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P R O C E E D I N G S

(In open court.)

THE COURT: Good morning.

All right. Let's take up the WPATH motion first.

Mr. Ragsdale, are you going to argue on this one?

MR. RAGSDALE: I am, although I suspect I will need assistance from Mr. Lannin, but I was going to start, Your Honor.

THE COURT: Fair enough. Proceed at your leisure.

MR. RAGSDALE: Okay.

Good morning, Your Honor. Barry Ragsdale for WPATH, along with Mr. Lannin, as well.

We are here at the Court's direction, and anxious to comply with whatever instructions the Court has for us.

I can give you a little background of what's happened since the last time we were in front of you, if that would be helpful.

THE COURT: That would be great. I'm certainly interested in -- the two issues that I think I would want to jump straight to is what, if any, effect does the fact that you guys filed a brief early on in this -- I know that doesn't make you a party, but you certainly put these guidelines, I would say, to the heart of the case. And then I want to hear about this D.C. Circuit matter.

MR. RAGSDALE: Sure.

1 I think our position, Your Honor, obviously is that an
2 amicus is not a party to the case, so that we would still be
3 judged and viewed as a nonparty for purposes of discovery.

4 Obviously, we offered those guidelines, along with the
5 other organizations that offered guidelines, in an effort to
6 help this Court as a friend of the Court. And we did that
7 knowing, obviously, that they were going to be at issue. They
8 would have been at issue, Your Honor, whether we filed an
9 amicus brief or not, right? The plaintiffs would have relied
10 on them, and the State would have attacked them.

11 So we don't believe that the fact that we did file an
12 amicus brief changes the calculus that this Court uses in
13 determining whether or not third-party discovery is justified,
14 or burdensome, or any of those categorizations.

15 As I said, we knew, and I think all parties knew that the
16 guidelines themselves were going to be at issue. Our issue,
17 obviously, is with delving into the background of how the
18 guidelines got done.

19 The science of the guidelines is going to be an issue in
20 your courtroom. And the parties that are present are going to
21 argue the science of those guidelines.

22 Our objections, obviously, stem from the internal, I'd say
23 politics, the internal decision making that went into the
24 formulation of those guidelines -- not the science of it, but
25 the internal parts. And that's where we have come to blows to

1 issue with the State is their intent to delve into that.

2 Last time we obviously argued the motion with this Court.
3 You gave us very wise instructions to go and try to reach a
4 compromise. And we did.

5 We had two separate meet and confers with the State, in
6 which we attempted to try to find some middle ground that would
7 let us go forward, and, you know, eliminate the necessity for
8 you having to rule on that motion -- not that that's a burden,
9 but it's something that we could live with. And we did that.

10 Now, intervening in that same time period during those
11 meet and confers, where we met in good faith with the lawyers
12 from the State to try to work it out, actions overtook us in
13 D.C. Mr. Lannin is actually counsel in that, and he can talk
14 to you specifically about what happened.

15 But as we sit here today, we have an order that was
16 entered by Judge Nichols that has been stayed temporarily for
17 purposes of the D.C. Circuit to review it. That obviously puts
18 us in a difficult position vis-a-vis those two cases, Your
19 Honor.

20 We certainly don't want to be in a position where we
21 voluntarily turn over documents that we are, at this point,
22 protected from having to turn over in D.C. And that's why we
23 brought that to this Court's attention.

24 To the extent you have detailed questions about D.C.,
25 Mr. Lannin is probably the person to direct those to.

1 Thank you, Your Honor.

2 THE COURT: Uh-huh.

3 MR. LANNIN: Good morning, Your Honor.

4 THE COURT: I suspect the State is going to say, hey,
5 this D.C. Circuit matter is totally different than ours, it
6 doesn't rise and fall on the issue of these guidelines. So I'd
7 say jump straight to the heart of that.

8 MR. LANNIN: Your Honor, I'm happy to.

9 And, in fact, I think at its core, both Florida and the
10 State of Alabama are seeking the exact same materials. And
11 they've both represented that it goes to the heart of the
12 matter.

13 In fact, in Florida, the Court -- I'm sorry -- the State
14 vigorously argued to the district court there, Judge Nichols,
15 that there should be no stay of his order producing some of
16 these materials because, in fact, that's the language of the
17 standard. It goes to the heart of the matter.

18 So with respect to the State, I just -- I don't see there
19 being a distinction. I think the issue is whether or not the
20 internal deliberative process, those materials, is fair game.

21 And to amplify what Mr. Ragsdale said, coming off of Your
22 Honor's last hearing, we did attempt to reach a compromise. In
23 the interim, Judge Nichols, in D.C., had clarified his original
24 order and ordered WPATH to produce certain internal materials.
25 And it wasn't a voluminous collection of e-mail searching, and

1 things like that, but it was a collection of materials that
2 evidenced the internal process.

3 And, Your Honor, WPATH went to work and started gathering
4 those materials. And was preparing a deponent to testify about
5 them because Judge Nichols had so ordered. And literally the
6 evening before we were set to produce the deponent, potentially
7 produce those materials, the D.C. Circuit stayed that order.

8 So, as it sits, WPATH has a collection of materials that
9 reflect internal deliberative process. I suspect that's
10 exactly the sort of materials that the State of Alabama is
11 seeking.

12 Nonetheless, the D.C. Circuit has instructed WPATH not to
13 produce those materials to Florida. And, so I think, as
14 Mr. Ragsdale rightly puts it, we are in kind of a box.

15 And I -- I think we and the State agree that Your Honor's
16 guidance on what to do here would be appropriate. And I
17 apologize if our notice to the Court suggested otherwise.

18 I think, you know, frankly the parties had a meet and
19 confer shortly before we filed those notices and agreed that,
20 at the end of the day, we may just need an order from Your
21 Honor so that we know how to proceed.

22 THE COURT: Understood.

23 Well, I think everybody agrees this case rises and falls,
24 to some degree, on these guidelines, right?

25 And I am pulling a few quotes here from the brief you

1 filed with this Court last year. You know, "The guidelines are
2 characterized as established evidence-based clinical
3 guidelines," "the product of careful and robust deliberation,"
4 "subject to rigorous requirements," "the result of a drafting,
5 comment, and review process that took five years," et cetera,
6 et cetera.

7 So, you know, I, obviously, to some degree, think the
8 State ought to be able to look behind the curtain on that. You
9 know, are there specific items here that you want to address,
10 as far as what you absolutely please don't make us turn this
11 over, as opposed to, well, really, you know, it won't kill us
12 if they get this?

13 MR. LANNIN: Your Honor, I appreciate the question.

14 And it is a very difficult line to draw because, at its
15 base level, we're talking about First Amendment issues now, and
16 what's protected now and what's not. And, obviously, now the
17 D.C. Circuit will take a close look at that issue and attempt
18 to divine a line in this case.

19 I think, in our view, you know, we had reached actual -- a
20 reasonable compromise with Florida that we would be able to,
21 for example, redact the names of any individuals that appeared
22 on internal documents, which goes some way to some mitigating
23 some First Amendment issues. And we had, you know, with Judge
24 Nichols's guidance, I think reached a compromise where the
25 organization was not turning itself inside out to produce every

1 relevant e-mail or document that could ever exist, but rather,
2 you know, as Judge Nichols ordered, a set of documents that
3 were sufficient to show the internal process.

4 So, for example, drafts of earlier chapters, comments to
5 those drafts, comments that members made, comments they
6 received, how they were addressed, those types of materials
7 that the organization could get its hands on without having to
8 hire a vendor and doing, you know, very expensive e-discovery.
9 That was what we collected.

10 And to be honest with Your Honor, obviously, that's the
11 materials that are sitting on a hard drive now. They're
12 just -- they haven't been produced pursuant to the D.C. stay.

13 I can't tell Your Honor that WPATH would be excited about
14 producing anything. And, obviously, we now have a feeling the
15 D.C. Circuit at least sees there's an issue here and wants to
16 take a closer look.

17 But if Your Honor is inclined to disagree with that, and,
18 as is your right, order the organization to produce something,
19 I could only suggest that, you know, the guidance that Judge
20 Nichols gave in the first instance may be a nice elegant place
21 to start there.

22 THE COURT: I tell you what. Why don't we switch
23 sides, let the State take a turn. And then I probably will
24 have questions for all of you.

25 MR. LANNIN: Very good. Thank you, Your Honor.

1 MR. LACOUR: Thank you, Your Honor. Edmund LaCour
2 here on behalf of the defendants.

3 I think there's a lot more for us to say that we didn't
4 say back at the hearing in February. As you noted, Your Honor,
5 the WPATH did come to this Court selling itself not as an
6 advocacy group, but as a, quote, respected professional
7 organization who was putting forward dispassionate science, not
8 impassioned advocacy.

9 Plaintiffs invited you to rely on those WPATH guidelines.
10 The United States invited you to rely on those guidelines. In
11 the preliminary injunction order, it appears that you, at least
12 as a preliminary matter, did place some reliance on those
13 guidelines. And so as you were just stating before, we do
14 think it is fair. And we think it is critical to a fair trial
15 that we are able to test those guidelines.

16 My friend suggested that our case is just like Florida's.
17 I dispute that for two fundamental reasons.

18 First, the Florida case, at least as a preliminary matter,
19 when the Court in Florida denied the motion for preliminary
20 injunction that the plaintiffs had brought there, applied a
21 much more state friendly legal standard. Basically -- I'm
22 reading now.

23 This is docket entry 64 from that case, 4:22-cv-325, at
24 page 4. And the standard there was if the State has reasonably
25 determined -- which is like a rational basis, a state

1 deferential standard.

2 If the State has reasonably determined these treatments
3 are experimental, the refusal to pay for them under the
4 Medicaid program is unconstitutional, or violates the ACA
5 non-discrimination provision, only if the State pays for other
6 equivalently experimental treatments, the plaintiffs will face
7 a difficult task to show that any other treatment is
8 equivalently experimental.

9 So a far more state friendly standard than what was
10 applied at the preliminary injunction stage, where the Court
11 recognized that these treatments carry very severe harms,
12 numerous harms, including loss of fertility, loss of sexual
13 function. But then the Court wrote, Nevertheless, WPATH has
14 put forward these guidelines. So very pro WPATH, very -- like
15 a higher burden for the State to satisfy, at least under
16 plaintiffs' approach to the case.

17 Second, we have a distinction, in terms of the evidence
18 that was presented by Alabama to Your Honor versus the evidence
19 that was presented by Florida and the D.C. case, which is -- I
20 think we presented significant evidence of bias, and
21 significant evidence to call into question the validity and the
22 soundness of the WPATH guidelines, evidence that was not
23 presented to the District Court in D.C. or to the D.C. Circuit.

24 And it's documented in our response to the motion to
25 quash, including the activists shouting down Dr. Zucker at the

1 2017 conference, the removal inexplicably of any age limits for
2 cross-sex hormones, mastectomies, and bottom surgeries on
3 children, and other issues that we find to be deeply troubling.

4 And including this -- and, yes, it does require us to look
5 beyond just the glossy pdf that WPATH has produced. But their
6 decisions on what not to include and why not to include them --
7 why is there not a chapter on de-transitioners? Why is there
8 not a chapter on ethics? We know there is a draft chapter on
9 ethics, it's not in final version. But they do have a chapter
10 on eunuchs, for example.

11 So for all those reasons, we think, both as a legal matter
12 and as a factual matter, our case is different from Florida's.
13 And for that reason, we think we are entitled to this
14 discovery. It is obviously relevant under the plaintiffs'
15 standard of the case.

16 THE COURT: Do you want to jump to the specific things
17 you're requesting and just quickly address those?

18 MR. LACOUR: Yes, Your Honor.

19 I can say that we were in negotiations. They were moving
20 along. We identified, I think, ten potential custodians, I
21 think five of whom are WPATH executives who have WPATH e-mails,
22 which should make it a little bit easier to search them. And
23 then five other very senior members of WPATH who don't work
24 directly for WPATH, but are on the board or on certain, like
25 guidelines drafting boards, and had senior positions in that

1 process.

2 We were working towards coming up with search terms. And
3 then things started to break WPATH's way in the D.C. Circuit,
4 and they cut off discussions -- they didn't cut off
5 discussions. They basically said that they were not going to
6 be able to keep moving forward with us.

7 THE COURT: All right. Why don't we give them another
8 bite at the apple, and then we'll see where we are.

9 MR. LACOUR: Thank you.

10 MR. LANNIN: Your Honor, we're not a party to the
11 Florida litigation, WPATH isn't. We attempted to submit an
12 amicus brief, but the District Court did not. So I am not
13 intimately familiar with the judge's decisions down there,
14 except to say that I know because Judge Nichols in D.C. asked,
15 that the judge in Florida has made it clear that he intends to
16 conduct a sweeping review of the evidence.

17 And it's not evidence limited to the time that Florida
18 enacted the ban that's challenged there. It's an
19 evidence-based review up to the moment. What does the
20 contemporary record show? And that's why Florida sought
21 exactly the same types of materials that Alabama has sought
22 here.

23 As I said to Your Honor earlier, the standard, the heart
24 of the matter, that's exactly the standard that was at issue in
25 the D.C. Circuit. That's the language that the D.C. Circuit

1 uses for evaluating relevance in this context.

2 And Florida urged the Court that this discovery did go to
3 the heart of the matter. Judge Nichols agreed, obviously, in
4 ordering the discovery and refusing to stay it.

5 The D.C. Circuit may have a different view. We don't
6 know. We know they stayed that order.

7 So I candidly and respectfully disagree with the State
8 about the importance of the discovery. I think it's the same.

9 You know, I think the -- the issue of, you know, when we
10 had our first meet and confer and the State proposed ten
11 custodians, I was frankly a little shocked because that's a lot
12 of folks. That's more than I see in many, you know, ordinary
13 corporate cases. And it's really a list that would -- of
14 everyone who could possibly be associated with the
15 organization.

16 And, so, you know, our view and what we suggested to the
17 State at that point was that it may make sense to take a more
18 targeted approach. Let's start with, as Judge Nichols said,
19 documents sufficient to show, instead of e-mail searches, and
20 collections, and search terms, maybe we can ask these folks to
21 just put their hands on documents that are responsive to these
22 issues on central servers, or on their own files and send it to
23 us, and then we could from there produce the materials that
24 were responsive.

25 We were in the middle of that exercise, as I said to Your

1 Honor earlier, when the D.C. Circuit stayed their order. So --

2 THE COURT: So I guess here would be my thought. You
3 know, after hearing both sides of this, certainly I have read
4 what you put before me. And if I don't let the State look
5 behind the curtain, I'm really, you know, not giving them a
6 chance to get discovery that truly goes to the heart of this
7 case. And I am making them try this with a hand behind their
8 back.

9 To the issue of whether some of this is burdensome, or
10 what the manner is, you know, I guess I would put it this way:
11 If you guys wanted to take some time this morning, or whatever,
12 to discuss method and manner, you know, I'm certainly open to
13 that. If you want me to just rule, I can just rule. But I'm
14 inclined to let them have the discovery.

15 Now, if there is a better way to do it between the two
16 sides that's less burdensome or makes more sense, you know,
17 then I would say let me let you go back and talk about that.
18 Or if you just want me to rule, I can do that.

19 But I think both of you know far more about the
20 particulars of what you're looking for and how to get it, and
21 to also protect both of your clients. So I guess that would be
22 my question. Do you want some time to talk? Is that something
23 you could work out in 20 minutes, or not really?

24 MR. LANNIN: Your Honor, I think 20 minutes may be
25 optimistic.

1 THE COURT: Right. I understand.

2 MR. LANNIN: But let me say this, Your Honor. I
3 appreciate your guidance.

4 I'm never adverse to talking further. I think if you
5 could give us a day or two to convene. My concern for Your
6 Honor, just so you know what I am thinking, you know, at the
7 end of the day, if there's a compromise to be had or not, I
8 think we, WPATH, would appreciate Your Honor memorializing it
9 in an order, because the D.C. Circuit has now instructed us not
10 to produce some of these materials to the State of Florida.

11 And so, again, not to reveal too much of my thinking
12 litigation-wise, but if we voluntarily turn over materials that
13 we have vigorously urged the D.C. Circuit we shouldn't have
14 to --

15 THE COURT: Understood.

16 MR. LANNIN: -- I am concerned that Florida's going to
17 turn around and say, Your Honor -- or to the D.C. Circuit how
18 could they possibly mean this when they voluntarily turned it
19 over in Alabama.

20 THE COURT: Got it.

21 MR. LANNIN: Your Honor's imprimatur on an order,
22 whether by agreement, or simply because we just need Your Honor
23 to rule, I think is the aiding of that.

24 THE COURT: All right. So am I hearing you say, then,
25 that y'all will talk, if you work something out in a day or

1 two, then for me to put it in an order? Or do you want me to
2 put it in an order right now and ask you to talk and determine
3 the method?

4 MR. LANNIN: I think an order -- I'm interested in the
5 State's views, but I think the latter might be helpful, Your
6 Honor. An order instructing the parties -- are you
7 contemplating it would be an order to produce materials and
8 then to figure out exactly how to implement it?

9 THE COURT: Yes.

10 MR. LANNIN: That, in my view, would be helpful. And
11 then if there are disputes as to the methodology or the means,
12 I suppose we could come back to Your Honor and seek guidance on
13 that.

14 THE COURT: Mr. LaCour, do you have thoughts on this?

15 MR. LACOUR: Your Honor, we served the subpoena
16 five months ago. We had a hearing a month ago.

17 What I think I'm hearing from my friend here is they need
18 an order from you to move forward. I think an order would be
19 helpful, as well, in that respect, too. And if they do intend
20 to seek a mandamus from the Eleventh Circuit, then we can prove
21 that up. But hopefully keep things moving forward, in terms of
22 discovery, because we do believe this is very important
23 discovery if the case is going to proceed under the plaintiffs'
24 legal theory.

25 THE COURT: Got it. So just so for our own schedule

1 and timing, you know, would it be your intent to go to the
2 Eleventh Circuit over this discovery order? It doesn't hurt my
3 feelings either way. I'm just trying to figure out our own
4 timetable here.

5 MR. LANNIN: Your Honor, I don't want to sound like I
6 am punting. I don't know.

7 THE COURT: Okay.

8 MR. LANNIN: I think it would depend on what agreement
9 could be reached, to be honest.

10 THE COURT: Okay.

11 MR. LANNIN: If you would indulge me for one second,
12 Your Honor, I just -- I have a feeling what I'm saying today
13 will be quoted back to me in the D.C. Circuit at some point by
14 Florida.

15 And so I want to make it clear, you know, WPATH feels that
16 any discovery inside their organization is inappropriate and is
17 violative of its First Amendment issues.

18 THE COURT: I hear you loud and clear on that.

19 MR. LANNIN: I understand, Your Honor. I'm just
20 putting it on the record for that day in the future.

21 THE COURT: Understood.

22 MR. LANNIN: But I do agree that an order from Your
23 Honor would be helpful in moving this forward.

24 THE COURT: Okay. All right.

25 Anything else we -- Mr. Ragsdale?

1 MR. RAGSDALE: Can I say one thing?

2 MR. LANNIN: Of course.

3 MR. RAGSDALE: Your Honor, I've heard you now say
4 several times that the State's entitled to a peek behind the
5 curtain. And I think you -- I don't think we necessarily
6 disagree with that. I would just simply caution that there is
7 a difference between a peek behind the curtain and rifling
8 through our private papers and possessions. And that's really
9 kind of where we've ended up.

10 We have tried to work with the State to give them that
11 look behind -- here's how the guidelines were reached, here's
12 the studies we relied on, here's the science that we looked at,
13 which is really what this ought to be about.

14 The State, it seems to me, is really more intent on
15 attacking the organization. And that's where the First
16 Amendment implications arise.

17 And so, in drafting your order, which we welcome, I would
18 just simply ask for the Court to recognize that there is a
19 difference between an opportunity to look behind the curtain
20 and an opportunity to go on a witch hunt against an
21 organization with which the State apparently disagrees.

22 And that's the only thing I would add to our final
23 comments. And probably Mr. Lannin's going to tell me he wishes
24 I wouldn't have said that. But that's my thoughts.

25 THE COURT: Understood.

1 Does the State want the last word?

2 MR. LACOUR: Your Honor, as we said before, we want to
3 be able to test whether this is dispassionate science or
4 impassioned advocacy that has produced these guidelines. We
5 want the documents we need to be able to make that assessment.
6 And we have put forward evidence that we think shows there is
7 reason to be concerned that this is not simply dispassionate
8 science being done by this group.

9 And so we hope that we can get adequate evidence to be
10 able to present a full case without, as Your Honor alluded to,
11 having one hand tied behind our back.

12 So thank you very much for your attention to this matter.

13 THE COURT: All right.

14 MR. RAGSDALE: Thank you, Your Honor.

15 THE COURT: Yes. Thank you.

16 MR. LANNIN: Thank you, Your Honor.

17 THE COURT: Let's talk about the motion for judgment
18 on the pleadings. Is that going to be you, Mr. Davis?

19 MR. DAVIS: That's me.

20 THE COURT: All right. And just so I'm clear -- do we
21 have any -- as we sit here today, do we have any discovery that
22 has been propounded by the other side that would be the subject
23 of your motion?

24 MR. DAVIS: Not that's currently an issue, Judge.
25 There was some served by the United States that would go

1 towards legislative motive after -- and as part of our meet and
2 confers, those are no longer in play.

3 THE COURT: Gotcha.

4 MR. DAVIS: We still think the issue's important and
5 it would be helpful to simplify the case.

6 THE COURT: So a couple of questions I would have is,
7 you know, your motion for judgment on the pleadings really
8 seems to be sort of trying to build a wall on discovery.

9 And so I guess I'm -- my question would be: Wouldn't that
10 be better addressed by a motion to quash in the event that
11 somebody filed something that was objectionable?

12 MR. DAVIS: We don't think so, Judge.

13 And I forgot I was cautioned that I need to introduce
14 myself for the record before I speak. I'm Jim Davis arguing
15 for the defendants.

16 We think the Court -- it would be appropriate for the
17 Court to go ahead and address these issues.

18 The United States came in. They promised you that they
19 weren't doing anything more than tagging along on the equal
20 protection claim that the plaintiffs were bringing. But now
21 they're arguing for different types of equal protection claims,
22 in addition to that original one. So we think it would be
23 helpful to simplify the case and hold the United States to its
24 promise.

25 We also think that under Rule 12 we're entitled to a

1 judgment on the pleadings because the United States has not --
2 its complaint does not contain the type of allegations that
3 would support these other varieties of equal protection claims.

4 Their Arlington Heights invidious discrimination claim
5 they say they want to bring needs to be supported by some
6 allegation somewhere that the Legislature was motivated, at
7 least in part, by invidious discrimination. But their
8 complaint contains exactly zero allegations.

9 So we think under Rule 12 we are entitled to a judgment on
10 the pleadings at this time, and that it would be helpful to
11 simplify the case. Because the United States is reserving the
12 right to go after this stuff in the future.

13 We're here. We have got the motion in front of you. We
14 would like a ruling now that we're entitled to this. And to be
15 clear to the parties what kind of record we need to be
16 building.

17 And I can address the arguments on the rational basis
18 claim that they say they're also bringing and why -- in more
19 detail why we think we're entitled to it for each variety. But
20 that's why we think it would be helpful to go ahead and get a
21 ruling now.

22 THE COURT: All right. Who's going to argue on the
23 other side?

24 MS. TOYAMA: I am, Your Honor.

25 THE COURT: All right.

1 MS. TOYAMA: Good morning, Your Honor. Kaitlin Toyama
2 for the United States.

3 So, I mean, just listening right now to what defendants
4 are talking about, I think there's been a lot of confusion on
5 what it means to plead an equal protection claim. And there's
6 a difference between evidentiary standards versus theories of
7 liability --

8 THE COURT: Can you stand a little closer to the
9 microphone? Thank you.

10 MS. TOYAMA: Oh, yes. Sorry.

11 And so, Your Honor, there's really two reasons to deny
12 this motion. The first goes to basic civil procedure and
13 whether it's appropriate to bring its 12(c) motion here. But I
14 think maybe it would be helpful to go back to -- go to our
15 second reason, which is that the United States has properly
16 pleaded its equal protection claim. And this is one claim. I
17 do want to be clear on that.

18 THE COURT: Can you turn her microphone up just a
19 little bit?

20 MS. TOYAMA: I can lean forward.

21 THE COURT: All right.

22 MS. TOYAMA: And I'll try to speak louder, if that's
23 helpful. I will lean forward.

24 THE COURT: I can hear you well now.

25 MS. TOYAMA: Okay.

1 So, Your Honor, the United States intervenes in this claim
2 under one claim, and that's violation of the Equal Protection
3 Clause.

4 The single claim, however, contains multiple layers of
5 analysis that can be approached in different ways. And the
6 problem with defendants' motion is that they are confusing
7 these different analytical frameworks as separate and distinct
8 claims, which is wrong.

9 So our single claim does ask one question, and that is
10 does SB 184 violate the Equal Protection Clause? And at the
11 end of this litigation, there will be one answer -- yes or no.

12 But to get to that answer, it's not a straight line.
13 There is -- the path to that answer is varied, it's complex,
14 and it requires different tests at different stages.

15 And so taking a step back and looking at equal protection
16 on a more fundamental level, the seminal cases like *Washington*
17 *vs. Davis* and *Village of Arlington Heights* establish that for
18 equal protection to come into play, there must be
19 discriminatory intent or purpose. And that a law that does not
20 intend to discriminate does not violate the Equal Protection
21 Clause. That is a requirement across the board.

22 And to be clear, when we're talking about intent to
23 discriminate, that does not necessarily mean intent to harm.
24 What we're talking about is does a law treat people
25 differently. Does it create classifications. And there are

1 different ways to identify that in a statute.

2 And so, for example, the Eleventh Circuit, in E&T Realty
3 vs. Strickland, broke these three different types of theories
4 for a statute into three categories.

5 The first are statutes that discriminate on their face;
6 the second are neutral statutes that purposefully discriminate;
7 and the third are facially mutual statutes administrated in a
8 discriminatory matter. But, again, these are three different
9 ways to show that a single statute has a requisite
10 discriminatory intent or purpose to trigger the protections of
11 the Equal Protection Clause.

12 And, here, the United States has primarily advanced the
13 theory under the first argument or the first theory, which is
14 that the intent to discriminate is clear by looking at the
15 statute on its face. But we have not foreclosed and have
16 offered evidence on a second theory, which is that the statute
17 is facially neutral, but it has the -- it still has the
18 requisite intent to discriminate. And you can find that by
19 looking beyond the face of the statute.

20 For example, that it could include statements made by
21 legislators before a law was enacted, or it could also include
22 disparate impact.

23 But, again, both approaches take us to the same
24 conclusion, that the law is intended to discriminate. We
25 cannot have an Equal Protection Clause without intent. That is

1 across the board.

2 And then from there, after we show that a law
3 discriminates and again creates a classification, treats people
4 differently, that's when we get into the question of does that
5 discrimination violate the Constitution. And so that's where
6 we have the different layers of analysis -- the different
7 frameworks for analysis.

8 So we have strict scrutiny, we have heightened scrutiny,
9 we have rational basis. But, again, we don't get into that
10 analysis until we first demonstrate that the law intends to
11 treat people differently.

12 When we get to that level of analysis, of course, we are
13 arguing that heightened scrutiny applies. And there the
14 standard turns on the State to show that SB 184 serves an
15 important government interest, and that the discriminatory
16 means are employed in a substantially related way to achieve
17 those objectives.

18 The proper justification must be genuine and sufficient.
19 It cannot differ from the law's actual purpose. It cannot be
20 hypothesized, cannot be invented post hoc in response
21 litigation.

22 In defendants' brief, and as suggested now, they're asking
23 for a judgment on, I guess, the United States' rational basis
24 claim, its Arlington Heights claim, its facial discrimination
25 claim, to the extent that claim is based on pretextual purpose.

1 But, respectfully as this explains, that is not how equal
2 protection claims work.

3 In the preliminary injunction order, Your Honor wrote that
4 the -- that there is a substantial likelihood that the
5 plaintiffs will succeed on their equal protection claim, which
6 is correct that there is one claim. You cannot break it up
7 into separate claims.

8 So given this full context, it's easy to see how the
9 United States' complaint and intervention satisfies the basic
10 pleading standard, the notice pleading standard required under
11 Rule 12.

12 For example, paragraphs 4 through 7, 24 through 39, 41
13 through 44, 46 through 54, and 57 of the complaint
14 intervention, those paragraphs allege and describe how the
15 intent or purpose of SB 184 is to discriminate. And, again,
16 here we're talking about this threshold question does the law
17 treat people differently.

18 Paragraphs 9 and 57 through 58 allege that heightened
19 scrutiny applies.

20 Paragraphs 8 and 59 discuss how the law fails heightened
21 scrutiny.

22 And in the alternative, paragraphs 48 and 60 discuss how
23 the law fails rational basis review.

24 So that complaint is clearly sufficient to prove -- to
25 provide notice as to the United States' equal protection claim.

1 Though if the Court is inclined to find that more information
2 is needed, we would respectfully ask for leave to amend. But
3 going --

4 THE COURT: Well, I don't know that I heard you
5 specifically address the wording of your complaint. I think
6 the State's position is pretty clear that that should have been
7 specifically alleged in the complaint.

8 And so I would ask you to address that. But also I'd ask
9 you to address -- I know you were not here on that date, but,
10 you know, the Department of Justice did come in and say we
11 assert no claim outside of what is already before the Court, no
12 other theories. We're just asking to join as a party to the
13 already existing claims.

14 So maybe you could address that a little bit.

15 MS. TOYAMA: Right, Your Honor.

16 I think I could actually combine the answer into one --
17 the questions into one answer, which is that plaintiffs and
18 United States -- again, we are bringing one claim -- equal
19 protection claim. And there are just different theories and
20 different tests that go into answering the question of whether
21 the equal protection clause is violated.

22 And so we're not required under the rules to plead every
23 single specific argument, every theory. We just have to
24 establish that -- or we have to plead sufficient facts
25 demonstrate --

1 THE COURT: Let me cut you off right there and let
2 Mr. Davis come back to the podium. I will give you another
3 bite at the apple.

4 MS. TOYAMA: Okay.

5 MR. DAVIS: Judge, they're all calling it an equal
6 protection claim, but there are different varieties of equal
7 protection claim and a different way to get there.

8 Even if what my friend is saying is true, that this is all
9 just an equal protection claim, they're still doing something
10 different than what the private plaintiffs are doing.

11 The private plaintiffs are arguing that this statute
12 that's being challenged draws a line between transgender
13 children and other children, that it's not sufficiently tied to
14 a sufficiently important state interest. The private
15 plaintiffs, in other words, put the statute itself on trial.

16 The United States says that they reserve the right at any
17 time to change the theory and put the Legislature on trial, to
18 start examining what was in their hearts and minds when they
19 passed this statute. We want to know if that's going to be in
20 the case or not.

21 We think a ruling on our motion for judgment on the
22 pleading is a way for the Court to be clear that the United
23 States is going to be tied to the theory, the type of record,
24 the type of case that the private plaintiffs are bringing.

25 THE COURT: So she says, hey, if you decide otherwise,

1 then let us amend. Do you want to address that?

2 MR. DAVIS: Well, amendment would fix the lack of
3 allegations in the complaint, but it would be, I think,
4 breaking their promise to tag along with what the private
5 plaintiffs are doing. I think it would turn this into a very
6 different type of case.

7 It's not the case that you heard at the preliminary
8 injunction hearing. It's not the case that we have been
9 litigating for these past several months.

10 MS. TOYAMA: Thank you, Your Honor. Again, Kaitlin
11 Toyama for the United States.

12 I guess I would answer that by -- in a couple of different
13 ways. The first is that the United States is bringing the same
14 claim as plaintiffs. And our primary theory is that the law
15 does discriminate on its face. And so, again, that means just
16 by looking at the words on paper, it's clear that the law
17 discriminates. But that --

18 THE COURT: So depending on how I rule on this, is it
19 going to be your intent, then, to go subpoena legislators'
20 e-mails, and correspondence, and this sort of thing?

21 MS. TOYAMA: Your Honor --

22 THE COURT: Is that where you are going to head?

23 MS. TOYAMA: I don't think I can really speak to what
24 our intention is for current -- for the next phase.

25 THE COURT: Well, I need you to speak to it. I need

1 you to answer my question. I need to know that. Is that where
2 you are headed?

3 MS. TOYAMA: Well, Your Honor, we're currently --
4 well, there are current discovery requests to defendants asking
5 for information along those lines.

6 THE COURT: Okay. So I don't know what -- I'm not
7 being rude. But I don't know what's a secret about that. If
8 that's -- if this is your theory of the case, then I don't know
9 why you can't tell me what you're going to do.

10 MS. TOYAMA: And I wish I could -- I wish I could
11 answer yes or no, but to be perfectly honest, I don't know what
12 our plan is going to be.

13 THE COURT: Let's take a five-minute break, and you
14 can confer with your folks, and then you can let me know what
15 your intent is.

16 MS. TOYAMA: Okay. Thank you, Your Honor.

17 (Recess.)

18 THE COURT: What did we decide?

19 MS. TOYAMA: Thank you, Your Honor. Again, Kaitlin
20 Toyama for the United States.

21 So I do want to confirm that we are not going to be -- we
22 are not going to be subpoenaing legislators. But I do want to
23 just make a point that public statements from the legislators
24 have already been entered in this case, and we should be
25 allowed to present that information at trial. Whether that --

1 so because it does go to our burden of proof. And so whether
2 we can meet our burden of proof, it seems more appropriate to
3 be decided at the time of trial.

4 I did want to go back, if I may, to actually your first
5 question to defendants about whether this whole motion is moot.
6 And our position is that it is moot, it's untimely, and it's
7 also procedurally deficient under Rule 12(c).

8 And so as you mentioned, there are no current discovery
9 requests that are pending that this motion could apply to.
10 When defendants filed this motion, they filed it concurrently
11 with their brief in support of the motions to quash. And when
12 Your Honor denied -- or when Your Honor granted that motion,
13 ostensibly all the arguments that went into whether the
14 subpoenas were appropriate, those were resolved. And so
15 there's no current discovery that this motion could apply to.

16 Rule --

17 THE COURT: All right. So I have a quick question for
18 you, then, Mr. Davis. Could you not accomplish what you want
19 with a 12(e) motion for a more definite statement?

20 MR. DAVIS: That would bear some thought, Judge. And
21 I would want to confer with colleagues about that. Perhaps so.

22 The main thing we want to do is streamline the case, find
23 out what is in the case and what is not, and whether they're
24 going to be held to their promise that they were just -- not
25 going to do anything different from what the private plaintiffs

1 did.

2 If you would like, Judge, we could file something with the
3 Court in the next couple of days after we have had a chance to
4 discuss it as to whether we want to do this, whether we want a
5 ruling on our motion for judgment on the pleadings, or whether
6 we would be content to ask for a more definite statement from
7 the United States. We don't want anything to drag the case
8 down.

9 THE COURT: I understand. And I don't necessarily see
10 this as a new claim as much as a new theory of the claim or an
11 additional theory of the claim. At the same time, I certainly,
12 you know, want everybody to be on notice of, you know, the
13 clock is running and the sand is running through the hourglass
14 right now, so...

15 MR. DAVIS: Exactly. We want to be able to enforce
16 our law again. We want the chance to convince you that this
17 law is constitutional so that we can protect these kids.

18 And, you know, if you want to just tell the parties now
19 whether you're going to let the plaintiffs or the United States
20 run down a different rabbit trail of legislative intent, or
21 whether you're going to hold them to the theories that we have
22 been litigating so far, that would be helpful, too.

23 THE COURT: Right. I think I'm going to have to think
24 on that --

25 MR. DAVIS: Fair enough.

1 THE COURT: -- a day or two myself. But, yes, we will
2 have to move down that line.

3 Anything else you want to say?

4 MS. TOYAMA: Sure, Your Honor. Just very quickly.

5 I do just want to also make clear that the United States
6 and the plaintiffs both reserved our right to go through a
7 different type of analysis for the equal protection claim, so
8 the Arlington Heights claim.

9 And on the first issue of whether the law is facially
10 discriminatory or facially neutral, that is a claim -- or
11 whether the law is facially neutral was something that was
12 raised by defendants on the Eleventh Circuit.

13 And so to the extent that we're going to be limiting
14 claims, it needs to be equal. We need to be able to prove our
15 case on different theories that defendants are also going to be
16 raising.

17 THE COURT: All right. Anybody have anything else
18 they want the Court to hear on this? Fair enough.

19 All right. Thank you.

20 All right. Let's talk about the HHS issue.

21 MR. DAVIS: Jim Davis for the defendants again.

22 What I was just discussing with my friends representing
23 the United States was whether it made sense to talk about the
24 interrogatories and the requests for productions together
25 because of the overlap.

1 They're planning on arguing those separately. I will
2 start with whichever one you want me to start with, but a lot
3 of it's going to apply to both.

4 THE COURT: Right. Right. You know, to the extent we
5 could do them together, that would be great. If you want to do
6 it in two separate tranches, that's fine, too.

7 MR. DAVIS: I plan to address them both, and if my
8 friends wish to divide the argument up however they wish, of
9 course, that's their right.

10 Jim Davis again for the defendants, Judge.

11 The United States inserted itself into this litigation
12 arguing that puberty blockers and cross-sex hormones are safe,
13 effective, and medically necessary for children with gender
14 dysphoria.

15 And in this case, they have cited material from the United
16 States Department of Health and Human Services for the
17 proposition that if we don't give children with gender
18 dysphoria these treatments, those children would be harmed.
19 They have documents and information that will help you decide
20 whether those claims are true.

21 At HHS they have folks who look at these issues, who are
22 monitoring ongoing experiments on children, who are --

23 THE COURT: So let me drill down right there.

24 MR. DAVIS: Okay.

25 THE COURT: I didn't see a case that I thought set the

1 woods on fire as the definitive, you know, the HHS 100 percent
2 can be treated as DOJ and the government for purposes of
3 discovery.

4 MR. DAVIS: Okay. Let me go to that point, then.

5 THE COURT: All right.

6 MR. DAVIS: Because their objection, they say HHS is
7 not part of the United States for purposes of discovery.

8 THE COURT: Right.

9 MR. DAVIS: I think that's crazy. There is nothing in
10 the rules that says the United States has some kind of
11 exemption.

12 Now, I can see -- it would be one thing -- the United
13 States is a large entity, the federal government. It would be
14 one thing if we were saying you need to go look at commerce,
15 and state, and the treasury, and defense, and every agency
16 you've got. You need to go look there.

17 We have targeted HHS, which has folks who are looking at
18 this. They are funding studies that experts for the plaintiffs
19 and the United States are saying is part of this so-called vast
20 body of evidence supporting the treatment.

21 So they are very much involved in these issues. And one
22 of the cases we cited -- and you are right, Judge. There is
23 nothing from the Supreme Court that says definitively one way
24 or another what you are supposed to do. But one of the cases
25 we cited, United States vs. UBS Securities, says the definition

1 of United States also include agencies that inform the
2 policies, rules, and regulations that the executive branch
3 sets.

4 We also cited a case from the Eastern District of
5 Louisiana, *Deane vs. Dynasplint Systems, Inc.*, where they said
6 you're not allowed to just limit yourself to the Department of
7 Justice, the lawyers.

8 DOJ doesn't have teams of scientists looking at this
9 stuff. HHS does. So they're all -- both agencies are subject
10 to directives from the same president. HHS is part of the
11 United States.

12 And I'd say this, too. The Department of Justice is not
13 the intervening party. And Merrick Garland is not the
14 intervening party. The intervening party is the United States.
15 They intervened under 42 U.S.C. 2000h-2. That statute permits
16 intervention for or in the name of the United States. That's
17 the party.

18 The case that they cite under *U.S. vs. New York*, the
19 language is -- says that -- in that case, the Attorney General
20 intervened under a different statute. And that statute says
21 that the Attorney General may intervene -- for or in the name
22 of the United States may intervene in such an action. But it's
23 the Attorney General who may bring the civil -- I messed up,
24 Judge, okay? Let me go back.

25 In the case they cite for *U.S. vs. New York*, it's -- the

1 statute says the Attorney General may bring a civil action.
2 The statute they used here says the Attorney General for or in
3 the name of the United States may intervene. So the United
4 States is the party for you here. In the case they cite, the
5 statute says that the Attorney General may bring a civil
6 action.

7 So that's why we think it's perfectly fair game to say the
8 United States includes more than just the lawyers. We have an
9 agency here who, as *U.S. vs. UBS Securities*, says, is informing
10 the policies, rules, and regulations that the executive branch
11 sets.

12 THE COURT: Why don't we switch sides real quick, and
13 then I will bring you back up, Mr. Davis.

14 MS. MURPHY: Good morning, Your Honor. Amie Murphy on
15 behalf of the United States.

16 THE COURT: Good morning.

17 MS. MURPHY: Your Honor, I just want to begin by
18 addressing some of the points that defendants made about the
19 case law.

20 It's true that the cases that the United States cited are
21 a bit thin. But they come to the right result, that the United
22 States -- when the Attorney General intervenes on behalf of the
23 United States, he doesn't do so on behalf of the entire federal
24 government.

25 And a point about the cases that defendants cited, when

1 read together, it makes clear that it's not simply that the
2 Attorney General has intervened in these particular
3 circumstances. What's required is that party discovery is
4 allowed when these non-party agencies have been heavily
5 involved in the litigation, either through because there was a
6 joint investigation, or they were part of the investigation, or
7 part of the litigation of the case. And that's simply not the
8 case here.

9 Your Honor, up until this point, HHS has not been involved
10 in the case. We've simply relied on some of their research
11 that they funded in some of our pleadings. And that's not
12 enough to make them subject to party discovery.

13 The issue, the threshold question here is whether or not
14 HHS -- whether or not the Attorney General has custody and
15 control of the documents. And he simply does not.

16 Like I said, we have cited some of the research that they
17 funded, but the connection stops there.

18 This concept is not unique to the federal government. If
19 you look at in the private sector, if someone was hurt at a
20 Walmart, they can sue Walmart, but it doesn't subject all the
21 Walmart subsidiaries to party discovery. You can't get
22 discovery from jet.com, you can't get discovery from Sam's
23 Club, all because you sued Walmart. It's the same with the
24 federal government.

25 If Your Honor would like, I can move on and talk a little

1 bit about relevance, because I think that's important here,
2 too.

3 So far, up to this point, the United States has produced
4 approximately 2.5 million pages of documents. 2.3 million of
5 those documents have been over the United States' own
6 objections, and they were on behalf of HHS.

7 Now, to be clear, those 2.3 million documents consisted of
8 an administrative record, which had already been compiled and
9 produced in another lawsuit where the rule-making process
10 itself was at issue.

11 So since it had already been produced, the burden to
12 produce it here was not very great. And we did it, because as
13 we told defendants repeatedly throughout the meet and confer
14 process, if they could just narrow the scope of their requests
15 and tell us what it is that they actually wanted, we were open
16 to facilitating a production on behalf of HHS in order to keep
17 this case moving along, for efficiency, and in the interest of
18 cooperation.

19 But here's the problem, Your Honor. What defendants say
20 they want with respect to the evidence, which is evidence
21 related to the safety and efficacy of the treatments at issue,
22 what -- their requests actually demand far more than that.

23 And I am not even talking about all 45. I'm talking just
24 about the ones, the 14 that are the subject of this motion.

25 So I can give you some examples. For instance, request

1 number 6 asks for every type of document or communication
2 regarding transitioning. Not the safety and efficacy of the
3 treatments related to transitioning, but just the very notion
4 of transitioning itself. That's far more than what defendants
5 have said that they want.

6 Other requests, such as request number 18, that refers to
7 a specific study. But then, in addition to wanting every type
8 of communication and document, they also want a long list of
9 types of documents that the United States believes does not
10 bear on the outcome of this case.

11 For the first time in their reply brief, defendants
12 offered that what they want with respect to requests 18, 19,
13 and 20 is actually a little bit different. And so what they
14 say is that they want to understand the process behind the
15 study's development and implementation, to ensure that the
16 studies fairly and accurately portray the information that is
17 in the possession, custody, and control of HHS.

18 So if I understand that correctly, on the one end,
19 defendants want -- defendants' justification for wanting these
20 documents is that so their experts can critique the studies.
21 And on the other end of the spectrum, they want these documents
22 so that they can show that HHS, a government agency, is
23 potentially hiding something.

24 But on that latter point, Your Honor, defendants have put
25 forth no evidence in this case that indicates that any of the

1 research that's been funded by HHS misrepresents the real
2 picture. HHS is not on trial here, and there's no basis for
3 that theory.

4 On the other end, there is simply no need for them to have
5 the underlying documents for their experts to critique any of
6 the HHS-funded studies. The studies speak for themselves. And
7 each study includes information within it that their experts
8 can use to analyze it.

9 It includes information on the methodology. It includes
10 information on whether there were any conflicts. It also
11 includes information on funding sources.

12 So my last --

13 THE COURT: I'm assuming that not every single thing
14 in an underlying document would wind up in the published study.

15 MS. MURPHY: I'm sorry, Your Honor. Can you --

16 THE COURT: So why would it not be helpful for the
17 State to be able to see the underlying documents to understand
18 what made it into the study results and what didn't?

19 MS. MURPHY: Sure. Your Honor --

20 THE COURT: If they only have the study, then, you
21 know, they're just getting the headline. So can you address
22 that for me a little bit?

23 MS. MURPHY: Sure.

24 Your Honor, I mean, it's -- we are of the opinion that the
25 studies speak for themselves. And some of the documents that

1 they've requested go far beyond what would ordinarily be used
2 to critique a study -- the funding sources, meeting minutes,
3 board meeting minutes. All of those seem irrelevant to the
4 outcome of the study itself.

5 THE COURT: So, I mean, is there anything that you
6 would concede behind the study should be discoverable?

7 MS. MURPHY: Sure.

8 Your Honor, I think that there's definitely room for
9 compromise on a lot of these requests. Specifically the ones
10 where they've specified studies and they've -- if -- we can
11 probably have a discussion about what documents we -- the HHS
12 could produce.

13 THE COURT: Well, it just seems to me I can make a
14 study come out any way I want it to. I'm not saying that's
15 what happened here. But I've been around 53 years, and I've
16 certainly seen studies that came out that were one-sided on a
17 variety of issues.

18 So if you -- you know, I can tell you as we sit here today
19 I would think that it would be very relevant, you know, the
20 decision making that went into how these studies arrived at the
21 result.

22 So, you know, I know there can be some quibbling about,
23 you know, which exact items should be included in that, but
24 just to say you can only have the study, that seems to be --
25 that seems to be drawing the line too far to one side.

1 MS. MURPHY: Sure.

2 And, Your Honor, I think one of the problems we have is
3 that a lot of the documents underlying the studies that
4 defendants have requested would most likely be protected by the
5 deliberative process privilege. And so I think there is -- the
6 documents are going to fall on a spectrum.

7 There's going to be some that I think, as Your Honor
8 points out, are probably relevant to the outcome of the study
9 and may assist in them analyzing the study. On the other end
10 of the spectrum, there's things like e-mails and internal
11 communications that the disclosure of which would violate
12 deliberative process. And that's what we're most concerned
13 with.

14 And the reason why that's important, Your Honor, is
15 because what makes studies of high quality is the ability for
16 the employees and the researchers to have frank discussions, to
17 have the ability to speak up to say -- you know, to question
18 the evidence, to question the underlying data. But if those
19 documents are subject to discovery, they're unable to have
20 those frank communications.

21 THE COURT: So do I hear you saying today that
22 whatever the result of this, that DOJ will facilitate discovery
23 with HHS?

24 MS. MURPHY: Yes, Your Honor. I mean, we've told
25 defendants all along that we've been willing to facilitate a

1 production on behalf of HHS, despite the fact that we don't --
2 we are not legally obligated to do so.

3 THE COURT: So based on what I have kind of given you
4 as my thoughts on this, what items would you now say, hey, yes,
5 we think this should be discoverable? Tell me the items you
6 think, yes, I'll go to HHS and I will get these things for
7 them, but, Judge, these three things, or whatever, we don't
8 think we ought to discuss.

9 MS. MURPHY: I think -- it's hard for me to name
10 specific documents, Your Honor, since I -- I can come up with
11 some examples, maybe, from the list.

12 THE COURT: Would it help if we took another
13 five minutes and let you confer with your folks on that? I'm
14 just trying to find a way to solve our issue today if we can.

15 MS. MURPHY: Sure.

16 Your Honor, I think part of the issue is that simply
17 there's such a variety of documents that are out there. You
18 know, if we could take e-mails, internal communications off the
19 table, I think that would -- that would really narrow down.
20 And it would also make our searches for documents much more
21 efficient.

22 THE COURT: So, Mr. Davis, I will ask you that
23 question on the other side. Are there certain documents that
24 you can live without? Say, hey, we need these top eight items,
25 or --

1 MR. DAVIS: I don't know what's there, Judge. We do
2 think it important -- I don't know if you want to take the
3 break now, or if you want to hear my response to some of this
4 stuff.

5 THE COURT: Yeah. Go ahead and give me your response,
6 and then --

7 MR. DAVIS: It sounds like the issue of whether HHS is
8 part of the United States is sort of moot. If you order it --

9 THE COURT: That's what I gathered.

10 MR. DAVIS: All right. Let me skip to the importance.
11 My friends said we haven't shown that there might be
12 something behind the study, but our response on the
13 interrogatory motion, Doc 267, page 7, talks about the Chen
14 study.

15 This is a study that the experts for the plaintiffs and
16 the United States rely on. And this is where -- we think it
17 critically important that we get, just like with WPATH, we get
18 to peek behind the study of this. The four corners doesn't
19 tell you everything.

20 This will take just a second, but I want to lay this out.
21 That study started when the some authors or people who wanted
22 to do the study in 2015, they issued a protocol. They said
23 this is what we want to study, somebody please fund it.

24 And what they said they wanted to do was create a body of
25 evidence supporting gender-affirming care by measuring how

1 children performed over time. They wanted to see how children
2 getting these treatments did in eight areas. And that included
3 gender dysphoria, depression, anxiety, trauma symptoms,
4 self-injury, suicidality, body esteem, and quality of life.
5 That's what we're going to study. HHS decided to fund the
6 study.

7 Two years after they started the study, the authors came
8 back and they published a paper. And they said good news, the
9 treatments work. The children who are getting these treatments
10 are improving in two areas.

11 They say nothing about the other six. They say nothing
12 about why they chose not to disclose anything about how the
13 children were doing in those other six areas that they said
14 they were going to measure. We don't know what happened.

15 But somebody at HHS has been getting data, reviewing
16 progress updates. We need discovery to see what happened with
17 that study. What are we not being told as a result of these
18 ongoing experiments on children? I can't tell you exactly what
19 we need to show that, because I do not know what is there.

20 The deliberative process privilege does not protect facts.
21 We need facts. I can't say if there are e-mails that are not
22 protected by the deliberative process privilege or not because
23 I don't know what's there.

24 If you want us -- well, I think that is what I wanted to
25 explain to the Court about that. I don't know -- we think we

1 need an order granting our motion to compel.

2 If there are particular areas that they want to talk
3 about, we'll talk about it. If there are particular areas that
4 they weren't aware of at this time that would be unduly
5 burdensome in their view, and they want to say, hey, we just
6 discovered that if we do this, that's going to be too much, we
7 need to narrow this a little bit, we are open to those
8 discussions.

9 But we have got expert reports due next month. We've been
10 litigating this case for a long time.

11 We ask for an order granting the motion to compel. If
12 there are issues they want to talk about, wrinkles we need to
13 iron out, we will work on that. But we need them to start
14 giving us some of this stuff quickly so our experts can start
15 reviewing it.

16 MS. MURPHY: Your Honor, the point that I wanted to
17 make is simply that right now, as the requests are written,
18 they're way to overly broad for us to have a meaningful
19 discussion with HHS about what documents are relevant.

20 If defendants -- if we can have a productive discussion
21 with defendants where they can identify particular documents
22 that they want, and we can find them, but so far we haven't
23 been able to do that. So far what defendants have said is that
24 they simply want to use search terms to alleviate the
25 burdensomeness. But we are not there yet.

1 Search terms are a good tool to use once the requests
2 themselves have been narrowed to the scope of permissible
3 discovery. We're simply not there. We're still unable to
4 figure out what some of these requests are really asking for,
5 and what documents they want.

6 We can have a discussion about what documents might be
7 useful for each of these studies. But I also wanted to point
8 out that these are studies that are funded by HHS. So some of
9 the documents they may have control over, and some of the
10 documents they may not.

11 Funding documents, probably yes. But some of the other
12 documents, like meeting minutes, notes from meetings, they may
13 not have custody and control over.

14 So once we're able to narrow the requests and understand
15 what it is that we're looking for, then we can have more
16 productive discussions about what we can offer to respond to
17 the requests.

18 THE COURT: So, you know, I would say this: At least
19 from what I'm hearing today, DOJ's position on facilitating and
20 meeting and confer seems to be vastly different than what the
21 State said in its pleadings. You know, what I gathered from
22 what the State said in its pleadings was they tried to talk to
23 you guys, but hit a dead end. Can you help me reconcile that?

24 MS. MURPHY: Your Honor, we've produced 2.5 million
25 pages of documents. As I said before, 2.3 of those were an

1 administrative record. So it's -- it was something that was
2 not burdensome to produce.

3 THE COURT: You're talking about things from HHS?

4 MS. MURPHY: Pardon me?

5 THE COURT: Have you produced anything from HHS?

6 MS. MURPHY: The administrative record -- so the
7 2.3 million documents were on behalf of HHS. It was an
8 administrative record that had already been compiled for the
9 purposes of another lawsuit. It was compiled and produced.

10 So -- and specifically, what the administrative record
11 includes are documents that the agency considered when, in its
12 rule-making process for the 2020 regulation, related to the
13 Section 1557 of the Affordable Care Act.

14 So these are all documents that the agency considered.
15 But notably, Your Honor, when compiling an administrative
16 record, HHS doesn't include internal memos, e-mails, stuff that
17 is otherwise privileged, because, in their view, it's something
18 that's not considered.

19 THE COURT: All right. I think I have probably heard
20 what I need to on this.

21 MS. MURPHY: Okay. Thank you, Your Honor.

22 THE COURT: Uh-huh.

23 Was there anything else anybody wanted to say regarding
24 the interrogatories?

25 MR. DAVIS: No, Judge. I think the same argument

1 applies on the interrogatories. What we've lined up -- we have
2 narrowed it down significantly. And those -- the ones that are
3 still an issue you'll find at Doc 259 at pages 2 and 3.

4 The information at HHS is as available to the Department
5 of Justice as HHS documents are. And if it's in their hands,
6 it's reasonably available, and they need to use that
7 information from HHS to respond to our interrogatories.

8 THE COURT: Well, and as I understand it, you know, I
9 hear DOJ saying regardless of whether -- I mean, do I even need
10 to determine whether or not HHS is the same thing as the United
11 States for the purposes of discovery? Or are you just telling
12 me, hey, that's moot, Judge, we're going to get it for them?

13 MS. MURPHY: Your Honor, I don't think that you have
14 to decide that issue since we have agreed to produce documents
15 on their behalf.

16 THE COURT: And I appreciate your willingness to do
17 that. I do.

18 Okay. Anything else the government wants to say about
19 this?

20 MS. WILLIAMS: Your Honor, Renee Williams for the
21 United States.

22 We had -- excuse me. Good morning, Your Honor.

23 THE COURT: Good morning.

24 MS. WILLIAMS: Renee Williams for the United States.
25 We had -- my colleague and I had decided to split up the

1 argument related to the interrogatories and the requests for
2 production. Just one quick point, Your Honor, because I think,
3 as you have mentioned, you know, we have covered a lot of
4 ground.

5 With respect to what -- I believe Mr. Davis was talking
6 about the Chen study that he referred to, and how, you know, in
7 defendants' view there was some deficiencies there as they've
8 characterized it.

9 We would just submit, Your Honor, that the defendants were
10 able to do that analysis with the study itself. They were able
11 to review the study, review the -- I believe it was the
12 protocol, and, you know, compare the two and see, oh, okay,
13 well, there are some things in the final study that were not
14 there that were promised.

15 And so we would just submit, Your Honor, that that's
16 exactly why we think that the studies stand for themselves.
17 And so our experts, the defendants' experts would be able to
18 make those assessments. And if, you know, if the studies are,
19 you know, in any way deficient, then, you know, the four
20 corners of the study wouldn't allow the parties to make those
21 determinations and arguments to Your Honor.

22 So that's just -- I just wanted to make that note, with
23 respect to those particular -- that study that was referenced.

24 Thank you, Your Honor.

25 MR. DAVIS: I can look at the study and know

1 something's missing, but I don't know why. And I don't know
2 what the missing part says. I don't know if the kids were
3 doing worse in those other six areas. I don't know.

4 Just like with WPATH, we need to peek behind the curtain
5 at some of these studies so you can see at trial whether the
6 evidence -- whether what you heard at the preliminary
7 injunction hearing was correct, whether you were told the full
8 story at the hearing.

9 We think there's a whole lot more if we get the chance to
10 look behind the curtain of some of these things. So we ask
11 that you grant both motions to compel.

12 THE COURT: All right. We've covered a lot of ground
13 today. I appreciate the arguments of all the parties. And we
14 will get an order out.

15 Anything else we need to cover today?

16 All right. Nobody sees any -- do we see any discovery
17 issues that are about to break through the surface of the
18 water, or no?

19 MR. DAVIS: Jim Davis for the defendants.

20 I'm not aware of anything. We are just anxious to get
21 some productions going so that we can get our experts some
22 material. I don't -- but at this time, I don't know of
23 anything else.

24 THE COURT: All right.

25 MS. MURPHY: Nothing on behalf of the United States,

1 Your Honor.

2 THE COURT: Okay.

3 MR. LACOUR: Your Honor, the only other thing I would
4 note is the motion that was argued back in February on the
5 plaintiffs' medical records, we are still hoping to get those
6 medical records so we can review them, have our experts review
7 them. Our expert reports are due April 10th, I believe it is.
8 And then set up depositions of the plaintiffs.

9 THE COURT: Roger.

10 Okay. We're adjourned. Thank you.

11

12 (Whereupon, the above proceedings were concluded at
13 11:32 a.m.)

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CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Christina K Decker

03-23-2023

Christina K. Decker, RMR, CRR
Federal Official Court Reporter
ACCR#: 255

Date