



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

APPEARANCES

FOR THE PLAINTIFFS:

Jeffrey P. Doss, Esq.  
LIGHTFOOT, FRANKLIN & WHITE, LLC  
The Clark Building  
400 20th Street North  
Birmingham, Alabama 35203

Coty Rae Montag, Esq.  
DOJ-Crt  
Civil Rights Division  
150 M Street NE  
4con  
Washington, DC 20002  
202-598-1580  
Email: Coty.montag@usdoj.gov

Jason R. Cheek, Esq.  
U S Atty Office - NDAL  
1801 Fourth Ave N  
Birmingham, AL 35203  
205-244-2104  
Email: Jason.cheek@usdoj.gov

Kaitlin N Toyama, Esq.  
United States Department of Justice  
Civil Rights Division  
950 Pennsylvania Avenue, NW  
Washington, DC 20530  
202-353-5311  
Email: Kaitlin.toyama@usdoj.gov

FOR THE DEFENDANT:

James W. Davis, Esq.  
Edmund LaCour, Esq.  
Alexander Barrett Bowdre, Esq.  
OFFICE OF THE ATTORNEY GENERAL  
501 Washington Avenue  
P.O. Box 300152  
Montgomery, Alabama 36130-0152  
(334) 242-7300

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

AMICI:  
Barry Alan Ragsdale, Esq.  
Robert Vance, Esq.  
Dominick Feld Hyde, P.C.  
Litigation  
1130 22nd St S - Ste 4000  
Birmingham, AL 35205  
205-536-8888  
Email: BRagsdale@dfhlaw.com

Cortlin Hall Lannin, Esq.  
COVINGTON & BURLING LLP  
Salesforce Tower  
415 Mission Street  
Suite 5400  
San Francisco, CA 94105  
415-591-7078  
Email: Clannin@cov.com

COURTROOM DEPUTY: Wanda Robinson

COURT REPORTER: Christina K. Decker, RMR, CRR

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

P R O C E E D I N G S

(In open court.)

THE COURT: All right. Good morning. Who wants to address the State's motion on the scheduling order?

MR. BOWDRE: For the State, I would like to do that.

THE COURT: All right.

MR. BOWDRE: Thank you.

Thank you, Your Honor. Barrett Bowdre on behalf of the State defendants.

We take no pleasure in coming to this Court asking for an amendment to the scheduling order. It is the State's law that is being enjoined from being enforced. And we want to go to trial and provide the evidence that this Court needs. That we think once we do that, we think the Court will agree to lift the injunction.

But we are in a frustrating position, in that we sent discovery requests to HHS and WPATH seven and eight months ago, and we still don't have that discovery. And the Court has recognized that that discovery is really, really important to our case. It has recognized that without that discovery we would be going to trial with a hand tied behind our back. And so it has rightfully ordered HHS and WPATH to produce that discovery.

And since the Court's order --

THE COURT: Quick question. Just so you can address

1 this, and you probably are, anyway.

2 Is the State's time frame or scheduling affected at all by  
3 the last ruling we had on the interlocutory appeal? Does that  
4 change any of your -- or do we still think March is when you  
5 want it to be?

6 MR. BOWDRE: Your Honor, I think March -- well, I  
7 guess two responses.

8 First, is the proposal that we have is our best idea.  
9 We're not wedded to those dates. But we do think that  
10 specifically, with regard to HHS, that that amount of time is  
11 probably necessary for them to give us a complete production.

12 And in the HHS's filing on Friday, they said that they  
13 hope to be able to start production by June 30th, which, of  
14 course, is the current deadline for producing all discovery.

15 As to WPATH, we think that there are a couple of ways that  
16 we can move forward quickly. I mean, one is that this Court  
17 can order WPATH to produce the hard drive that WPATH told the  
18 Court in March they had ready to go. We still don't have that  
19 hard drive. We have received zero documents from WPATH after  
20 this Court's order.

21 And then we are in negotiations about custodians and  
22 search terms, with regard to our request that don't -- that go  
23 beyond the Standards of Care 8.

24 And I am happy to address that further, if you would like.  
25 But I think --

1 THE COURT: No. Go ahead and address it.

2 MR. BOWDRE: Okay. So with regard to WPATH, we think  
3 there are -- there are two issues that we have run into with  
4 WPATH. One is that we have not received any of the discovery  
5 that they say they have ready to go, with regard to how they  
6 created the Standards of Care 8. And they say that they will  
7 not and have not used custodians and search terms to find those  
8 documents, but have done a different method and have that ready  
9 to go.

10 We are -- we tend to think that custodians and search  
11 terms would be appropriate, but we are willing to look at what  
12 they have, and then go from there and see if we think that is a  
13 complete production or not.

14 But then there are all these other requests that we have  
15 not heard anything from WPATH about how they plan to address  
16 those and how they plan to file -- find the responsive  
17 documents. And those requests go to questions about the  
18 organization's reaction to members' concerns about pediatric  
19 transitioning care in America, and whether WPATH is quashing  
20 those concerns and quashing people who speak up. And we have  
21 evidence to suggest that they are.

22 We have the cancellation of Dr. Ken Zucker's panel  
23 discussion, that we have talked with this Court about, at the  
24 2017 USPATH conference. We have leaders from, or former  
25 leaders from WPATH going public with their concerns over

1 pediatric transitioning in America. And WPATH issues a  
2 statement saying, Don't speak to the press.

3 And so we think that the e-mails that go into those public  
4 statements are really, really important, that those e-mails,  
5 those message board posts are the things that are going to  
6 provide evidence about whether WPATH is actually quashing  
7 dissent within the ranks, or whether it's, as it seems to  
8 indicate, really open to the science.

9 And so we have proposed a list of custodians to WPATH. We  
10 proposed a starting list of ten custodians for them to  
11 consider, and hopefully for us to have a discussion about  
12 whether these custodians work, or whether they think other  
13 people might be the correct entities to search their e-mails  
14 and computers.

15 But instead of having that conversation, WPATH came back  
16 and said, no, we're not going to use any custodians or any  
17 search terms. And they gave two reasons. One is that the  
18 custodians that we suggested are either they don't have control  
19 over those persons' e-mails, or those persons are not likely to  
20 have responsive information. And I want to break those out  
21 into those two categories.

22 So we provided two sets of custodians. One, we had a  
23 number of five custodians that work for WPATH. They have WPATH  
24 e-mail addresses. They are the administrative arm of WPATH.  
25 They run WPATH day to day. That's our understanding.

1           And some of these custodians -- two of them are  
2 specifically listed in the back of the Standards of Care 8 as  
3 providing administrative support for Standards of Care 8. So  
4 we figured those two people would be likely candidates to have  
5 useful information, responsive information, with regard to how  
6 Standards of Care 8 was created.

7           Some of the other custodians that again work for WPATH or  
8 for the administrative agency that runs WPATH are seen on video  
9 after Dr. Zucker -- after the cancellation of Dr. Zucker's  
10 panel, the 2017 USPATH conference, and they're seen on video  
11 responding on behalf of WPATH to the protesters who interrupted  
12 the panel and made him not able to speak.

13           So those two people we think obviously have responsive  
14 documents to at least that instance, and they likely have  
15 responsive documents to others. And yet WPATH's response is,  
16 no, these people are not likely to have responsive documents at  
17 all.

18           The other category of custodians that we have suggested  
19 are leaders within WPATH who have long been involved with WPATH  
20 and their positions and their public statements and the  
21 Standards of Care 8. These are people who either serve or have  
22 served on the board of directors, or who have been the  
23 president or senior leadership of WPATH, and often are also  
24 authors of Standards of Care 8. There's a lot of overlap  
25 between the leadership and the creation of the standards.

1           And so we chose five of the authors and leaders that we  
2 thought would have the most responsive information with regard  
3 to pediatric and adolescent transitioning. That's what we're  
4 after. And their response to that was, well, those people  
5 don't have WPATH e-mail addresses and so we cannot search  
6 those.

7           And, of course, if that were the standard, Walmart would  
8 be pretty well advised to make sure that its senior leadership  
9 and board of director members also don't have Walmart e-mail  
10 addresses, and instead conduct Walmart business over their  
11 personal gmail accounts so Walmart doesn't have to conduct  
12 discovery.

13           Of course, that's not the standard. And the question is  
14 whether they have control over these -- over these e-mails, and  
15 whether they have the legal right to ask for the e-mails.

16           And yet WPATH has not even offered to ask those custodians  
17 that we have suggested for the responsive e-mails that are  
18 related to WPATH and related to the requests that we have asked  
19 for.

20           THE COURT: I think I have got what I need from you on  
21 that issue -- your argument combined with what you have put  
22 forward in your pleadings.

23           MR. BOWDRE: Okay.

24           THE COURT: So let's talk scheduling, then, for a  
25 little bit.

1 MR. BOWDRE: Yeah.

2 So we have proposed a schedule. Like I said, we are not  
3 wedded to those dates, but we do think that there are two  
4 important components of any schedule this Court enters.

5 And the first is that there needs to be a date certain by  
6 which HHS and WPATH produce a full and complete set of  
7 discovery responses. We think that that is important to give  
8 them enough time to do a complete production. We don't think  
9 it would be fair -- in fact, we think would be manifestly  
10 unfair if they were able to take advantage of the time  
11 exigencies that they created to do less discovery than  
12 otherwise they would be required to do, and which this Court  
13 has already ordered them to do.

14 But we think that they should have enough time to complete  
15 that production, but that it should be a pretty tight timeline.  
16 We need to hold their feet to the fire and make this discovery  
17 production a priority for them. They need to devote their  
18 resources to make this go quickly.

19 And then the second thing that we think is really  
20 important is that there needs to be a time period -- and we  
21 think a three-month time period is sufficient -- after the  
22 production from HHS and WPATH for all the other discovery that  
23 has to occur that depends on that. And so that, you know, when  
24 we get the production, it will take us time to review the  
25 production.

1           If the production is as big as HHS seems to have  
2 indicated, it's going to take us some time to review that. And  
3 we plan to devote a lot of resources to that. But it will take  
4 time. It will take time to --

5           THE COURT: Let me jump ahead of you just a little  
6 bit.

7           MR. BOWDRE: Yeah.

8           THE COURT: Why don't you -- I am not saying I am  
9 going to grant these, but just so I've got this as a time  
10 frame, why don't you just set for me some proposed dates -- the  
11 30 day, the 90 day -- that you think things ought to happen.

12           Then I want to hear and see what WPATH and the government  
13 think.

14           MR. BOWDRE: Yes, Your Honor.

15           So our proposal is the date certain for the full  
16 production is October 1. And these dates are listed in the  
17 proposed order that we submitted.

18           THE COURT: Right.

19           MR. BOWDRE: But it's October 1 for HHS and WPATH.

20           Defendants' supplemental reports would be due  
21 November 20th.

22           Plaintiffs' rebuttal reports would be due December 18th.

23           The discovery cutoff, we propose January 19th.

24           Dispositive motions, February 9th.

25           And trial in March.

1 THE COURT: I'm going to give you another bite at the  
2 apple, Mr. Bowdre, but let's see what WPATH has to say real  
3 quick.

4 MR. BOWDRE: Yes, Your Honor.

5 MR. RAGSDALE: Good morning, Your Honor.

6 THE COURT: Good morning.

7 MR. RAGSDALE: I'm Barry Ragsdale on behalf of WPATH,  
8 with Cortlin Lannin, as well.

9 A couple of things I would say, Your Honor. First of all,  
10 we obviously take no position on the scheduling of the  
11 plaintiffs' and defendants' trial. We're not a party to the  
12 case, as you are well aware.

13 I would also say, Your Honor, that I am a little surprised  
14 by the tone of Mr. Bowdre's presentation, and the notion that  
15 we have somehow refused to comply with this Court's order.

16 We have obviously been pursuing our rights and remedies  
17 under an appeal. And, Your Honor, we intend to take you  
18 obviously at your word that you would not be upset if we  
19 pursued a mandamus petition on this same issue.

20 Obviously, the issues that are presented to us are  
21 fundamental First Amendment issues, organizational issues that  
22 we feel like we have a right to pursue that.

23 We have been --

24 THE COURT: I have been reversed before, Mr. Ragsdale.

25 MR. RAGSDALE: Well, Your Honor, I have failed to

1 reverse numerous judges on a lot of occasions, so...

2 And I understand that. And I wanted to let the Court know  
3 that we do intend to file a mandamus petition this week.

4 It would be -- we intend to ask the Eleventh Circuit to  
5 act expeditiously on that. They obviously get to decide how  
6 expeditiously they act on it. But certainly make them aware of  
7 the fact that it is a factor factoring into this Court's  
8 scheduling, as well. That will be filed this week.

9 As far as the specifics, in terms of what we have or  
10 haven't agreed to produce in those, Mr. Lannin is actually in a  
11 better position to talk about that, if that is a concern to  
12 this Court. I mean, at this point, it seems to me what the  
13 Court is focused on is what am I going to do with my schedule  
14 and how does this fit into that schedule.

15 THE COURT: No. Absolutely. And, you know, I'm just  
16 looking at this. You know, certainly we had hoped to try this  
17 in August.

18 I tend to agree with the State that that's going to be  
19 hard to manage at this point. I also realize if I'm going to  
20 reset it, it's going to be a two-week trial. That makes a  
21 pretty big dent in the schedule.

22 If I'm going to reset it, then I ought to probably  
23 reasonably reset it with the knowledge that probably there will  
24 be another discovery fight that might slow us down as we get  
25 down the road.

1 And so I am inclined to reset -- I cannot do it that March  
2 date, but I might be looking at April.

3 And I haven't heard anybody say, please, please don't  
4 reset it. So, you know, I'm aware of that.

5 I also -- obviously, this is a very important case. I do  
6 not want to put any of the parties in the position that, you  
7 know, they did not feel like they were able to complete fully  
8 discovery they thought that they might need.

9 So, anyway, with that said, go ahead with your argument.

10 MR. RAGSDALE: Well, I'm actually done. If you want  
11 to add anything.

12 MR. LANNIN: Your Honor, thanks again for having me.  
13 And I don't have a whole lot to add.

14 I will just say this: Mr. Ragsdale is absolutely correct.  
15 We will file the mandamus and seek expedited treatment of the  
16 petition. And if the Eleventh Circuit denies our petition, we,  
17 as you saw in our reply, are prepared to produce at this point,  
18 nearly 8 or 900 documents that, as Your Honor hopefully saw in  
19 our submission, really --

20 THE COURT: Well, I hope you are prepared to produce  
21 it now awaiting a hopeful decision from the Eleventh Circuit,  
22 because I think my order is good until you get something  
23 different.

24 MR. LANNIN: We are, Your Honor. Absolutely.

25 THE COURT: All right.

1 MR. LANNIN: And our intention -- and I wanted to  
2 assure Your Honor that since the moment you denied our motion  
3 to quash, WPATH has been working to gather those documents.  
4 Many hundreds of attorney hours have been spent gathering and  
5 then redacting the documents in accord with Your Honor's order.  
6 So we haven't been sitting on our hands. I just wanted to make  
7 that clear.

8 And those documents are quite sensitive in our view, of  
9 course, and cover every stage of the development of the  
10 guidelines process. They reflect member input on the  
11 guidelines. They reflect candid comments before the guidelines  
12 even came together. A lot of what we heard from the State  
13 they're looking for is covered in this set of documents.

14 There is a discussion about e-mail custodians. I do take  
15 issue with the State's representation that we have  
16 categorically refused to entertain discussions about e-mail  
17 custodians. We've been clear, and included in our reply, that  
18 we would be happy to meet and confer on that issue.

19 I do agree with the State that we have some disagreements  
20 about it. I don't know that this is the right forum or moment  
21 to ventilate those issues.

22 I would just preview for Your Honor that, unfortunately, I  
23 think there may well be more discovery issues coming your way  
24 on that issue. We have a strong disagreement about whether  
25 third-party doctors, third parties of third party at this

1 point, if they are properly subjected to discovery for, you  
2 know, their volunteer efforts on behalf of WPATH.

3 But, again, I don't want to rabbit hole on that now if  
4 Your Honor is -- you know, proceeds to move ahead on the  
5 scheduling front first.

6 THE COURT: Well, that's probably my inclination, you  
7 know.

8 Again, though, I mean, I think the parties need to sit  
9 down and work most of this out. You know, just in reading  
10 everybody's filings, you know, and hearing the beginnings of  
11 some of these arguments today, you know, it's not hard for me  
12 to already kind of figure out, well, here is really probably  
13 what ought to happen.

14 So, you know, everybody is a good lawyer in this courtroom  
15 or they wouldn't be here. It seems to me that everybody could  
16 sit down and work through these things if we just got in a room  
17 for about six hours and knocked it out.

18 You know, obviously, the next step is going to be for  
19 somebody to file a motion to compel, and God knows what after  
20 that. You know, I certainly -- we can air this thing out with  
21 me if you want to. And I will figure out what's going on and  
22 what needs to happen. And I'm perfectly glad to do that.

23 But, you know, I do want to say, you know, if I have to  
24 air this out, you know, there's some likelihood that I may find  
25 somebody's not acting in good faith. And who it is, I don't

1 know.

2 You know, Judge Monk in Calhoun County used to have a  
3 great saying. He said, Now, you lawyers ought to work this  
4 out. And I'm going to tell you if you make me have a hearing  
5 on it, we're going to have one. And I'm going to listen to the  
6 facts and apply the law. But he said, I'm going to tell you  
7 this: Whoever wins is going to know they won, and whoever  
8 loses is going to know they lost.

9 That's probably a standard I'm not going to use. But, you  
10 know, I would say you guys ought to sit down and let's work  
11 this out. Save us all a whole lot of time.

12 Look, no doubt that WPATH is the standard, you know. Your  
13 guidelines are the standard. And so, you know, I would say  
14 generally anything that's clearly relevant to that standard,  
15 you know, needs to come out one way or the other.

16 I get it on third parties. But I bet y'all can work  
17 together to find a solution, you know, to those things, as  
18 well.

19 MR. LANNIN: Very good, Your Honor. I don't want to  
20 be on the receiving end of knowing that I made a mistake, so...

21 Let me say this, Your Honor, just to be clear. I think  
22 our current intent, with Your Honor's consent, would be to  
23 expeditiously produce that set of documents just as soon as the  
24 Eleventh Circuit acts on our petition. And, again, we are  
25 going to ask them to move quickly because it's not our intent

1 to wait.

2 I heard this morning the State -- I thought I heard the  
3 State open or express openness to reviewing those documents and  
4 then coming back and entertaining a meet and confer at that  
5 point about other materials that might fill gaps in their view.  
6 That sounds like a process that, in fact, I think we proposed  
7 the same thing in our submission.

8 That's all to say we are happy to keep talking. I think  
9 those documents, assuming the Eleventh Circuit moves as quickly  
10 as we want them to, that they should be in their possession  
11 within the next two to three weeks.

12 THE COURT: So I certainly don't try to predict what  
13 appellate courts will do, but how quickly have they ruled on  
14 such things in the past? Educate me.

15 MR. LANNIN: The best example I have, Your Honor, is  
16 in a case in Florida that also concerns this type of issue, the  
17 district court ordered a deposition to proceed of the  
18 administrator of Florida's health and -- basically, the HHS of  
19 Florida, the Medicare agency. And the State had moved for a  
20 protective order citing the Apex Doctrine. The district court  
21 overruled it and mandated the deposition to proceed. And the  
22 State moved for mandamus with the Eleventh Circuit.

23 And, again, I'm -- don't quote me on this, but I believe  
24 they acted within weeks. And in the submission, in the writ,  
25 the State had acted -- or had asked that the Eleventh Circuit

1 to move quickly, and they did so.

2 So I'm afraid it might mean that the State has an  
3 expedited deadline to oppose the writ. I think that's probably  
4 likely. But I don't think any of the arguments will be  
5 particularly novel or new. And so hopefully, you know, there's  
6 material they can live with there.

7 THE COURT: All right. And I think Mr. Ragsdale said  
8 WPATH has -- obviously, y'all don't care what the dates are in  
9 this proposed order.

10 MR. LANNIN: We do not, Your Honor.

11 THE COURT: All right. Anything else from WPATH?

12 MR. LANNIN: No, sir.

13 THE COURT: All right. Well, let's hear from the  
14 private plaintiffs, and then the government.

15 MR. LANNIN: Thank you, Your Honor.

16 MR. DOSS: Your Honor, the only thing that I would add  
17 on behalf of the private plaintiffs is if a trial is likely to  
18 occur in April, if that's what's available for the Court, if  
19 the parties could have an opportunity within the next week or  
20 so to confer on a proposed schedule backed out from that trial  
21 date about the interim deadlines, like the expert disclosures,  
22 and the fact cutoff, and that sort of thing, and then propose  
23 it to Your Honor based on that trial date. That would be the  
24 only request on behalf of the private plaintiffs.

25 THE COURT: A reasonable request.

1 MR. DOSS: Thank you, Your Honor.

2 THE COURT: Uh-huh. Uh-huh.

3 Government?

4 MS. MONTAG: Good morning, Your Honor.

5 THE COURT: Good morning.

6 MS. MONTAG: Coty Montag on behalf of the United  
7 States.

8 Since the Court issued its March 27th order, the United  
9 States has endeavored to comply with the order as efficiently  
10 and diligently as possible. And we have operated in good faith  
11 throughout this process. We just want to let you know that  
12 compliance with the Court's order is of utmost priority to the  
13 United States' counsel in this case.

14 The United States does not oppose an extension of the  
15 schedule in this case, and we do not take issue with the  
16 specific dates proposed by defendants. Having an opportunity  
17 to meet and confer would be useful, as suggested by the private  
18 plaintiffs.

19 What we're asking the Court to do is set parameters on the  
20 method for HHS's document production so that we can get  
21 defendants the documents they assert they need as quickly as  
22 possible. And we've set this out in our brief. I would be  
23 happy to go over it briefly for you.

24 THE COURT: No. I have read it. I am familiar with  
25 the differences between each of your proposals for searches.

1 MS. MONTAG: Okay. Well, we'd ask the Court to adopt  
2 the proposal set forth by HHS.

3 And I did want to note here today, just to show how  
4 seriously we're taking this, we do have representatives from  
5 HHS here, including the chief information officer, Dr. Karl  
6 Mathias.

7 And so we just wanted to express to the Court how  
8 seriously we're taking this. And in order for HHS to meet its  
9 discovery obligations, we'd ask the Court to adopt the proposal  
10 set forth by the United States.

11 THE COURT: And while we're on that, Mr. Bowdre, why  
12 don't I let you address specifically that HHS proposal again.

13 And I will bring you back up again.

14 MS. MONTAG: Okay.

15 MR. BOWDRE: Thank you, Your Honor.

16 I think the main point is that we think the proposal is  
17 premature for this Court to act on. Friday was the first time  
18 that we heard of the United States' proposal to limit eleven  
19 custodians and ten narrow search terms.

20 We think that -- or we thought that we were getting to a  
21 place of good compromise with regard to the search terms. And  
22 I think that if we have a little more time we can -- we can at  
23 least move forward and clarify where our disagreements are.

24 With that said, we do have --

25 THE COURT: So do I hear you say give us a few weeks

1 to address this more, and then we may come back to the Court?

2 MR. BOWDRE: That is our request.

3 And I think it might make sense to go on and put us on the  
4 calendar, if that's available, for three weeks, four weeks from  
5 now, to take up the specifics of the parameters that you --  
6 that this Court might want to set for the HHS discovery.

7 I'm happy to address some of our broad concerns. We did  
8 so briefly in the reply brief.

9 We don't think, for instance, that the eleven search terms  
10 is very useful and -- or very appropriate.

11 THE COURT: Just for argument's sake --

12 MR. BOWDRE: Yeah.

13 THE COURT: -- let's say you do it that their way  
14 first. And then you look at it and you say, well, clearly  
15 there are holes in this, now let's try my way. Address that  
16 for me.

17 MR. BOWDRE: I think -- I think one problem is, given  
18 the process that HHS uses, I think that would set us back  
19 another six months. That if we don't come up with a good  
20 framework at the beginning, it's really hard to go back, I  
21 would assume, and get another bite at the apple and ask for  
22 more, given how long it takes evidently for them to run  
23 searches and the different divisions that are siloed out from  
24 one another from HHS.

25 I do think it makes sense for us to have this conversation

1 now, maybe not today, but in three weeks, and to work through  
2 some of this and come to an agreement on those sorts of things.

3 But, again, we do have really serious concerns about  
4 limiting it artificially to ten narrow search terms. We don't  
5 think that's an efficient way to move forward. And that's not  
6 our understanding of how -- of how best to use search terms.

7 Because I guess our understanding is that if you are  
8 looking for the universe of documents that are likely to be  
9 responsive, just like in Westlaw searching, you want some sort  
10 of broader search terms, and you want some really narrow ones  
11 to grab the specific things that you are after, and so some  
12 combination would be useful. And it's not necessarily the case  
13 that fewer search terms necessarily means less work or -- or  
14 fewer documents on the output side.

15 We also have concerns with the network drives proposal.  
16 Our understanding is that the network drives encompasses  
17 anything that's not e-mail. So it's all the documents, all the  
18 papers that the HHS staff have on their computers.

19 And HHS says that adding in the subjective human element  
20 has benefits. And I don't doubt that it has some benefits.  
21 But it also has some really true costs to that, as well, that  
22 it removes any sort of objective standard and objective check  
23 to make sure that we are getting documents that maybe the HHS  
24 workers weren't there when they were created, and so they just  
25 don't know about. Or maybe as they are subjectively

1 interpreting our requests, they are interpreting it very  
2 narrowly and don't produce the documents that are, you know,  
3 the ones that might be most helpful and useful and responsive  
4 to the requests.

5 So we have concerns about their proposal. But, again, I  
6 this it's premature for this Court to rule on that today.

7 THE COURT: So you want me to convene basically  
8 another status in 30 days to talk about this, and give the two  
9 of you a chance to exchange ideas and come up with a plan?

10 MR. BOWDRE: Yes, Your Honor. That would be our  
11 suggestion.

12 THE COURT: All right. Have you -- I know we have HHS  
13 attorneys in the courtroom today. Have you previously had a  
14 chance to sit down with them in person? Or just --

15 MR. BOWDRE: Not in person. And we are happy to do  
16 that today.

17 We have had hours and hours of phone calls. And I think  
18 since the Court's order very productive phone calls.

19 And, frankly, if we had been having those phone calls  
20 seven months ago, I don't think we would be in the position  
21 that we are today.

22 So I think we are moving forward. We are making progress.  
23 And I think if the Court gives us a little more time, we can at  
24 least tee up the issues in a much more narrow way for this  
25 Court to rule on.

1 THE COURT: Does HHS desire to be heard from today?

2 MS. MONTAG: Your Honor, if I could just address a few  
3 points.

4 So on the e-mail searches for custodians and search terms,  
5 we can continue to negotiate with defendants.

6 And I do want to make clear that HHS's counsel has been  
7 participating in those conversations. So HHS has been able to  
8 talk directly to defendants in those conversations.

9 As we set forth in our brief, there is a burden, the more  
10 search terms that are used, because of the way HHS's operating  
11 systems are set up, what the parties have agreed to is that HHS  
12 will collect documents from nine separate operating divisions,  
13 which employ 47,000 people. And every time search terms are  
14 run, they have to be run one at a time across each operating  
15 division.

16 And so we're more than happy to continue to meet and  
17 confer with defendants on this, but did want to point out there  
18 is a burden associated here.

19 I also would just like to briefly address this manual  
20 collection method that we're calling the go-get method. This  
21 is the procedure that HHS customarily uses when compiling an  
22 administrative record. This is not novel. This is not  
23 something we have developed just for this case. This is what  
24 they typically do, including in litigation.

25 And so it's a very reasonable method. There are quality

1 control measures to ensure that the process is documented from  
2 start to finish.

3 THE COURT: So I think I heard Mr. Bowdre say, well,  
4 you know, you may miss things some that way. And I think maybe  
5 he said in a very gentle way that the human element might --

6 MS. MONTAG: Sure.

7 THE COURT: -- exclude certain things that he wanted.  
8 Address those things.

9 MS. MONTAG: So we -- if there's anything missing, we  
10 can go back and address those deficiencies. We think this is  
11 the fastest method, because actually it can begin immediately.

12 THE COURT: How fast? So if you start this tomorrow,  
13 when is it done and when is this all in their hands?

14 MS. MONTAG: So for the network drives, HHS  
15 anticipates today -- that if it started today, it would take  
16 four months from start to finish, which is the fastest, you  
17 know, that we can -- that we can do.

18 But that's getting defendants the bulk of the documents --

19 THE COURT: How many people are on this?

20 MS. MONTAG: Many. I -- we have -- we have multiple  
21 attorneys at DOJ who will be reviewing, HHS --

22 THE COURT: Four months is a long time.

23 MS. MONTAG: Given the nature of HHS's systems -- and,  
24 again, we are talking about nine operating divisions. We're  
25 talking about essentially nine separate companies.

1           And HHS will be deploying point people in each of those  
2 nine operating divisions. Once the documents are pulled --

3           THE COURT: I feel like if I ask 3M to do this across  
4 their divisions, it could be done in three weeks.

5           MS. MONTAG: Well, 3 --

6           THE COURT: Are we getting -- are we running into  
7 bureaucracy here?

8           MS. MONTAG: Absolutely not, Your Honor. This is --

9           THE COURT: I'm going to interrupt you.

10          Mr. Bowdre, what do you think about this time period of  
11 four months? If you agree with it, it won't hurt my feelings.  
12 That just seems like a long time.

13          MR. BOWDRE: I'm not sure if we have enough  
14 information to know one way or the other. I think -- you know,  
15 we tend to have a lot of faith in our federal government, and  
16 that if the Court orders them to produce something, I think  
17 they can figure out a way to do it.

18          But as for the specifics, we understand the federal  
19 government's concerns. And we just -- we agree that there has  
20 to be a way to get us the responsive documents in a timely  
21 manner.

22          THE COURT: So that brings me back to what you just  
23 said a minute ago, which is, well, you know, if we go through  
24 this first process for the first tranche, then the clock is  
25 running out on us again if we have to come back to the Court.

1 That's my concern.

2 MR. BOWDRE: And, yes. Yes, Your Honor. I think  
3 that's why it's important to have the -- to have the full  
4 process at the very beginning and not on the back end.

5 THE COURT: All right.

6 All right. Let's switch again. So if we have got ten  
7 people on it, and it's going to take you four months, why don't  
8 we put 30 people on it, and it's going to take you half that  
9 time?

10 MS. MONTAG: Certainly.

11 Well, Your Honor, I do want to point out this will be a  
12 rolling production. So, again, this will be the fastest way  
13 for HHS to start pulling responsive documents, have them  
14 reviewed for responsiveness and privilege, and start getting  
15 them over to the defendants.

16 If we go to the search term methods, even if we have 30  
17 more people, we still need to negotiate the search terms with  
18 defendants, we have to run the search terms, we have to provide  
19 them hit reports, we have to modify the search terms. I think  
20 that will be months before we're --

21 THE COURT: But it's about resources, right? It's  
22 about how many resources you want to dedicate.

23 An unnamed federal agency asked me for an additional  
24 six months some time ago to produce a record. And I said,  
25 that's -- that's not reasonable. They said, well, that's the

1 fastest we can produce it. I said, I think you can produce it  
2 in 30 days. They said, we can't produce it in 30 days. I  
3 said, If it's not produced in 30 days, then I want your  
4 director in my courtroom and let's talk about sanctions. It  
5 was produced in 21 days.

6 I'm just asking about resources. That's all. And I'm not  
7 saying four months is unreasonable. I just need you to show me  
8 why it's not, you know?

9 MS. MONTAG: Sure. Really, this goes down to the way  
10 HHS's systems are set up. And again, what I've said about the  
11 nine separate companies, all with their own technical  
12 personnel. So even if we had a hundred attorneys on this, my  
13 understanding is that it would still take this amount of time.

14 We will move as quickly as possible. If we can do it  
15 faster than four months, I would love to do it in three months.

16 We can come back to the Court. I think by July we will  
17 have a much better sense of how long it will take.

18 But, again, this can start today. And so no further delay  
19 would be needed. It can start today. We can come back to the  
20 Court and give you a better estimate once we've started the  
21 process.

22 THE COURT: Gotcha. And let me say this. Look, I  
23 have not done a full argument on this. I don't know if all the  
24 State's opinion about your discovery and WPATH's is correct. I  
25 don't know that your positions are correct.

1           The only thing I do know is now I'm having to continue  
2 this case until next year. I don't want to continue it again.  
3 I'm going to be really mad if we had to continue it again.

4           And so everybody on the discovery side -- I'm not just  
5 singling out you guys. The State, too. Everybody has got to  
6 work together.

7           And, again, I can solve some of this -- I can actually  
8 solve it all if we have a hearing, but I just don't think  
9 anybody really wants me to do that. So I really want everybody  
10 to put this in climbing gear and let's move forward. Because  
11 we have got to get all this discovery done. And we have got to  
12 get it done fast.

13           MS. MONTAG: Absolutely.

14           THE COURT: Here's my thought: I like Mr. Bowdre's  
15 idea about, you know, let's come back and have a status on all  
16 of this in 30 days, and we will know a whole lot more.

17           I think you will be able to go back to HHS and say, hey, I  
18 think the judge may want this done faster than four months.  
19 And I bet in 30 days you're going to have a plan for me about  
20 how it can be done quicker.

21           So let's move on to that track. And we'll look at our  
22 days.

23           If I am looking 30 days down the road right now,  
24 anybody -- today would be the 22nd -- 30 days out from this, is  
25 that a bad week for anybody?

1 MS. MONTAG: We could certainly make it work.

2 THE COURT: Excellent.

3 All right. Anybody think we ought to address any other  
4 issues?

5 MS. MONTAG: Nothing from the United States.

6 THE COURT: All right. I am going to continue this  
7 trial. So I will ask the parties to confer on all these dates.

8 I will say that, you know, the State's dates look  
9 reasonable. We don't have to pick those exact dates, but they  
10 look pretty reasonable to me. I would hope that, you know,  
11 y'all can agree, even if it's not those exact dates, but agree  
12 on reasonable dates and move forward.

13 Okay. Last question. Everybody's in the room. Does it  
14 do any good for everybody to go eat lunch, come back in here  
15 and just sit down while we've got everybody in the room, and  
16 begin this conversation? Or do y'all just want to go back to  
17 the office and get on the telephone?

18 MS. MONTAG: Your Honor, we have some flights back to  
19 D.C., but we're more than happy to start the conversation with  
20 defendants today. And, again --

21 THE COURT: When are those flights?

22 MS. MONTAG: 2:30.

23 THE COURT: 2:30.

24 All right. Well, does that help anybody, if I leave the  
25 courtroom and y'all -- and everybody from HHS stays, and maybe

1 even WPATH, if we need to? Does that help?

2 MR. BOWDRE: We are obviously happy to begin the  
3 conversations today.

4 THE COURT: If it doesn't help, then don't worry. I'm  
5 just saying does it help?

6 MS. MONTAG: Your Honor, I think we would benefit from  
7 returning home and having more conversations. I don't know  
8 that we will be able to figure anything out today. But if  
9 that's what you'd like us to do, we're more than happy to --

10 THE COURT: All right. Well, sounds like we just need  
11 to get on the flights.

12 I will say this: When we come back in 30 days, I want  
13 some definites from every side. And I want some give from  
14 every side. And I've given everybody some leeway today.

15 WPATH, I understand that, you know, you don't want to give  
16 this up, you don't want to waive any of your rights by  
17 producing too quickly, but we're narrowing in now on a firm  
18 order. We'll see what happens at the Eleventh Circuit, but I  
19 expect things to start moving at this point.

20 I do appreciate that you brought HHS. I really do. I'm  
21 glad they're here in the room today. That's a sign of good  
22 faith that we're getting this process rolling.

23 I do think it might help me before we get out of here to  
24 hear actually from somebody at HHS about this process.

25 DR. MATHIAS: Good morning, Your Honor. I'm Karl

1 Mathias. I'm the Chief Information Officer from HHS.

2 THE COURT: Good morning.

3 DR. MATHIAS: And I just wanted to elaborate a little  
4 bit more on the complexity so you understand what we're talking  
5 about.

6 And if I could just tell you a little background about  
7 myself.

8 THE COURT: Sure.

9 DR. MATHIAS: I had seven years as an assistant  
10 director of the CIO at the U.S. Marshals. So I wish -- I will  
11 be honest -- it was the best job I ever had, so...

12 But here at HHS, complexity's a little higher. But I am  
13 familiar with the issues. And certainly with your concerns,  
14 Your Honor.

15 So I just want to reassure you that when it comes to  
16 getting an order for discovery, I take that very seriously.

17 HHS is an interesting organization, in that it's these  
18 multiple operating divisions. You've got these staff  
19 divisions. And we're not all on the same mail system. We're  
20 not all on the same file system. And even within the different  
21 organizations, you've got multiple file systems within them.

22 So, for example, if I were to look at the office of the  
23 secretary, which is the staff divisions, not only do we have  
24 e-mail that is on its own thing, we have a document system  
25 called OneDrive. We have another system called SharePoint. We

1 have another system you'll hear called Azure.

2 And so when we come to respond to this, we're searching  
3 across all of those to look for responsive documents and  
4 potentially e-mail.

5 I have to do those separately. We have a different set of  
6 organizations that do, you know, that cover FDA, that cover  
7 CDC, that cover National Institutes of Health. They have their  
8 own systems.

9 And when you look at the National Institutes of Health, it  
10 gets even more interesting, because they have 27 institutes  
11 underneath that umbrella organization. And sometimes even  
12 those are using different systems that they then have to go out  
13 and look for documents.

14 So when we're going to put together the -- to be  
15 responsive to the request for discovery, we're reaching out  
16 within the organization with different people doing different  
17 searches, and then bringing it back together to be responsive  
18 to the request. So I don't want you to think --

19 THE COURT: So let me interrupt just for a second.

20 DR. MATHIAS: Yeah.

21 THE COURT: And the answer to this may be no. But I'm  
22 assuming everybody in this room has reached out to other states  
23 that are in this same litigation -- Arkansas comes to mind.  
24 Was any of this discovery conducted previously in any other  
25 case?

1 MS. MONTAG: It was not, Your Honor.

2 THE COURT: Okay. All right.

3 I'm sorry. Go ahead.

4 DR. MATHIAS: Yeah. So I just wanted to -- when we  
5 talk about the complexity, it's really about pulling all of  
6 this together. And we're pulling significant amounts of  
7 information together.

8 And I wish I could tell you technology is firm and solid.  
9 You would think it is, reading the headlines. But we actually  
10 see transmission errors that cause things to restart.

11 It takes us some time to pull it together before we can  
12 deliver it to the attorneys for them to do their processes on  
13 it.

14 So that's -- when we talk about the complexity, that's  
15 what we are talking about, is pulling all of this together.

16 And, also, you know, we have started looking at this to  
17 make sure that we are going to be responsive. We have been  
18 looking at document discovery.

19 If we extend this into e-mail, my experience has been that  
20 you just order -- just expand this by an order of magnitude of  
21 what's going to come back. And it does take time. So...

22 THE COURT: All right. I will give the State the last  
23 word if they want it.

24 MR. BOWDRE: Your Honor, I appreciate the chance to  
25 work with HHS. I think there are ways that we can move

1 forward. And I think, you know, we -- one thing that comes to  
2 mind is that we can narrow the divisions in which we are  
3 seeking search terms to be used for the network drives. So I  
4 appreciate that.

5 The only question I have is when would you like a proposed  
6 schedule? Once you enter the order setting the trial date, we  
7 will confer. When do you want us to propose a schedule?

8 THE COURT: I'm guessing the parties would need a  
9 couple of weeks to confer? Would that be a fair amount?

10 MR. DOSS: Yes, Your Honor.

11 THE COURT: Maybe two weeks? And that way I'll know  
12 what it is coming into the next status hearing, if there's any  
13 issue there.

14 MR. BOWDRE: Yes, Your Honor.

15 THE COURT: And I would be looking at whatever the  
16 first Monday is in April as a trial date.

17 We're still talking about two weeks; is that right?

18 MR. BOWDRE: Yeah.

19 THE COURT: Everybody still think that's a reasonable  
20 number? Do we think it could be more or less?

21 MR. BOWDRE: We think two weeks sounds about right for  
22 the trial.

23 THE COURT: Government? Private plaintiffs?

24 MS. MONTAG: We would say less. Less than two weeks.

25 MR. DOSS: I'd say about two weeks. We are looking at

1 maybe ten experts total, I think, between both sides, which is  
2 going to take some time to work through.

3 THE COURT: Right. Right.

4 So, yeah, I would leave y'all with this. So when we come  
5 back in 30 days, I'm probably going to be a little bit more  
6 prickly about discovery and all these other issues. I have  
7 kind of given some leeway that I am not going willing to give,  
8 you know, when we get another 30 days down the road.

9 So I expect discovery to start moving really, really,  
10 really fast. And, you know, at the end of this, you know, we  
11 are about to reset this until next spring.

12 Look, you know, if this law is unconstitutional, then we  
13 need finality on it. If it is not unconstitutional, then, you  
14 know, the will of the Legislature and the Governor needs to be  
15 implemented.

16 So everybody needs to really pick up the ball and run with  
17 it. And whatever priorities you may have with other cases, or  
18 administratively within your organization, or anything else,  
19 this is the top priority. This is the top priority.

20 And so if things aren't moving, then I'm going to be  
21 asking questions about, okay, I want to know exactly how many  
22 people are working on this, I want to know exactly how many  
23 hours a day they're working on it, I want to know what your  
24 resources are to add more people to it. And that's for  
25 everybody on both sides to make this go, so...

1           And, hey, I'm also -- you know, I'm also going to want to  
2 know is everything the State is asking for reasonable? And  
3 does it meet the discovery standard?

4           So, again, I don't know the answers to any of those,  
5 except to know we have really got the blue-ribbon group of  
6 lawyers in here on both sides. Everybody knows what the  
7 expectation is. And so let's pull together and get this done.

8           Anything else?

9           MR. BOWDRE: Not from the defendants, Your Honor.

10          THE COURT: All right.

11          MS. MONTAG: Not from the United States.

12          THE COURT: All right. We're adjourned.

13

14                 (Whereupon, the above proceedings were concluded at  
15 10:48 a.m.)

16

17

18

19

20

21

22

23

24

25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

CERTIFICATE

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

Christina K Decker

05-25-2023

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

Date