

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF TENNESSEE  
NASHVILLE DIVISION

L.W. et al., )  
*by and through her parents and next friends,* )  
*Samantha Williams and Brian Williams,* )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
JONATHAN SKRMETTI et al., )  
 )  
Defendants. )

No. 3:23-cv-00376  
JUDGE RICHARDSON

**DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO RESET BRIEFING  
SCHEDULE AND CONSOLIDATE PRELIMINARY INJUNCTION HEARING WITH  
TRIAL ON THE MERITS**

## INTRODUCTION

Plaintiffs remain convinced of their atextual misreading of the Act and rely on it to support an illusory emergency. To the extent urgency exists at all for the patient Plaintiffs, it is being caused by non-party Vanderbilt University Medical Center's decision to do what the law does not require of it—*i.e.*, change patient Plaintiffs' treatment before April 1, 2024. Dr. Lacy, for her part, can neither use her own ostrichism about the Act to self-inflict irreparable harm nor rely on third-party standing for her patients. Finally, it would be news to the entire federal judiciary if the United States had standing and an unheralded cause of action to sue Tennessee for sex discrimination.

Plaintiffs have yet to demonstrate an understanding that federal district courts adjudicate cases and controversies between parties and do not sit as courts of nullification “striking down” legislation. Courts can thus enjoin “specific parties,” not “legal rules in the abstract.” *California v. Texas*, 141 S. Ct. 2104, 2115 (2021) (quoting *Murphy v. NCAA*, 138 S. Ct. 1461, 1486 (2018) (Thomas, J., concurring), in turn, citing Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933, 936 (2018)).

When a court enjoins the executive from enforcing a statute, it is not suspending, revoking, or delaying the effective date of that law. The statute remains in effect; the injunction simply forbids the named defendants to enforce the statute while the court's order remains in place. The injunction is nothing more than a judicially imposed non-enforcement policy, and its effect is no different from a non-enforcement policy that the executive imposes upon itself. It stops the executive from initiating enforcement proceedings while the injunction remains in effect.

Mitchell, 104 V. L. Rev. at 986-87; accord *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021) (“[F]ederal courts enjoy the power to enjoin individuals tasked with enforcing laws, not the laws themselves.”)

Defendants already agree that continued treatment of current patients does not violate the Act and therefore cannot be the subject of enforcement. So what putative conduct of the Defendants are the Plaintiffs seeking to enjoin? How would a preliminary injunction from this Court right now materially change the relationship of the parties, given that VUMC (and Dr. Lacy) are going far outside the law's requirements in refusing care after July 1? Plaintiffs provide no answers and because they have succumbed to the writ-of-erasure fallacy, they do not even realize they need to try.

Plaintiffs think they are litigating a nullification action. The wish is father to the thought, of course, as it would be to Plaintiffs' distinct strategic advantage: a preliminary injunction hearing with minimal scrutiny of the factual bases of their claims. There is no imminent emergency traceable to the Defendants' conduct. The Court should grant Defendants' motion to set the preliminary injunction hearing and trial for January 2024.<sup>1</sup>

## ARGUMENT

### **I. Plaintiffs should not be permitted to rush Defendants and the Court into a meaningless preliminary injunction hearing that will not change their circumstances.**

Plaintiffs rest their opposition to Defendants' motion on an interpretation of the Act that no reader of English could adopt. When the Act says, "[i]t is not a violation ... if ... (B) [t]he performance or administration of the medical procedure on the minor began prior to the effective date of this act and concludes on or before March 31, 2024," § 68-33-103(b)(1), Plaintiffs read in an invisible "titration" requirement for current patients between July 1, 2023, and March 31, 2024. Opp. 1, 4-5. Instead of addressing the statute's text, they rely exclusively on legislative history—

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<sup>1</sup> To be clear, Defendants moved for a consolidated trial on the merits as a significant concession to Plaintiffs' desire for a speedy resolution. However, if Plaintiffs object so strongly to a trial in January 2024, *see* Opp. 3 (discussing purpose of Rule 65(a)(2)), then a mere evidentiary hearing on the preliminary injunction at that time is fine with Defendants too.

an unwelcome throwback to a different era in American jurisprudence. This case should not be made to dance to the tune of statutory “2+2=5.”

Dr. Lacy even tries to assert the injuries of her patients, present and future, in defiance of Article III’s requirements. Third party standing doctrine does not extend so far.

To be sure, there is ultimately a real case here—just not real urgency traceable to Defendants. If there is indeed an emergency, VUMC and Dr. Lacy are creating it and neither the Act nor Defendants coerced them into doing so. Defendants are not responsible for the actions of VUMC or whatever harm Dr. Lacy says she is going to visit upon her own patients.

**a. The plain language of the Act cannot be interpreted to create liability prior to April 1, 2024, for treatment already underway.**

As discussed now several times, the prohibition on certain medical procedures for minors set forth in the new § 68-33-103(a), does not apply if “[t]he performance or administration of the medical procedure on the minor began prior to the effective date of this act and concludes on or before March 31, 2024,” and their provider certifies that continued treatment is necessary. ECF 33-1 at 446, §§ 68-33-103(b)(1)(A), -(b)(3). In other words, the plain text allows each of the patient Plaintiffs to continue their current treatment through March 31, 2024, assuming their provider completes the required certification—notwithstanding Plaintiffs’ or VUMC’s mischaracterization or misunderstanding of the Act. And Dr. Lacy’s patients who have started treatment prior to July 1 likewise may continue, assuming she certifies the continued treatment is necessary. The Act does not require VUMC or Dr. Lacy to stop ongoing treatment after July 1. Plaintiff Rebecca Roe has already acknowledged as much. *See* ECF. No. 27 at ¶31 (correctly stating the Act “allow[s] [treatment] to continue until March of 2024 for people like Ryan who had started on treatment”).

The Act emphatically does not require “titration” or “winding down” starting July 1. Unsurprisingly, Plaintiffs never even quote the text. And statements by a single legislator in the legislative history change nothing. *See* Opp. 4-5. “[T]he text of a law controls over purported legislative intentions unmoored from any statutory text.” *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2496 (2022). And it is well established in Tennessee that “when the plain meaning of a statute is clear after application of the traditional tools of statutory interpretation, a court should not ‘delve into the legislative history of an unambiguous statute.’” *State v. Deberry*, 651 S.W.3d 918, 930 (Tenn. 2022) (quoting *State v. Welch*, 595 S.W.3d 615, 624 (Tenn. 2020)). But even if the Court were permitted to look at the legislative history, it should be “reluctant” to attribute statements made by legislators who voted for the law to the “legislative body as a whole” because “[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it.” *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2256 (2022) (quoting *United States v. O’Brien*, 391 U.S. 367, 384 (1968)). “The remarks of a single legislator, even [a] sponsor, are not controlling in analyzing legislative history.” *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979).

**b. Dr. Lacy lacks standing to assert the rights of current or future patients.**

No longer arguing that Dr. Lacy will experience any irreparable injury herself, or any injury at all for that matter, Plaintiffs emphasize the supposed “harm that will befall Dr. Lacy’s existing and prospective patients as soon as the law takes effect.” Opp. 5. But nowhere in Dr. Lacy’s declaration or in Plaintiffs’ briefing have they clarified:

- whether any of Dr. Lacy’s existing 20 patients has not started treatment now but will after July 1, 2023;
- whether any of her patients has gone to another provider in Memphis, such as Choices, which has committed to continuing treatment through March 2024; and

- how many of her existing 20 patients, all of whom are over 16-years old, will be adults by then.

Plaintiffs are the ones who requested a preliminary injunction and a breakneck pace. They cannot sandbag Defendants and this Court by waiting to provide information about the supposed imminent, irreparable harm that Dr. Lacy's current patients face until "a reply declaration in further support of the preliminary injunction." Opp. 5.

The absence of any of Dr. Lacy's patients in this case is yet more proof that Dr. Lacy lacks third-party standing to "complain[] . . . on their behalf." Opp. 5. Third-party standing is the "exception rather than the rule." *South Carolina v. Regan*, 465 U.S. 367, 380 (1984). A plaintiff may assert the rights of a third party only when (1) the plaintiff has a "close" relationship with the third party; and (2) some "hindrance" affects the third party's ability to protect his own interests. *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004). There is no hindrance to Dr. Lacy's current patients suing on their own behalf. Defendants would not have opposed allowing her minor patients to litigate pseudonymously, and the ACLU no doubt would have jumped at the chance to serve as their counsel. But two months after the law was signed, none of Dr. Lacy's minor patients has sued or requested a preliminary injunction. That is their decision to make, not Dr. Lacy's.

Dr. Lacy's attempt to invoke third-party standing for "unascertained" minors who might someday be her patients is on even worse footing because she has no relationship with those hypothetical future patients at all. *See Kowalski*, 543 U.S. at 131 (attorneys lacked third-party standing for potential future clients). That is probably why Plaintiffs' filings have focused on Dr. Lacy's concern about "abandoning her" existing "patients." (D.E. 33, PI Memo, at 417; see also

D.E. 1, Compl., at 32; D.E. 28, Lacy Declaration at 242.) A doctor cannot abandon a patient that the doctor does not already treat.<sup>2</sup>

**c. Plaintiffs have not even argued, much less shown that any preliminary injunction will cure their imaginary or VUMC-created July 1 problem.**

“The required showing of irreparable harm cannot properly be premised on harm that would not be alleviated by the particular preliminary injunction being sought.” *Patel v. AR Grp. Tennessee, LLC*, No. 3:20-CV-00052, 2020 WL 5849346, at \*8 (M.D. Tenn. Oct. 1, 2020) (Richardson, J.). And yet in their papers, Plaintiffs have never once established how enjoining Defendants from enforcing the Act against VUMC in connection with patient Plaintiffs or Dr. Lacy in connection with her current patients could possibly make any difference given what the Act says and what Defendants have acknowledged.

Injury in fact is one thing, but irreparable harm requires a “higher threshold” than mere Article III standing. *Nat’l Fair Hous. All. v. Carson*, 330 F. Supp. 3d 14, 63 (D.D.C. 2018). Neither the Act nor Defendants have coerced VUMC into its apparent decision to deny patient Plaintiffs care after July 1. Neither the Act nor Defendants have coerced Dr. Lacy into her view that the Act requires her to end or modify her current patients’ care after July 1. The uncoerced actions of VUMC cannot create irreparable harm for the patient Plaintiffs, and Dr. Lacy cannot inflict cognizable irreparable harm upon herself.

Causation is lacking when the plaintiff’s “alleged harms arise not from [third parties] acting under the command of [the challenged law], but rather from the [third parties’] voluntary choice to go above and beyond [the challenged law].” *Crawford v. U.S. Dep’t of Treasury*, 868 F.3d 438,

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<sup>2</sup> The Supreme Court has also abrogated decisions such as *June Medical Services L.L.C. v. Russo*, 140 S. Ct. 2103 (2020), that “ignored the Court’s third-party standing doctrine,” *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2275-76 & n.61 (2022).

457 (6th Cir. 2017) (emphasis omitted). If VUMC has “legitimate discretion” not to cause the Plaintiffs’ harm, that discretion “breaks the chain” of causation between Plaintiffs and the Act. *Turaani v. Wray*, 988 F.3d 313, 316-17 (6th Cir. 2021). And Defendants, of course, cannot be held accountable for third parties’ “inaccurate” reading of the Act. *Whitewater Draw Nat. Res. Conservation Dist. v. Mayorkas*, 5 F.4th 997, 1015 (9th Cir. 2021). If providers incorrectly believe the Act mandates a change in ongoing treatments on July 1, that false belief does not entitle Plaintiffs to an injunction.<sup>3</sup> And this Court can remedy that misperception by simply saying what the Act does already: “It is not a violation” to continue a procedure that “began prior to [July 1] and concludes on or before March 31, 2024.” § 68-33-103(b)(1)(B); see *Hawkins v. Haaland*, 991 F.3d 216, 230-31 (D.C. Cir. 2021) (explaining that third parties’ misunderstanding of the law does not create causation and that the “misunderstanding ... would presumably be corrected by today’s decision, which explains” why the misunderstanding is wrong).

Worse for Dr. Lacy—Defendants have already informed her that her reading of the law is wrong. If she stops treating current patients because of her confusion, then whatever harm she is suffering has been inflicted upon herself. Equity does not redress self-inflicted harms. *Livonia Prop. Holdings, L.L.C. v. 12840-12976 Farmington Rd. Holdings, L.L.C.*, 717 F. Supp. 2d 724, 740 (E.D. Mich.), *aff’d sub nom. Livonia Properties Holdings, LLC v. 12840-12976 Farmington Rd. Holdings, LLC*, 399 F. App’x 97, 104 (6th Cir. 2010) (“self-inflicted harm is not the type that

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<sup>3</sup> The patient Plaintiffs and their parents further assert that even if their ongoing treatment could continue past July 1—as Rebecca Roe admits it can—they would still face “emotional stress” related to permanent physical changes that would occur if they cannot find another provider or the “upheaval that would be caused by traveling or moving out of state for treatment.” Opp. 5 n.2. But the potential emotional harm they describe would spring directly from Plaintiffs’ own egregious misreading of the plain statutory text or VUMC’s yet-to-be-explained-or-proved decision to stop treatment before being required to do so. It has nothing to do with the Act or any of the Defendants.

injunctions are meant to prevent”) (citing *Wright & Miller*, 11A Fed. Prac. & Proc. Civ. § 2948.1 (3d ed.)).

Plaintiffs are transparently seeking to have the Court address the merits of their claims on as thin a record as possible. Despite having months to prepare their case, Plaintiffs have resisted voluntary discovery. Plaintiffs have medical records from VUMC (and have apparently had them for quite some time) but refuse to produce them voluntarily, even when defense counsel offered an interim “attorneys’-eyes-only” agreement. Plaintiffs know the names of the patient Plaintiffs’ other medical providers but refuse to disclose them. Plaintiffs refuse to even disclose the names of the pseudonymous parties on an attorneys’-eyes-only basis. There’s always a reason. *We have not had a 26(f) conference.* (Exhibit A, May 3<sup>rd</sup> email from Counsel Stella Yarbrough; Exhibit B, May 3-4<sup>th</sup> email exchange with Counsel Joshua Block.) *We need a protective order.* (Exhibit A.) *We want to edit the protective order.* (Exhibit B.) *We want to redact medical records to take out our clients’ names.* (Exhibit B.) *We do not think you deserve school records even though every minor plaintiff and parent talks about what happened at school.* (Exhibit B.)

While in a run-of-the-mill case these would be just ordinary back-and-forths, in this one they seem calculated to prejudice Defendants and their ability to discover facts directly relevant to the preliminary injunction. A week has passed in which Plaintiffs could have produced (1) medical records, (2) a list of providers, and (3) their own identities all under an attorneys’-eyes-only agreement that was on offer. Why refuse if not to prejudice Defendants and rig the record in Plaintiffs’ favor? To top it off, while refusing voluntary discovery all week and not even giving names of all the plaintiffs, they still have the cheek to ask the Court to require Defendants to respond by May 15. Opp. 8.

Which gets to the important point about Plaintiffs’ delay in even filing this suit. Nothing underscores Plaintiffs’ writ-of-erasure fallacy more than their conflation of their lawyers (who surely want the Act nullified) with their case. Citing the time it took *counsel* to work with (find) reticent *plaintiffs* and prepare their declarations somehow justifies Plaintiffs’ delay? Opp. at 6. If Plaintiffs were hesitant, that is Plaintiffs’ fault. But, we are told, Defendants were supposed to pre-prepare for fact discovery against unknown (and still pseudonymous) plaintiffs. *Id.* at 6-7. It is not a “masterclass in contradictions” for Defendants to need time to discover facts about people whose names they still have not been given.<sup>4</sup> Plaintiffs knew the Legislature was considering this law before it passed, and their delays and discovery excuses should be taken into account when assessing the alleged urgency of having a preliminary injunction hearing by July 1.<sup>5</sup>

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<sup>4</sup> Plaintiffs emphasize that their counsel put out “a press release on the day the law was signed making clear their intention to seek a preliminary injunction.” Opp. 8. In preparing this reply, Defendants’ counsel have pored over the press release, and nowhere does it mention a “preliminary injunction.” What the press release does say, tellingly, is that minors such as the patient Plaintiffs “will be forced to lose access to such care after March 31, 2024, in Tennessee,” not on July 1, 2023. Press Release, ACLU, Tennessee Bans Gender-Affirming Care for Transgender Youth (Mar. 2, 2023), <https://www.aclu.org/press-releases/tennessee-bans-gender-affirming-care-for-transgender-youth#>.

<sup>5</sup> Plaintiffs quibble with the Tennessee Attorney General seeking preliminary injunctive relief “[a]t least twice in 2022 alone” “more than six weeks after” federal agencies issued rules without prior notice and comment. Opp. 9 n.4. Neither is apposite. In *Tennessee v. U.S. Department of Education*, the agencies serially promulgated documents throughout June 2021 imposing new obligations. 615 F. Supp. 3d 807 (E.D. Tenn. 2022) (granting preliminary injunction ten months after States’ 2021 motion), *appeal argued*, No. 22 5807 (6th Cir. Apr. 26, 2023). Two weeks after the last rule, Tennessee politely requested rescission. Letter from General Slatery to President Biden (July 7, 2021), <https://bit.ly/3sNdNNn>. The agencies refused so a coalition of States sued a few weeks later. In *Tennessee v. U.S. Department of Agriculture*, Tennessee and twenty-one other States sought a preliminary injunction precisely six weeks after USDA’s final rule, but Judge McDonough *denied* the motion to expedite because, *inter alia*, the States took more than two business days to serve the summons that the court took eight business days to issue. No. 3:22-cv-257, 2022 WL 5336196 (E.D. Tenn. Aug. 10, 2022).

**II. The putative intervention of the United States cannot create imminent harm where there is none because the United States lacks any independent cause of action.**

Plaintiffs now change their tune and say that, even if they face no irreparable harm on July 1, others do—namely, “transgender minors living in Tennessee ... who have not begun care” and “the medical providers who would treat them.” Opp. 9. Who purports to represent these non-parties? The United States, with no identified cause of action upon which to sue. *Id.* (The United States does not purport to represent any medical providers.) Though the United States is a proposed intervenor (not a party) and has filed a proposed preliminary-injunction motion (not an actual one), Plaintiffs say this Court must rush to conduct a hearing before July 1 for the United States’ sake.

Plaintiffs misstate basic civil procedure. The United States needs a cause of action to sue for any relief that goes beyond what the Plaintiffs could obtain. It has none. And it needs standing to assert the injuries of non-party and unidentified citizens of Tennessee.

First, the United States lacks a cause of action. The statute that authorizes the United States’ intervention, 42 U.S.C. § 2000h-2, states that the United States can get “the same relief as if it had instituted the action.” 42 U.S.C. § 2000h-2. But if the United States “had instituted” this action, then it could get nowhere. Congress has not given the United States a general cause of action to sue States for sex discrimination. “[T]he United States may not sue to enjoin violations of individuals’ fourteenth amendment rights without specific statutory authority.” *United States v. City of Philadelphia*, 644 F.2d 187, 201 (3d Cir. 1980). Section 2000h-2 “does not create an independent federal claim; it merely allows the United States Attorney General to intervene.” *Sayman v. Nat’l Evaluation Sys., Inc.*, 2002 WL 598519, at \*1 (N.D. Ill. Apr. 17). And no other statute creates a cause of action either. That omission is telling because, in other kinds of cases covered by § 2000h-2, Congress did create a cause of action for the United States. *See, e.g.*,

*Spangler v. United States*, 415 F.2d 1242, 1244 (9th Cir. 1969) (discussing 42 U.S.C. §2000c-6, which lets the United States sue schools who deny equal protection to students).

Second, the United States lacks Article III standing. If an intervenor “seeks additional relief beyond that which the plaintiff requests,” then it “must demonstrate Article III standing.” *Town of Chester v. Laroe Ests., Inc.*, 581 U.S. 433, 439 (2017). The United States does not even argue it has independent standing in its complaint. The only conceivable theory that it could have tried to cobble together would be *parens patriae*, but that theory (which the United States has not invoked) fails. As relevant here, *parens patriae* is unavailable because the case involves “an identifiable group”—transgender minors in a single state who want to start a prohibited treatment after July 1—with no generalized injury to the United States “as a whole.” *Chapman v. Tristar Prod., Inc.*, 940 F.3d 299, 306 (6th Cir. 2019).

That Plaintiffs resort to theories of standing the United States does not even offer—all the Department of Justice can say is that the United States has an “interest,” not an “injury” (U.S. Opp. 1-2)—tells the Court all it needs to know. The intervention statute is not a panacea that transforms a case between Plaintiffs and Defendants into the very nullification proceeding that federal courts have no power to conduct.

## CONCLUSION

There is no July 1 emergency because the law is clear that current treatments can continue until April 1, 2024. No stray quotation from the legislative history can change that. Defendants’ motion should be granted.

Dated: May 5, 2023

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 5, 2023, the undersigned filed the foregoing document via this Court's electronic filing system, which sent notice of such filing to the following counsel of record:

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## EXHIBIT A

**From:** [Stella Yarbrough](#)  
**To:** [Adam Montara](#)  
**Cc:** [Steven J. Griffin](#); [Clark Hildabrand](#); [Trenton Meriwether](#); [Sruji Swaminathan](#); [Maia Zelkind](#); [Lucas Cameron-Vaughn](#); [Chapman Dean](#); [Tamica Daniel@usdoj.gov](#); [alyssa.lareau@usdoj.gov](#); [Gloria Yi@usdoj.gov](#); [Coty Montag@usdoj.gov](#); [Ryan N. Henry](#); [Brooke Huppenthal](#); [Cameron T. Norris](#); [Joshua Block](#)  
**Subject:** RE: Call Tomorrow Morning to Discuss Schedule  
**Date:** Wednesday, May 3, 2023 12:14:51 PM  
**Attachments:** [image001.png](#)  
[Proposed Order for Pseudonym.pdf](#)  
[LW\\_v\\_Skrmetti Proposed Protective Order.docx](#)

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Adam,

We are aware of Sixth Circuit precedent requiring a hearing when there are disputed questions of fact. That is a separate question from whether there should be pre-hearing discovery. Under the federal rules, “[a] party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.” Fed. R. Civ. P. 26(d)(1). “The decision to authorize early discovery lies within the sound discretion of the trial court, and, ultimately, depends on the specific justifications offered in support of the application. Accordingly, the party requesting the expedited discovery bears the burden of establishing the need for the request.” *Change Healthcare Operations, LLC v. Feeney*, No. 3:22-0305, 2022 WL 18640593, at \*1 (M.D. Tenn. Aug. 4, 2022) (internal quotation marks and citations omitted). Discovery sought in connection with a preliminary injunction hearing should “be limited to the factual issues raised in the preliminary injunction motion” and not broad “merits discovery.” *Id.* at \*2.

We are not “unprepared” to sign HIPAA waivers for appropriate medical records. We are attempting to meet and confer with you over the scope of any court order or stipulation to authorize discovery for them. And we are trying to do so as part of an orderly process instead of in response to ad hoc demands. For example, to the extent that you are seeking information from medical providers other than Vanderbilt, we think that the requests are not appropriately tailored to the limited nature of the preliminary injunction proceeding and can be addressed during the regular discovery process.

Before any medical records can be produced, there also needs to be a protective order in place. We have sent you a proposal for that. We also need to resolve an outstanding issue with respect to our plaintiffs proceeding by pseudonym. As part of that motion, we included the attached proposed order, which places restrictions on the further disclosure of our clients’ names. In your response to the motion, you stated that your consent was conditional on the Court also ordering that “During this litigation, Defendants shall not publicly or privately disclose or identify for any purpose that these movant-plaintiffs are parties to this case, except ‘to the full extent necessary to defend the law being challenged.’” Our initial proposed order outlined a specific procedure for any further disclosures, and we do not agree to your additional language to the extent that it is inconsistent with the terms of our proposed order. We will need to resolve this issue and have an appropriate order in place before our clients’ names are disclosed. If you consent to the language we originally proposed, then the Court can enter that order without additional delay.

We also think it is entirely appropriate to begin discussions now about your proposal for what discovery is necessary in the event that the Court denies your motion to delay a hearing until January. If the court grants your motion, then there is no need for accelerated discovery, and we can just proceed according to the federal rules. By discussing the scope and schedule of pre-hearing discovery now we can ensure that we have a schedule in place in the event that your motion is denied. During our earlier call, you referenced the discovery schedule in Indiana. Are you proposing a similar one here? Do you think fact or expert depositions are necessary or is document discovery sufficient? Do you think it is necessary to conduct discovery beyond medical records? Given your concerns about having adequate time to prepare, we think it is in everyone’s interest to resolve these issues now so an appropriate scheduling order can be entered if your motion is denied.

Please find attached the proposed pseudonym order, previously filed as an attachment to our motion, and a clean version of the proposed protective order.

-Stella

**Stella Yarbrough**

(she/her) Legal

Director

ACLU Foundation of Tennessee

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## EXHIBIT B

**From:** [Joshua Block](#)  
**To:** [Steven J. Griffin](#); [Stella Yarborough](#); [Adam Mortara](#); [External - Tara Borelli](#); [External - A Smith Carrington](#)  
**Cc:** [Clark Hildabrand](#); [Trenton Meriwether](#); [Exlerarl - Sruti Swambathan](#); [External - Maja Zelkind](#); [Lucas Cameron Vaughn](#); [Chanman Deay](#); [Tamica Daniel@usdoj.gov](#); [alyssa.lareau@usdoj.gov](#); [Gloria Yi@usdoj.gov](#); [Coty Montag@usdoj.gov](#); [Ryan N. Henry](#); [Brooke Huppenthal](#); [Cameron T. Norris](#)  
**Subject:** Follow up on discovery meet and confer for LW v Skremettl  
**Date:** Thursday, May 4, 2023 4:04:59 PM  
**Attachments:** [image001.png](#)  
[image002.png](#)  
[Protective Order draft 5-4.docx](#)  
[TN SB 1 - proposed order Molton to Proceed Under Pseudonym 5-4.docx](#)

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Steven,

Thanks for your response. I believe we continue to make great progress. Please see below:

#### Protective order

Attached is an updated version with track changes from your proposal. We deleted the text you inserted about designating only portions of documents confidential. We agree that is an appropriate goal for deposition transcripts, but we do not believe it is feasible for many of the medical records at issue in this case. We have accepted all your other edits, without necessarily agreeing with all the statements made in your explanatory comments. If you have no further edits, we can get this on file.

#### Pseudonym order

Attached is a proposed pseudonym order. Since you have indicated that you only anticipate disclosing identifying information for the purposes of serving third-party subpoenas we have added in a paragraph specifically authorizing disclosure for third-party subpoenas instead of using more general phrasing. If you have no further edits, we can get this on file.

#### Response to written discovery

We will provide formal written answers to your discovery requests by early next week or when the protective order and pseudonym orders are entered, whichever is later.

We will produce VUMC documents to you once the protective order and pseudonym orders are entered. When we produce those documents, we intend to redact the patient plaintiffs' former names, the names of the anonymous plaintiffs, and the clients' contact information. You will not be prejudiced by these redactions because we will disclose the same information to you in response to your interrogatory. Even with the protective order in place, we think it is appropriate for us to take these steps to minimize the number of documents containing this sensitive information.

We are in the process of collecting documents from mental health providers who have treated the plaintiffs for gender dysphoria. These are highly sensitive documents that are not typically released by mental health providers for any reason. Once we have the documents, we will promptly review them to determine whether we object to producing portions of the documents. To be clear, we are not at this time categorically objecting to producing these records. Under the normal discovery rules, we would have had several weeks to thoroughly review the documents before responding to your discovery request. We are working diligently to dramatically accelerate our review with the goal of responding next week, but cannot preemptively waive our right to assert potential objections.

We object to your request for information about all medical providers for the past 10 years. Without waiving our ability to state additional objections in our formal responses, we think the requests are not reasonably tailored to the issues in this case or to the specific issues in the preliminary injunction motions. We will provide you information for medical providers within the past 5 years who have treated the patients for gender dysphoria. To the extent that the patient's pediatricians have been consulted regarding gender dysphoria, the pediatricians' information will be included in that response.

We object to the requests for information about the plaintiffs' schools. We do not think the plaintiffs' educational records have any relevance to the issue in this case, which concerns plaintiffs' medical care. If you have a specific reason why you think these records are relevant to the case—and necessary for accelerated discover—please let us know.

We do not agree to execute HIPAA waivers. Although some courts have compelled parties to sign waivers, the majority of courts to consider the issue have recognized that they do not have the power to do so. We are working diligently and in good faith to provide you a lot of medical records on an accelerated timeline. We believe that if you wish to obtain HIPAA-protected records directly from providers, the proper mechanism is to obtain an order from the court. *See, e.g., Berry v. Specialized Loan Servicing, LLC*, No. 218CV02721SHLDKV, 2019 WL 9103421, at \*4 (W.D. Tenn. June 24, 2019) (stating that because "HIPAA provides specific procedures that outline how the Defendants may receive the medical records they request via the issuance of a subpoena, the court is unwilling at this juncture to compel Berry to sign a broad medical release authorizing discovery of all her medical records"). If you seek a court order, we reserve the right to object to particular requests as overbroad or for any other valid reason.

#### Deposition

Without waiving our right to object to a deposition, we will get back to regarding Dr. Lacy's availability. A deposition would have to be tailored to the specific issues at stake in the preliminary injunction, and the deposition would have to be limited in time. We think that any hours spent deposing Dr. Lacy now would be subtracted from the hours available to depose Dr. Lacy later in the case. We look forward to continuing discussions with you

on this.

Thanks again. We look forward to continuing these productive communications.

Josh

**Joshua Block**

Pronouns: he, him

Senior Staff Attorney

Jon L. Stryker and Slobodan Randjelovic

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**From:** Joshua Block

**Sent:** Thursday, May 4, 2023 9:16 AM

**To:** Steven J. Griffin <[Steven.Griffin@ag.tn.gov](mailto:Steven.Griffin@ag.tn.gov)>; Stella Yarbrough <[syarbrough@aclu-tn.org](mailto:syarbrough@aclu-tn.org)>; Adam Mortara <[mortara@lawfairllc.com](mailto:mortara@lawfairllc.com)>

**Cc:** Clark Hildabrand <[Clark.Hildabrand@ag.tn.gov](mailto:Clark.Hildabrand@ag.tn.gov)>; Trenton Meriwether <[Trenton.Meriwether@ag.tn.gov](mailto:Trenton.Meriwether@ag.tn.gov)>; Exteranl - Sruti Swaminathan <[SSwaminathan@lambdalegal.org](mailto:SSwaminathan@lambdalegal.org)>; External - Maia Zelkind <[mzelkind@lambdalegal.org](mailto:mzelkind@lambdalegal.org)>; Lucas Cameron-Vaughn <[Lucas@aclu-tn.org](mailto:Lucas@aclu-tn.org)>; Chapman, Dean <[dchapman@akingump.com](mailto:dchapman@akingump.com)>; Tamica.Daniel@usdoj.gov; alyssa.lareau@usdoj.gov; Gloria.Yi@usdoj.gov; Coty.Montag@usdoj.gov; Ryan N. Henry <[Ryan.Henry@ag.tn.gov](mailto:Ryan.Henry@ag.tn.gov)>; Brooke Huppenthal <[Brooke.Huppenthal@ag.tn.gov](mailto:Brooke.Huppenthal@ag.tn.gov)>; Cameron T. Norris <[cam@consovoymccarthy.com](mailto:cam@consovoymccarthy.com)>

**Subject:** RE: Call Tomorrow Morning to Discuss Schedule

Thanks Steven. We will discuss and respond later this afternoon.

**Joshua Block**

Pronouns: he, him

Senior Staff Attorney

Jon L. Stryker and Slobodan Randjelovic

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**From:** Steven J. Griffin <[Steven.Griffin@ag.tn.gov](mailto:Steven.Griffin@ag.tn.gov)>

**Sent:** Thursday, May 4, 2023 1:31 AM

**To:** Joshua Block <[jblock@aclu.org](mailto:jblock@aclu.org)>; Stella Yarbrough <[syarbrough@aclu-tn.org](mailto:syarbrough@aclu-tn.org)>; Adam Mortara <[mortara@lawfairllc.com](mailto:mortara@lawfairllc.com)>

**Cc:** Clark Hildabrand <[Clark.Hildabrand@ag.tn.gov](mailto:Clark.Hildabrand@ag.tn.gov)>; Trenton Meriwether <[Trenton.Meriwether@ag.tn.gov](mailto:Trenton.Meriwether@ag.tn.gov)>; Exteranl - Sruti Swaminathan <[SSwaminathan@lambdalegal.org](mailto:SSwaminathan@lambdalegal.org)>; External - Maia Zelkind <[mzelkind@lambdalegal.org](mailto:mzelkind@lambdalegal.org)>; Lucas Cameron-Vaughn <[Lucas@aclu-tn.org](mailto:Lucas@aclu-tn.org)>; Chapman, Dean <[dchapman@akingump.com](mailto:dchapman@akingump.com)>; Tamica.Daniel@usdoj.gov; alyssa.lareau@usdoj.gov; Gloria.Yi@usdoj.gov; Coty.Montag@usdoj.gov; Ryan N. Henry <[Ryan.Henry@ag.tn.gov](mailto:Ryan.Henry@ag.tn.gov)>; Brooke Huppenthal <[Brooke.Huppenthal@ag.tn.gov](mailto:Brooke.Huppenthal@ag.tn.gov)>; Cameron T. Norris <[cam@consovoymccarthy.com](mailto:cam@consovoymccarthy.com)>

**Subject:** RE: Call Tomorrow Morning to Discuss Schedule

Josh, thanks for following up on our call from earlier today.

I will address each of the issues you listed below:

Protective Order

Attached is the protective order you sent with our redline edits and comments.

Motion to Proceed Pseudonymously

The proposed order Stella sent earlier was in PDF format so I can't redline, but we can agree to entry of the same with the following edits:

6. Individuals to whom Identifying Information is disclosed shall not further disclose that information to any other person unless necessary to litigate this action and unless notice is provided to Movants' counsel at least two business days prior to disclosure. (This tracks the notice requirement under Local Rule 45.01(d) for third-party subpoenas—which is the only instance we think we might need to disclose information to someone not listed in Paragraph 5 of the order).

7. Under no circumstances shall any person disclose Identifying Information to the media. (I believe you already agree to this, but correct me if I am wrong.)

Pre-Hearing Discovery

I invite you to reevaluate your position regarding Fed. R. Civ. P. 26(f). Rule 26(d)(1) allows parties to seek discovery from any source once the parties have conferred as required by Rule 26(f), which is titled "Conference of the Parties (not "conference with the court"); Planning for Discovery" and directs the parties to discuss certain things including a plan for discovery. We did that in our call on Monday, even if we did not reach agreement—which is not surprising given that the defendants are requesting the court defer ruling on the PI motion and the plaintiffs are requesting an expedited PI ruling. Our discovery requests sent yesterday were proper, and no Rule 26(d)(1) stipulation is necessary. I am attaching here a Word version of each set of requests we sent for your convenience in responding to the same.

We reiterate that we cannot agree to a schedule for discovery until after the court decides whether to expedite the hearing on plaintiffs' PI motion or defers its ruling until after the completion of discovery. But we are not wasting any time in preparing.

Discovery Propounded to Plaintiffs

Our discovery requests at this point are certainly targeted to what we see as factual disputes relevant to the PI hearing.

Your team mentioned that you have a complete set of medical records from VUMC for each minor plaintiff dating back to their first appointment at that facility. We look forward to receiving those as quickly as possible. If you would consider producing those as "attorneys-eyes only" until the court enters the pseudonym order and protective order, that would be much appreciated.

Although you have not yet formally answered our initial discovery requests, I understand from our call earlier today that the plaintiffs object to producing a list of the plaintiffs' medical and mental health providers for the past 10 years; plaintiffs object to producing executed HIPAA releases; plaintiffs object (for now) to producing records from any provider other than VUMC, though you are going ahead and requesting counseling records (though I am not sure about the scope of your efforts on this); and plaintiffs object to providing any information regarding the schools in which the minor plaintiffs have been enrolled. Please let me know if any of this is incorrect. We plan to take these issues up with the court and would prefer you promptly provide formal responses so that we can appropriately frame the issues.

You mentioned your concern about the request for medical information being too broad because it could cover things like dentist and optometrist visits. I don't think we need anything related to dentist or optometry visits, so you can exclude those. But your clients have put their medical and mental health at issue in this case by asserting claims for irreparable harm, including their filing of declarations that discuss their medical and mental health treatment over the course of many years. We are entitled to discovery of information relevant to those claims in advance of the PI hearing. "Just trust us" is not sufficient. If you want to discuss this issue further, we are happy to do so, but we need to do so quickly given your continued push for an expedited PI ruling.

Depositions

We are still considering which depositions we will need to take and will certainly need to review the minor plaintiffs' medical records before we determine whether we need to depose any of the plaintiffs. We will likely need to depose Dr. Lacy if you want to go ahead and check with her regarding her available dates. We will also let you know about expert depositions. Again, some of this may depend on when the court decides to have the PI hearing.

If you have any questions or wish to discuss further, please do not hesitate to let me know.

Thanks,  
Steven

---

**From:** Joshua Block <jblock@aclu.org>

**Sent:** Wednesday, May 3, 2023 9:35 PM

**To:** Stella Yarbrough <syarbrough@aclu-tn.org>; Adam Mortara <mortara@lawfairllc.com>

**Cc:** Steven J. Griffin <Steven.Griffin@ag.tn.gov>; Clark Hildabrand <Clark.Hildabrand@ag.tn.gov>; Trenton Meriwether

<Trenton.Meriwether@ag.tn.gov>; Exteranl - Sruti Swaminathan <SSwaminathan@lambdalegal.org>; External - Maia Zelkind <mzelkind@lambdalegal.org>; Lucas Cameron-Vaughn <Lucas@aclu-tn.org>; Chapman, Dean <dchapman@akingump.com>; Tamica.Daniel@usdoj.gov; alyssa.lareau@usdoj.gov; Gloria.Yi@usdoj.gov; Coty.Montag@usdoj.gov; Ryan N. Henry <Ryan.Henry@ag.tn.gov>; Brooke Huppenthal <Brooke.Huppenthal@ag.tn.gov>; Cameron T. Norris <cam@consovoymccarthy.com>  
**Subject:** RE: Call Tomorrow Morning to Discuss Schedule

Steven,

Thank you for speaking with us this afternoon about discovery in this case. We think the call was productive in amicably resolving some issues and in narrowing the scope of remaining disagreements. We would also like to reiterate our request that you notify us before filing a discovery motion with the court to give us an opportunity to determine whether we are really at an impasse on a particular issue.

Below is our summary of the issues addressed during the call. If anything is inaccurate please let us know.

#### Protective order

We sent you a draft protective order earlier today, which you are currently reviewing. During the call, we stated that we would also be proposing a small additional change restricting counsel from sharing medical documents with retained experts. Attached is a revised order with that addition, which also fixes a few typos. Our understanding is that Defendants will review and get back to us with comments as soon as possible.

#### Motion to proceed under pseudonym

Our motion to proceed under a pseudonym included a proposed order that set forth particular procedures that must be followed before the anonymous Plaintiffs' names are disclosed. As we discussed on the call, we do not object to the first and third conditions you proposed in your response to our motion, but we do object to the second condition, which we see as inconsistent with the specific procedures for disclosure set forth in our original proposed motion. You agreed to review the issue and let us know whether we can resolve this outstanding issue to avoid additional delay.

#### Pre-hearing discovery

During the call, we stated our position that under Rule 26(d)(1) discovery may not occur until the 26(f) conference takes place unless the parties stipulate to it or the court enters an order authorizing accelerated discovery. You stated that you had considered the phone call on Monday to be the 26(f) conference. Reviewing the federal rules since our call, we think the 26(f) conference refers to the official conference with the court, not the pre-conference meeting between the parties. We also reiterated our understanding that pre-hearing discovery must be limited specifically to information relevant to the preliminary injunction hearing, not broader merits discovery.

The parties disagree about whether all of the discovery submitted by Defendants is appropriately tailored to pre-hearing discovery. The parties did not resolve those differences during the call and recognized that Defendants may ultimately take some issues to the court. We requested that you provide us advanced notice before filing a motion to give us an opportunity to confirm we are at an impasse on a particular issue.

Specific topics we discussed are below.

#### Documents

We stated that we have already collected the patient plaintiffs' records from Vanderbilt and will produce them soon after a protective order and the motion to proceed under a pseudonym are entered by the court. We will follow up with a proposed stipulation authorizing the production pursuant to Rule 26(d)(1) while reserving the parties' rights with respect to whether additional pre-hearing discovery is appropriate.

In light of our willingness to produce the Vanderbilt records, we stated that we objected to Defendants serving a third-party subpoena or to Plaintiffs signing a HIPAA release. We stated our position that in light of the highly confidential information in the medical records, we do not want them to be produced directly from a third-party in unredacted form. Our understanding is that Defendants are taking this issue under advisement.

We also stated our belief that medical records from plaintiffs' mental health providers are not sufficiently tailored to the preliminary injunction. You disagreed. The parties did not reach resolution on this issue, but we agreed to begin collecting records from the mental health providers to avoid delay in the event that we reach agreement or that the court orders production. We believe the parties are not yet at an impasse and that an additional meet and confer would be productive.

We objected to your request for medical information from all of plaintiffs' doctors for the past 10 years as overbroad. We agreed to provide you with a list of providers plaintiffs have seen for gender dysphoria. You indicated you wanted to know whether plaintiffs have attempted to obtain care elsewhere. We agreed to answer an interrogatory on that topic. Our understanding is that Defendants are taking this issue under advisement.

We stated that we objected to your request for educational records as not sufficiently related to the issues at stake in the preliminary injunction. We also stated that we are concerned that sending subpoenas to plaintiffs' schools could compromise their privacy by revealing they are transgender. Our understanding is that Defendants are taking this issue under advisement.

#### Depositions

The parties did not come to an agreement regarding the possibility of depositions but discussed tentative plans regarding what depositions they may seek. You stated that you may wish to take depositions of the parent plaintiffs and Dr. Lacy. You also asked whether we intended to call any of our adolescent plaintiffs as witness at the hearing. We stated that we did not yet know and that we believed it is possible for the court to rule on the preliminary injunction without a hearing. You stated that if we intended to call a plaintiff as a witness you should have the opportunity to depose them. We asked you to consider deposing only one parent of one of the minor plaintiffs instead of all three.

You stated you did not know whether deposing experts would be necessary. We stated that we do not think expert depositions are necessary and stated that prior depositions of our experts are publicly available on the dockets of cases in which they have been deposed. You noted that you would consider whether expert depositions are necessary in light of the availability of their previous depositions.

We believe that additional discussions would be productive, and as stated above, request that you notify us before filing a discovery motion so that the parties can first seek to resolve any issues without involving the court.

Thanks,  
Josh

**Joshua Block**

Pronouns: he, him

Senior Staff Attorney

Jon L. Stryker and Slobodan Randjelovic

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