also, I consider all of these documents to be protected and privileged by the First Amendment to the U.S. Constitution and the rights it guarantees to citizens of this country to free speech, assembly, and to petition the government.

6. I have reviewed the non-party document subpoena issued by Asst. U.S. Attorney Jason R. Cheek and directed to SLI which I understand is Exhibit A to the Objection and Motion to Quash which is being filed on behalf of SLI. The problem

is not producing documents, but the basis for doing so. In over 30 years of bill drafting and advising on issues for which I am competent, I have never been subpoenaed (nor has SLI), called as a witness, or sued.

7. The Alabama Legislature has no formal reporting or record keeping system. Except for records of various versions of bills and amendments, and votes by members, no recordings of proceedings are made. By law, the intent of legislators and others in the process of passing a law is irrelevant. It is not admissible as evidence in a case to construe a statute or determine the constitutionality of a law. What I intended in any of my legal advising in this process has nothing to do with the objective of this case, which is simply the Constitutionality of the statute in question. That is a very important issue that is not colored by the thoughts, actions, and goals of any individual or entity, legislator or otherwise.

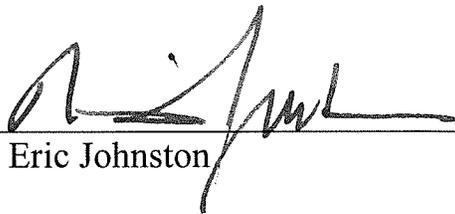
8. The constitutionality of VCAP will be decided by the judicial system applying the U.S. Constitution to the issues raised by VCAP. Lawyers will argue from both sides of the issue. What was said and argued during the legislative process will not be admissible or before this court. Similarly, what I said during the legislative process and what my legal files contain is privileged, work product and simply not relevant.

9. The compliance with the federal government subpoena would also have a chilling effect on me and other professionals, and other citizens who dare to engage in their constitutional rights when their views happen to be contrary to the political views of a government administration. I consider the subpoena in this case issued by the federal government to be contrary to and an undermining of fundamental constitutional values and legal rights, as well as, political harassment.

10. Several of the plaintiff's lawyers in this lawsuit similarly provide legal counsel to the plaintiffs. No one would request their records. Except for legal memos made public, no records of anyone acting as a volunteer SLI attorney should be produced. Because the name "Southeast Law Institute" appears on the memo, email, or other communication from an attorney, does not change his or her privileged nature. Requiring the volunteer attorney to produce privileged legal advice will compromise his or her ability to do so and the opportunity of legislators to request it in the future. If this subpoena is enforced, in the future I will have to limit the number of documents I create and preserve related to political issues and I will also have to consider that anything I write in any note, memo, letter, etc. may one day be read and used against me for political purposes by a government lawyer who has a different political viewpoint. Other persons with similar views as mine (including, just as one example, Eagle Forum of Alabama and persons who might otherwise be

inclined to offer testimony before legislative committee hearings) will likely be deterred altogether from political engagement if this subpoena is enforced. For all these reasons, I respectfully urge the Court to quash the subpoena in its entirety.

Signed this 15<sup>th</sup> day of September, 2022.

By:   
A. Eric Johnston