

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

Brianna Boe, *et al.*,)
)
Plaintiffs,)
)
United States of America,)
)
Intervenor Plaintiff,)
)
v.) Civil Action No. 2:22-cv-184-LCB
)
Hon. Steve Marshall, in his official)
capacity as Attorney General,)
of the State of Alabama, *et al.*,)
)
Defendants.)

**DEFENDANTS' MOTION TO COMPEL PLAINTIFF-INTERVENOR
TO ANSWER INTERROGATORIES**

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INTRODUCTION

As explained at length in Defendants’ Motion to Compel Production of Plaintiff-Intervenor’s Records (Doc. 227), the Plaintiff that voluntarily intervened here is “the United States.” Defendants accordingly served discovery requests on the United States, seeking responses from the components of the United States most likely to have relevant information—primarily the Department of Health and Human Services. Yet the United States refuses to respond or provide documents except from the “three offices within the Department of Justice acting as counsel” for the United States. Doc. 247 at 4 n.1. As it did when Defendants requested documents, the United States pressed a special exemption from discovery that would apply to no other entity—limiting discovery to an entity’s *counsel*—and declined to fully respond to Defendants’ interrogatories as well. For many of the same reasons the Court should order the United States to respond to Defendants’ requests for production of documents, it should also order full and complete responses to Defendants’ interrogatories.

BACKGROUND

Most of the relevant background is set forth in Defendants’ Motion to Compel Production of Plaintiff-Intervenor’s Records. Doc. 227 at 9-13. In short, the United States voluntarily intervened, bringing the full weight of the federal government into this case, but refuses to engage in discovery except as to the attorneys it selected to

litigate this case (and then—understandably—asserts that many of the documents those attorneys have are privileged). As relevant here, Defendants served their first set of interrogatories on the United States on December 20, 2022. Bowdre Decl., Ex. 1. Defendants sought answers about relevant providers in Alabama (ROGs 1-2), the evidentiary bases for the United States’ claims (ROGs 3-10), monitoring of health outcomes and evidence about transitioning treatments in minors (ROGs 11-15), studies about those treatments (ROG 16), collaboration with WPATH, the American Academy of Pediatrics, or the Endocrine Society about these treatments (ROG 17), and funding for these treatments (ROG 18).

The United States served its responses and objections a month later. Bowdre Decl., Ex. 2. It objected to the interrogatories about its claims as premature, and, to facilitate this Court’s review, this motion does not address those interrogatories. At this time, Defendants move to compel full and complete answers to ROGs 11-18:

11. Identify (including by identifying the specific persons or entities involved) any ways in which You monitor, or have monitored, the health outcomes of Minors, in Alabama or elsewhere, who receive Puberty Blockers, Cross-Sex Hormones, and/or surgical interventions to treat Gender Dysphoria and/or Related Conditions.
12. Identify any ways in which You track and/or review, or have tracked and/or reviewed, evidence related to the efficacy or safety of using Puberty Blockers, Cross-Sex Hormones, and/or surgical interventions to treat Minors suffering from Gender Dysphoria and/or Related Conditions.
13. Identify (including by identifying the specific persons or entities involved) any ways in which You track and/or review, or have

tracked and/or reviewed, evidence or instances of Desistance or De-transition.

14. Identify (including by identifying the specific persons or entities involved) any ways in which You identify, define, monitor, track, and/or discourage “disinformation” related to Transitioning treatments in Minors. *See, e.g.*, AAP Letter to Merrick Garland, Oct. 3, 2022, <https://downloads.aap.org/DOFA/DOJ%20Letter%20Final.pdf>.
15. Identify (including by identifying the specific persons or entities involved) any ways in which You are reviewing WPATH’s Standards of Care 8 (SOC-8) or using SOC-8 to update Your guidance or practices.
16. Identify any studies You are funding, conducting, or helping to fund or conduct—or have funded, conducted, or helped to fund or conduct—related to Transitioning treatments in Minors.
17. Identify (including by identifying the specific persons or entities involved) any ways in which You collaborate or work, or have collaborated or worked, with WPATH, USPATH, the American Academy of Pediatrics, and/or Endocrine Society regarding the use of Transitioning treatments in Minors.
18. Identify (including by identifying the specific persons or entities involved) any ways in which You have provided, are providing, or have decided to provide funding for Transitioning Minors.

Bowdre Decl., Ex. 1, at 8-10.

The United States’ primary objection to all the interrogatories (including 11-18) was that agencies like HHS are not part of the United States. Invoking the allegedly special “nature of the federal government,” the United States insisted that it would respond to interrogatories based only “on information within the possession, custody, or control of the three offices acting as counsel and handling this litigation

on behalf of the United States.” Bowdre Decl., Ex. 2, at 2. Thus, the United States’ answers were along these lines: “the United States Attorney’s Office for the Middle District of Alabama, Civil Division ha[s] not funded or conducted any studies related to gender-affirming treatments in minors” or “issue[d] medical guidance regarding the standards of care for transgender minors.” *Id.* at 15-16. The United States also objected to relevance for ROGs 11-13 and 15-18, and to vagueness for ROG 14. *Id.* at 12-17.

The parties engaged in a conferral process by both email and phone about the United States’ sweeping assertion that only its counsel would be subject to discovery (and that counsel’s materials would be largely privileged). *See generally* Doc. 227-1, Ex. 3. Defendants emphasized that they seek responses only from HHS, but the United States still refused to respond. *Id.* It took the same position on the interrogatories, Bowdre Decl., Ex. 3, giving rise to this motion. Because HHS is the agency within the United States most likely to possess relevant information, Defendants seek full and complete answers from HHS and its components to ROGs 11-18.

LEGAL STANDARD

Under Federal Rule of Civil Procedure 26(b), “[p]arties 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.” “An interrogatory may relate to any matter that may be inquired into under Rule 26(b).” Fed. R. Civ. P. 33(a)(2). Without a

valid objection, “[e]ach interrogatory must . . . be answered separately and fully in writing under oath” “by the party to whom they are directed.” Fed. R. Civ. P. 33(b)(1), (3).

Rule 37(a)(3)(B)(iii) permits a party to move to compel interrogatory answers. “The party resisting production of information bears the burden of establishing lack of relevancy or undue burden in supplying the requested information.” *Rosen v. Provident Life & Accident Ins. Co.*, 308 F.R.D. 670, 680 (N.D. Ala. 2015) (cleaned up).

ARGUMENT

I. Defendants Seek Information Held By The United States.

Under Rule 33(b)(1), “interrogatories must be answered” “by the party to whom they are directed” or “by any officer or agent, who must furnish the information *available to the party*” (emphasis added). This rule “requires a party to include in their answer all information within their control or known by the party’s agents.” *McNeal v. Macon Cnty. Bd. of Educ.*, No. 3:19-cv-00122-SRW, 2021 WL 6883429, at *5 (M.D. Ala. May 26, 2021) (cleaned up). Moreover, “[a] party cannot limit its answers to matters within its own knowledge and ignore information immediately available to it or under its control.” *Id.* at *9 (cleaned up) (quoting *Essex Builders Grp., Inc. v. Amerisure Ins. Co.*, 230 F.R.D. 682, 685 (M.D. Fla. 2005)). Instead, it “must make an effort to” “obtain the requested information” from its

“investigators,” “agents[, and] representative[s].” *Essex*, 230 F.R.D. at 685; *see also* 10A Wright & Miler, *Federal Procedure, Lawyers Edition* § 26:506 (2022) (“Information available to a party includes whatever information the party has learned, as of the time the interrogatory was served, from nonparties and other sources, even those sources not under the party’s control, as well as information that the responding party has acquired firsthand.”).

As fully explained in Defendants’ motion to compel production of documents and forthcoming reply in support of that motion, the United States has control over information held by its agency, HHS. *See* Doc. 227 at 19-25. Defendants do not belabor the point here, other than to note that the United States’ lead response—that “[w]hen one federal agency files suit, other federal agencies do not automatically become parties to the litigation,” Doc. 247 at 9—ignores that the Intervenor here is “the United States,” not “one federal agency.” *Compare id.* (citing *SEC v. Biopure Corp.*, 2006 WL 2789002, *4 (D.D.C. Jan. 20, 2006)).

The United States’ only other case (Doc. 247 at 8) is irrelevant. In *United States v. City of New York*, the Attorney General had statutory authority to “bring a civil action” against state government entities. No. 07-cv-2067-NGG-RLM, 2012 WL 1999860, at *11 (E.D.N.Y. June 3, 2012) (quoting 42 U.S.C. § 2000e-5(f)(1)). Here, by contrast, the Attorney General had authority to intervene *only* “for or in the name of the United States.” 42 U.S.C. § 2000h-2. That is why when the United States

moved to intervene in this case, it made clear that the party with “an unconditional right to intervene” was “the United States.” Doc. 58-1 at 2-3; *see* Doc. 58-3 ¶ 14 (complaint in intervention, identifying “Plaintiff-Intervenor” as “the United States of America”); *id.* at 16 (identifying counsel as “Attorneys for Plaintiff-Intervenor United States of America”); Doc. 247 at 23 (same).

In its response, the United States concedes that the Attorney General here is “acting on behalf of the federal government” and argues that “the United States” “is entitled to relief.” Doc. 247 at 8 n.6. The United States makes no effort to explain how a non-party could be “entitled to relief” in an Article III case or controversy. Nor does it explain or defend its prior objection that “HHS is not a part of the United States.” Doc. 227-1, Ex. 3, at 4. It makes no sense that one cabinet agency (DOJ) would *be* the United States while another cabinet agency (HHS) would not be *part* of the United States. At minimum, HHS staff must be “agents” of the United States, requiring the United States to seek their input for answers to interrogatories. *McNeal*, 2021 WL 6883429, at *5.

The United States’ insistence that it would answer these interrogatories only “based on information within the possession, custody, or control of the three offices acting as counsel” (Bowdre Decl., Ex. 2, at 2) also contradicts black-letter discovery law. Defendants are not *allowed* to “direct[.]” interrogatories “to the attorney for a party.” 8B Wright & Miller, *Federal Practice & Procedure* § 2171 (3d ed.). Instead,

interrogatories “must be addressed to the party, who is then required to give all information known to it or its attorney.” *Id.* Just as Defendants may not direct interrogatories to a plaintiff’s lawyer, a plaintiff cannot limit its answers to whatever its lawyer knows.

For these reasons, and those more fully explained in parallel briefing about Defendants’ requests for production of documents, the United States’ objection that it will not provide answers from HHS lacks merit. The Court should compel the United States to answer ROGs 11-18 fully and completely with the input of HHS and its components.

II. HHS Information About The Safety And Efficacy Of The Treatments At Issue Is Highly Relevant.

The United States also offered blanket, unspecific relevancy objections to ROGs 11-13 and 15-18. Relevance is “construed broadly to encompass any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case,” no matter if the material itself would be admissible. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). When it comes to interrogatories, relevancy “is viewed very liberally.” 8B Wright & Miller, *Federal Practice & Procedure* § 2165. As explained in parallel briefing, it takes little imagination to see why HHS’s review of “evidence related to the efficacy or safety” or standards of these treatments (ROGs 12, 15), monitoring of “health outcomes” and detransitioning (ROGs 11, 13), studies of these treatments (ROG 16), collaboration

with medical organizations about the treatments (ROG 17), and funding of these treatments (ROG 18) are all highly relevant to the claims and defenses here. *See* Doc. 227 at 14-19; *cf.* Doc. 219 at 28-33. The United States’ relevancy objection fails.

Any objection based on burden would also be meritless. The United States’ “conclusory” “recitation of expense and burdensomeness,” unconnected from any specific interrogatory at issue, is facially deficient. *Panola Land Buyers Ass’n v. Shuman*, 762 F.2d 1550, 1559 (11th Cir. 1985); Fed. R. Civ. P. 33(b)(4) (“The grounds for objecting to an interrogatory must be stated with specificity.”); *see* Bowdre Decl., Ex. 2, at 2. And as explained elsewhere in detail, any burden is not *undue* and can be alleviated by the identification of relevant HHS personnel—but the United States has refused to engage in such an effort. *See* Doc. 227 at 25.

III. Interrogatory No. 14 Is Not Vague.

Last, the United States objected to Interrogatory No. 14 as “vague and unclear,” while stating that it “does not have responsive information.” Bowdre Decl., Ex. 2, at 15. Again, that Interrogatory asks:

Identify (including by identifying the specific persons or entities involved) any ways in which You identify, define, monitor, track, and/or discourage “disinformation” related to Transitioning treatments in Minors. *See, e.g.*, AAP Letter to Merrick Garland, Oct. 3, 2022, <https://downloads.aap.org/DOFA/DOJ%20Letter%20Final.pdf>.

Because the United States did not seek the input of HHS in answering this interrogatory, its existing answer is deficient and must be supplemented. For instance, speaking to the Federation of State Medical Boards, HHS’s assistant secretary for health recently decried “substantial misinformation about gender-affirming care” and called for “advocat[ing] for our tech companies to create a healthier, cleaner information environment.”¹ Federal instructions to state medical boards that they should regulate what can be said about the treatments at issue as directed by the federal government are relevant to multiple issues here.

Even under the United States’ redefinition of itself as a few litigating offices, the United States’ answer is incomplete. The interrogatory itself cites a letter to Attorney General Garland calling for investigation of supposed disinformation about these treatments—a letter that would be responsive—yet the United States says it has no “responsive information.” A follow-up letter to Attorney General Garland from individuals who have detransitioned criticized the medical organizations’ letter as “nothing more than an attempt to silence the reasonable voices of concerned critics calling for a more cautious approach to experimental medical practices impacting vulnerable children.”² Members of Congress and state attorneys general also sent

¹ Address by Admiral Rachel L. Levine to Federation of State Medical Boards, at 8:18-10:01, May 27, 2022, <https://youtu.be/971Ai5VmkAA>.

² Letter from Chloe Cole, et al., to Hon. Merrick Garland, Oct. 7, 2022, <https://perma.cc/T3ZD-TJRX>.

Attorney General Garland letters on the topic.³ In short, there is obviously responsive information, even from the entities that the United States has supposedly consulted. The Court should compel a full and complete answer.

Finally, Interrogatory No. 14 is not vague. It cites a letter providing an example of the issues on which Defendants request information. The United States does not “state[] with specificity” its vagueness objection, Fed. R. Civ. P. 33(b)(4), and given that its own agents have attacked supposed “disinformation,” the United States cannot now feign confusion as to the scope and meaning of the interrogatory.

CONCLUSION

The Court should grant Defendants’ motion to compel full and complete answers from HHS and its components to Defendants’ Interrogatories 11-18.

Respectfully submitted,

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³ Letter from Rep. Chip Roy, et al., to Hon. Merrick Garland, Nov. 2, 2022, <https://perma.cc/J9BM-R7WS>; Letter from Jonathan Skrmetti, et al., to Hon. Merrick Garland, Oct. 12, 2022, <https://perma.cc/8BME-BSHL>.

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CERTIFICATE OF SERVICE

I certify that I electronically filed this document using the Court's CM/ECF system on February 20, 2023, which will serve all counsel of record.

s/ A. Barrett Bowdre
Counsel for Defendants

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

Brianna Boe, <i>et al.</i> ,)	
)	
<i>Plaintiffs</i> ,)	
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United States of America,)	
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<i>Intervenor Plaintiff</i> ,)	
)	
v.)	Civil Action No. 2:22-cv-184-LCB
)	
Hon. Steve Marshall, in his official)	
capacity as Attorney General,)	
of the State of Alabama, <i>et al.</i> ,)	
)	
<i>Defendants</i> .)	

**DECLARATION OF A. BARRETT BOWDRE IN SUPPORT OF
DEFENDANTS’ MOTION TO COMPEL PLAINTIFF-INTERVENOR
TO ANSWER INTERROGATORIES**

I, A. Barrett Bowdre, hereby declare as follows:

1. I am one of the attorneys representing Defendants in the above case. I am over the age of 21 and am capable of making this declaration pursuant to 28 U.S.C. § 1746. I have not been convicted of a felony or crime involving dishonesty, and the facts contained herein are within my personal knowledge.

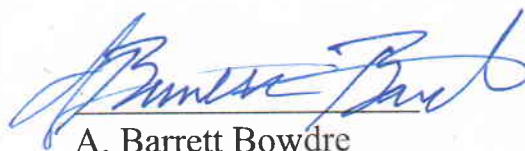
2. Attached as **Exhibit 1** is a true and correct copy of Defendants’ First Interrogatories to Intervenor-Plaintiff United States of America, which were served on the United States on December 20, 2022.

3. Attached as **Exhibit 2** is a true and correct copy of the United States' Responses to Defendants' First Requests for Production, which were served by the United States on January 19, 2023.

4. Attached as **Exhibit 3** is a true and correct copy of the parties' email correspondence concerning Defendants' First Interrogatories to Intervenor-Plaintiff and the related First Requests for Production to Intervenor-Plaintiff. The parties had numerous telephonic meet-and-confers in addition to this correspondence about the Requests.

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

Executed on February 16, 2023.

A handwritten signature in blue ink, appearing to read "A. Barrett Bowdre", is written over a horizontal line.

A. Barrett Bowdre
Counsel for Defendants

Exhibit 1

Defendants' First Interrogatories to Intervenor-Plaintiff
United States of America

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

Brianna Boe, <i>et al.</i> ,)	
)	
<i>Plaintiffs</i> ,)	
)	
United States of America,)	
)	
<i>Intervenor Plaintiff</i> ,)	
)	
v.)	No. 2:22-cv-00184-LCB
)	
Hon. Steve Marshall, in his official)	
capacity as Attorney General of the)	
State of Alabama, <i>et al.</i> ,)	
)	
<i>Defendants</i> .)	

**DEFENDANTS’ FIRST INTERROGATORIES TO
INTERVENOR-PLAINTIFF UNITED STATES OF AMERICA**

Pursuant to Fed. R. Civ. P. 26 and Fed. R. Civ. P. 33, Alabama Attorney General Steve Marshall, Montgomery County District Attorney Daryl D. Bailey, Cullman County District Attorney C. Wilson Blaylock, Lee County District Attorney Jessica Ventiere, Twelfth Judicial Circuit District Attorney Tom Anderson, and Jefferson County District Attorney Danny Carr, collectively the Defendants, hereby propound the following Interrogatories to Intervenor-Plaintiff United States of America to be answered according to such Rules and any and all applicable Orders of the Court.

INSTRUCTIONS

Your responses should include all information, knowledge, or belief available not only to You, but also to any attorneys, investigators, consultants, agents, and other representatives acting on Your behalf. Please respond in accordance with the following instructions:

1. **Claims of Privilege and Exception to Discovery.** If any claim of privilege is asserted, in whole or in part, with respect to any Interrogatory, please identify the specific privilege or protection claimed and state the basis for the claim, identifying the pertinent circumstances with sufficient specificity to permit Defendants to assess the basis of any such claim for privilege or protection.

2. **Continuing Nature.** These Interrogatories are intended to be and shall be answered or responded to fully as of the date of response and shall be deemed to be continuing thereafter until the conclusion of this matter. If You should subsequently acquire any further information responsive to these Interrogatories, You should promptly furnish such information to the undersigned counsel.

3. **Answer to the Fullest Extent Possible.** If any of the Interrogatories cannot be answered in full, please answer to the fullest extent possible, explaining why you cannot answer the remainder of the Interrogatory and stating any information or knowledge which You have concerning the unanswered portion.

4. **Objections.** If You have a good-faith objection to any of these Interrogatories, or any part thereof, the specific nature of the objection and whether it applies to the entire Interrogatory or to a certain portion thereof shall be clearly stated. If there is an objection to any part of an Interrogatory, then the part or parts objected to should be indicated and information responsive to the remaining unobjectionable parts should be provided.

5. **Language.** The use of the singular form of any word includes the plural and vice versa. Reference to one gender includes the other gender(s). The word “all” means any and all. The word “including” means “including without limitation.”

DEFINITIONS

1. All terms used in these Interrogatories have the broadest possible meaning accorded to them under the Federal Rules of Civil Procedure.

2. The terms “**You**” and “**Your**” refer to the United States of America, any executive agency or department in which documents responsive to these Requests may be found, and the officers, agents, employees, present or former counsel, and all other persons acting on behalf of those agencies or departments.

3. “**Alabama Vulnerable Child Compassion and Protection Act**” (or “**Act**”) shall mean Alabama Act No. 2022-289, introduced in the Alabama Legislature as Senate Bill 184 and signed into law on or around April 8, 2022.

4. “**Sex**” or “**Biological Sex**” shall mean the biological state of being male or female, based on the individual’s chromosomes and reproductive organs at birth.

5. “**Gender Dysphoria**” is the diagnosis of Gender Dysphoria under the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5). “**Related Conditions**” include “gender incongruence” as defined by the ICD-11 and any other issues concerning trans (or transgender), gender diverse, and non-binary gender identities.

6. “**Puberty Blockers**” shall mean medication administered to Minors to delay or prevent the onset or continuation of puberty, or otherwise to delay or prevent the formation or maturation of secondary sex characteristics. This includes, but is not limited to, common puberty blockers such as histrelin acetate and leuprolide acetate if administered for the purpose of Transitioning. For purposes of these Interrogatories, “Puberty Blockers” does not include GnRH agonists administered to young children (7 and younger) for the treatment of central precocious puberty or to adult men (19+) for the treatment of prostate cancer.

7. “**Cross-sex Hormones**” shall mean hormones administered to induce the physical characteristics of a sex or gender profile other than the Biological Sex of the patient (including non-cross-sex gender identities such as “non-binary”). It includes, but is not limited to, administering androgenic hormones such as testosterone, fluoxymesterone, and methyltestosterone to a biological female, and

estrogenic hormones such as estrogen and estradiol to a biological male. It also includes the administration of hormone blockers and anti-androgens such as flutamide, spironolactone, and cyproterone if used as part of Transitioning.

8. “**Desistance**” shall mean the resolution of diagnosed Gender Dysphoria or Related Conditions in a Minor without the continued administration of Puberty Blockers, Cross-Sex Hormones, or surgical interventions.

9. “**Transitioning**” shall mean the administration of medicines such as Puberty Blockers, Cross-Sex Hormones, and surgical interventions to change the physical appearance of a Minor in a way that is not consistent with the patient’s Biological Sex. This includes changing the appearance to appear as a cross-sex identification as well as non-cross-sex identifications such as “non-binary.”

10. “**Detransitioning**” shall mean any actions taken to conceal or reverse the effects of Transitioning, including the administration of medicines, surgical interventions, and social actions such as changing pronouns, dress, or other forms of gender expression.

11. “**Minor**” shall mean a person under the age of 19.

12. “**Health Care Providers**” means professionals who provide medical health care or mental health care. “Health care providers” include, but are not limited to, pediatricians, doctors of medicine, doctors of osteopathy, physicians, obstetricians, gynecologists, surgeons, plastic surgeons, urologists,

endocrinologists, neurologists, psychologists, psychiatrists, psychotherapists, mental health professionals, clinicians, speech-language pathologists, social workers, counselors, therapists, and bioethicists. As used in these Interrogatories, “health care providers” includes a nurse or nurse practitioner if that person is the primary person providing services but not if he or she acts only as support staff for another health care provider. The following professionals are specifically excluded from the definition of “health care providers” as used in these Interrogatories: pharmacists, dentists, orthodontists, endodontists, optometrists, ophthalmologists, and podiatrists.

INTERROGATORIES

1. If You have knowledge of any Health Care Providers, in Alabama or elsewhere, who are evaluating, diagnosing, monitoring, or treating Minors in Alabama for Gender Dysphoria or a Related Condition, whether alone or in conjunction with other Health Care Providers, identify such Health Care Providers. To “identify,” as used in this Interrogatory, is to provide the person or entity’s name, business name, business address, business phone number, and any other readily available business contact information for the Health Care Provider.

2. Identify all Health Care Providers, in Alabama or elsewhere, whom you have reason to believe are evaluating, diagnosing, monitoring, or treating Minors in Alabama for Gender Dysphoria or a Related Condition, whether alone or in

conjunction with other Health Care Providers. You do not need to include any Health Care Provider identified in response to Interrogatory No. 1. To “identify,” as used in this Interrogatory, is to provide the person or entity’s name, business name, business address, business phone number, and any other readily available business contact information for the health care provider.

3. Identify all persons known to you who have knowledge or information that supports or refutes the allegations set forth in Your Operative Complaint.

4. If You contend that the Act “criminaliz[es] certain forms of medically necessary gender-affirming care for transgender minors,” but “permits all other minors to access the same procedures and treatments,” Doc. 92 at 3, identify and explain all evidentiary bases for Your contention.

5. If You contend that “[a] diagnosis of gender dysphoria is currently required in order to receive many forms of gender-affirming care, including hormone therapy and surgery,” Doc. 92 at 6, identify and explain all evidentiary bases for Your contention.

6. If You contend that “[m]edical treatment standards for gender dysphoria, including for minors, are well-established,” Doc. 62-1 at 14, identify and explain all evidentiary bases for Your contention.

7. If You contend that “the State’s articulated objectives are pretextual justifications that mask the true purpose of the law: to express moral disapproval of

a vulnerable and unpopular group,” Doc. 62-1 at 27, identify and explain all evidentiary bases for Your contention.

8. If You contend that “the overwhelming weight of medical evidence confirms that the medical care that S.B. 184 forbids is safe, effective, and medically necessary treatment for the health and wellbeing of children and adolescents suffering from gender dysphoria,” Doc. 62-1 at 30, identify and explain all evidentiary bases for Your contention.

9. If You contend that “[t]here have been ample observational studies, including federally funded trials, supporting the use of puberty blockers and other gender-affirming hormone therapy for adolescents,” Doc. 62-1 at 31, identify and explain all evidentiary bases for Your contention.

10. If You contend that “parents and many minors are able to comprehend the risks involved” of the treatments banned by the Act, Doc. 62-1 at 33, identify and explain all evidentiary bases for Your contention.

11. Identify (including by identifying the specific persons or entities involved) any ways in which You monitor, or have monitored, the health outcomes of Minors, in Alabama or elsewhere, who receive Puberty Blockers, Cross-Sex Hormones, and/or surgical interventions to treat Gender Dysphoria and/or Related Conditions.

12. Identify any ways in which You track and/or review, or have tracked and/or reviewed, evidence related to the efficacy or safety of using Puberty Blockers, Cross-Sex Hormones, and/or surgical interventions to treat Minors suffering from Gender Dysphoria and/or Related Conditions.

13. Identify (including by identifying the specific persons or entities involved) any ways in which You track and/or review, or have tracked and/or reviewed, evidence or instances of Desistance or Detransition.

14. Identify (including by identifying the specific persons or entities involved) any ways in which You identify, define, monitor, track, and/or discourage “disinformation” related to Transitioning treatments in Minors. *See, e.g.*, AAP Letter to Merrick Garland, Oct. 3, 2022, <https://downloads.aap.org/DOFA/DOJ%20Letter%20Final.pdf>.

15. Identify (including by identifying the specific persons or entities involved) any ways in which You are reviewing WPATH’s Standards of Care 8 (SOC-8) or using SOC-8 to update Your guidance or practices.

16. Identify any studies You are funding, conducting, or helping to fund or conduct—or have funded, conducted, or helped to fund or conduct—related to Transitioning treatments in Minors.

17. Identify (including by identifying the specific persons or entities involved) any ways in which You collaborate or work, or have collaborated or

worked, with WPATH, USPATH, the American Academy of Pediatrics, and/or Endocrine Society regarding the use of Transitioning treatments in Minors.

18. Identify (including by identifying the specific persons or entities involved) any ways in which You have provided, are providing, or have decided to provide funding for Transitioning Minors.

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Exhibit 2

Intervenor-Plaintiff United States' Objections and Responses to
Defendants' First Interrogatories

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

Brianna Boe, <i>et al.</i> ,)	
)	
<i>Plaintiffs,</i>)	
)	
United States of America,)	
)	
<i>Plaintiff-Intervenor,</i>)	
)	
v.)	No. 2:22-cv-00184-LCB-CWB
)	
Hon. Steve Marshall, in his official)	
capacity as Attorney General of the)	
State of Alabama, <i>et al.</i> ,)	
)	
<i>Defendants.</i>)	

**PLAINTIFF-INTERVENOR UNITED STATES OF AMERICA’S
OBJECTIONS AND RESPONSES TO DEFENDANTS’ FIRST
INTERROGATORIES**

Pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure, Plaintiff-Intervenor United States of America submits its objections and responses to Defendants’ First Interrogatories.

Preliminary Statement

The United States’ Responses are limited to information currently available to the United States and are based on the United States’ understanding of the information it has received or obtained to date. Additional discovery may reveal facts that affect whether any given document is responsive to any particular

request. The United States' investigation is continuing and, consistent with the Federal Rules and the Local Rules of this Court, the United States will supplement its Responses.

Objections and Responses

The United States objects to the Requests' definition of "You" or "Your," which is overly broad and disproportionate to the needs of the case because it is not limited to the portion of the vast federal government that is likely to have information relevant to the claims and defenses in this case. Instead, the definition would apply to the entire federal government, "former counsel," and "all other persons acting on behalf of" the entire federal government. The boilerplate language in the Requests' definition disregards the nature of the federal government and the comparatively limited claims and defenses in this case. If followed, it would call for broad and burdensome searches that are not likely in any way to lead to information relevant to the claims and defenses in this case. It is unreasonable, disproportionate, and likely impossible for counsel for the United States in this case to attempt to ascertain, find, and collect responsive information from all persons who meet this unnecessarily overbroad definition. Instead, the United States will respond to each Request based on information within the possession, custody, or control of the three offices acting as counsel and handling this litigation on behalf of the United States—that is, the United States Department of Justice, Civil Rights Division, Federal Coordination &

Compliance Section; the United States Attorney's Office for the Northern District of Alabama, Civil Division; and the United States Attorney's Office for the Middle District of Alabama, Civil Division.

INTERROGATORY NO. 1:

If You have knowledge of any Health Care Providers, in Alabama or elsewhere, who are evaluating, diagnosing, monitoring, or treating Minors in Alabama for Gender Dysphoria or a Related Condition, whether alone or in conjunction with other Health Care Providers, identify such Health Care Providers. To "identify," as used in this Interrogatory, is to provide the person or entity's name, business name, business address, business phone number, and any other readily available business contact information for the Health Care Provider.

RESPONSE:

The United States objects to Interrogatory No. 1 on the grounds that it seeks information protected by the attorney-client privilege, common interest privilege, or deliberative process privilege. Moreover, it is outside the scope of permitted discovery under Rule 26(b)(1) because it seeks information unrelated to a claim or defense. Whether the United States has knowledge of any health care providers providing gender-affirming care to minors in Alabama, beyond those named in its initial disclosures, has no bearing on the outcome of this litigation. All of the individuals the United States believes may have knowledge to support its claims in

this case have been listed in Plaintiff-Intervenor United States of America's First Supplemental Disclosures, served on January 17, 2023.

INTERROGATORY NO. 2:

Identify all Health Care Providers, in Alabama or elsewhere, whom you have reason to believe are evaluating, diagnosing, monitoring, or treating Minors in Alabama for Gender Dysphoria or a Related Condition, whether alone or in conjunction with other Health Care Providers. You do not need to include any Health Care Provider identified in response to Interrogatory No. 1. To "identify," as used in this Interrogatory, is to provide the person or entity's name, business name, business address, business phone number, and any other readily available business contact information for the health care provider.

RESPONSE:

The United States objects to Interrogatory No. 2 on the grounds that it seeks information protected by the attorney-client privilege, common interest privilege, and deliberative process privilege. This Interrogatory is also overbroad and unduly burdensome. It calls for a similar category of information as Interrogatory No. 1, except that it goes even further beyond the bounds of permissible discovery under Rule 26(b)(1) in that it requires the United States to *speculate* which health care providers are providing gender-affirming care to minors in Alabama. Certainly, unsubstantiated information such as this, were it to exist, would not bear on the

outcome of this litigation. All of the individuals the United States believes may have knowledge to support the claims in this case have been listed in Plaintiff-Intervenor United States of America's First Supplemental Disclosures, served on January 17, 2023.

INTERROGATORY NO. 3:

Identify all persons known to you who have knowledge or information that supports or refutes the allegations set forth in Your Operative Complaint.

RESPONSE:

The United States objects to Interrogatory No. 3 on the grounds that it seeks information protected by the attorney-client privilege, common interest privilege, or deliberative process privilege. Moreover, this Interrogatory is outside the scope of permitted discovery under Rule 26(b)(1) because it seeks information unrelated to a claim or defense. It is also vague. The United States has disclosed all of the people it is aware of who have knowledge supporting its claims in its Rule 26 disclosures, *see* Plaintiff-Intervenor United States of America's First Supplemental Initial Disclosures. The United States reserves the right to supplement its disclosures if it learns of additional relevant witnesses.

Which individuals may have knowledge that would *refute* the claims requires that the United States speculate on what it means to "refute" the claims, which may differ from what Defendants have in mind considering that the parties

disagree on several legal issues related to this case. Given that this aspect of the interrogatory calls for the United States' mental impressions, and that the United States believes that all of the allegations in its operative complaint are accurate, the United States does not provide a response to the second part of the Interrogatory.

INTERROGATORY NO. 4:

If You contend that the Act “criminaliz[es] certain forms of medically necessary gender-affirming care for transgender minors,” but “permits all other minors to access the same procedures and treatments,” Doc. 92 at 3, identify and explain all evidentiary bases for Your contention.

RESPONSE:

The United States objects to Interrogatory No. 4 on the grounds that contention interrogatories are premature at this point in discovery. The United States is preparing to produce the responsive documents in its possession to date, and reserves the right to supplement its production as discovery, particularly the exchange of expert reports, proceeds. Without waiving the foregoing objection, the United States responds that Section 4 of the Vulnerable Child Compassion and Protection Act (VCAP) is discriminatory on its face because it bans particular treatments and procedures only when they are being used to affirm a gender identity that is “inconsistent with the minor’s sex” as assigned at birth. VCAP, § 4. As such, VCAP singles out transgender minors for discriminatory treatment. Those

same procedures that VCAP prohibits for transgender minors remain as permissible as before for all other purposes, including gender-affirming care for anyone who is not transgender. Specifically, VCAP states that “no person shall engage in or cause” specified types of medical care to be performed on a minor with “the purpose of attempting to alter the appearance of or affirm the minor’s perception of his or her gender or sex, if that appearance or perception is inconsistent” with their sex assigned at birth. *Id.* at § 4(a). The practices prohibited by Section 4 of VCAP include administering puberty blockers and administering hormone therapy. *Id.* at § 4(a)(1)-(3). Notably, there is an exception for procedures “undertaken to treat a minor born with a medically verifiable disorder of sex development.” *Id.* at § 4(b). A violation of Section 4 of S.B. 184 is a Class C felony, *id.* at § 4(c), which is punishable by up to 10 years of imprisonment and a fine of up to \$15,000. *See* Ala. Crim. Code §§ 13-A-5-6(a)(3), 13A-5-11(a)(3). In addition to the statute itself, the United States refers to the Declaration of Dr. Armand Antommara in Support of Plaintiff-Intervenor United States’ Motion for a Temporary Restraining Order and a Preliminary Injunction and the exhibits accompanying that declaration.

INTERROGATORY NO. 5:

If You contend that “[a] diagnosis of gender dysphoria is currently required in order to receive many forms of gender-affirming care, including hormone

therapy and surgery,” Doc. 92 at 6, identify and explain all evidentiary bases for Your contention.

RESPONSE:

The United States objects to Interrogatory No. 5 on the grounds that contention interrogatories are premature at this point in discovery. The United States is preparing to produce the responsive documents in its possession to date, and reserves the right to supplement its production as discovery, particularly the exchange of expert reports, proceeds. Without waiving the foregoing objection, the United States refers to the declarations, studies, and clinical practice guidelines listed in Plaintiff-Intervenor United States of America’s First Supplemental Disclosures, served on January 17, 2023, at B(1), (2), (4), (8), (10), and (15).

INTERROGATORY NO. 6:

If You contend that “[m]edical treatment standards for gender dysphoria, including for minors, are well-established,” Doc. 62-1 at 14, identify and explain all evidentiary bases for Your contention.

RESPONSE:

The United States objects to Interrogatory No. 6 on the grounds that contention interrogatories are premature at this point in discovery. The parties have not yet exchanged documents, disclosed their experts, nor deposed any of the witnesses. Without waiving the foregoing objection, the United States refers to the

declarations, studies, and clinical practice guidelines listed in Plaintiff-Intervenor United States of America's First Supplemental Disclosures, served on January 17, 2023, at B(1), (2), (4), (5), (8), (10), and (15).

INTERROGATORY NO. 7:

If You contend that “the State’s articulated objectives are pretextual justifications that mask the true purpose of the law: to express moral disapproval of a vulnerable and unpopular group,” Doc. 62-1 at 27, identify and explain all evidentiary bases for Your contention.

RESPONSE:

The United States objects to Interrogatory No. 7 on the grounds that contention interrogatories are premature at this point in discovery. The parties have not yet exchanged documents nor have they deposed any of the witnesses. Without waiving the foregoing objection, the United States refers to the legislation’s text and legislative history, which belie the State’s purported purpose to protect youth. The text and legislative history of VCAP include expressions of moral disapproval of transgender status. So, too, its suggestion that transgender minors will “outgrow” their gender identity. VCAP, § 2(4). Statements from Governor Ivey and co-sponsor Representative Allen reflect profound disapproval of people whose gender identity is inconsistent with the sex they were assigned at birth. In addition, the United States refers to the documents listed in Plaintiff-Intervenor United

States of America's First Supplemental Disclosures, served on January 17, 2023, at B(6) and (7).

INTERROGATORY NO. 8:

If You contend that “the overwhelming weight of medical evidence confirms that the medical care that S.B. 184 forbids is safe, effective, and medically necessary treatment for the health and wellbeing of children and adolescents suffering from gender dysphoria,” Doc. 62-1 at 30, identify and explain all evidentiary bases for Your contention.

RESPONSE:

The United States objects to Interrogatory No. 8 on the grounds that contention interrogatories are premature at this point in discovery. The United States is preparing to produce the responsive documents in its possession to date. Moreover, the response to this Interrogatory is informed by the United States' experts, and the deadline for their disclosure has not yet passed. Accordingly, the United States reserves the right to supplement its response later in discovery. Without waiving the foregoing objection, the United States refers to the declarations, studies, and clinical practice guidelines listed in Plaintiff-Intervenor United States of America's First Supplemental Disclosures, served on January 17, 2023, at B(1), (2), (4), (5), (8), (10), and (15).

INTERROGATORY NO. 9:

If You contend that “[t]here have been ample observational studies, including federally funded trials, supporting the use of puberty blockers and other gender-affirming hormone therapy for adolescents,” Doc. 62-1 at 31, identify and explain all evidentiary bases for Your contention.

RESPONSE:

The United States objects to Interrogatory No. 9 on the grounds that contention interrogatories are premature at this point in discovery. The United States is preparing to produce the responsive documents in its possession to date. Moreover, the response to this Interrogatory is informed by the United States’ experts, and the deadline for their disclosure has not yet passed. Accordingly, the United States reserves the right to supplement its response later in discovery. Without waiving the foregoing objection, the United States refers to the declarations, studies, and clinical practice guidelines listed in Plaintiff-Intervenor United States of America’s First Supplemental Disclosures, served on January 17, 2023, at B(1), (2), (8), (10), and (15).

INTERROGATORY NO. 10:

If You contend that “parents and many minors are able to comprehend the risks involved” of the treatments banned by the Act, Doc. 62-1 at 33, identify and explain all evidentiary bases for Your contention.

RESPONSE:

The United States objects to Interrogatory No. 10 on the grounds that contention interrogatories are premature at this point in discovery. The United States is preparing to produce the responsive documents in its possession to date. Moreover, the response to this Interrogatory is informed by the United States' experts, and the deadline for their disclosure has not yet passed. Accordingly, the United States reserves the right to supplement its response later in discovery. Without waiving the foregoing objection, the United States refers to the declarations and studies listed in Plaintiff-Intervenor United States of America's First Supplemental Disclosures, served on January 17, 2023, at B(8) and (12).

INTERROGATORY NO. 11:

Identify (including by identifying the specific persons or entities involved) any ways in which You monitor, or have monitored, the health outcomes of Minors, in Alabama or elsewhere, who receive Puberty Blockers, Cross-Sex Hormones, and/or surgical interventions to treat Gender Dysphoria and/or Related Conditions.

RESPONSE:

The United States objects to Interrogatory No. 11 on the grounds that it is outside the scope of permitted discovery under Rule 26(b)(1) because it seeks information unrelated to a claim or defense, particularly when it comes to surgical

interventions since the United States is not challenging that part of VCAP. The United States further objects on the grounds that the term “monitor” is vague. Nevertheless, the United States Department of Justice, Civil Rights Division, Federal Coordination & Compliance Section; the United States Attorney’s Office for the Northern District of Alabama, Civil Division; and the United States Attorney’s Office for the Middle District of Alabama, Civil Division do not monitor such outcomes.

INTERROGATORY NO. 12:

Identify any ways in which You track and/or review, or have tracked and/or reviewed, evidence related to the efficacy or safety of using Puberty Blockers, Cross-Sex Hormones, and/or surgical interventions to treat Minors suffering from Gender Dysphoria and/or Related Conditions.

RESPONSE:

The United States objects to Interrogatory No. 12 on the grounds that it is outside the scope of permitted discovery under Rule 26(b)(1) because it seeks information unrelated to a claim or defense, particularly when it comes to surgical interventions since the United States is not challenging that part of VCAP. Nevertheless, the United States Department of Justice, Civil Rights Division, Federal Coordination & Compliance Section; the United States Attorney’s Office for the Northern District of Alabama, Civil Division; and the United States Attorney’s Office for the Middle District of Alabama, Civil Division do not track such evidence.

INTERROGATORY NO. 13:

Identify (including by identifying the specific persons or entities involved) any ways in which You track and/or review, or have tracked and/or reviewed, evidence or instances of Desistance or Detransition.

RESPONSE:

The United States objects to Interrogatory No. 13 on the grounds that it is outside the scope of permitted discovery under Rule 26(b)(1) because it seeks information unrelated to a claim or defense. Nevertheless, the United States Department of Justice, Civil Rights Division, Federal Coordination & Compliance Section; the United States Attorney’s Office for the Northern District of Alabama, Civil Division; and the United States Attorney’s Office for the Middle District of Alabama, Civil Division do not track such evidence.

INTERROGATORY NO. 14:

Identify (including by identifying the specific persons or entities involved) any ways in which You identify, define, monitor, track, and/or discourage “disinformation” related to Transitioning treatments in Minors. *See, e.g.*, AAP Letter to Merrick Garland, Oct. 3, 2022,

<https://downloads.aap.org/DOFA/DOJ%20Letter%20Final.pdf>.

RESPONSE:

The United States objects to Interrogatory No. 14 as vague and unclear. The United States does not have responsive information for this Interrogatory.

INTERROGATORY NO. 15:

Identify (including by identifying the specific persons or entities involved) any ways in which You are reviewing WPATH's Standards of Care 8 (SOC-8) or using SOC-8 to update Your guidance or practices.

RESPONSE:

The United States objects to Interrogatory No. 15 on the grounds that it is outside the scope of permitted discovery under Rule 26(b)(1) because it seeks information unrelated to a claim or defense. Nevertheless, the United States Department of Justice, Civil Rights Division, Federal Coordination & Compliance Section; the United States Attorney's Office for the Northern District of Alabama, Civil Division; and the United States Attorney's Office for the Middle District of Alabama, Civil Division do not issue medical guidance regarding the standards of care for transgender minors or practice in this area of medicine.

INTERROGATORY NO. 16:

Identify any studies You are funding, conducting, or helping to fund or conduct—or have funded, conducted, or helped to fund or conduct—related to Transitioning treatments in Minors.

RESPONSE:

The United States objects to Interrogatory No. 16 on the grounds that it is outside the scope of permitted discovery under Rule 26(b)(1) because it seeks information unrelated to a claim or defense. Nevertheless, the United States Department of Justice, Civil Rights Division, Federal Coordination & Compliance Section; the United States Attorney's Office for the Northern District of Alabama, Civil Division; and the United States Attorney's Office for the Middle District of Alabama, Civil Division have not funded or conducted any studies related to gender-affirming treatments in minors.

INTERROGATORY NO. 17:

Identify (including by identifying the specific persons or entities involved) any ways in which You collaborate or work, or have collaborated or worked, with WPATH, USPATH, the American Academy of Pediatrics, and/or Endocrine Society regarding the use of Transitioning treatments in Minors.

RESPONSE:

The United States objects to Interrogatory No. 17 on the grounds that it is outside the scope of permitted discovery under Rule 26(b)(1) because it seeks information unrelated to a claim or defense. Nevertheless, the United States Department of Justice, Civil Rights Division, Federal Coordination & Compliance Section; the United States Attorney's Office for the Northern District of Alabama,

Civil Division; and the United States Attorney's Office for the Middle District of Alabama, Civil Division have not collaborated or worked with WPATH, USPATH, the American Academy of Pediatrics, and/or Endocrine Society regarding the use of gender-affirming treatments in minors.

INTERROGATORY NO. 18:

Identify (including by identifying the specific persons or entities involved) any ways in which You have provided, are providing, or have decided to provide funding for Transitioning Minors.

RESPONSE:

The United States objects to Interrogatory No. 18 on the grounds that it is outside the scope of permitted discovery under Rule 26(b)(1) because it seeks information unrelated to a claim or defense. Nevertheless, the United States Department of Justice, Civil Rights Division, Federal Coordination & Compliance Section; the United States Attorney's Office for the Northern District of Alabama, Civil Division; and the United States Attorney's Office for the Middle District of Alabama, Civil Division have not provided funding for transitioning minors.

Dated: January 19, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2023, I sent, via electronic mail, the foregoing Objections and Responses to Defendants' First Interrogatories to the following counsel of record:

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Counsel for Defendants

Respectfully submitted,

/s/ Coty Montag

Coty Montag

Deputy Chief

Civil Rights Division

U.S. Department of Justice

Exhibit 3

E-mail Correspondence Between Defendants and Intervenor-Plaintiff
United States of America

Bowdre, Barrett

From: Brian Barnes <BBarnes@cooperkirk.com>
Sent: Tuesday, February 14, 2023 12:03 PM
To: Murphy, Amie (CRT); Melody H. Eagan; Montag, Coty (CRT); Bowdre, Barrett; Adam Reinke; John Ramer
Cc: Cheek, Jason (USAALN); LaCour, Edmund; Wilson, Thomas; Davis, Jim; Seiss, Ben; Christopher Mills; Pete Patterson; David Thompson; Jeffrey P. Doss; Amie A. Vague; AOrr; Jennifer Levi; Sarah Warbelow; Cynthia Weaver; Andy Pratt; Misty Peterson; Brent Ray; Abigail Terry; Michael Shortnacy; Scott McCoy; Diego Soto; Jessica Stone; Marshall, Margaret (USAALN); Williams, Renee (CRT); Toyama, Kaitlin (CRT)
Subject: RE: Boe v. Marshall, No. 22-184 (M.D. Ala.) -- HHS Documents

This message has originated from an **External Source**. Please use proper judgment and caution when opening attachments, clicking links, or responding to this email.

Hi Amie,

Thanks for your note. We're planning to move to compel interrogatory responses from HHS (including subcomponents of HHS such as FDA and NIH). The arguments on this track the ones we're already litigating with respect to the RFPs, but I'd be happy to discuss if you think that doing so would be productive.

Best regards,

Brian

From: Murphy, Amie (CRT) <Amie.Murphy2@usdoj.gov>
Sent: Tuesday, February 14, 2023 9:29 AM
To: Brian Barnes <BBarnes@cooperkirk.com>; Melody H. Eagan <meagan@lightfootlaw.com>; Montag, Coty (CRT) <Coty.Montag@usdoj.gov>; Bowdre, Barrett <Barrett.Bowdre@AlabamaAG.gov>; Adam Reinke <Areinke@kslaw.Com>; John Ramer <jramer@cooperkirk.com>
Cc: Cheek, Jason (USAALN) <Jason.Cheek@usdoj.gov>; LaCour, Edmund <Edmund.LaCour@AlabamaAG.gov>; Wilson, Thomas <Thomas.Wilson@AlabamaAG.gov>; Davis, Jim <Jim.Davis@AlabamaAG.gov>; Seiss, Ben <Ben.Seiss@AlabamaAG.gov>; Christopher Mills <cmills@spero.law>; Pete Patterson <ppatterson@cooperkirk.com>; David Thompson <dthompson@cooperkirk.com>; Jeffrey P. Doss <jdoss@lightfootlaw.com>; Amie A. Vague <avague@lightfootlaw.com>; AOrr <AOrr@nclrights.Org>; Jennifer Levi <jlevi@glad.Org>; Sarah Warbelow <Sarah.Warbelow@hrc.Org>; Cynthia Weaver <cynthia.Weaver@hrc.Org>; Andy Pratt <Apratt@kslaw.Com>; Misty Peterson <Mpeterson@kslaw.Com>; Brent Ray <Bray@kslaw.Com>; Abigail Terry <ATerry@kslaw.com>; Michael Shortnacy <Mshortnacy@kslaw.Com>; Scott McCoy <Scott.Mccoy@splcenter.Org>; Diego Soto <Diego.Soto@splcenter.Org>; Jessica Stone <Jessica.Stone@splcenter.Org>; Marshall, Margaret (USAALN) <Margaret.Marshall@usdoj.gov>; Williams, Renee (CRT) <Renee.Williams3@usdoj.gov>; Toyama, Kaitlin (CRT) <Kaitlin.Toyama@usdoj.gov>
Subject: RE: Boe v. Marshall, No. 22-184 (M.D. Ala.) -- HHS Documents

Good morning, Brian—

Can you be more specific about the basis for your motion to compel regarding the United States' responses to the interrogatories? This is the first time you are raising any concern with them. Are Defendants planning to move to compel responses from HHS, FDA, and NIH, or is there more to it than that?

We are checking on RFPs 11-13 and expect to have a response for you this week.

Best,

Amie

From: Brian Barnes <BBarnes@cooperkirk.com>

Sent: Tuesday, February 14, 2023 8:23 AM

To: Murphy, Amie (CRT) <Amie.Murphy2@usdoj.gov>; Melody H. Eagan <meagan@lightfootlaw.com>; Montag, Coty (CRT) <Coty.Montag@usdoj.gov>; Bowdre, Barrett <Barrett.Bowdre@AlabamaAG.gov>; Adam Reinke <Areinke@kslaw.Com>; John Ramer <jramer@cooperkirk.com>

Cc: Cheek, Jason (USAALN) <JCheek@usa.doj.gov>; LaCour, Edmund <Edmund.LaCour@AlabamaAG.gov>; Wilson, Thomas <Thomas.Wilson@AlabamaAG.gov>; Davis, Jim <Jim.Davis@AlabamaAG.gov>; Seiss, Ben <Ben.Seiss@AlabamaAG.gov>; Christopher Mills <cmills@spero.law>; Pete Patterson <ppatterson@cooperkirk.com>; David Thompson <dthompson@cooperkirk.com>; Jeffrey P. Doss <jdoss@lightfootlaw.com>; Amie A. Vague <avague@lightfootlaw.com>; AOrr <Aorr@nclrights.Org>; Jennifer Levi <jlevi@glad.Org>; Sarah Warbelow <Sarah.Warbelow@hrc.Org>; Cynthia Weaver <cynthia.Weaver@hrc.Org>; Andy Pratt <Apratt@kslaw.Com>; Misty Peterson <Mpeterson@kslaw.Com>; Brent Ray <Bray@kslaw.Com>; Abigail Terry <ATerry@kslaw.com>; Michael Shortnacy <Mshortnacy@kslaw.Com>; Scott McCoy <Scott.Mccoy@splcenter.Org>; Diego Soto <Diego.Soto@splcenter.Org>; Jessica Stone <Jessica.Stone@splcenter.Org>; Marshall, Margaret (USAALN) <mmarshall2@usa.doj.gov>; Williams, Renee (CRT) <Renee.Williams3@usdoj.gov>; Toyama, Kaitlin (CRT) <Kaitlin.Toyama@usdoj.gov>

Subject: [EXTERNAL] RE: Boe v. Marshall, No. 22-184 (M.D. Ala.) -- HHS Documents

Hi Amie,

I'm writing on a couple of fronts.

First, given the trial schedule in this case, Defendants want to tee up for the Court as many unresolvable discovery disputes as possible for the March 21 hearing. To that end, we are planning to file a motion to compel that would require the United States to provide more complete responses to the following interrogatories: 11, 12, 13, 14, 15, 16, 17, and 18. The United States only answered those interrogatories on behalf of three offices within the Department of Justice. Given the brief you all filed yesterday and our prior discussions, we think we have a good understanding of the United States's position and do not believe that further efforts to meet and confer about the scope of the United States' interrogatory responses would be productive. But to the extent you disagree, we are happy to talk this week. To ensure that the motion to compel on these interrogatories can be argued on March 21, Defendants plan to file the motion on Monday (February 20).

Second, I wanted to follow up on our proposal with respect to RFPs 11, 12, and 13. We last communicated about those RFPs three weeks ago, when you said that you would consider our proposal and get back with us "as soon as possible." Can you give us a timeline for when we will be hearing back from you on this? Consistent with my first point above, Defendants may seek to put this issue before the Court ahead of the March 21 hearing if we cannot reach agreement soon.

Best regards,

Brian

From: Murphy, Amie (CRT) <Amie.Murphy2@usdoj.gov>

Sent: Tuesday, January 24, 2023 10:38 AM

To: Brian Barnes <BBarnes@cooperkirk.com>; Melody H. Eagan <meagan@lightfootlaw.com>; Montag, Coty (CRT)

<Coty.Montag@usdoj.gov>; Bowdre, Barrett <Barrett.Bowdre@AlabamaAG.gov>; Adam Reinke <Areinke@kslaw.Com>; John Ramer <jramer@cooperkirk.com>

Cc: Cheek, Jason (USAALN) <Jason.Cheek@usdoj.gov>; LaCour, Edmund <Edmund.LaCour@AlabamaAG.gov>; Wilson, Thomas <Thomas.Wilson@AlabamaAG.gov>; Davis, Jim <Jim.Davis@AlabamaAG.gov>; Seiss, Ben <Ben.Seiss@AlabamaAG.gov>; Christopher Mills <cmills@spero.law>; Pete Patterson <ppatterson@cooperkirk.com>; David Thompson <dthompson@cooperkirk.com>; Jeffrey P. Doss <jdoss@lightfootlaw.com>; Amie A. Vague <avague@lightfootlaw.com>; AOrr <Aorr@nclrights.Org>; Jennifer Levi <Jlevi@glad.Org>; Sarah Warbelow <Sarah.Warbelow@hrc.Org>; Cynthia Weaver <cynthia.Weaver@hrc.Org>; Andy Pratt <Apratt@kslaw.Com>; Misty Peterson <Mpeterson@kslaw.Com>; Brent Ray <Bray@kslaw.Com>; Abigail Terry <ATerry@kslaw.com>; Michael Shortnacy <Mshortnacy@kslaw.Com>; Scott McCoy <Scott.Mccoy@splcenter.Org>; Diego Soto <Diego.Soto@splcenter.Org>; Jessica Stone <Jessica.Stone@splcenter.Org>; Marshall, Margaret (USAALN) <Margaret.Marshall@usdoj.gov>; Williams, Renee (CRT) <Renee.Williams3@usdoj.gov>; Toyama, Kaitlin (CRT) <Kaitlin.Toyama@usdoj.gov>

Subject: RE: Boe v. Marshall, No. 22-184 (M.D. Ala.) -- HHS Documents

Thanks, Brian. Your clarifications are very helpful. We will get back to you on this as soon as possible.

From: Brian Barnes <BBarnes@cooperkirk.com>

Sent: Monday, January 23, 2023 3:21 PM

To: Murphy, Amie (CRT) <Amie.Murphy2@usdoj.gov>; Melody H. Eagan <meagan@lightfootlaw.com>; Montag, Coty (CRT) <Coty.Montag@usdoj.gov>; Bowdre, Barrett <Barrett.Bowdre@AlabamaAG.gov>; Adam Reinke <Areinke@kslaw.Com>; John Ramer <jramer@cooperkirk.com>

Cc: Cheek, Jason (USAALN) <JCheek@usa.doj.gov>; LaCour, Edmund <Edmund.LaCour@AlabamaAG.gov>; Wilson, Thomas <Thomas.Wilson@AlabamaAG.gov>; Davis, Jim <Jim.Davis@AlabamaAG.gov>; Seiss, Ben <Ben.Seiss@AlabamaAG.gov>; Christopher Mills <cmills@spero.law>; Pete Patterson <ppatterson@cooperkirk.com>; David Thompson <dthompson@cooperkirk.com>; Jeffrey P. Doss <jdoss@lightfootlaw.com>; Amie A. Vague <avague@lightfootlaw.com>; AOrr <Aorr@nclrights.Org>; Jennifer Levi <Jlevi@glad.Org>; Sarah Warbelow <Sarah.Warbelow@hrc.Org>; Cynthia Weaver <cynthia.Weaver@hrc.Org>; Andy Pratt <Apratt@kslaw.Com>; Misty Peterson <Mpeterson@kslaw.Com>; Brent Ray <Bray@kslaw.Com>; Abigail Terry <ATerry@kslaw.com>; Michael Shortnacy <Mshortnacy@kslaw.Com>; Scott McCoy <Scott.Mccoy@splcenter.Org>; Diego Soto <Diego.Soto@splcenter.Org>; Jessica Stone <Jessica.Stone@splcenter.Org>; Marshall, Margaret (USAALN) <mmarshall2@usa.doj.gov>; Williams, Renee (CRT) <Renee.Williams3@usdoj.gov>; Toyama, Kaitlin (CRT) <Kaitlin.Toyama@usdoj.gov>

Subject: [EXTERNAL] RE: Boe v. Marshall, No. 22-184 (M.D. Ala.) -- HHS Documents

Hi Amie,

Thanks for your note on RFPs 11, 12, and 13. Here are answers to your questions:

1. We're not completely certain what you mean by the administrative record "as defined and assembled by HHS." To clarify, our proposal on RFPs 11, 12, and 13 is that the United States produce "the full administrative record that was before the Secretary at the time he made" the decisions referenced in each of those RFPs. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). That would include "all information [the agency] considered either directly or indirectly." *Marcum v. Salazar*, 751 F. Supp. 2d 74, 78 (D.D.C. 2010).
2. We agree that privileged documents aren't part of the administrative record (as defined above). So if the United States agrees to our proposal on RFPs 11, 12, and 13, no privilege log would need to be produced for purposes of responding to those requests. To be clear, we aren't offering to abandon the request for a privilege log as to other RFPs, but we would agree to give up on a privilege log for purposes of RFPs 11, 12, and 13 if the United States agrees to our proposal on those RFPs.

3. Our thought on RFP 11 was that the agency may have already assembled the materials it has considered so far even though there isn't yet a final rule. But if that isn't correct, our proposal may not be feasible with respect to RFP 11.

Best regards,

Brian

From: Murphy, Amie (CRT) <Amie.Murphy2@usdoj.gov>

Sent: Friday, January 20, 2023 2:06 PM

To: Brian Barnes <BBarnes@cooperkirk.com>; Melody H. Eagan <meagan@lightfootlaw.com>; Montag, Coty (CRT) <Coty.Montag@usdoj.gov>; Bowdre, Barrett <Barrett.Bowdre@AlabamaAG.gov>; Adam Reinke <Areinke@kslaw.Com>; John Ramer <jramer@cooperkirk.com>

Cc: Cheek, Jason (USAALN) <Jason.Cheek@usdoj.gov>; LaCour, Edmund <Edmund.LaCour@AlabamaAG.gov>; Wilson, Thomas <Thomas.Wilson@AlabamaAG.gov>; Davis, Jim <Jim.Davis@AlabamaAG.gov>; Seiss, Ben <Ben.Seiss@AlabamaAG.gov>; Christopher Mills <cmills@spero.law>; Pete Patterson <ppatterson@cooperkirk.com>; David Thompson <dthompson@cooperkirk.com>; Jeffrey P. Doss <jdoss@lightfootlaw.com>; Amie A. Vague <avague@lightfootlaw.com>; AOrr <Aorr@nclrights.Org>; Jennifer Levi <jlevi@glad.Org>; Sarah Warbelow <Sarah.Warbelow@hrc.Org>; Cynthia Weaver <cynthia.Weaver@hrc.Org>; Andy Pratt <Apratt@kslaw.Com>; Misty Peterson <Mpeterson@kslaw.Com>; Brent Ray <Bray@kslaw.Com>; Abigail Terry <ATerry@kslaw.com>; Michael Shortnacy <Mshortnacy@kslaw.Com>; Scott McCoy <Scott.Mccoy@splcenter.Org>; Diego Soto <Diego.Soto@splcenter.Org>; Jessica Stone <Jessica.Stone@splcenter.Org>; Marshall, Margaret (USAALN) <Margaret.Marshall@usdoj.gov>; Williams, Renee (CRT) <Renee.Williams3@usdoj.gov>; Toyama, Kaitlin (CRT) <Kaitlin.Toyama@usdoj.gov>

Subject: RE: Boe v. Marshall, No. 22-184 (M.D. Ala.) -- HHS Documents

Hi Brian-

Thanks for taking the time to continue our discussion on the RFPs yesterday. As we discussed, we are considering your request for "administrative records" regarding RFPs 11-13. On that note, we want to clarify three points:

- 1) Defendants are only seeking the administrative record, as defined and assembled by HHS;
- 2) Defendants agree that the administrative record does not include privileged materials (e.g., documents that fall within the deliberative process privilege, attorney-client privilege, and work product privilege). Since deliberative process materials, including internal memoranda, are not considered part of the administrative record, there will be no expectation that the United States create a privilege log; and
- 3) RFP 11 is specific to the current Section 1557 NPRM. Since the rulemaking process is ongoing, please specify what Defendants are seeking with respect to this RFP.

Best,

Amie

From: Brian Barnes <BBarnes@cooperkirk.com>

Sent: Thursday, January 12, 2023 10:19 PM

To: Murphy, Amie (CRT) <Amie.Murphy2@usdoj.gov>; Melody H. Eagan <meagan@lightfootlaw.com>; Montag, Coty (CRT) <Coty.Montag@usdoj.gov>; Bowdre, Barrett <Barrett.Bowdre@AlabamaAG.gov>; Adam Reinke <Areinke@kslaw.Com>; John Ramer <jramer@cooperkirk.com>

Cc: Cheek, Jason (USAALN) <JCheek@usa.doj.gov>; LaCour, Edmund <Edmund.LaCour@AlabamaAG.gov>; Wilson, Thomas <Thomas.Wilson@AlabamaAG.gov>; Davis, Jim <Jim.Davis@AlabamaAG.gov>; Seiss, Ben

<Ben.Seiss@AlabamaAG.gov>; Christopher Mills <cmills@spero.law>; Pete Patterson <ppatterson@cooperkirk.com>; David Thompson <dthompson@cooperkirk.com>; Jeffrey P. Doss <jdoss@lightfootlaw.com>; Amie A. Vague <avague@lightfootlaw.com>; AOrr <Aorr@nclrights.Org>; Jennifer Levi <jlevi@glad.Org>; Sarah Warbelow <Sarah.Warbelow@hrc.Org>; Cynthia Weaver <cynthia.Weaver@hrc.Org>; Andy Pratt <Apratt@kslaw.Com>; Misty Peterson <Mpeterson@kslaw.Com>; Brent Ray <Bray@kslaw.Com>; Abigail Terry <ATerry@kslaw.com>; Michael Shortnacy <Mshortnacy@kslaw.Com>; Scott McCoy <Scott.Mccoy@splcenter.Org>; Diego Soto <Diego.Soto@splcenter.Org>; Jessica Stone <Jessica.Stone@splcenter.Org>; Marshall, Margaret (USAALN) <mmarshall2@usa.doj.gov>; Williams, Renee (CRT) <Renee.Williams3@usdoj.gov>; Toyama, Kaitlin (CRT) <Kaitlin.Toyama@usdoj.gov>

Subject: [EXTERNAL] RE: Boe v. Marshall, No. 22-184 (M.D. Ala.) -- HHS Documents

Hi Amie,

The proposal in my note of January 5 was for the United States to identify custodians it would use to respond to a subset of the RFPs (RFP 18, RFP 19, RFP 20, RFP 23, RFP 24, RFP 29, and RFP 30) and to use that list of custodians to help frame a discussion around whether and how to limit the scope of the remaining RFPs on which we haven't offered to stand down. We think this is a sensible approach because it's impossible for us to assess the claims of burdensomeness without having any sense for the number of custodians or volume of documents in play. Would the United States be amenable to that approach? And if not, does the United States have a counterproposal?

Your note below doesn't respond to my question about whether there are administrative records for the actions referenced in RFP 11, RFP 12, and RFP 13. As I noted, one path forward on those RFPs would be for the United States to produce the relevant administrative records. If they already exist, it's difficult for us to see how producing them could be unduly burdensome.

We recognize that some documents responsive to some of our RFPs may be covered by the deliberative process privilege, but that's not a basis for refusing to search for responsive documents. Non-deliberative (e.g., factual) material cannot be withheld under the deliberative process privilege even if it's predecisional. That's why the administrative record for a final agency action can be thousands of pages long and isn't limited to whatever an agency says about its decision in the Federal Register. The deliberative process privilege is also a qualified privilege that can be overcome when a litigant makes a sufficient showing of need. For those reasons among others, the deliberative process privilege can only be asserted on a document-by-document basis, and the privilege issue you raise is premature.

Finally, while we appreciate the offer to send links to the documents referenced in RFPs 11-13, 18, 19, 20, 23, 24, 29, and 30, we obviously already have those documents. The thrust of those RFPs is not to request copies of the documents themselves but the factual inputs and other non-privileged materials behind them.

If you aren't able to respond to this note by Monday, please let me know when between now and then you are available to meet and confer by telephone. Given the schedule in this case, we think it's essential to complete these negotiations no later than the end of next week.

Best regards,

Brian

From: Murphy, Amie (CRT) <Amie.Murphy2@usdoj.gov>

Sent: Wednesday, January 11, 2023 1:25 PM

To: Brian Barnes <BBarnes@cooperkirk.com>; Melody H. Eagan <meagan@lightfootlaw.com>; Montag, Coty (CRT) <Coty.Montag@usdoj.gov>; Bowdre, Barrett <Barrett.Bowdre@AlabamaAG.gov>; Adam Reinke <Areinke@kslaw.Com>; John Ramer <jramer@cooperkirk.com>

Cc: Cheek, Jason (USAALN) <Jason.Cheek@usdoj.gov>; LaCour, Edmund <Edmund.LaCour@AlabamaAG.gov>; Wilson,

Thomas <Thomas.Wilson@AlabamaAG.gov>; Davis, Jim <Jim.Davis@AlabamaAG.gov>; Seiss, Ben <Ben.Seiss@AlabamaAG.gov>; Christopher Mills <cmills@spero.law>; Pete Patterson <ppatterson@cooperkirk.com>; David Thompson <dthompson@cooperkirk.com>; Jeffrey P. Doss <jdoss@lightfootlaw.com>; Amie A. Vague <avague@lightfootlaw.com>; AOrr <Aorr@nclrights.Org>; Jennifer Levi <jlevi@glad.Org>; Sarah Warbelow <Sarah.Warbelow@hrc.Org>; Cynthia Weaver <cynthia.Weaver@hrc.Org>; Andy Pratt <Apratt@kslaw.Com>; Misty Peterson <Mpeterson@kslaw.Com>; Brent Ray <Bray@kslaw.Com>; Abigail Terry <ATerry@kslaw.com>; Michael Shortnacy <Mshortnacy@kslaw.Com>; Scott McCoy <Scott.Mccoy@splcenter.Org>; Diego Soto <Diego.Soto@splcenter.Org>; Jessica Stone <Jessica.Stone@splcenter.Org>; Marshall, Margaret (USAALN) <Margaret.Marshall@usdoj.gov>; Williams, Renee (CRT) <Renee.Williams3@usdoj.gov>; Toyama, Kaitlin (CRT) <Kaitlin.Toyama@usdoj.gov>

Subject: RE: Boe v. Marshall, No. 22-184 (M.D. Ala.) -- HHS Documents

Brian-

Thanks again for your email. Our position remains that HHS is not a part of the United States for purposes of this case. However, without waiving our objections and while fully preserving our rights on the issue, we remain open to the possibility of attempting to facilitate a production of responsive documents on behalf of HHS provided we can come to agreement on the boundaries of the requests at issue.

We appreciate your efforts to provide greater specificity as to which RFPs Defendants believe will most likely yield relevant information. However, a number of RFPs that you refer to as the "broader" ones remain unaddressed. Because those requests remain in play, the totality of Defendants' requests remain overly broad and unduly burdensome, in addition to raising the same significant relevance and deliberative process concerns we have discussed previously during the meet and confer process. For example, we do not see how pre-decisional emails, memos, or pre-final drafts of publicly available studies and reports have any bearing on this lawsuit or are properly discoverable.

We also wanted to flag, in case it's useful and in the interest of expediency, that many of the reports and studies mentioned in your email can be accessed online. We could provide links to certain publications responsive to RFPs 11-13, 18, 19, 20, 23, 24, 29, and 30 if you would like. Please let us know if that would be helpful.

Amie

Amie S. Murphy
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U.S. Department of Justice
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From: Murphy, Amie (CRT)

Sent: Friday, January 6, 2023 5:04 PM

To: Brian Barnes <BBarnes@cooperkirk.com>; Melody H. Eagan <meagan@lightfootlaw.com>; Montag, Coty (CRT) <Coty.Montag@usdoj.gov>; Bowdre, Barrett <Barrett.Bowdre@AlabamaAG.gov>; Adam Reinke <Areinke@kslaw.Com>; John Ramer <jramer@cooperkirk.com>

Cc: Cheek, Jason (USAALN) <JCheek@usa.doj.gov>; LaCour, Edmund <Edmund.LaCour@AlabamaAG.gov>; Wilson, Thomas <Thomas.Wilson@AlabamaAG.gov>; Davis, Jim <Jim.Davis@AlabamaAG.gov>; Seiss, Ben <Ben.Seiss@AlabamaAG.gov>; Christopher Mills <cmills@spero.law>; Pete Patterson <ppatterson@cooperkirk.com>;

David Thompson <dthompson@cooperkirk.com>; Jeffrey P. Doss <jdoss@lightfootlaw.com>; Amie A. Vague <avague@lightfootlaw.com>; AOrr <Aorr@nclrights.Org>; Jennifer Levi <jlevi@glad.Org>; Sarah Warbelow <Sarah.Warbelow@hrc.Org>; Cynthia Weaver <cynthia.Weaver@hrc.Org>; Andy Pratt <Apratt@kslaw.Com>; Misty Peterson <Mpeterson@kslaw.Com>; Brent Ray <Bray@kslaw.Com>; Abigail Terry <ATerry@kslaw.com>; Michael Shortnacy <Mshortnacy@kslaw.Com>; Scott McCoy <Scott.Mccoy@splcenter.Org>; Diego Soto <Diego.Soto@splcenter.Org>; Jessica Stone <Jessica.Stone@splcenter.Org>; Marshall, Margaret (USAALN) <mmarshall2@usa.doj.gov>; Williams, Renee (CRT) <Renee.Williams3@usdoj.gov>; Toyama, Kaitlin (CRT) <Kaitlin.Toyama@usdoj.gov>

Subject: RE: Boe v. Marshall, No. 22-184 (M.D. Ala.) -- HHS Documents

Thanks, Brian. We're working through this issue as expeditiously as possible and will know early next week which day works best to schedule the call. Have a nice weekend.

From: Brian Barnes <BBarnes@cooperkirk.com>

Sent: Friday, January 6, 2023 3:21 PM

To: Murphy, Amie (CRT) <Amie.Murphy2@usdoj.gov>; Melody H. Eagan <meagan@lightfootlaw.com>; Montag, Coty (CRT) <Coty.Montag@usdoj.gov>; Bowdre, Barrett <Barrett.Bowdre@AlabamaAG.gov>; Adam Reinke <Areinke@kslaw.Com>; John Ramer <jramer@cooperkirk.com>

Cc: Cheek, Jason (USAALN) <JCheek@usa.doj.gov>; LaCour, Edmund <Edmund.LaCour@AlabamaAG.gov>; Wilson, Thomas <Thomas.Wilson@AlabamaAG.gov>; Davis, Jim <Jim.Davis@AlabamaAG.gov>; Seiss, Ben <Ben.Seiss@AlabamaAG.gov>; Christopher Mills <cmills@spero.law>; Pete Patterson <ppatterson@cooperkirk.com>; David Thompson <dthompson@cooperkirk.com>; Jeffrey P. Doss <jdoss@lightfootlaw.com>; Amie A. Vague <avague@lightfootlaw.com>; AOrr <Aorr@nclrights.Org>; Jennifer Levi <jlevi@glad.Org>; Sarah Warbelow <Sarah.Warbelow@hrc.Org>; Cynthia Weaver <cynthia.Weaver@hrc.Org>; Andy Pratt <Apratt@kslaw.Com>; Misty Peterson <Mpeterson@kslaw.Com>; Brent Ray <Bray@kslaw.Com>; Abigail Terry <ATerry@kslaw.com>; Michael Shortnacy <Mshortnacy@kslaw.Com>; Scott McCoy <Scott.Mccoy@splcenter.Org>; Diego Soto <Diego.Soto@splcenter.Org>; Jessica Stone <Jessica.Stone@splcenter.Org>; Marshall, Margaret (USAALN) <mmarshall2@usa.doj.gov>; Williams, Renee (CRT) <Renee.Williams3@usdoj.gov>; Toyama, Kaitlin (CRT) <Kaitlin.Toyama@usdoj.gov>

Subject: [EXTERNAL] RE: Boe v. Marshall, No. 22-184 (M.D. Ala.) -- HHS Documents

Thanks, Amie. Just in the interest of keeping the ball rolling, should we schedule another call for late in the day Tuesday or sometime on Wednesday? We can always cancel if a call proves unnecessary, but I think it would be good to have another time on the calendar when we can discuss after you respond to my last note in writing.

I hope you have a nice weekend.

Brian

From: Murphy, Amie (CRT) <Amie.Murphy2@usdoj.gov>

Sent: Friday, January 6, 2023 11:19 AM

To: Brian Barnes <BBarnes@cooperkirk.com>; Melody H. Eagan <meagan@lightfootlaw.com>; Montag, Coty (CRT) <Coty.Montag@usdoj.gov>; Bowdre, Barrett <Barrett.Bowdre@AlabamaAG.gov>; Adam Reinke <Areinke@kslaw.Com>; John Ramer <jramer@cooperkirk.com>

Cc: Cheek, Jason (USAALN) <Jason.Cheek@usdoj.gov>; LaCour, Edmund <Edmund.LaCour@AlabamaAG.gov>; Wilson, Thomas <Thomas.Wilson@AlabamaAG.gov>; Davis, Jim <Jim.Davis@AlabamaAG.gov>; Seiss, Ben <Ben.Seiss@AlabamaAG.gov>; Christopher Mills <cmills@spero.law>; Pete Patterson <ppatterson@cooperkirk.com>; David Thompson <dthompson@cooperkirk.com>; Jeffrey P. Doss <jdoss@lightfootlaw.com>; Amie A. Vague <avague@lightfootlaw.com>; AOrr <Aorr@nclrights.Org>; Jennifer Levi <jlevi@glad.Org>; Sarah Warbelow <Sarah.Warbelow@hrc.Org>; Cynthia Weaver <cynthia.Weaver@hrc.Org>; Andy Pratt <Apratt@kslaw.Com>; Misty Peterson <Mpeterson@kslaw.Com>; Brent Ray <Bray@kslaw.Com>; Abigail Terry <ATerry@kslaw.com>; Michael Shortnacy <Mshortnacy@kslaw.Com>; Scott McCoy <Scott.Mccoy@splcenter.Org>; Diego Soto

<Diego.Soto@splcenter.Org>; Jessica Stone <Jessica.Stone@splcenter.Org>; Marshall, Margaret (USAALN) <Margaret.Marshall@usdoj.gov>; Williams, Renee (CRT) <Renee.Williams3@usdoj.gov>; Toyama, Kaitlin (CRT) <Kaitlin.Toyama@usdoj.gov>

Subject: RE: Boe v. Marshall, No. 22-184 (M.D. Ala.) -- HHS Documents

Thanks for giving the issue more consideration. We will give this some thought and get back to you on Monday or Tuesday.

From: Brian Barnes <BBarnes@cooperkirk.com>

Sent: Thursday, January 5, 2023 5:23 PM

To: Murphy, Amie (CRT) <Amie.Murphy2@usdoj.gov>; Melody H. Eagan <meagan@lightfootlaw.com>; Montag, Coty (CRT) <Coty.Montag@usdoj.gov>; Bowdre, Barrett <Barrett.Bowdre@AlabamaAG.gov>; Adam Reinke <Areinke@kslaw.Com>; John Ramer <jramer@cooperkirk.com>

Cc: Cheek, Jason (USAALN) <JCheek@usa.doj.gov>; LaCour, Edmund <Edmund.LaCour@AlabamaAG.gov>; Wilson, Thomas <Thomas.Wilson@AlabamaAG.gov>; Davis, Jim <Jim.Davis@AlabamaAG.gov>; Seiss, Ben <Ben.Seiss@AlabamaAG.gov>; Christopher Mills <cmills@spero.law>; Pete Patterson <ppatterson@cooperkirk.com>; David Thompson <dthompson@cooperkirk.com>; Jeffrey P. Doss <jdoss@lightfootlaw.com>; Amie A. Vague <avague@lightfootlaw.com>; AOrr <Aorr@nclrights.Org>; Jennifer Levi <jlevi@glad.Org>; Sarah Warbelow <Sarah.Warbelow@hrc.Org>; Cynthia Weaver <cynthia.Weaver@hrc.Org>; Andy Pratt <Apratt@kslaw.Com>; Misty Peterson <Mpeterson@kslaw.Com>; Brent Ray <Bray@kslaw.Com>; Abigail Terry <ATerry@kslaw.com>; Michael Shortnacy <Mshortnacy@kslaw.Com>; Scott McCoy <Scott.Mccoy@splcenter.Org>; Diego Soto <Diego.Soto@splcenter.Org>; Jessica Stone <Jessica.Stone@splcenter.Org>; Marshall, Margaret (USAALN) <mmarshall2@usa.doj.gov>; Williams, Renee (CRT) <Renee.Williams3@usdoj.gov>; Toyama, Kaitlin (CRT) <Kaitlin.Toyama@usdoj.gov>

Subject: [EXTERNAL] RE: Boe v. Marshall, No. 22-184 (M.D. Ala.) -- HHS Documents

Dear Amie,

Here are a few thoughts and responses relevant to your email below and the issues we discussed during our call on January 3.

1. This issue will hopefully turn out to be academic, but we strongly disagree with your position that HHS documents are beyond the scope of materials that the United States is required to review and produce under Rule 34. Under that rule, documents are in bounds if they are in the “responding party’s possession, custody, or control.” The “responding party” here is the United States. The United States—not the Attorney General or the Department of Justice—is the entity listed in the intervention papers and which now appears on the case caption. Nor could it be otherwise: the statute the United States relied on to intervene specifies that “the Attorney General *for or in the name of the United States* may intervene.” 42 U.S.C. § 2000h-2 (emphasis added). The Attorney General and the DOJ may serve as attorneys for the United States, but it is the United States itself that is the party. So it is the United States itself that is responsible for complying with discovery obligations *as a party*. The pertinent question is thus what documents the *United States* has in its “possession, custody or control.” And as relevant here, the answer is that the United States has “possession, custody, or control” over documents and communications at HHS because HHS is an executive agency of the United States.
2. As we discussed during our January 3 call, the fundamental thing we are after with most of the discovery requests directed to the United States is evidence relevant to the safety and efficacy of the treatments that are the subject of the lawsuit. We know that HHS has relevant evidence on this topic based on things that agency has said and done in recent years. Some of our RFPs are targeted requests that specifically seek documents concerning a subset of those actions that we view as especially likely to yield highly relevant documents –
 - a. RFP 18 (documents concerning an NIH-funded study on the impact of early medical treatment for transgender youth);

- b. RFP 19 (documents concerning an NIH-funded study on the physiologic response to cross-sex hormones among transgender youth);
- c. RFP 20 (documents concerning NIH-funded research by Natalie Nokoff regarding transitioning and gender dysphoria);
- d. RFP 23 (documents concerning the FDA's decision to add a warning about pseudotumor cerebri to the label for puberty blockers);
- e. RFP 24 (documents concerning the FDA's review of puberty blockers);
- f. RFP 29 (documents concerning a topic brief on treatments for gender dysphoria by the Agency for Healthcare Research and Quality); and
- g. RFP 30 (documents concerning a publication by the Office of Population Affairs on gender-affirming care and young people).

In terms of a path forward, we think a logical next step is for the United States to identify the custodians who are most likely to have documents responsive to those RFPs. We could then have a conversation about whether those same custodians would be appropriate for purposes of responding to some of the broader RFPs.

- 3. RFP 11, RFP 12, and RFP 13 all seek documents relating to administrative actions taken or being considered by HHS. Has HHS maintained administrative records relating to those actions? If so, producing those records to us could be a way of satisfying those requests with minimal burden.
- 4. We understand your concerns about burdensomeness, and as part of a broader compromise we would be willing to withdraw the following RFPs: RFP 2, RFP 3, RFP 17, RFP 21, RFP 26, RFP 27, RFP 32, RFP 33, RFP 44, and RFP 45. Although we do not think that the United States's decision to abandon its challenge to the features of the Act that regulate surgeries makes evidence concerning surgeries irrelevant, I note that we are offering to withdraw RFP 26 (documents concerning reporting of adverse events for surgical procedures used to treat gender dysphoria).
- 5. As I mentioned at the end of our call, the documents we are seeking in fact discovery will be important inputs for our experts' analysis. Accordingly, if we come close to the March 20 deadline for disclosure of defendants' expert reports and still have significant document discovery requests outstanding, it is very likely that we will seek an extension of the March 20 deadline. I am raising this issue now because the plaintiffs' expert reports are due on January 23. Given the current status of fact discovery, defendants would not oppose an extension of that deadline (assuming a similar extension of the deadline for disclosure of defendants' expert reports).
- 6. Concerning the ESI protocol, the concern I raised during our last call was with respect to the following sentence that plaintiffs proposed to add to Section V(E): "The Parties further agree that when producing Documents and ESI, privileged, data privacy protected, or irrelevant material contained within an otherwise discoverable Document or ESI record should be redacted." We read that sentence to permit redactions of "irrelevant material contained within an otherwise discoverable Document." As I mentioned during the call, we are very reluctant to agree to a protocol that permits redactions based on relevance. (We are uncertain what plaintiffs have in mind by way of "data privacy protected" redactions but also would likely object to that.)

Especially in light of the Court's decision yesterday to move up the trial date by two months, we think it's urgent to conclude these discussions so that the United States can begin reviewing and producing documents as soon as possible. To that end, please let us know your availability for a call to discuss these issues on Monday or Tuesday of next week.

Best regards,

Brian

From: Murphy, Amie (CRT) <Amie.Murphy2@usdoj.gov>

Sent: Thursday, January 5, 2023 9:17 AM

To: Brian Barnes <BBarnes@cooperkirk.com>; Melody H. Eagan <meagan@lightfootlaw.com>; Montag, Coty (CRT) <Coty.Montag@usdoj.gov>; Bowdre, Barrett <Barrett.Bowdre@AlabamaAG.gov>; Adam Reinke <Areinke@kslaw.Com>; John Ramer <jramer@cooperkirk.com>

Cc: Cheek, Jason (USAALN) <Jason.Cheek@usdoj.gov>; LaCour, Edmund <Edmund.LaCour@AlabamaAG.gov>; Wilson, Thomas <Thomas.Wilson@AlabamaAG.gov>; Davis, Jim <Jim.Davis@AlabamaAG.gov>; Seiss, Ben <Ben.Seiss@AlabamaAG.gov>; Christopher Mills <cmills@spero.law>; Pete Patterson <ppatterson@cooperkirk.com>; David Thompson <dthompson@cooperkirk.com>; Jeffrey P. Doss <jdoss@lightfootlaw.com>; Amie A. Vague <avague@lightfootlaw.com>; AOrr <Aorr@nclrights.Org>; Jennifer Levi <Jlevi@glad.Org>; Sarah Warbelow <Sarah.Warbelow@hrc.Org>; Cynthia Weaver <cynthia.Weaver@hrc.Org>; Andy Pratt <Apratt@kslaw.Com>; Misty Peterson <Mpeterson@kslaw.Com>; Brent Ray <Bray@kslaw.Com>; Abigail Terry <ATerry@kslaw.com>; Michael Shortnacy <Mshortnacy@kslaw.Com>; Scott McCoy <Scott.Mccoy@splcenter.Org>; Diego Soto <Diego.Soto@splcenter.Org>; Jessica Stone <Jessica.Stone@splcenter.Org>; Marshall, Margaret (USAALN) <Margaret.Marshall@usdoj.gov>; Williams, Renee (CRT) <Renee.Williams3@usdoj.gov>; Toyama, Kaitlin (CRT) <Kaitlin.Toyama@usdoj.gov>

Subject: RE: Boe v. Marshall, No. 22-184 (M.D. Ala.) -- HHS Documents

Hi Brian:

Thanks for taking the time to speak with us yesterday. I'm writing to memorialize a couple thoughts that were exchanged during the call.

First, the United States reaffirms that it is not contesting the constitutionality of the portion of the statute related to surgical procedures and that discovery related to surgeries is not relevant to this matter. Please confirm that Defendants will withdraw certain requests accordingly.

Second, we reaffirm that HHS is not a party to the case and this case was not referred to DOJ by HHS. Private Plaintiffs also no longer assert a claim under Section 1557 of the Patient Protection and Affordable Care Act. Finally, the RFPs implicating HHS are unduly broad and overly burdensome, and seek documents that are not relevant to this case. Yet, in the interest of cooperation and efficiency, we are willing to consider facilitating a production through HHS if you narrow your requests so that we may have a productive conversation with agency counsel. Please confirm our understanding that Defendants are considering this request and will get back to us this week.

I think that covers it, but please let me know if I've left something out or you disagree with my representations.

Best,

Amie

Amie S. Murphy
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From: Brian Barnes <BBarnes@cooperkirk.com>
Sent: Friday, December 23, 2022 12:10 PM
To: Murphy, Amie (CRT) <Amie.Murphy2@usdoj.gov>; Melody H. Eagan <meagan@lightfootlaw.com>; Montag, Coty (CRT) <Coty.Montag@usdoj.gov>; Bowdre, Barrett <Barrett.Bowdre@AlabamaAG.gov>; Adam Reinke <Areinke@kslaw.Com>; John Ramer <jramer@cooperkirk.com>
Cc: Cheek, Jason (USAALN) <JCheek@usa.doj.gov>; LaCour, Edmund <Edmund.LaCour@AlabamaAG.gov>; Wilson, Thomas <Thomas.Wilson@AlabamaAG.gov>; Davis, Jim <Jim.Davis@AlabamaAG.gov>; Seiss, Ben <Ben.Seiss@AlabamaAG.gov>; Christopher Mills <cmills@spero.law>; Pete Patterson <ppatterson@cooperkirk.com>; David Thompson <dthompson@cooperkirk.com>; Jeffrey P. Doss <jdoss@lightfootlaw.com>; Amie A. Vague <avague@lightfootlaw.com>; AOrr <Aorr@nclrights.Org>; Jennifer Levi <jlevi@glad.Org>; Sarah Warbelow <Sarah.Warbelow@hrc.Org>; Cynthia Weaver <cynthia.Weaver@hrc.Org>; Andy Pratt <Apratt@kslaw.Com>; Misty Peterson <Mpeterson@kslaw.Com>; Brent Ray <Bray@kslaw.Com>; Abigail Terry <ATerry@kslaw.com>; Michael Shortnacy <Mshortnacy@kslaw.Com>; Scott McCoy <Scott.Mccoy@splcenter.Org>; Diego Soto <Diego.Soto@splcenter.Org>; Jessica Stone <Jessica.Stone@splcenter.Org>; Marshall, Margaret (USAALN) <mmarshall2@usa.doj.gov>; Williams, Renee (CRT) <Renee.Williams3@usdoj.gov>; Toyama, Kaitlin (CRT) <Kaitlin.Toyama@usdoj.gov>
Subject: [EXTERNAL] RE: Boe v. Marshall, No. 22-184 (M.D. Ala.) -- HHS Documents

Hi Amie,

Thanks for your note on Wednesday. Here are a few responses and reactions --

1. The only document requests for which we don't think it's necessary to use HHS custodians are RFPs 4 and 5. Given that the core factual dispute in this case is over the safety and efficacy of medical treatments, our view is that HHS (including agencies housed within HHS such as FDA and NIH) is by far the most important place for the United States to look for relevant documents. We're of course open to a conversation about ways to limit the burden of responding to our document requests, including by narrowing the scope of some of the RFPs and identifying appropriate custodians and search terms. But it still isn't clear to us whether the United States is willing to search the ESI of HHS custodians and produce responsive materials (including emails). Please clarify the United States' position on that threshold issue.
2. The treatments referenced in my note of December 16 are the ones prohibited by Section 4 of S.B. 184. That includes: (1) puberty blocking medication, (2) cross-sex hormones, and (3) surgeries that sterilize, that artificially construct tissue with the appearance of genitalia, or that remove any healthy body part or tissue except male circumcision. We are puzzled by your statement that surgery "is not relevant here" given that the United States' complaint asks the Court to permanently enjoin Section 4 of the Act in full, including the provisions that regulate surgeries. *See also* U.S. Complaint ¶¶ 38, 39, 42, and 51. If the United States no longer intends to challenge the Act's regulation of surgeries, please let us know since that would affect our thinking about various discovery issues.
3. Provided that the same limitation applies to Defendants' attorneys, we agree that there is no need for the United States to search DOJ attorneys' ESI or log privileged responsive documents found in a DOJ attorney's ESI.
4. We cannot agree to limit the United States' production to documents that the United States may use to support its claims. RFP 4 requests all such materials, but the other document requests Defendants served on the United States are not so limited.

We're available to discuss these issues any time on January 3. Please let us know a time that works for you.

Best regards,

Brian W. Barnes
Cooper & Kirk, PLLC
(202) 220-9623

From: Murphy, Amie (CRT) <Amie.Murphy2@usdoj.gov>
Sent: Wednesday, December 21, 2022 4:02 PM
To: Brian Barnes <BBarnes@cooperkirk.com>; Melody H. Eagan <meagan@lightfootlaw.com>; Montag, Coty (CRT) <Coty.Montag@usdoj.gov>; Bowdre, Barrett <Barrett.Bowdre@AlabamaAG.gov>; Adam Reinke <Areinke@kslaw.Com>; John Ramer <jramer@cooperkirk.com>
Cc: Cheek, Jason (USAALN) <Jason.Cheek@usdoj.gov>; LaCour, Edmund <Edmund.LaCour@AlabamaAG.gov>; Wilson, Thomas <Thomas.Wilson@AlabamaAG.gov>; Davis, Jim <Jim.Davis@AlabamaAG.gov>; Seiss, Ben <Ben.Seiss@AlabamaAG.gov>; Christopher Mills <cmills@spero.law>; Pete Patterson <ppatterson@cooperkirk.com>; David Thompson <dthompson@cooperkirk.com>; Jeffrey P. Doss <jdoss@lightfootlaw.com>; Amie A. Vague <avague@lightfootlaw.com>; AOrr <Aorr@nclrights.Org>; Jennifer Levi <jlevi@glad.Org>; Sarah Warbelow <Sarah.Warbelow@hrc.Org>; Cynthia Weaver <cynthia.Weaver@hrc.Org>; Andy Pratt <Apratt@kslaw.Com>; Misty Peterson <Mpeterson@kslaw.Com>; Brent Ray <Bray@kslaw.Com>; Abigail Terry <ATerry@kslaw.com>; Michael Shortnacy <Mshortnacy@kslaw.Com>; Scott McCoy <Scott.Mccoy@splcenter.Org>; Diego Soto <Diego.Soto@splcenter.Org>; Jessica Stone <Jessica.Stone@splcenter.Org>; Marshall, Margaret (USAALN) <Margaret.Marshall@usdoj.gov>; Williams, Renee (CRT) <Renee.Williams3@usdoj.gov>; Toyama, Kaitlin (CRT) <Kaitlin.Toyama@usdoj.gov>
Subject: RE: Boe v. Marshall, No. 22-184 (M.D. Ala.) -- HHS Documents

Dear Brian,

Thank you for clarifying that the scope of your requests regarding scientific evidence pertains only to documents within the possession, custody, and control of HHS and its agencies, which include FDA, NIH, and the Centers for Medicare and Medicaid Services.

In order for us to answer the questions in your email, we first need to understand the breadth of the commitment you are asking us to undertake. Simply put, it would help to know which of the 45 RFPs you believe apply to HHS. Even if we were to agree to your request right now, we would still need to identify the particular RFPs prior to connecting with the agency in order to guide our discussion. For sake of efficiency, we would like to know that information now in order to decide whether making that commitment is even feasible. Additionally, your email states that you are seeking “medical and scientific evidence surrounding the treatments at issue here.” Please specify the treatments you are referring to—is this limited to hormones and puberty blockers? Surgery is not relevant here and so shouldn’t be covered by your request.

The United States anticipates making its initial production of documents by January 20, given that we have not yet agreed to the terms of the ESI protocol. In light of your December 20 email to Melody, stating that it would be disproportional to the needs of the case to search ESI held by attorneys at the Attorney General’s Office, we assume the same limitation can apply to attorneys at the Department of Justice and thus we will not search attorneys’ ESI or log privileged responsive documents found in a DOJ attorney’s ESI. We also propose limiting the United States’ production to documents that the United States may use to support its claims.

We propose having a discussion about this after the holidays, during the week of January 2. If you are able to send us a list of RFPs prior to the call, please do that. It seems as though we are making some headway and we are hopeful that we can reach a resolution.

Best,

Amie

P.S. Wishing everyone on this chain a happy holiday!

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From: Brian Barnes <BBarnes@cooperkirk.com>
Sent: Friday, December 16, 2022 3:52 PM
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Cc: Cheek, Jason (USAALN) <JCheek@usa.doj.gov>; LaCour, Edmund <Edmund.LaCour@AlabamaAG.gov>; Wilson, Thomas <Thomas.Wilson@AlabamaAG.gov>; Davis, Jim <Jim.Davis@AlabamaAG.gov>; Seiss, Ben <Ben.Seiss@AlabamaAG.gov>; Christopher Mills <cmills@spero.law>; Pete Patterson <ppatterson@cooperkirk.com>; David Thompson <dthompson@cooperkirk.com>; Jeffrey P. Doss <jdoss@lightfootlaw.com>; Amie A. Vague <avague@lightfootlaw.com>; AOrr <Aorr@nclrights.Org>; Jennifer Levi <jlevi@glad.Org>; Sarah Warbelow <Sarah.Warbelow@hrc.Org>; Cynthia Weaver <cynthia.Weaver@hrc.Org>; Andy Pratt <Apratt@kslaw.Com>; Misty Peterson <Mpeterson@kslaw.Com>; Brent Ray <Bray@kslaw.Com>; Abigail Terry <ATerry@kslaw.com>; Michael Shortnacy <Mshortnacy@kslaw.Com>; Scott McCoy <Scott.Mccoy@splcenter.Org>; Diego Soto <Diego.Soto@splcenter.Org>; Jessica Stone <Jessica.Stone@splcenter.Org>; Marshall, Margaret (USAALN) <mmarshall2@usa.doj.gov>; Williams, Renee (CRT) <Renee.Williams3@usdoj.gov>; Toyama, Kaitlin (CRT) <Kaitlin.Toyama@usdoj.gov>; Murphy, Amie (CRT) <Amie.Murphy2@usdoj.gov>
Subject: [EXTERNAL] Boe v. Marshall, No. 22-184 (M.D. Ala.) -- HHS Documents

Dear Amie,

Thank you for taking the time to speak with us yesterday regarding the United States's position with respect to Defendants' requests for production. We appreciate that your client is generally willing to work with us regarding those requests, but we need more clarity regarding your position—especially as it relates to the Department of Health and Human Services (HHS).

As we stated during the call, we think that the medical and scientific evidence surrounding the treatments at issue here is highly relevant to the claims in this case. And we know that the federal government employs healthcare and medical professionals who research, study, and make decisions based upon that evidence. We are therefore seeking documents and communications in the possession, custody, or control of those professionals. As we explained during the call, in an effort to narrow the requests, we are willing to focus only on HHS (with the understanding that this includes the agencies within HHS such as the FDA and the NIH). The call left us with a few questions that we need you to answer to chart a path forward:

1. Is the United States willing to identify custodians at HHS, including at agencies within HHS such as FDA and NIH, that would be the most likely to possess documents and communications concerning the scientific evidence surrounding the safety and efficacy of the treatments at issue in this case?

2. Assuming that we can agree upon relevant search terms, is the United States willing to search the ESI of HHS custodians for responsive documents using agreed-upon search terms?
3. Would those searches extend to the custodians' emails?

Once we know the answers to these questions, it will make it much easier to discern next steps—whether that is proceeding to identify custodians and search terms or instead teeing up for the Court a dispute over the United States's discovery obligations. Given the schedule in this case, we ask that you respond to this note by December 21.

Best regards,

Brian W. Barnes
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(202) 220-9623

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