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

BRIANNA BOE, et al.;	)	
	)	
Plaintiffs,	)	
	)	
and	)	
	)	
UNITED STATES OF AMERICA,	)	**Civil Action No. 2:22-cv-00184-LCB**
	)	
Plaintiff-Intervenor,	)	
	)	
vs.	)	
	)	
STEVE MARSHALL, in his official capacity as Attorney General of the State of Alabama; et al.;	)	
	)	
Defendants.	)	

SUPPLEMENT TO EAGLE FORUM OF ALABAMA'S AND SOUTHEAST LAW INSTITUTE'S MOTIONS TO QUASH NON-PARTY DOCUMENT SUBPOENAS FROM THE U.S. IN LIGHT OF THE U.S.'S "NOTICE" FILED 10/7/22 REGARDING THOSE SUBPOENAS

In light of the "Notice Regarding Subpoenas to Third Parties Eagle Forum of Alabama and Southeast Law Institute" filed by the U.S. this past Friday night, October 7, 2022 (Doc. 184), the non-parties Eagle Forum of Alabama ("EFA") and Southeast Law Institute ("SLI") hereby file this Supplement to their pending motions to quash (or in the alternative, to modify) the non-party document subpoenas that

were previously issued back in August by the U.S. Attorney's office (Docs. 151 and 152). Those subpoenas as originally issued by the U.S. demanded production from these non-parties of eleven (11) broad categories of documents going back to 2017 regarding EFA's and SLI's concerns about gender-altering medical treatment to minors and the VCAP legislation for which EFA and its membership was advocating. After filing a Response in Opposition to the Motions to Quash (Doc. 168, filed 9/21/22), to which response EFA and SLI replied (Doc. 176, filed 9/28/22), the U.S. this past Friday night informed the Court that it had "narrowed" the scope of the subpoenas at issue to only one (1) category of documents so as "to reduce the burden of production on EFA and SLI."[1] The U.S. now seeks from these private non-parties only "any medical studies or literature referenced in Section 2 of VCAP."[2]

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[1] The discussions between these non-parties and the U.S. this past Thursday and Friday that led up to the U.S.'s Friday night filing was a comedy of errors and miscommunications on the government's part. First, after a couple of further "meet and confer" conferences between Mike Hurst (partner of the undersigned) and U.S. Attorney Prim Escalona that did not result in a resolution of the dispute before the Court, Asst. U.S. Attorney Jason Cheek (who had issued the original subpoenas at issue) e-mailed the undersigned on Friday, October 7, 2022, at 2:47 p.m. to say that the United States had decided to withdraw the subpoenas. See Exhibit A here (copy of Mr. Cheek's email). Then, at 3:26 p.m., Ms. Escalona called the office of the undersigned and left a voice mail message in which, after acknowledging Mr. Cheek's email and apologizing for the confusion on the U.S.'s end, she said that the U.S. was not withdrawing the subpoenas in their entirety after all but rather would be "narrowing" the subpoenas and seeking one category of documents as was described in the U.S.'s filing later that night.

[2] In fact, the "narrowed" category of documents referenced in the U.S.'s Friday night filing is in essence an attempt to issue a new subpoena, as the new category of documents which the U.S.

First, the U.S.'s Friday night filing constitutes a concession that its original subpoenas to these non-parties were overly broad (stunningly so, in fact) and imposed an undue burden on EFA in violation of Fed. R. Civ. P. 45(d)(1)[3] and 45(d)(3)(A)(iv). The U.S.'s Friday night filing also constitutes a tacit confession that the entire set of documents sought from these non-parties in the original subpoenas were (as discussed at length in EFA's and SLI's motions to quash and recent reply brief): (a) neither relevant nor proportional to any issue in this lawsuit (and, thus, the subpoenas were improper under Fed. R. Civ. P. 26(b)(1)), and (b) constitutionally protected from discovery by First Amendment privilege.

As stated above, the U.S.'s latest request to these non-parties is to produce the "medical studies or literature referenced in Section 2 of VCAP." This request is also objectionable for the same basic reasons as applied to the 11 document categories in the original subpoenas. Once again, the U.S. improperly ignores the fact that the VCAP statute is the product of the Alabama Legislature which enacted it – not these private organizations which have no lawmaking authority whatsoever.

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now seeks does not match any of the original 11 categories of the subpoenas which the U.S. no longer seeks. Putting aside the procedural irregularity, however, this new request for documents from the U.S. is substantively improper for the same basic reasons previously outlined by EFA and SLI in their motions to quash and their reply brief and discussed below.

[3] Rule 45(d)(1) provides that the district court must impose an appropriate sanction – which may include reasonable attorney's fees – on a party or attorney who fails to comply with its/his/her duty to avoid imposing undue burden or expense on a person to whom a subpoena is issued.

Further, the VCAP statute (passed by the Alabama Legislature and signed into law by Governor Ivey earlier this year) nowhere specifically designates which particular studies the Legislature had in mind as supporting the law it was enacting. Rather, the VCAP statute references studies only generally, in sections 2(4)[4] and 2(14)[5] of the Legislative Findings section of the statute. While EFA has some medical studies or literature and at one time or another likely passed copies of some of those along to individual legislators during the three-year period that VCAP was before the Alabama Legislature,[6] neither EFA nor SLI have any way of identifying specifically which studies the Legislature intended to reference in the statute it passed in 2022. See the Second Declaration of Margaret S. Clarke (attached hereto as Exhibit B); and the Second Declaration of A. Eric Johnston (attached hereto as Exhibit C). Thus, neither EFA nor SLI have any way to respond to this latest

[4] "… numerous studies have shown that a substantial majority of children who experience discordance between their sex and identity will outgrow the discordance once they go through puberty and will eventually have an identity that aligns with their sex."

[5] "Several studies demonstrate that hormonal and surgical interventions often do not resolve the underlying psychological issues affecting the individual. For example, individuals who undergo crosssex cosmetic surgical procedures have been found to suffer from elevated mortality rates higher than the general population. They experience significantly higher rates of substance abuse, depression, and psychiatric hospitalizations."

[6] SLI had no involvement in the research, collecting or providing of any medical studies or literature referenced in Section 2 of VCAP in any event. See the Second Declaration of A. Eric Johnston, paragraphs 8-10.

discovery request from the U.S., which is improperly asserted against them as non-parties anyway.

Clearly, as evidenced by the U.S.'s withdrawal of its original subpoenas, and for the reasons discussed previously in EFA's and SLI's motions to quash and previous reply brief, any request that EFA or SLI should produce just any medical studies or literature in its files concerning transgender persons or minors would not be relevant or proportional to the issue before the Court of whether the VCAP statute passed by the Alabama Legislature is constitutional.

Further, for EFA to produce just any medical studies or literature in its files concerning transgender persons or minors would still be an undue burden on it and its volunteer General Counsel, Margaret Clarke and, thus, violative of Rule 45(d)(1) and 45(d)(3)(A)(iv). See the Second Declaration of Margaret S. Clarke (Exhibit B hereto).

Moreover, EFA understands that the State of Alabama defendants have already produced to the plaintiffs numerous medical studies, in the Appendix to their brief to the Eleventh Circuit from the preliminary injunction order. See Exhibit D hereto (copy of index to said appendix; note the medical studies and literature outlined in III – IX of that Appendix). Further, EFA would also point the Court to the Brief filed in the Eleventh Circuit on July 5, 2022, by *amicus curiae* Ethics and

Public Policy Center in favor of the State of Alabama defendants-appellants; that brief has an excellent discussion of the medical studies and literature pertinent to the constitutionality of the VCAP statute. The U.S. obviously already has all of these medical studies and literature produced by the State and outlined in the Ethics and Public Policy Center's *amicus* brief. Any production from EFA's or SLI's files would almost certainly be duplicative of what the U.S. already has from these sources. Thus, such production would not only be an undue burden on EFA, but also a completely unnecessary one in violation of the proportionality requirement of Rule 26(b)(1).[7]

Finally, to the extent that some of the medical articles or literature in EFA's files were provided to individual members of the Alabama Legislature at some point during the three-year legislative process resulting in the passage of VCAP (which fact may not be easily determinable at this point anyway), forced production of these documents from a private grassroots, volunteer-driven organization such as EFA is prohibited by First Amendment privilege anyway for the reasons outlined in EFA's motion to quash and previous reply brief.

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[7] As the Court is aware, the factors pertinent to the proportionality test for the general scope of discovery under Rule 26(b)(1) include the parties' relative access to relevant information, the parties' resources, and whether the burden or expense of the proposed discovery outweighs its likely benefit. The latest version of the proposed subpoena from the U.S. (with its vast resources) to these small non-parties fails all of those tests.

/s/ John M. Graham
John M. Graham
ASB-5616-G70J

Attorney for Eagle Forum of Alabama
and Southeast Law Institute

OF COUNSEL:

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CERTIFICATE OF SERVICE

I hereby certify that this 12th day of October, 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

John Graham (7235)

From: Cheek, Jason (USAALN) <Jason.Cheek@usdoj.gov>
Sent: Friday, October 7, 2022 2:47 PM
To: John Graham (7235)
Subject: RE: Eagle Forum of AL and Southeast Law Institute in Eknes-Tucker v. Marshall, No. 2:22cv184LCB (MDAL)

Good afternoon, John,

I called earlier, but I understand that you are out of the office today.

I wanted to let you know that the United States has decided to withdraw the subpoenas to Eagle Forum of Alabama and Southeast Law Institute. A notice informing the Court of this will be filed in short order.

I hope you have a nice weekend,
Jason
.....
Jason R. Cheek
Deputy Chief, Civil Division
Assistant United States Attorney
Northern District of Alabama
(205) 244-2104

From: John Graham (7235) <John.Graham@phelps.com>
Sent: Thursday, September 15, 2022 8:16 AM
To: Cheek, Jason (USAALN) <JCheek@usa.doj.gov>
Cc: Toyama, Kaitlin (CRT) <Kaitlin.Toyama@usdoj.gov>
Subject: [EXTERNAL] RE: Eagle Forum of AL and Southeast Law Institute in Eknes-Tucker v. Marshall, No. 2:22cv184LCB (MDAL)

Jason, thanks for your email and the narrowing of the subpoenas. Unfortunately, all of the problems with the subpoenas that we outlined in the motions to quash – including but certainly not limited to the First Amendment privilege issues – still apply to the subpoenas as narrowed to the topics enumerated in your email. My clients' position has not changed.

John M. Graham
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phelps

EXHIBIT A

From: Cheek, Jason (USAALN) <Jason.Cheek@usdoj.gov>
Sent: Wednesday, September 14, 2022 8:35 AM
To: John Graham (7235) <John.Graham@phelps.com>
Cc: Toyama, Kaitlin (CRT) <Kaitlin.Toyama@usdoj.gov>
Subject: RE: Eagle Forum of AL and Southeast Law Institute in Eknes-Tucker v. Marshall, No. 2:22cv184LCB (MDAL)

Good morning, John,

Thanks again for making time last Thursday to discuss the motions to quash with us.

In the meantime, we've had additional time to review your clients' filings. Several of our subpoena requests were designed to confirm that Southeast Law Institute and/or Eagle Forum of Alabama drafted or assisted in drafting VCAP or its predecessor bills. In light of Southeast Law Institute's acknowledgment that it assisted in the legal research and drafting of a bill for the sponsors of VCAP, and Eagle Forum of Alabama's statement that it developed proposed legislation to be considered by legislators, as stated in the organizations' motions to quash and accompanying declarations, the United States is willing to narrow the materials sought in both subpoenas at this time to Requests Nos. 1, 2, 4, 5, and 6. We are open to accepting production on a rolling basis.

I also want to reiterate what I stated during our phone call last week--the United States' subpoena should not be read to seek membership lists from Eagle Forum of Alabama or the Southeast Law Institute. If your clients have any counter proposals or questions, or any other suggestions for ways to narrow the issues before the Court, we are happy to discuss.

Sincerely,
Jason

.....

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

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

BRIANNA BOE, et al.;	)	
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Plaintiffs,	)	
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and	)	
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UNITED STATES OF AMERICA,	)	**Civil Action No. 2:22-cv-00184-LCB**
	)	
Plaintiff-Intervenor,	)	
	)	
vs.	)	
	)	
STEVE MARSHALL, in his official capacity as Attorney General of the State of Alabama; et al.;	)	
	)	
Defendants.	)	

SECOND DECLARATION OF MARGARET S. CLARKE

I, Margaret S. Clarke, 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 Margaret S. Clarke, 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 previously gave a Declaration in this matter on September 2,

EXHIBIT B

2022 (filed with the Court on September 7, 2022) in support of Eagle Forum of Alabama's (EFA) Objection and Motion to Quash Document Subpoena, Or in the Alternative, Motion to Modify Subpoena. This Declaration is given in further support of EFA's objection/motion, and particularly in response to the "Notice Regarding Subpoenas to Third Parties Eagle Forum of Alabama and Southeast Law Institute" filed by the United States Department of Justice this past Friday night, October 7, 2022. I understand that the U.S., while no longer requesting the documents set out in its original 11-category subpoena, is now demanding that EFA produce the "medical studies or literature referenced in Section 2 of VCAP."

2. The VCAP statute (passed by the Alabama Legislature and signed into law by Governor Ivey earlier this year) nowhere specifically designates which particular studies the Legislature had in mind as supporting the law it was enacting. While EFA has some medical studies or literature in its files and at one time or another likely passed copies of some of those along to individual legislators during the three-year period that VCAP was before the Alabama Legislature, EFA has no way of identifying specifically which studies the Legislature intended to reference in the statute it passed in 2022. It would be pure speculation on the part of EFA as to what medical studies the Alabama Legislature intended to reference in the legislative findings of Section 2 of VCAP.

3. The U.S., Intervenor Plaintiff, now demands two small advocacy organizations produce all our medical research which supports the Alabama Legislature's statutory findings in Section 2 of the VCAP. The original subpoena from the U.S. has already cost EFA weeks of research and communications to protect our First Amendment rights under the United States Constitution.

4. It would still be a massive and undue burden for me as a volunteer to attempt to comply with this revised (new) subpoena from the U.S. I have no assistance whatsoever. My personal affairs have already suffered along with my work on other issues because of this subpoena from the U.S.

5. On my personal computer, which I use for my volunteer work with EFA, are nearly 500 Word/PDF documents and over 2,000 email messages potentially related to the VCAP campaign. This does not include countless hard copies of documents saved in boxes and binders. These documents are not organized in any way that would allow me to easily and quickly identify which documents are medical articles or literature or which of those may have been provided at some point to a legislator. Any attempt to comply with the U.S.'s latest version of its document request would (in addition to significant and unnecessary work it would impose on others associated with EFA) require me to open and read through each of the

thousands of the documents in my personal files referenced above. This task would easily take a number of days of my time, as well as causing me to incur personal expense.

6. For all these reasons, I respectfully again urge the Court to quash the subpoena, both in its original form and the revised version that the U.S. now proposes.

Signed this 11 day of October, 2022.

By: Margaret S. Clarke
Margaret S. Clarke

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.	)	

SECOND 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. As President of the Southeast Law Institute ("SLI"), I previously filed a Declaration in this case. (Document No. 152-3.) This Declaration is to supplement my earlier Declaration.

EXHIBIT C

3. The initial subpoena from the Government was overly broad and along with the Eagle Forum of Alabama ("EFA"), we objected on constitutional, privilege and relevancy grounds.

4. After several conversations among counsel and response and reply pleadings, the Government filed its "Notice Regarding Subpoenas to Third Parties Eagle Forum of Alabama and Southeast Law Institute." (Document No. 184.)

5. The Government's Notice attempts to modify its subpoena to EFA and SLI saying "that it now only seeks any medical studies or literature referenced in Section 2 of VCAP … ."

6. In my first Declaration, paragraph 5, I explained that I provided counsel and advice on constitutional issues and assisted EFA and Legislators in drafting the VCAP legislation. I further explained that "except for legal memorandum published to legislators generally or otherwise made public, these documents are my work product and covered by the attorney-client and work product privileges." I also stated my documents were entitled to other first amendment protections.

7. Without waving any of my earlier objections on rights and privileges recorded to me as an attorney and under the United States Constitution, in the interest of cooperating with the needs of this litigation, I respond to the Government's amended request.

8. SLI had no involvement in the research, collecting or providing of any medical studies or literature referenced in Section 2 of VCAP. SLI's assistance was to the constitutional considerations of the legislative bill and to providing procedural guidance on the legislative process.

9. The bill that became law was prepared by the Alabama Legislative Services Agency for and/or with contributions by the senate and house sponsors of the bill. Medical testimony was presented by physicians in committee hearings both in favor of and against the bill. I do not know if any of that testimony referenced the findings in the law. Further than that, I have no information related to the Section 2 findings.

10. Consequently, SLI is unable to further respond to the subpoena and requests the court to find that SLI has complied with the subpoena, that it be released from its enforcement, and that any remaining requirements be quashed on the grounds previously stated.

Signed this 11th day of October, 2022.

By: _____
A. Eric Johnston

No. 22-11707

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PAUL A. EKNES-TUCKER, et al.,
Plaintiffs-Appellees,

&

UNITED STATES OF AMERICA
Intervenor-Plaintiff-Appellee,

v.

GOVERNOR OF THE STATE OF ALABAMA, et al.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Alabama
Case No. 2:22-cv-184-LCB

APPELLANTS' APPENDIX VOLUME III OF XIII

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July 5, 2022

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