

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

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

**PLAINTIFF-INTERVENOR UNITED STATES OF AMERICA’S
RESPONSE IN OPPOSITION TO DEFENDANTS’ MOTION TO COMPEL
DESIGNATION OF ADMIRAL RACHEL LEVINE AS A CUSTODIAN**

The United States opposes the designation of Admiral Rachel Levine, the Assistant Secretary for Health for the U.S. Department of Health and Human Services (HHS), as a custodian for discovery purposes. The Court should reject Defendants’ attempts to obtain all material remotely related to transgender people by searching the files of a high-ranking HHS official—who happens to be transgender—for at least three reasons. First, HHS’s custodian designations, which include key agency officials other than Admiral Levine, are reasonable and

sufficient. Second, based on HHS's investigation into her emails and records, designating Admiral Levine as a custodian will not yield unique information not included in the records of already-designated individuals. Finally, Defendants' demand to designate Admiral Levine as a custodian is disproportionate to the needs of the case. The Court should therefore deny Defendants' motion.

BACKGROUND

A. HHS'S COLLECTION AND PRODUCTION PROCESS AND ITS SELECTION OF CUSTODIANS

The United States and HHS have been working diligently with Defendants so that documents can be produced in accordance with the Court's Fifth Amended Scheduling Order, ECF No. 292. As an initial matter, HHS designated nine custodians, all of whom are leaders or play key roles in their division. For instance, five of the custodians bear the title Director, and the remaining four are Team Leader, Deputy Assistant Secretary, Senior Advisor, and Psychologist.¹ These custodians are more than sufficient to meet HHS's discovery obligations.

¹ The custodians are: Janet Maynard, Director, Office of Rare Diseases, Pediatrics, Urologic and Reproductive Medicine, FDA; Christian Cao, Team Leader, Division of Pharmacovigilance I, FDA; Diana Bianchi, Director, National Institute of Child Health and Human Development, National Institutes of Health (NIH); Rohan Hazra, Director, National Institute of Child Health and Human Development – Division of Extramural Research, NIH; Karen Parker, Director, Sexual & Gender Minority Research Office, NIH; Joshua A. Gordon, Director, National Institute of Mental Health, NIH; Maura Calsyn, Deputy Assistant Secretary for Health Policy, Office of the Assistant Secretary for Health; Dylan Nicole de Kervor, Senior Advisor, Office for Civil Rights; and Arlin Hatch, Psychologist, Center for Mental Health Services, Substance Abuse and Mental Health Services Administration.

HHS has already produced approximately 2.3 million pages of documents to Defendants, in rolling productions in March and June 2023. In terms of the remaining production, HHS has completed the email and manual collections for all the Operating Divisions and Staff Divisions that the parties agreed are likely to have responsive information. Attorney review of these documents has been ongoing and the next set of documents, mostly comprised of the emails collected from the custodian designee for the Office of the Assistant Secretary for Health (OASH), will be produced shortly. This production includes emails from the account of Deputy Assistant Secretary for Health Policy Maura Calsyn.

HHS selected Ms. Calsyn as the email custodian for OASH because she was the member of Admiral Levine’s Immediate Office team who was most likely to have the most complete repository of OASH emails responsive to Defendants’ discovery requests.² In her role, Ms. Calsyn advised “[Admiral Levine] on all aspects of legislation, policy, research, evaluation, and intergovernmental matters.”

HHS, *Maura Calsyn* (Aug. 30, 2022),

<https://www.hhs.gov/about/leadership/maura-calsyn.html> [https://perma.cc/5HLZ-

ERV6]. Ms. Calsyn’s portfolio included health policy issues related to transgender youth. Exhibit A, Declaration of Sarah Boateng (Boateng Decl.), ¶ 9.

² Deputy Assistant Secretary Calsyn departed OASH for another HHS division just a week before emails were collected. Her records have been preserved pursuant to a litigation hold.

For non-email documents from OASH, HHS used a manual collection process and collected documents directly from individuals who have responsive information. Another member of Admiral Levine’s team, Sarah Boateng, the Principal Deputy Assistant Secretary for Health, led this document collection process. Ms. Boateng “shares responsibility with the Assistant Secretary for Health, Admiral Rachel Levine, for planning, coordinating, and directing substantive program matters; policy and program development; and determining and setting legislative and program priorities covering the full range of public health activities within the Office of the Assistant Secretary for Health (“OASH”) to promote healthy people, healthy communities, healthy nation.” *Id.* ¶ 2; HHS, *Sarah Boateng, MHA* (Sept. 6, 2022), <https://www.hhs.gov/about/leadership/sarah-boateng.html> [<https://perma.cc/7V52-87D2>]. The entirety of the OASH Immediate Office reports to Ms. Boateng on substantive issues. Boateng Decl., ¶ 7. HHS has collected non-email files from multiple high-ranking staff members within OASH, including Ms. Boateng, Ms. Calsyn; the Director, Executive Secretariat of OASH Celinda Franco; Chief of Staff Captain Eun (Kathy) J. Oh; OASH Communications Director Adam Sarvana; OASH Senior Advisor on LGBTQI+ Health Equity Adrian Shanker; and Deputy Assistant Secretary, Office of Population Affairs Jessica Swafford Marcella. *Id.* ¶ 14. HHS also reviewed

Admiral Levine's non-email files and found that her files do not contain responsive information that is different from the files that will be produced. *Id.* ¶¶ 15, 32.

B. ADMIRAL LEVINE'S EMAILS AND OTHER RECORDS

Admiral Rachel Levine serves as the Assistant Secretary for Health after being nominated and confirmed in 2021. HHS, *Admiral Rachel L. Levine, MD* (Oct. 31, 2022), <https://www.hhs.gov/about/leadership/rachel-levine.html> [https://perma.cc/NK4L-VH4L]. As part of HHS's leadership team, her role is to lead the agency's efforts to "improve the health and well-being of all Americans." *Id.* Admiral Levine favors in-person communications over email. Boateng Decl., ¶¶ 20, 37. As such, she sends relatively few emails, on average 11, in any given day. *Id.* ¶ 22. Approximately 80% of the emails she sends are emails that she has forwarded to Ms. Boateng or Chief of Staff Captain Kathy Oh without comment, who then forward them on to the appropriate personnel, including Deputy Assistant Secretary Calsyn. *Id.* ¶ 23. While approximately 10% of the emails she sends are a simple, non-substantive response such as "thank you," it is still her practice to copy appropriate members of her staff. *Id.* ¶ 25. The remaining approximate 10% are substantive responses that she usually asks a member of her Immediate Office team to draft for her to send or to send on her behalf. For those emails, it is her practice to copy members of her team for their awareness. *Id.* ¶ 27. If any of those emails involved the subject matter of this litigation, it would be

Admiral Levine’s practice to copy Ms. Boateng or Deputy Assistant Secretary Calsyn, which means those emails would necessarily be collected when searching the already-designated individual’s email accounts. *Id.*

With respect to non-email files, Admiral Levine does not draft her own speeches. Moreover, it is not her practice to edit documents electronically, but instead discusses her edits with her staff, who implement the changes for her. *Id.* ¶¶ 31, 36. It is for this reason that Ms. Boateng determined that Admiral Levine’s non-email files would be unlikely to include unique responsive information. *Id.* ¶ 15.

ARGUMENT

Admiral Levine should not be designated as a custodian in this matter. First, HHS’s designation of Deputy Assistant Secretary Calsyn as a custodian is reasonable and will not result in a deficient production. Second, Admiral Levine’s records do not contain information that is unique and that will not otherwise be collected. Third, Defendants’ insistence on designating Admiral Levine as a custodian is disproportionate to the needs of the case.

A. HHS’S CUSTODIAN SELECTION IS REASONABLE AND WILL NOT RESULT IN A DEFICIENT PRODUCTION.

Defendants are not entitled to dictate who HHS names as a custodian, given that the designee for OASH is reasonable and the production will not be deficient. As one district court has observed, “[u]nless [the] choice [of custodians] is

manifestly unreasonable or the requesting party demonstrates that the resulting production is deficient, the court should play no role in dictating the design of the search, whether in choosing search tools, selecting search terms, or . . . designating custodians.” *Mortg. Resol. Servicing v. J.P. Morgan Chase Bank, N.A.*, No. 15 Civ. 0293, 2017 WL 2305398, at *2 (S.D.N.Y. May 18, 2017); *see also Enslin v. Coca-Cola Co.*, No. 2:14-CV-06476, 2016 WL 7042206, at *3 (E.D. Pa. June 8, 2016) (“Asking a court to compel a party to search the ESI of additional custodians is similar to asking a court to compel a party to undertake additional efforts to search for paper documents. In either case, the requesting party is second-guessing the responding party’s representation that it conducted a reasonable inquiry for responsive information”). Absent agreement by the parties, the party responding to the discovery requests chooses the custodians it deems “most likely to possess responsive information.” *Firefighters’ Ret. Sys. v. Citco Grp. Ltd.*, No. Civil Action 13-373-SDD-EWD, 2018 WL 276941, at *4 (M.D. La. Jan. 3, 2018) (quoting *Mortg. Resol. Servicing*, 2017 WL 2305398, at *2).

HHS is a large government agency with many operating and staff divisions and, as the responding party, it selected custodians from each of the divisions that were most likely to have responsive information. This was no small task. The selections were made with input from key decision-makers in each of the divisions based on their intimate knowledge of how their office operates, the type of

functions that are performed, and their subject area of expertise. HHS aimed to select people who were in the “sweet spot” of the flow of information. As HHS explained to Defendants during negotiations regarding custodians, information flows upward within each division; however, that notion was balanced against the fact that emails received by the individuals at the very top are filtered through someone whose role it is to be the information gatekeeper. Exhibit B.

For OASH, the person at the optimal point in the email information flow was Deputy Assistant Secretary Calsyn. Working with counsel, OASH determined that Ms. Calsyn was the individual who was most likely to have the largest repository of emails that were responsive to Defendants’ discovery requests. Boateng Decl. ¶ 9. As part of the leadership team within OASH, she was responsible for developing and directing policy initiatives across the Office, including policy initiatives involving the subject of transgender rights, and advising Admiral Levine on all aspects of legislation, policy, research, evaluation, and intergovernmental matters. *Id.* HHS’s designation of Ms. Calsyn as the email custodian for OASH was based on the sound discretion of personnel in the best position to know who within their division was most likely to have responsive information. Given that Ms. Calsyn worked closely with Admiral Levine, Defendants will receive responsive emails that the two of them exchanged with one another and that Admiral Levine sent out. Defendants should not be permitted

to second-guess HHS's decision based on pure speculation—particularly because they have not yet seen the entirety of Ms. Calsyn's emails.

Defendants cannot establish that HHS's designation of Deputy Assistant Secretary Calsyn as the email custodian for OASH is unreasonable or that the agency's production will be deficient. Defendants claim that Ms. Calsyn is insufficient because she is “a lawyer with no medical expertise—much less involvement in treatment for gender dysphoric minors—and as a lower-level staffer, would not be privy to all relevant communications.” ECF 302 at 2-3. When choosing a custodian, the responding party is bound to designate the individual who is most likely to have responsive information. Whether there is someone within the organization who has a *personal* background that is more related to the subject matter is immaterial. Moreover, Defendants' bare claim that Ms. Calsyn would not be privy to all relevant communication is unsupported and contradicts HHS's own statements regarding Ms. Calsyn's role in the organization.

HHS's procedures for non-email documents within OASH are also reasonable. Ms. Boateng led the search of OASH's network drives to find responsive documents. Boateng Decl., ¶ 15. Ms. Boateng “cast a broad net to ensure that OASH sufficiently collected unique, non-email files that are responsive to Defendants' discovery requests.” *Id.* In addition, certain studies, speeches, and other documents that were identified by Defendants were specifically pulled to

ensure they would be included in the production. There is no reason to doubt that HHS has conducted a thorough search for responsive documents and that, to the extent Admiral Levine may have relied on research in HHS's custody or control in support of the content of her remarks that gender-affirming care is safe and effective, it has been collected.

Accordingly, HHS's procedures for identifying responsive documents, including the designation of Ms. Calsyn as the email custodian for OASH, are reasonable and will not result in a deficient production.

B. DESIGNATING ADMIRAL LEVINE AS A CUSTODIAN WILL NOT RESULT IN UNIQUE INFORMATION.

Designating Admiral Levine as a custodian will not result in unique information that HHS would not otherwise identify. *See* Fed. R. Civ. P. 26(b)(2)(C) (stating a court “must limit the . . . extent of discovery otherwise allowed by these rules” if the court determines that “discovery sought is unreasonably cumulative or duplicative”). To justify an order compelling HHS to search the records of an additional custodian, Defendants, “as the requesting party, must demonstrate each custodian would provide ‘unique relevant information not already obtained.’” *In re 3M Combat Arms Earplug Products Liability Litigation*, No. 3:19-md-2885, 2020 WL 4501794, at *1 (N.D. Fla. Aug. 5, 2020) (quoting *Fort Worth Emps.’ Ret. Fund v. J.P. Morgan Chase & Co.*, 297 F.R.D. 99, 107-08

(S.D.N.Y. 2013) (refusing to compel a party to search the records of additional custodians even though each had some connection to the events of the case)).

HHS selected Deputy Assistant Secretary Calsyn as the email custodian for OASH because she was a member of Admiral Levine’s Immediate Office team and, as such, advised the Assistant Secretary on all aspects of legislation, policy, research, evaluation, and intergovernmental matters. Boateng Decl., ¶ 9. The two officials worked closely together, and to the extent that one of Admiral Levine’s emails related to the subject matter underlying this litigation, it is almost certain that Ms. Calsyn—who directed policy on transgender issues—would have received a copy of it. *Id.* ¶¶ 23, 25, 27. In designating Ms. Calsyn as the OASH email custodian, OASH determined that the email files of Admiral Levine, and other members of OASH, which relate to the underlying subject matter of this litigation were likely to be substantively duplicative of Ms. Calsyn’s files. *Id.* ¶ 10.

For the manual collection of documents, Principal Deputy Assistant Secretary Boateng tasked the OASH staff who would have documents responsive to Defendants’ discovery requests with collecting those documents. *Id.* ¶¶ 15, 32. This collection is expected to retrieve any hard-copy documents that Admiral Levine worked on—including public statements and speeches—particularly given that she does not draft her own speeches, and due to her practice of not marking up hard copies of documents and communicating edits orally to her staff. *Id.* ¶¶ 31,

35-37. In manually collecting non-email documents for this litigation, OASH explicitly considered Admiral Levine's files to determine whether they would contain unique responsive documents. *Id.* ¶ 15. OASH determined, however, that the review and collection of non-email documents from other custodians rendered Admiral Levine's documents duplicative of what was already collected for the litigation. *Id.*

Defendants' argument that Admiral Levine's position and public prominence warrant her inclusion as a custodian should be rejected. While Admiral Levine has discussed gender-affirming care for minors in her public role as a high-ranking, openly transgender HHS official, her role alone does not make her records subject to search. *See Mortg. Resol. Servicing*, 2017 WL 2305398, at *3 (noting that "speculation that [a desired custodian's] position as a senior executive might increase the relevance of [their] files is not a basis for designating [them] as a custodian") (citing *Assured Guar. Mun. Corp. v. UBS Real Estate Securities, Inc.*, Nos. 12 Civ. 1579(HB)(JCF), 12 Civ. 7322(HB)(SN), 2013 WL 1195545, at *3-4 (S.D.N.Y. Mar. 25, 2013)); *see also In re Morgan Stanley Mortgage Pass-through Certificates Litigation*, No. 09-CV-02137 (LTS)(SN), 2013 WL 4838796, at *2 (S.D.N.Y. Sept. 11, 2013). Again, Admiral Levine is serving at HHS as a public official, not as a practicing doctor or researcher. Admiral Levine's files do not differ from Ms. Calsyn's emails or the documents collected by OASH staff.

Defendants' focus on Admiral Levine's "unique credentials and medical expertise in adolescent medicine and gender dysphoria," ECF 302 at 18, is misleading. To justify requiring HHS to designate Admiral Levine as a custodian, Defendants must show that the *discovery sought* is unique, not that the custodian herself has unique credentials. *See Fort Worth Emps.' Ret. Fund*, 297 F.R.D. at 107 (noting that the requesting party provided "no evidence that there are *unique responsive documents* being missed in the current search scheme that would justify the inclusion of additional custodians from this subgroup") (emphasis added). To the extent that her prior experience as a pediatrician informs her statements on the safety and efficacy of gender-affirming care, it neither changes the nature of the role she was appointed to fill at the agency nor the documents in her possession. Finally, Defendants provide examples of documents they believe will be produced if Admiral Levine were to be made a custodian, however each of these examples are types of documents that are already being collected within the scope of the existing agreed-upon search terms and custodians. ECF No. 302 at 12-13. For example, "[d]ocuments about how 'gender-affirming care for youth' is purportedly 'not in scientific or medical dispute,'" (ECF No. 302 at 12), will already be captured through the parties' agreed-upon search terms including "gender," "affirm," "youth," "treat," and "adverse." Ex. B at 9-10. Likewise, "[a]ny documents bearing on the informed consent process," (ECF No. 302 at 13), will

also be captured through those search terms as well as the term “consent.” Ex. B at 9-10.

The bottom line is Admiral Levine’s records are not unique and, as HHS has said repeatedly, Admiral Levine’s work is supported by her Immediate Office team and any responsive, non-privileged files will be produced. Ex. B. Defendants have failed to show any evidence to suggest otherwise and, instead, simply disregard HHS’s own explanation, given over emails and a series of calls, of how the office—and Admiral Levine—operate.

C. DEFENDANTS’ DEMAND TO MAKE ADMIRAL LEVINE A CUSTODIAN IS DISPROPORTIONATE TO THE NEEDS OF THE CASE.

Any marginal benefit that could be gained from searching Admiral Levine’s records is not proportional to the needs of the case. While courts construe relevance broadly, much of what Defendants are seeking by adding Admiral Levine as a custodian fails even this low bar. Relevance is considered within the context of proportionality. Specifically, proportionality concerns “include the importance of the requested discovery, the parties’ relative access to the information, and ‘whether the burden or expense of the proposed discovery outweighs its likely benefit.’” *Taylor v. Farm Credit of N. Fla. ACA*, No. 21-13807, 2022 WL 4493044, at *3 (11th Cir. Sept. 28, 2022) (quoting Fed. R. Civ. P. 26(b)(1)). Defendants “do not need, and are not entitled under the rules of

proportionality, to every single document related to” the issues in this case. *In re Morgan Stanley*, 2013 WL 4838796, at *2.

This Court has rightly stated that the “fundamental issue in this case . . . is whether Section 4(a)(1)-(3) of [VCAP] is constitutional under the Fourteenth Amendment,” ECF 192 at 5, and made clear in its ruling on Defendants’ first motion to compel that the focus of discovery should be on the safety and efficacy of the treatments. ECF 261 at 4 (denying Defendants’ motion with regard to RFP 6 that sought all documents concerning “transitioning” as opposed to “the effects of transitioning.”). Defendants’ demand for the records of one high-ranking official within a large organization simply because they believe she is a “leading official” on transgender issues goes well beyond that scope.

Defendants’ fixation with Admiral Levine ignores the nature of her role within HHS—where a completely separate operating division (NIH) has funded *some* research on the subject of gender-affirming care. Admiral Levine does not oversee NIH and is a consumer of the research it funds, just like the public.

The *Garcia Ramirez* case, cited by Defendants, illustrates the difference between when individual agency officials’ records may be determinative and, as here, when they are not. *Garcia Ramirez v. U.S. Immigr. Customs Enf’t*, 331 F.R.D. 194 (D.D.C. 2019). There, the communications of individuals within the federal agencies were central to the case because whether those agencies had

considered less restrictive placements determined the outcome of the core legal analysis.³ By contrast, Admiral Levine’s actions, speeches, or public statements in her role as an HHS official *will not* resolve the question of whether SB 184 is constitutional.

As a last resort, Defendants speculate that “[s]earching the Assistant Secretary’s communications and documents could uncover evidence demonstrating that the treatment regimen is not ‘evidence-based’ at all.” ECF 302, at 16. *But see In re Blue Cross Blue Shield*, No. 2:13-CV-20000-RDP, 2017 WL 11681948, at *2 (N.D. Ala. Aug. 30, 2017) (“mere suspicion,” without more, “is not enough to meet the proportionality factors in Rule 26(b)(1)”). A single HHS official, who is not conducting original research, or even overseeing the operating division that funds that research, cannot have the sort of evidence that would warrant collection of documents that are not unique from those that have already been collected and will soon be produced.

In this litigation, Defendants currently have or will have access to: a large body of published scientific and medical literature on gender-affirming care; discovery Defendants have obtained from WPATH; discovery from HHS

³ Plaintiffs were young adult immigrants who arrived in the United States as unaccompanied minors and, upon their eighteenth birthdays, were transferred into the custody of Immigration and Customs Enforcement (ICE). *Id.* at 196. Plaintiffs sued ICE and other federal agencies claiming that they failed to consider transferring the immigrants to the least restrictive placements, as required by law. *Id.*

components, including the FDA and NIH; expert depositions and reports; news stories; and records from Admiral Levine’s Immediate Office colleagues. Adding Admiral Levine to the list of custodians is not proportional to the needs of the case and will simply inhibit HHS’s ability to meet the October 20, 2023, discovery deadline.⁴

CONCLUSION

For the foregoing reasons, the Court should deny Defendants’ Motion to Compel the United States to add Admiral Levine as a document custodian.

Dated: August 21, 2023

Respectfully submitted,

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⁴ As described in Ms. Boateng’s Declaration, less than 4% of Admiral Levine’s sent emails hit on the search terms proposed by Defendants. Boateng Decl. ¶ 22. Despite this small percentage of communications—all of which would be duplicated in other files already being produced—this proposed additional collection from Admiral Levine’s emails would require OASH to collect and review an additional 6,559 documents solely from Admiral Levine’s Outlook files. *Id.*

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CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to counsel of record.

Respectfully submitted,

/s/ Amie S. Murphy

Trial Attorney

Civil Rights Division

U.S. Department of Justice

EXHIBIT A

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

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

DECLARATION OF SARAH BOATENG

I, Sarah Newman Boateng, declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that my testimony below is true and correct:

1. I am employed in the position of Principal Deputy Assistant Secretary for Health (“P-DASH”) for the U.S. Department of Health and Human Services (“HHS” or “Department”).

2. I have held the position of P-DASH since July 2022. In this role, I share responsibility with the Assistant Secretary for Health, Admiral Rachel Levine, for planning, coordinating, and directing substantive program matters; policy and program development; and determining and setting legislative and program priorities covering the full range of public health activities within the Office of the Assistant Secretary for Health (“OASH”) to promote healthy people, healthy communities, healthy nation.

3. Prior to assuming my current position, I served as the OASH Chief of Staff from February 2021 through July 2022, where I organized and prioritized critical issues to support OASH's mission to lead America to a healthier future. Prior to that I served as the Executive Deputy Secretary at the Pennsylvania Department of Health, the Special Assistant to the Physician General at the Pennsylvania Department of Health, the Director of Public Affairs at Planned Parenthood Keystone and a constituent advocate/LGBT Affair Advisor for U.S. Senator Robert P. Casey, Jr.

4. I hold a master's degree in Healthcare Administration from the Colorado State University. I am also a graduate of the University of Pittsburgh and the Robert Morris University.

5. This declaration is based upon personal knowledge, information acquired by me in the course of performing my official duties, and my review of HHS records, systems, and information maintained by HHS in the regular course of my employment.

6. I understand that, as part of the above-captioned litigation, Defendants filed on July 31, 2023 a document entitled "Defendants' Motion To Compel Designation Of One Additional HHS Custodian: Admiral Rachel Levine" ("Motion"). I understand that Defendants' Motion asks the Court to require HHS to search Admiral Levine's files for emails and documents responsive to certain search terms.

OASH's Document Collection to Date for this Litigation

7. In my role as P-DASH, the entirety of the OASH Immediate Office reports to me directly or through one of my direct reports on substantive issues. Therefore, I have personal knowledge as to which OASH personnel are working on issues related to the subject matter

underlying this litigation.

8. I understand that HHS has already collected emails from the Outlook files of former Deputy Assistant Secretary for Health Policy Maura Calsyn.

9. OASH considered each member of the OASH Immediate Office, including Admiral Levine, in determining whose emails to collect in order to comply with its discovery obligations in this litigation. Working with counsel, OASH determined that Deputy Assistant Secretary for Health Policy Maura Calsyn was the individual who was most likely to have the largest repository of emails that were responsive to Defendants' discovery requests. As the Deputy Assistant Secretary for Health Policy, Maura Calsyn advised Admiral Levine on all aspects of legislation, policy, research, evaluation, and intergovernmental matters. As part of the leadership team within the Office of the Assistant Secretary for Health, she was also responsible for developing and directing policy initiatives across the Office. Substantively, Maura Calsyn's portfolio included health policy issues related to transgender youth.

10. OASH also determined that the email files of other members of the OASH Immediate Office, including Admiral Levine, that relate to the underlying subject matter of this litigation were likely to be substantively duplicative of Maura Calsyn's email files. Therefore, it was determined that collecting other individuals' email files, including Admiral Levine's email files, would be unlikely to yield unique email documents that would be responsive to Defendants' discovery requests.

11. I also understand that HHS has offered to produce emails that OASH has collected in response to a FOIA request that is closely related to the subject matter underlying this litigation. Attached hereto as Exhibit A is a copy of the FOIA request that HHS received

from America First Legal on March 23, 2023. This FOIA request seeks “[a]ll records of communications, including e-mail and Microsoft Teams messages, to or from Rachel Levine” that contain specific search terms outlined in the FOIA request.

12. I understand that the search terms included in the FOIA request are substantively the same as the search terms Defendants want HHS to run across Admiral Levine’s files. In particular, the FOIA request includes the following search terms: “WPATH,” “gender-affirming care,” “puberty blockers,” “testosterone,” “hormone replacement therapy,” “HRT,” “transgender clinics,” “gender dysphoria,” “transition surgery,” “gender identity,” “detransitioning,” “detransitioned,” “detransitioner,” “medically transitioned,” “medically necessary,” “parental rights,” and “parental consent.”

13. I understand that documents have already been collected in response to this FOIA request and are being actively reviewed by the FOIA office within HHS. I understand that HHS has offered to produce to Defendants any of the documents released in response to this FOIA request because the burden of doing so will be very small for the Agency since they are already being collected, reviewed, and released.

14. I also understand that HHS has already collected non-email files from multiple members of the OASH Immediate Office, including at least myself; former Deputy Assistant Secretary for Health Policy Maura Calsyn; the Director, Executive Secretariat of OASH Celinda Franco; Chief of Staff Captain Eun (Kathy) J. Oh; OASH Communications Director Adam Sarvana; and OASH Senior Advisor on LGBTQI+ Health Equity Adrian Shanker. I additionally understand that HHS has already collected non-email files from Deputy Assistant Secretary, Office of Population Affairs Jessica Swafford Marcella.

15. I led OASH's efforts to collect non-email files from within and throughout the agency. In doing so, I cast a broad net to ensure that OASH sufficiently collected unique, non-email files that are responsive to Defendants' discovery requests. Admiral Levine's non-email files were considered to be part of that wide net. However, I determined that Admiral Levine's non-email files were unlikely to contain unique responsive documents that were not duplicative of the files of the other individuals from whom documents were collected. I will explain the reasons for that below.

Role as P-DASH

16. The entire OASH Immediate Office reports to me directly or through one of my direct reports on substantive issues being handled by the Immediate Office. Therefore, I have direct knowledge as to which OASH personnel are working on which issues and oversee that work where appropriate.

17. I understand that Defendants have expressed an interest in work done by the OASH Office of Population Affairs ("OPA"). OPA reports to Admiral Levine through me. While Admiral Levine meets with each OASH office—including OPA—quarterly, I am either involved in those meetings or kept abreast as to important issues that are covered therein. When available, the Deputy Assistant Secretary for Health Policy would also participate in those meetings to the extent that the meeting's subject matter warranted her participation.

Admiral Levine's Email and Document Practices

18. I have worked closely with Admiral Levine for the last eight years, including in my roles as P-DASH where I serve as Admiral Levine's Principal Deputy, as Admiral Levine's

Chief of Staff, as the Executive Deputy Secretary at the Pennsylvania Department of Health (Admiral Levine was the Secretary), and as the Special Assistant to the Physician General at the Pennsylvania Department of Health (Admiral Levine was the Physician General).

19. Because of these many years of close contact and work, I am familiar with Admiral Levine's email and document practices.

20. For many years prior to coming to public service, Admiral Levine served as a practicing pediatrician. While her office had a personal computer, she spent the majority of her day seeing patients and not working at an office desk. Therefore, Admiral Levine did not use computers and email as her primary communication tool until late in her career. As a result, Admiral Levine handles email and electronic documents differently than most other personnel in the OASH Immediate Office.

21. First, Admiral Levine clears her inbox every day. The emails are saved but by the end of the day each email that has come into her inbox has been reviewed and dispensed with, as appropriate.

22. Secondly, Admiral Levine sends relatively few emails in a given day. OASH polled a three-month period from March 1, 2023 to May 1, 2023 to determine how many emails Admiral Levine sends on a daily and monthly average. On average, Admiral Levine sends approximately 11 emails each day, or 346 emails per month. Less than 4% of those emails (approximately 12 per month) hit on the search terms proposed by Defendants. Despite this paucity of potentially relevant communications—all of which would be duplicated in other custodians' files as described below—I understand that Defendants' proposed additional collection from Admiral Levine's emails would require OASH to collect and review an

additional 6,559 documents solely from Admiral Levine's Outlook files. This would be in addition to the 12,716 documents that OASH has already collected and reviewed as part of this litigation. And few, if any, of those 6,559 documents would be expected to provide information unique from what OASH has already collected, reviewed, and will shortly produce.

23. Approximately 80% of Admiral Levine's sent emails are emails that she has forwarded to me and to Acting Chief of Staff Kathy Oh without comment. If Admiral Levine believes that an email is important (i.e., if it is not "spam"), she will forward it at least to Kathy Oh and me. Kathy and I will then forward those emails to the appropriate personnel within the OASH Immediate Office. To the extent that one of these emails related to the subject matter underlying this litigation, it is almost certain that the OASH Deputy Assistant Secretary for Health Policy would receive a copy of the email due to that person's role.

24. Therefore, searching Maura Calsyn's emails as well as the files of the appropriate OASH Immediate Office Personnel identified above would collect any of these documents that are responsive to Defendants' discovery requests.

25. Approximately 10% of Admiral Levine's sent emails are non-substantive responses to an email that she has received. Admiral Levine will often reply "thank you" or something similar to an email she receives. She rarely provides a more substantive response. Even when she provides these types of non-substantive responses, it is Admiral Levine's practice to copy members of the Immediate Office whose work intersects with the subject matter underlying the initial email. To the extent that one of these non-substantive response emails related to the subject matter underlying this litigation, it would be Admiral Levine's practice to copy myself and/or the OASH Deputy Assistant Secretary for Health Policy.

26. Therefore, searching Maura Calsyn's emails as well as the files of appropriate OASH Immediate Office Personnel identified above would collect any of these documents that are responsive to Defendants' discovery requests.

27. Finally, approximately 10% of Admiral Levine's sent emails are substantive responses to an email that she has received. In many instances, Admiral Levine asks a member of the OASH Immediate Office to draft a response for her to send or to send on her behalf. Whenever Admiral Levine sends substantive emails, it is her practice to copy members of the OASH Immediate Office for their awareness. Therefore, to the extent that one of these substantive response emails related to the subject matter underlying this litigation, it would be Admiral Levine's practice to copy at least myself and/or the OASH Deputy Assistant Secretary for Health Policy.

28. Therefore, searching Maura Calsyn's emails as well as the files of appropriate OASH Immediate Office Personnel identified above would collect any of these documents that are responsive to Defendants' discovery requests.

29. Accordingly, while Defendants are correct that "[Admiral] Levine, as head of OASH, almost certainly receives relevant communications from people *other than Calsyn*," (Motion at 18), their assumption that "[Admiral] Levine's communications contain unique, relevant information" is incorrect based on Admiral Levine's practice of forwarding emails to her Immediate Office team.

30. It is for this reason that OASH designated Maura Calsyn as the most appropriate custodian for email files given her position as Deputy Assistant Secretary for Health Policy.

31. Admiral Levine typically reviews documents in hard copy and does not edit documents with comments and redlines. Instead, to the extent that Admiral Levine believes that a draft document needs to be edited or changed, she would discuss the document with the appropriate member of the Immediate Office who would then implement Admiral Levine's edits.

32. Thus, searching the files of the appropriate OASH staff identified above would be expected to collect any non-email documents that are responsive to Defendants' discovery requests. As noted above, this is why no documents that "belong" to Admiral Levine were collected as part of OASH's manual collection of responsive documents: Admiral Levine does not have unique, responsive documents in her possession that are not duplicative of the files of the OASH staff identified above.

33. It is for this reason that OASH sought non-email documents from the entirety of the OASH Immediate Office and collected all unique, responsive documents that OASH was able to locate.

Admiral Levine's Speeches and Public Statements

34. I understand that Defendants have asserted that "Admiral Levine is *the* leading public-facing official in the United States government when it comes to transitioning treatments for minors." Motion at 1. In support of this statement, Defendants have pointed to Admiral Levine's public statements on the subject matter underlying the litigation, noting that "[Admiral] Levine has repeatedly spoken about the safety and efficacy of transitioning treatments for youth, particularly as it relates to purported mental health improvements." Motion at 9.

35. While Defendants are correct that Admiral Levine has made multiple public statements regarding the relevant subject matter, they are incorrect that “Admiral Levine’s emails likely contain unique information” (Motion at 17) for all of the reasons I have noted above. Admiral Levine’s public statements are no different than the other types of documents that I have already discussed. Admiral Levine’s files are unlikely to contain many, if any, documents that are unique from what OASH has already collected to fulfill its discovery obligations in this litigation.

36. As an initial matter, Admiral Levine does not draft her own speeches. Rather, members of the OASH Immediate Office—who have already collected responsive documents for the litigation—draft Admiral Levine’s speeches. And as discussed above regarding non-email documents, Admiral Levine reviews those draft speeches with the Immediate Office.

37. If Admiral Levine has proposed changes or revisions to those draft speeches, those changes and revisions are communicated orally to the Immediate Office, who in turn implement them into the draft speech. Thus, the documents that Defendants purport to seek are actually stored in the electronic files of the individuals from whom OASH has already collected documents.

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 21, 2023.

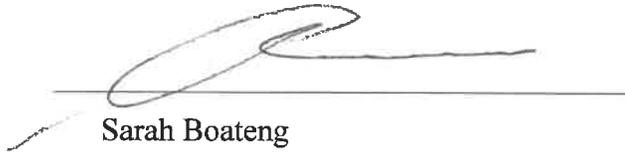

Sarah Boateng
Principal Deputy Assistant Secretary for Health
Office of the Assistant Secretary for Health

EXHIBIT B

From: [Murphy, Amie \(CRT\)](#)
To: [Brian Barnes](#)
Cc: [Cheek, Jason \(USAALN\)](#); [LaCour, Edmund](#); [Wilson, Thomas](#); [Davis, Jim](#); [Seiss, Ben](#); [Christopher Mills](#); [Pete Patterson](#); [David Thompson](#); [Jeffrey P. Doss](#); [Amie A. Vague](#); [AOrr](#); [Jennifer Levi](#); [Sarah Warbelow](#); [Cynthia Weaver](#); [Andy Pratt](#); [Misty Peterson](#); [Brent Ray](#); [Abigail Terry](#); [Michael Shortnacy](#); [Scott McCoy](#); [Melody H. Eagan](#); [Adam Reinke](#); [Diego Soto](#); [Jessica Stone](#); [Montag, Coty \(CRT\)](#); [Marshall, Margaret \(USAALN\)](#); [Williams, Renee \(CRT\)](#); [Toyama, Kaitlin \(CRT\)](#); [Bowdre, Barrett](#); [John Ramer](#)
Subject: RE: Boe v. Marshall, No. 22-184 (M.D. Ala.) -- HHS Documents
Date: Thursday, June 29, 2023 9:54:00 AM

Brian,

Thank you for giving further thought to HHS's proposal regarding Admiral Levine's emails. Given that we still disagree with your assessment that adding Admiral Levine to the list of custodians will lead to the production of relevant documents, HHS is only willing to produce her emails if it can do so without substantial cost to the agency. We think that the search terms in the FOIA request are sufficiently broad enough to unearth all responsive documents. Moreover, HHS plans to produce Deputy Assistant Secretary for Health Policy Maura Calsyn's emails, which were searched using the agreed-upon terms.

In the interest of avoiding motion practice, however, HHS can commit to producing the emails it has collected for the FOIA request on or before August 31st if you accept their offer.

Happy to discuss.

Amie

From: Brian Barnes <BBarnes@cooperkirk.com>
Sent: Wednesday, June 28, 2023 10:58 AM
To: Murphy, Amie (CRT) <Amie.Murphy2@usdoj.gov>
Cc: Cheek, Jason (USAALN) <JCheek@usa.doj.gov>; LaCour, Edmund <Edmund.LaCour@AlabamaAG.gov>; Wilson, Thomas <Thomas.Wilson@AlabamaAG.gov>; Davis, Jim <Jim.Davis@AlabamaAG.gov>; Seiss, Ben <Ben.Seiss@AlabamaAG.gov>; Christopher Mills <cmills@spero.law>; Pete Patterson <ppatterson@cooperkirk.com>; David Thompson <dthompson@cooperkirk.com>; Jeffrey P. Doss <jdoss@lightfootlaw.com>; Amie A. Vague <avague@lightfootlaw.com>; AOrr <AOrr@nclrights.Org>; Jennifer Levi <Jlevi@glad.Org>; Sarah Warbelow <Sarah.Warbelow@hrc.Org>; Cynthia Weaver <cynthia.Weaver@hrc.Org>; Andy Pratt <Apratt@kslaw.Com>; Misty Peterson <Mpeterson@kslaw.Com>; Brent Ray <Bray@kslaw.Com>; Abigail Terry <ATerry@kslaw.com>; Michael Shortnacy <Mshortnacy@kslaw.Com>; Scott McCoy <Scott.Mccoy@splcenter.Org>; Melody H. Eagan <meagan@lightfootlaw.com>; Adam Reinke <Areinke@kslaw.Com>; Diego Soto <Diego.Soto@splcenter.Org>; Jessica Stone <Jessica.Stone@splcenter.Org>; Montag, Coty (CRT) <Coty.Montag@usdoj.gov>; Marshall, Margaret (USAALN) <mmarshall2@usa.doj.gov>; Williams, Renee (CRT) <Renee.Williams3@usdoj.gov>; Toyama, Kaitlin (CRT) <Kaitlin.Toyama@usdoj.gov>; Bowdre, Barrett <Barrett.Bowdre@AlabamaAG.gov>; John Ramer <jramer@cooperkirk.com>
Subject: [EXTERNAL] RE: Boe v. Marshall, No. 22-184 (M.D. Ala.) -- HHS Documents

Hi Amie,

We have given further consideration to your proposal regarding the production of the FOIA documents in lieu of designating Admiral Levine as a custodian for our search terms, and we hope we can come to a compromise.

First, we appreciate your clarification that the documents produced to us would be produced pursuant to Rule 26, not FOIA, and that we will therefore not be dependent on the third-party FOIA requestor to challenge an incomplete production. We also understand your clarification to mean that we will be entitled to a complete privilege log under Rule 26 and that any asserted privileges – including the deliberative-process privilege – will work as they normally do in civil discovery, not FOIA. Please let me know if we have misunderstood anything here.

Second, we are concerned about the incomplete timeline stated in the FOIA request. While our RFPs would encompass Admiral Levine's entire tenure as Assistant Secretary for Health (beginning March 26, 2021, I believe), the FOIA request sets its timeline as "October 19, 2021, to the date this item is fully processed." (That date appears to be when Levine was commissioned as a four-star admiral in the U.S. Public Health Service Commissioned Corps). We request that the timeline be extended to capture Admiral Levine's entire time at HHS.

Third, there are a handful of search terms that we have agreed on which we do not think are encompassed by the FOIA request. We thus request that HHS add these to the search terms listed in the FOIA request:

- "Rapid onset gender dysphoria"
- Gatekeeping AND (youth or child! or adolescent or minor! or kid! or teen! or boy! or girl!) AND transgender!
- Littman AND (youth or child! or adolescent! or minor! or kid! or teen! or boy! or girl!) AND (transition! OR transgender)
- Consent AND (youth or child! or adolescent! or minor! or kid! or teen! or boy! or girl!) AND ((gender /3 affirming) or (puberty /3 Block!) or hormone or CSH)
- Finland and (youth or child! or adolescent! or minor! or kid! or teen! or boy! or girl!) AND (transgender or "gender affirming") AND (transition! or treat! or care or affirm!)
- Sweden and (youth or child! or adolescent! or minor! or kid! or teen! or boy! or girl!) AND (transgender or "gender affirming") AND (transition! or treat! or care)
- ("United Kingdom" or UK) and (youth or child! or adolescent! or minor! or kid! or teen! or boy! or girl!) AND (transgender or "gender affirming") AND (transition! or treat! or care)
- "Trans Youth Care Research Network"
- Adverse AND transgend! /5 (youth or child! or adolescent! or minor! or kid! or teen! or boy! or girl!) AND (trans! or gender or GAT or GAC)

Please let me know if HHS is amenable to these suggestions that will allow us to move things forward without motions practice. Happy to jump on the phone to discuss.

Best regards,

Brian

From: Murphy, Amie (CRT) <Amie.Murphy2@usdoj.gov>
Sent: Wednesday, June 21, 2023 1:52 PM
To: Brian Barnes <BBarnes@cooperkirk.com>
Cc: Cheek, Jason (USAALN) <Jason.Cheek@usdoj.gov>; LaCour, Edmund <Edmund.LaCour@AlabamaAG.gov>; Wilson, Thomas <Thomas.Wilson@AlabamaAG.gov>; Davis, Jim <Jim.Davis@AlabamaAG.gov>; Seiss, Ben <Ben.Seiss@AlabamaAG.gov>; Christopher Mills <cmills@spero.law>; Pete Patterson <ppatterson@cooperkirk.com>; David Thompson <dthompson@cooperkirk.com>; Jeffrey P. Doss <jdoss@lightfootlaw.com>; Amie A. Vague <avague@lightfootlaw.com>; AOrr <Aorr@nclrights.Org>; Jennifer Levi <jlevi@glad.Org>; Sarah Warbelow <Sarah.Warbelow@hrc.Org>; Cynthia Weaver <cynthia.Weaver@hrc.Org>; Andy Pratt <Apratt@kslaw.Com>; Misty Peterson <Mpeterson@kslaw.Com>; Brent Ray <Bray@kslaw.Com>; Abigail Terry <ATerry@kslaw.com>; Michael Shortnacy <Mshortnacy@kslaw.Com>; Scott McCoy <Scott.Mccoy@splcenter.Org>; Melody H. Eagan <meagan@lightfootlaw.com>; Adam Reinke <Areinke@kslaw.Com>; Diego Soto <Diego.Soto@splcenter.Org>; Jessica Stone <Jessica.Stone@splcenter.Org>; Montag, Coty (CRT) <Coty.Montag@usdoj.gov>; Marshall, Margaret (USAALN) <Margaret.Marshall@usdoj.gov>; Williams, Renee (CRT) <Renee.Williams3@usdoj.gov>; Toyama, Kaitlin (CRT) <Kaitlin.Toyama@usdoj.gov>; Bowdre, Barrett <Barrett.Bowdre@AlabamaAG.gov>; John Ramer <jramer@cooperkirk.com>
Subject: RE: Boe v. Marshall, No. 22-184 (M.D. Ala.) -- HHS Documents

Brian,

We disagree that Admiral Levine should be named as a record custodian because giving speeches isn't relevant to the underlying subject matter of the litigation. Further, we don't see how the studies she may have relied on to inform the content of those speeches would be relevant. Defendants have already requested the studies that HHS has funded on the topic, and HHS is in the process of producing those.

Nevertheless, without waiving our objection to relevance, we are authorized to propose a compromise. HHS received a FOIA request from a third-party organization for all of Admiral Levine's communications on gender-affirming care since she was sworn-in to office on October 19, 2021. HHS is willing to produce all the documents it produces to the third-party on or before the October 30, 2023 deadline. Attached is a copy of the FOIA request.

Please let us know whether you have any questions about this proposal.

Amie

From: Murphy, Amie (CRT)

Sent: Wednesday, June 21, 2023 9:20 AM

To: Brian Barnes <BBarnes@cooperkirk.com>

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

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

Brian,

We are discussing this with HHS and will get back to you shortly.

Amie

From: Brian Barnes <BBarnes@cooperkirk.com>

Sent: Tuesday, June 20, 2023 4:19 PM

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

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

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

Amie,

Thanks for meeting on the phone with us on Friday. Although we think it would have been better had we been able to participate in the process to narrow the search terms, we can agree to the narrowed search terms if HHS agrees to make Admiral Levine a custodian for searching emails at OASH. Otherwise, we intend to seek a ruling from the Court on the custodian issue at Monday's hearing. Please let us know if this compromise works by tomorrow at 1 pm CT so we can alert the Court as needed.

Best regards,

Brian

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

Sent: Thursday, June 15, 2023 2:54 PM

To: Brian Barnes <BBarnes@cooperkirk.com>

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

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

Hi Brian,

We're happy to get on a call to discuss the issues raised in your email. Unfortunately, times are a bit limited today and tomorrow with everyone trying to squeeze meetings in before the long weekend. For tomorrow, I can offer up 10-11 or 3-5.

Let me know what might work for you.

Amie

From: Brian Barnes <BBarnes@cooperkirk.com>

Sent: Thursday, June 15, 2023 10:19 AM

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

Hi Amie,

Thanks for the update. I think it probably makes sense to get on the phone this week to talk through some things and see where we are. Is there a time in the next day or two that works for you?

Regarding your last update, we're a bit concerned that the process is becoming unilateral. From your email it appears that HHS itself determined that some of the searches resulted "in an unreasonable number of documents," without letting us know how many documents it thought was "unreasonable." Then HHS determined for itself how to alter the search terms we had agreed on, again without allowing us to be part of that process. Then HHS determined for itself to run the new terms it had chosen, also without any input from us. Only after that process was complete did HHS provide us notice of what it had already done. It seems to us we should have input into that process. How many documents did the original search terms ping? What number does HHS consider to be "unreasonable"? We don't know, and it apparently doesn't matter to HHS that we don't know. We think that's a problem.

We also don't agree with your assessment that the change in the Boolean modifiers "increased the chance that the terms produced relevant documents." We fear that, instead, by using a "NEAR(5)" restriction, the new search terms HHS chose *exclude* relevant documents by requiring all the relevant terms to be closely stacked against one another. If we need to narrow the search terms, we can of course discuss ways to do that. But we are not comfortable with HHS simply determining the need for revised search terms and choosing the new terms all by itself. This should be a collaborative process.

We have similar concerns with the rejection of our suggestion to use custodians and search terms for OASH. In the spirit of compromise, we had agreed to use a "go get" method for SAMHSA, but suggested making Admiral Levine a custodian and using search terms for OASH. In response, you

informed us that HHS had already moved forward with the “go get” for OASH and thus had rejected our suggestion (apparently without even considering the compromise we had proposed). We remain concerned that a “go get” for OASH is insufficient. As you know, Admiral Levine is often the face of HHS regarding transitioning treatments for youth. Over and over Admiral Levine has spoken publicly, *as the Assistant Secretary for Health*, in favor of the safety and efficacy of those treatments. Just this week the Admiral stated in a public address: “Gender-affirming care is medical care. Gender-affirming care is mental health care. Gender-affirming care is literally suicide prevention care. It improves the quality of life, and it saves lives, and is based upon decades of study. It is a well-established medical practice...Gender-affirming care is medically necessary, safe, and effective, for transgender and non-binary youth and adults.”

https://twitter.com/HHS_ASH/status/1668264004492328961. Admiral Levine has made many similar speeches and statements as the Assistant Secretary for Health. Such statements *and their inputs* would seem to be responsive to our RFP asking for communications “concerning the effects of Transitioning or the treatment of Minors for Gender Dysphoria or a Related Condition on the well-being or health of Minors.”

Similarly, Admiral Levine has publicly discussed the informed-consent process used by gender clinics. As one news report put it: “Levine, the U.S. assistant secretary for health, said that clinics are proceeding carefully and that no American children are receiving drugs or hormones for gender dysphoria who shouldn’t. ‘It’s not like anyone who arrives automatically gets medical treatment,’ she said.” Chad Terhune et al., *As More Transgender Children Seek Medical Care, Families Confront Many Unknowns*, Reuters (Oct. 6, 2022), <https://www.reuters.com/investigates/special-report/usa-transyouth-care/>. Again, this statement and its inputs would seem to be responsive to our RFP asking for communications “concerning the informed consent process for treating Minors for Gender Dysphoria or a Related Condition.” Given these statements – and many, many more like them – we do not understand how HHS has determined that the Admiral Levine would not be an appropriate custodian.

Finally, there appear to be offices within OASH that also seem likely to us to have responsive information. For instance, in a number of RFPs we asked about communications and documents related to ongoing research studies, the reporting of adverse events, and the informed consent process. And we know that there have been adverse events—including two suicides—in specific studies we mentioned in the RFPs that HHS is funding. See Letter to Lawrence Tabak (June 6, 2023), https://www.help.senate.gov/imo/media/doc/nih_trans_letter.pdf. We would expect the Office of Human Research Protections and the Office of Research Integrity would have information relevant to these RFPs. Why is this not the case?

Again, we think a phone call to discuss these issues would be helpful. Please let me know if you are available tomorrow or Thursday for a call.

Best regards,

Brian

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

Sent: Thursday, June 8, 2023 3:31 PM

To: Brian Barnes <BBarnes@cooperkirk.com>

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

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

Good afternoon, Brian-

I'm writing with an update. HHS has completed its test searches of email accounts for NIH and the OS divisions (OCR, OASH, and SAMSHA) using the 20 search terms selected by Defendants. By and large, most of the terms did not result in an unreasonable number of documents. A few of the terms, however, needed to be modified, so HHS did so by changing the Boolean modifiers. This change increased the chance that the terms produced relevant documents without change to the substance of the terms themselves.

For NIH and the OS Divisions, the modified terms are as follows:

(gender NEAR(3) dysphoria) AND (youth OR child* OR adolescent* OR minor* OR kid* OR teen* OR boy* OR girl*) ~~AND~~ NEAR(5) (transition* OR treat* OR care OR affirm*)

(gender NEAR(3) affirming) AND (youth OR child* OR adolescent* OR minor* OR kid* OR teen* OR boy* OR girl*) ~~AND~~ NEAR(5) (transition* OR treat* OR care OR hormon*)

(consent AND (youth OR child* OR adolescent* OR minor* OR kid* OR teen* OR boy* OR girl*)) ~~AND~~ NEAR(5) ((gender NEAR(3) affirming) OR (puberty NEAR(3) Block*) OR hormone OR CSH)

("United Kingdom" OR UK) AND (youth OR child* OR adolescent* OR minor* OR kid* OR teen* OR boy* OR girl*) AND (transgender OR "gender affirming") ~~AND~~ NEAR(5) (transition* OR treat* OR care)

For NIH only, the modified terms are as follows:

(Hormone NEAR(3) therapy) AND (transition* OR transgender OR affirm*) ~~AND NEAR(5)~~ (youth OR child* OR adolescent* OR minor* OR kid* OR teen* OR boy* OR girl*)

For the OS Divisions only, the modified terms are as follows:

(wpath ~~AND NEAR(5)~~ (youth OR child* OR adolescent* OR minor* OR kid* OR teen* OR boy* OR girl* OR guidelines OR "soc8"))

(adverse AND (transgend* NEAR(5) (youth OR child* OR adolescent* OR minor* OR kid* OR teen* OR boy* OR girl*) ~~AND NEAR(5)~~ (trans* OR gender OR gat OR gac)))

In the interest of time, HHS verified these terms by rerunning them through the email accounts, and has begun collecting documents. We will continue to update you.

Best,

Amie

From: Murphy, Amie (CRT)

Sent: Wednesday, May 31, 2023 1:05 PM

To: 'Brian Barnes' <BBarnes@cooperkirk.com>

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

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

Thanks, Brian.

HHS has already begun moving forward with the “go get” method for OASH in order to meet the Court’s benchmarks. As Lena mentioned during the call, the potentially responsive information that OASH has is fairly circumscribed and mostly relates to Admiral Levine’s speech at the 2022 WPATH Scientific Symposium and the OPA two-pager on Gender Affirming Care and Young People. Of course, the search is not yet complete, so there may be more. Given what they are finding so far, however, we believe the burden of using search terms for their network drives far outweighs the need in this instance. The same thought applies to searching Admiral Levine’s emails.

Amie

From: Brian Barnes <BBarnes@cooperkirk.com>
Sent: Tuesday, May 30, 2023 1:25 PM
To: Murphy, Amie (CRT) <Amie.Murphy2@usdoj.gov>
Cc: Cheek, Jason (USAALN) <JCheek@usa.doj.gov>; LaCour, Edmund <Edmund.LaCour@AlabamaAG.gov>; Wilson, Thomas <Thomas.Wilson@AlabamaAG.gov>; Davis, Jim <Jim.Davis@AlabamaAG.gov>; Seiss, Ben <Ben.Seiss@AlabamaAG.gov>; Christopher Mills <cmills@spero.law>; Pete Patterson <ppatterson@cooperkirk.com>; David Thompson <dthompson@cooperkirk.com>; Jeffrey P. Doss <jdoss@lightfootlaw.com>; Amie A. Vague <avague@lightfootlaw.com>; AOrr <Aorr@nclrights.Org>; Jennifer Levi <Jlevi@glad.Org>; Sarah Warbelow <Sarah.Warbelow@hrc.Org>; Cynthia Weaver <cynthia.Weaver@hrc.Org>; Andy Pratt <Apratt@kslaw.Com>; Misty Peterson <Mpeterson@kslaw.Com>; Brent Ray <Bray@kslaw.Com>; Abigail Terry <ATerry@kslaw.com>; Michael Shortnacy <Mshortnacy@kslaw.Com>; Scott McCoy <Scott.Mccoy@splcenter.Org>; Melody H. Eagan <meagan@lightfootlaw.com>; Adam Reinke <Areinke@kslaw.Com>; Diego Soto <Diego.Soto@splcenter.Org>; Jessica Stone <Jessica.Stone@splcenter.Org>; Montag, Coty (CRT) <Coty.Montag@usdoj.gov>; Marshall, Margaret (USAALN) <mmarshall2@usa.doj.gov>; Williams, Renee (CRT) <Renee.Williams3@usdoj.gov>; Toyama, Kaitlin (CRT) <Kaitlin.Toyama@usdoj.gov>; Bowdre, Barrett <Barrett.Bowdre@AlabamaAG.gov>; John Ramer <jramer@cooperkirk.com>
Subject: [EXTERNAL] RE: Boe v. Marshall, No. 22-184 (M.D. Ala.) -- HHS Documents

Hi Amie,

Following up on our call last week, we are not inclined to use a “go get” for OASH. As I mentioned on the call, it seems like Admiral Levine and her office serve as the face of the Administration on many of the issues relevant to this case, so we think using search terms for that office makes sense. We also still think it makes sense to designate Admiral Levine as a custodian. In the spirit of compromise, however, we will agree to use a “go get” for SAMHSA. Happy to discuss further if that would be helpful.

Best regards,

Brian

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

Sent: Friday, May 26, 2023 10:24 AM

To: Brian Barnes <BBarnes@cooperkirk.com>

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

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

Thanks, Brian. Please let us know your thoughts on OASH so we can proceed on that front early next week. Have a nice holiday weekend everyone!

From: Brian Barnes <BBarnes@cooperkirk.com>

Sent: Thursday, May 25, 2023 1:47 PM

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

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

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

Hi Amie,

Thanks for the call earlier today. I've attached a list of search terms with the 20 terms that we would

propose HHS start with highlighted. This is without prejudice to Defendants proposing to add or modify search terms once we see a hit report for the 20 terms we have highlighted.

Best regards,

Brian

From: Murphy, Amie (CRT) <Amie.Murphy2@usdoj.gov>
Sent: Tuesday, May 23, 2023 6:30 PM
To: Brian Barnes <BBarnes@cooperkirk.com>
Cc: Cheek, Jason (USAALN) <Jason.Cheek@usdoj.gov>; LaCour, Edmund <Edmund.LaCour@AlabamaAG.gov>; Wilson, Thomas <Thomas.Wilson@AlabamaAG.gov>; Davis, Jim <Jim.Davis@AlabamaAG.gov>; Seiss, Ben <Ben.Seiss@AlabamaAG.gov>; Christopher Mills <cmills@spero.law>; Pete Patterson <ppatterson@cooperkirk.com>; David Thompson <dthompson@cooperkirk.com>; Jeffrey P. Doss <jdoss@lightfootlaw.com>; Amie A. Vague <avague@lightfootlaw.com>; AOrr <Aorr@nclrights.Org>; Jennifer Levi <jlevi@glad.Org>; Sarah Warbelow <Sarah.Warbelow@hrc.Org>; Cynthia Weaver <cynthia.Weaver@hrc.Org>; Andy Pratt <Apratt@kslaw.Com>; Misty Peterson <Mpeterson@kslaw.Com>; Brent Ray <Bray@kslaw.Com>; Abigail Terry <ATerry@kslaw.com>; Michael Shortnacy <Mshortnacy@kslaw.Com>; Scott McCoy <Scott.Mccoy@splcenter.Org>; Melody H. Eagan <meagan@lightfootlaw.com>; Adam Reinke <Areinke@kslaw.Com>; Diego Soto <Diego.Soto@splcenter.Org>; Jessica Stone <Jessica.Stone@splcenter.Org>; Montag, Coty (CRT) <Coty.Montag@usdoj.gov>; Marshall, Margaret (USAALN) <Margaret.Marshall@usdoj.gov>; Williams, Renee (CRT) <Renee.Williams3@usdoj.gov>; Toyama, Kaitlin (CRT) <Kaitlin.Toyama@usdoj.gov>; Bowdre, Barrett <Barrett.Bowdre@AlabamaAG.gov>; John Ramer <jramer@cooperkirk.com>
Subject: RE: Boe v. Marshall, No. 22-184 (M.D. Ala.) -- HHS Documents

Hi Brian—

I agree that it would make sense to get on a call this week to discuss custodians and additional divisions for the “go get.” In the meantime, we spoke with HHS and want to provide you with our thoughts on the concerns that you raise in your email. Also, I’m attaching an updated list of custodians, which includes the representative from SAMHSA that we mentioned in our brief.

First, Maura Calsyn and Dylan Nicole de Kervor are lawyers but they do not work in OGC, so it is not their role to provide legal advice to HHS or any of the divisions.

Second, HHS does not think that it makes sense to add Admiral Rachel Levine to the list of custodians. As the Assistant Secretary, her work is too broad and high level for searches of her email account or documents to result in relevant information pertaining to this lawsuit.

HHS is considering whether there is someone to add to the list of custodians from OCR.

Regarding the seniority of the persons on the list, information flows up the chain of command within the division, so these are the personnel that are most likely to have relevant emails/documents

regarding the work within their sphere. It is unnecessary to add anyone less senior.

HHS agrees to your suggestion for using a “go get” for the studies cited in RFPs 18 and 19.

On your last point about using the “go get” method for additional divisions within HHS, HHS suggests starting by adding SAMHSA and HRSA. They are still considering whether it makes sense to add others. They can answer any questions regarding these choices on our call.

Lastly, in light of the hearing, HHS intends to begin running email searches by the end of the week. They will start with 20 terms and, since it appears that you have no objection to the custodians that are on the current list, those custodians. We can add custodians if it makes sense to do so after our call. Please let us know which 20 terms from the two most recent versions of the list (yours and ours) you would like them to run by this Thursday.

Please let me know your availability for a call. We can meet during the following times:

Wednesday, 5/24 – 11:00-11:30, 12-12:30

Thursday, 5/25 – 10:30-4

Friday, 5/26 – 10-11:30

Amie

From: Brian Barnes <BBarnes@cooperkirk.com>

Sent: Monday, May 22, 2023 2:30 PM

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

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

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

Hi Amie,

Thanks for sending the list of suggested custodians. I think it will make sense for us to hop on the phone to discuss in the days ahead, but I first wanted to send along some thoughts and reactions in writing to hopefully help make our next discussion more productive.

First, we noticed that a couple of the suggested custodians (Maura Calsyn and Dylan Nicole de Kervor) are lawyers. That's not a problem per se, but before proceeding with them we wanted to confirm that their work on the relevant issues doesn't primarily involve giving legal advice. Obviously we should avoid using custodians whose responsive documents are likely to be covered by the attorney-client privilege.

Second, we wanted to raise the question whether it makes sense to add the Assistant Secretary for Health (Rachel Levine) to the list of custodians. While we were glad to see a member of her immediate team (Calsyn) included on the list, it seems to us that also including Levine herself would be sensible given her work on the relevant issues.

Third, we think it would make sense to add a custodian from the Office of Civil Rights who worked there on the relevant issues in 2019 and 2020. In the summer of 2020, OCR said in the Federal Register that "there is no medical consensus to support one or another form of treatment for gender dysphoria." 85 Fed. Reg. 37160, 37198 (June 19, 2020). That statement suggests that OCR was doing work on this issue in 2019 and 2020 that could be quite important to the case.

Fourth, all of the proposed custodians appear to be quite senior – mostly directors of various offices and senior advisors. We think it makes sense to have some senior people included on the list of custodians (see suggestion above about adding Admiral Levine). But we also suggest adding at least some more mid-level staff to the list. Obviously the thing we're trying to get at with this discovery is factual information about the safety and efficacy of certain treatments for gender dysphoria, and our concern is that some important information of that sort might not filter all the way up to the most senior people in a given office.

Fifth, it isn't clear to us that the list of proposed custodians includes anyone who is likely to have the documents responsive to RFPs 18 and 19. Those two RFPs ask about HHS-funded studies that started in 2015 and 2011, respectively. Rather than adding custodians to reach all the way back to that time period, one possibility we wanted to float is a targeted "go get" on those studies that would supplement the responsive materials that are returned via whatever custodians and search terms we ultimately settle on.

Finally, consistent with this morning's hearing and in the spirit of compromise, we're open to using a "go get" method for additional operating divisions at HHS. We'd be eager to hear from you about which of the remaining operating divisions you think are the strongest candidates for that approach. I think it would also help us get comfortable using that approach for additional operating divisions if you could tell us a bit more about the process you would contemplate using. It's not likely that our side will be willing to go along with abandoning the use of search terms for all of the operating divisions, but we appreciate the burdens involved and want to meet you half way on this issue.

Best regards,

Brian

From: Murphy, Amie (CRT) <Amie.Murphy2@usdoj.gov>
Sent: Friday, May 12, 2023 7:15 PM
To: Brian Barnes <BBarnes@cooperkirk.com>
Cc: Cheek, Jason (USAALN) <Jason.Cheek@usdoj.gov>; LaCour, Edmund <Edmund.LaCour@AlabamaAG.gov>; Wilson, Thomas <Thomas.Wilson@AlabamaAG.gov>; Davis, Jim <Jim.Davis@AlabamaAG.gov>; Seiss, Ben <Ben.Seiss@AlabamaAG.gov>; Christopher Mills <cmills@spero.law>; Pete Patterson <ppatterson@cooperkirk.com>; David Thompson <dthompson@cooperkirk.com>; Jeffrey P. Doss <jdoss@lightfootlaw.com>; Amie A. Vague <avague@lightfootlaw.com>; AOrr <Aorr@nclrights.Org>; Jennifer Levi <Jlevi@glad.Org>; Sarah Warbelow <Sarah.Warbelow@hrc.Org>; Cynthia Weaver <cynthia.Weaver@hrc.Org>; Andy Pratt <Apratt@kslaw.Com>; Misty Peterson <Mpeterson@kslaw.Com>; Brent Ray <Bray@kslaw.Com>; Abigail Terry <ATerry@kslaw.com>; Michael Shortnacy <Mshortnacy@kslaw.Com>; Scott McCoy <Scott.Mccoy@splcenter.Org>; Melody H. Eagan <meagan@lightfootlaw.com>; Adam Reinke <Areinke@kslaw.Com>; Diego Soto <Diego.Soto@splcenter.Org>; Jessica Stone <Jessica.Stone@splcenter.Org>; Montag, Coty (CRT) <Coty.Montag@usdoj.gov>; Marshall, Margaret (USAALN) <Margaret.Marshall@usdoj.gov>; Williams, Renee (CRT) <Renee.Williams3@usdoj.gov>; Toyama, Kaitlin (CRT) <Kaitlin.Toyama@usdoj.gov>; Bowdre, Barrett <Barrett.Bowdre@AlabamaAG.gov>; John Ramer <jramer@cooperkirk.com>
Subject: RE: Boe v. Marshall, No. 22-184 (M.D. Ala.) -- HHS Documents

Brian-

Thanks for sending over the latest round of edits to the list of search terms on Wednesday. Prior to receiving them, HHS had already started running hit reports for a sample of terms from the version I last sent to you. Specifically, HHS is running the following five terms through AHRQ, OASH, and OCR:

- gender /3 dysphoria AND (youth or child! or adolescent! or minor! or kid! or teen! or boy! or girl!) AND (transition! or treat!)
- gender /3 affirming AND (youth or child! or adolescent! or minor! or kid! or teen! or boy! or girl!) AND (transition! or treat!)
- GAC AND (transition! or treat!)
- puberty /3 Block! and (“side effect” or “off label” or osteo! or depress! or suicid! or seizur! or safe! or unapproved or vision or asthma or tumor or cancer or fracture or bone or joint or Gueriguian or Eugster or mitochondria) AND youth or child! or adolescent! or minor! or kid! or teen! or boy! or girl!)
- Tanner and (puberty /3 Block!)

We should have a more detailed update on where things stand early next week, but the preliminary results indicate that it will be necessary to limit the searches by custodian. To that end, I’m attaching HHS’s proposed list of custodians. Kevin is still working on getting names from SAMHSA.

From HHS:

You will see that half the list is from NIH, which fits with the focus on the safety and efficacy of transitioning treatments for transgender minors and that Agency's role in research in this area. The rest of the individuals are largely focused on specific RFPs (e.g., OASH's interactions with WPATH and FDA's analysis of adverse events related to GnRH agonists) or specific events (FDA's response to Congressional inquiries related to GnRH agonists). Also note that AHRQ, CDC, CMS, and IHS do not have custodians on this list given their limited interaction with the subject matter underlying this litigation.

My apologies for bombarding you with so many issues in consecutive emails, however I'm trying to maintain the information flow. Let me know if you think it makes sense to schedule a call soon.

Have a nice weekend.

Amie

From: Murphy, Amie (CRT)

Sent: Wednesday, May 10, 2023 4:50 PM

To: 'Brian Barnes' <BBarnes@cooperkirk.com>

Cc: Cheek, Jason (USAALN) <JCheek@usa.doj.gov>; 'LaCour, Edmund'

<Edmund.LaCour@AlabamaAG.gov>; 'Wilson, Thomas' <Thomas.Wilson@AlabamaAG.gov>; 'Davis,

Jim' <Jim.Davis@AlabamaAG.gov>; 'Seiss, Ben' <Ben.Seiss@AlabamaAG.gov>; 'Christopher Mills'

<cmills@spero.law>; 'Pete Patterson' <ppatterson@cooperkirk.com>; 'David Thompson'

<dthompson@cooperkirk.com>; 'Jeffrey P. Doss' <jdoss@lightfootlaw.com>; 'Amie A. Vague'

<avague@lightfootlaw.com>; 'AOrr' <Aorr@nclrights.Org>; 'Jennifer Levi' <JLevi@glad.Org>; 'Sarah

Warbelow' <Sarah.Warbelow@hrc.Org>; 'Cynthia Weaver' <cynthia.Weaver@hrc.Org>; 'Andy Pratt'

<Apratt@kslaw.Com>; 'Misty Peterson' <Mpeterson@kslaw.Com>; 'Brent Ray' <Bray@kslaw.Com>;

'Abigail Terry' <ATerry@kslaw.com>; 'Michael Shortnacy' <Mshortnacy@kslaw.Com>; 'Scott McCoy'

<Scott.Mccoy@splcenter.Org>; 'Melody H. Eagan' <meagan@lightfootlaw.com>; 'Adam Reinke'

<Areinke@kslaw.Com>; 'Diego Soto' <Diego.Soto@splcenter.Org>; 'Jessica Stone'

<Jessica.Stone@splcenter.Org>; Montag, Coty (CRT) <Coty.Montag@usdoj.gov>; Marshall, Margaret

(USAALN) <mmarshall2@usa.doj.gov>; Williams, Renee (CRT) <Renee.Williams3@usdoj.gov>;

Toyama, Kaitlin (CRT) <Kaitlin.Toyama@usdoj.gov>; 'Bowdre, Barrett'

<Barrett.Bowdre@AlabamaAG.gov>; 'John Ramer' <jramer@cooperkirk.com>

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

Brian-

I am still working on getting you a response to your specific proposal but should have an answer shortly. That said, we reaffirm our position that a motion is unnecessary, and this could be handled more efficiently and cooperatively by requesting a status conference.

In the meantime, to keep matters rolling on production, we would like to revisit an issue that we have discussed on several of the meet and confers, namely, removing some of the Operating Divisions from your list of Divisions that will be searched for responsive documents. As we have discussed, it would save copious time and expense if we do data pulls from each of the Divisions' network drives instead of scouring them using search terms, and that additional Divisions should be removed entirely. We understand that Defendants' reject our proposal to use data pulls for all the Divisions on the list, but that Defendants would consider it with respect to certain Divisions. On that note, the information that follows supports HHS's reasoning for using data pulls for CMS and IHS specifically, and for removing AHRQ and CDC from the list entirely because of their lack of interaction with the subject matter underlying this litigation. More details and explanation are below.

From HHS:

As we have discussed, because most Operating Divisions utilize all run their own file storage and need to be queried separately in order to try to find responsive documents, reducing the number of Divisions that need to be searched or that need to collect responsive documents will significantly reduce the burden on HHS and will likely reduce the amount of time it will take the Agency to comply with Alabama's RFPs. Thus, searching four Operating Divisions for documents that they are unlikely to have will only result in time wasted on the collection efforts and attorney review of documents that are expected to be nonresponsive to Alabama's RFPs. While it is an imperfect proxy for the number of files that would need to be searched, we note that the four Operating Divisions in question comprise approximately 34,000 government personnel.

CMS: As we have discussed on several occasions, CMS is unlikely to have documents responsive to Alabama's RFPs. CMS oversees two programs: Medicare and Medicaid. Generally, Medicare is for people 65 or older. You may be able to get Medicare earlier if you have a disability, End-Stage Renal Disease (permanent kidney failure requiring dialysis or a transplant), or ALS (also called Lou Gehrig's disease). However, of those categories, the only individuals who would qualify for Medicare under the age of 19 would be individuals between the age of 18 and 19 who have been diagnosed with Lou Gehrig's disease. Given that it is highly unlikely that a transgender individual between the age of 18 and 19 with Lou Gehrig's disease would receive transitioning treatments, it seems clear that information from the Medicare program will be nonresponsive to Alabama's RFPs.

For Medicaid, Medicaid provides health coverage (as distinguished from treatment) to millions of Americans, including eligible low-income adults, children, pregnant women, elderly adults and people with disabilities. Medicaid is administered by states, according to federal requirements. CMS has advised that their only interaction with the subject matter of this case would be through the provision of funding to states who thereby provide funding to care providers who are providing treatment to Medicaid beneficiaries. If, for example, a state Medicaid program were to pay for covered gender-affirming care for transitioning Minors, CMS would reimburse states for the federal share of that payment (the federal financial participation or FFP). Thus, CMS provide funding for states, which are in turn the ones providing funding for transitioning minors who are receiving treatment from a third party. For this reason, it is highly unlikely that CMS will have documents responsive to RFPs. Therefore, we suggest a solution that we have discussed before: CMS will run a

search through its claims database for responsive information and provide that information in order to fulfill its discovery obligations in this litigation.

IHS: As we have discussed, IHS is the principal federal health care provider and health advocate for Indian people, and its goal is to raise their health status to the highest possible level. However, IHS is also a federated Agency whereby most of its services that might be tangentially related to the underlying subject matter are provided by third parties and the Tribes themselves. IHS has indicated that the Agency is unlikely to have anything responsive to Alabama's RFPs other than a data pull of its treatment database similar to the database discussed above with regard to CMS. Therefore, we suggest a solution that we have discussed before: IHS will run a search through its treatment database for responsive information and provide that information in order to fulfill its discovery obligations in this litigation.

CDC: As we have discussed during our meet and confers, the CDC does not interact with the underlying subject matter of the litigation. CDC's mission is to protect America from health, safety and security threats, both foreign and in the U.S. CDC fights **disease** and supports communities and citizens to do the same. Given that there is no disease related to this litigation, CDC is highly unlikely to have documents responsive to Alabama's RFPs. In fact, Alabama's RFPs do not reference any disease and information relating to disease is not likely to be discoverable information. Therefore, we suggest removing the CDC from the list of Divisions subject to document collection in response to Alabama's RFPs.

When we queried CDC to determine what, if any, responsive information the Agency may have, the only item that CDC was able to identify as even tangentially related to the subject matter underlying this litigation is as follows: The CDC funds a Youth Risk Behavior Survey (YRBS). As part of the YRBS, and after years of research and several rounds of cognitive testing, CDC piloted the current question (below) with 10 states and 9 local school districts during the 2017 YRBS cycle. Follow-up cognitive interviews conducted in 2018 confirmed that the question functioned well, and the question was included in the YRBS Optional Question list for any interested site to use. Since then, state and local YRBS coordinators have chosen to include the question in more than 70 questionnaires.

Some people describe themselves as transgender when their sex at birth does not match the way they think or feel about their gender. Are you transgender?

- A. No, I am not transgender
- B. Yes, I am transgender
- C. I am not sure if I am transgender
- D. I do not know what this question is asking

AHRQ: As discussed during our meet and confers, AHRQ has only been able to identify two documents that are related to the underlying subject matter of this litigation. The first is a grant award entitled, "Using telehealth to improve access to gender-affirming care for BIPOC and rural gender diverse youth." The second document is the Topic Brief referenced in RFP 29 - Topic Brief: Treatments for Gender Dysphoria in Transgender Youth, <https://effectivehealthcare.ahrq.gov/system/files/docs/topic-brief-gender-dysphoria.pdf> (Jan. 8, 2021).

With regard to the first document, at the very least we suggest that AHRQ manually collect documents related to the grant since running search terms across the network drives of a 2,000+ employee Agency to try to find documents related to a single grant will likely be particularly inefficient. With regard to the Topic Brief, we note that the Agency decision was to **not** develop a new systematic review. In other words, AHRQ decided **not** to take an action in this area, indicating that there will be little, if any, further information to collect from the Agency on the Topic Brief. As additional context with regard to the Topic Brief, we provide the following information:

AHRQ's Effective Healthcare Program supports Evidence-based Practice Centers (EPCs), which are universities and medical centers that produce evidence reports on medications, devices, and other healthcare services under contract to the agency. The referenced Topic Brief is a document that represents the disposition of a topic that was nominated for a systematic evidence review. The topic nomination process is described here: <https://effectivehealthcare.ahrq.gov/about/epc/nomination>. This page includes additional background on the EPCs, including the EPC Program's COI policy: <https://effectivehealthcare.ahrq.gov/about/epc>. AHRQ conducts this research under Section 902(a) of the Public Health Service Act, 42 U.S.C. § 299a(a). <https://www.govinfo.gov/content/pkg/USCODE-2021-title42/pdf/USCODE-2021-title42-chap6A-subchapVII-partA-sec299a.pdf>.

We look forward to your response.

Amie

From: Murphy, Amie (CRT)

Sent: Tuesday, May 9, 2023 2:44 PM

To: Brian Barnes <BBarnes@cooperkirk.com>

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

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

Thanks, Brian. We are discussing your proposal and will get back to you as soon as possible, however probably not before 9:00 am tomorrow.

From: Brian Barnes <BBarnes@cooperkirk.com>
Sent: Tuesday, May 9, 2023 8:43 AM
To: Murphy, Amie (CRT) <Amie.Murphy2@usdoj.gov>
Cc: Cheek, Jason (USAALN) <JCheek@usa.doj.gov>; LaCour, Edmund <Edmund.LaCour@AlabamaAG.gov>; Wilson, Thomas <Thomas.Wilson@AlabamaAG.gov>; Davis, Jim <Jim.Davis@AlabamaAG.gov>; Seiss, Ben <Ben.Seiss@AlabamaAG.gov>; Christopher Mills <cmills@spero.law>; Pete Patterson <ppatterson@cooperkirk.com>; David Thompson <dthompson@cooperkirk.com>; Jeffrey P. Doss <jdoss@lightfootlaw.com>; Amie A. Vague <avague@lightfootlaw.com>; AOrr <Aorr@nclrights.Org>; Jennifer Levi <jlevi@glad.Org>; Sarah Warbelow <Sarah.Warbelow@hrc.Org>; Cynthia Weaver <cynthia.Weaver@hrc.Org>; Andy Pratt <Apratt@kslaw.Com>; Misty Peterson <Mpeterson@kslaw.Com>; Brent Ray <Bray@kslaw.Com>; Abigail Terry <ATerry@kslaw.com>; Michael Shortnacy <Mshortnacy@kslaw.Com>; Scott McCoy <Scott.Mccoy@splcenter.Org>; Melody H. Eagan <meagan@lightfootlaw.com>; Adam Reinke <Areinke@kslaw.Com>; Diego Soto <Diego.Soto@splcenter.Org>; Jessica Stone <Jessica.Stone@splcenter.Org>; Montag, Coty (CRT) <Coty.Montag@usdoj.gov>; Marshall, Margaret (USAALN) <mmarshall2@usa.doj.gov>; Williams, Renee (CRT) <Renee.Williams3@usdoj.gov>; Toyama, Kaitlin (CRT) <Kaitlin.Toyama@usdoj.gov>; Bowdre, Barrett <Barrett.Bowdre@AlabamaAG.gov>; John Ramer <jramer@cooperkirk.com>
Subject: [EXTERNAL] RE: Boe v. Marshall, No. 22-184 (M.D. Ala.) -- HHS Documents

Amie,

Thanks for your email. We agree a status conference is needed, but we think it would be helpful if the Court had a concrete proposal before it. To that end, we intend to file a motion asking the Court to amend the scheduling order and proposing the following schedule:

Complete production by HHS and WPATH: October 1, 2023
Discovery Cutoff: January 19, 2024
Dispositive motions: February 9, 2024
Defendants' expert disclosures: November 20, 2023
Rebuttal expert disclosures: December 18, 2023
Final trial lists: February 23, 2024
Trial: March 2024

Would you and counsel for the private plaintiffs please let me know by 9 am Wednesday morning if you consent to our request?

Best regards,

Brian

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

Sent: Monday, May 8, 2023 8:09 PM

To: Brian Barnes <BBarnes@cooperkirk.com>

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

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

Brian-

We plan to request a status conference to work through some of the issues that we've discussed by phone with you regarding discovery. As I understand Defendants' position, you are opposed to a joint request. Can you please confirm whether that is still the case?

Amie

From: Murphy, Amie (CRT)

Sent: Friday, May 5, 2023 3:51 PM

To: Brian Barnes <BBarnes@cooperkirk.com>

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

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

Hi Brian-

I think we're close. We made a couple edits that are aimed at linking transitioning with the safety and efficacy of the treatments. Please let me know if you think we should discuss them.

Have a nice weekend.

Amie

From: Brian Barnes <BBarnes@cooperkirk.com>
Sent: Wednesday, May 3, 2023 5:06 PM
To: Murphy, Amie (CRT) <Amie.Murphy2@usdoj.gov>
Cc: Cheek, Jason (USAALN) <JCheek@usa.doj.gov>; LaCour, Edmund <Edmund.LaCour@AlabamaAG.gov>; Wilson, Thomas <Thomas.Wilson@AlabamaAG.gov>; Davis, Jim <Jim.Davis@AlabamaAG.gov>; Seiss, Ben <Ben.Seiss@AlabamaAG.gov>; Christopher Mills <cmills@spero.law>; Pete Patterson <ppatterson@cooperkirk.com>; David Thompson <dthompson@cooperkirk.com>; Jeffrey P. Doss <jdoss@lightfootlaw.com>; Amie A. Vague <avague@lightfootlaw.com>; AOrr <Aorr@nclrights.Org>; Jennifer Levi <jlevi@glad.Org>; Sarah Warbelow <Sarah.Warbelow@hrc.Org>; Cynthia Weaver <cynthia.Weaver@hrc.Org>; Andy Pratt <Apratt@kslaw.Com>; Misty Peterson <Mpeterson@kslaw.Com>; Brent Ray <Bray@kslaw.Com>; Abigail Terry <ATerry@kslaw.com>; Michael Shortnacy <Mshortnacy@kslaw.Com>; Scott McCoy <Scott.Mccoy@splcenter.Org>; Melody H. Eagan <meagan@lightfootlaw.com>; Adam Reinke <Areinke@kslaw.Com>; Diego Soto <Diego.Soto@splcenter.Org>; Jessica Stone <Jessica.Stone@splcenter.Org>; Montag, Coty (CRT) <Coty.Montag@usdoj.gov>; Marshall, Margaret (USAALN) <mmarshall2@usa.doj.gov>; Williams, Renee (CRT) <Renee.Williams3@usdoj.gov>; Toyama, Kaitlin (CRT) <Kaitlin.Toyama@usdoj.gov>; Bowdre, Barrett <Barrett.Bowdre@AlabamaAG.gov>; John Ramer <jramer@cooperkirk.com>
Subject: [EXTERNAL] RE: Boe v. Marshall, No. 22-184 (M.D. Ala.) -- HHS Documents

Hi Amie,

I've attached a new set of proposed terms that shows changes to the last version we sent over in redline. We've tried to accommodate many of the concerns you raised about the previous version, but please let me know if you think it would be useful to have another conversation about any remaining disagreements.

Best regards,

Brian

From: Murphy, Amie (CRT) <Amie.Murphy2@usdoj.gov>
Sent: Wednesday, May 3, 2023 10:00 AM
To: Brian Barnes <BBarnes@cooperkirk.com>

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

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

Good morning, Brian-

Will you be prepared to send your thoughts on the search terms soon? I believe we left things with the ball in your court and we would like to get to a point ASAP where we can begin running test searches.

Amie

Amie S. Murphy
Trial Attorney
Housing and Civil Enforcement Section
Civil Rights Division
U.S. Department of Justice
Tel: (202) 305-5003
Fax: (202) 514-1116
amie.murphy2@usdoj.gov

From: Brian Barnes <BBarnes@cooperkirk.com>
Sent: Friday, April 28, 2023 12:57 PM
To: Murphy, Amie (CRT) <Amie.Murphy2@usdoj.gov>
Cc: Cheek, Jason (USAALN) <JCheek@usa.doj.gov>; LaCour, Edmund <Edmund.LaCour@AlabamaAG.gov>; Wilson, Thomas <Thomas.Wilson@AlabamaAG.gov>; Davis, Jim <Jim.Davis@AlabamaAG.gov>; Seiss, Ben <Ben.Seiss@AlabamaAG.gov>; Christopher Mills <cmills@spero.law>; Pete Patterson <ppatterson@cooperkirk.com>; David Thompson <dthompson@cooperkirk.com>; Jeffrey P. Doss <jdoss@lightfootlaw.com>; Amie A. Vague

<avague@lightfootlaw.com>; AOrr <Aorr@nclrights.Org>; Jennifer Levi <jlevi@glad.Org>; Sarah Warbelow <Sarah.Warbelow@hrc.Org>; Cynthia Weaver <cynthia.Weaver@hrc.Org>; Andy Pratt <Apratt@kslaw.Com>; Misty Peterson <Mpeterson@kslaw.Com>; Brent Ray <Bray@kslaw.Com>; Abigail Terry <ATerry@kslaw.com>; Michael Shortnacy <Mshortnacy@kslaw.Com>; Scott McCoy <Scott.Mccoy@splcenter.Org>; Melody H. Eagan <meagan@lightfootlaw.com>; Adam Reinke <Areinke@kslaw.Com>; Diego Soto <Diego.Soto@splcenter.Org>; Jessica Stone <Jessica.Stone@splcenter.Org>; Montag, Coty (CRT) <Coty.Montag@usdoj.gov>; Marshall, Margaret (USAALN) <mmarshall2@usa.doj.gov>; Williams, Renee (CRT) <Renee.Williams3@usdoj.gov>; Toyama, Kaitlin (CRT) <Kaitlin.Toyama@usdoj.gov>; Bowdre, Barrett <Barrett.Bowdre@AlabamaAG.gov>; John Ramer <jramer@cooperkirk.com>
Subject: [EXTERNAL] RE: Boe v. Marshall, No. 22-184 (M.D. Ala.) -- HHS Documents

Thanks for sending around a dial-in, Amie. That time still works for us.

From: Murphy, Amie (CRT) <Amie.Murphy2@usdoj.gov>
Sent: Friday, April 28, 2023 12:16 PM
To: Brian Barnes <BBarnes@cooperkirk.com>
Cc: Cheek, Jason (USAALN) <Jason.Cheek@usdoj.gov>; LaCour, Edmund <Edmund.LaCour@AlabamaAG.gov>; Wilson, Thomas <Thomas.Wilson@AlabamaAG.gov>; Davis, Jim <Jim.Davis@AlabamaAG.gov>; Seiss, Ben <Ben.Seiss@AlabamaAG.gov>; Christopher Mills <cmills@spero.law>; Pete Patterson <ppatterson@cooperkirk.com>; David Thompson <dthompson@cooperkirk.com>; Jeffrey P. Doss <jdoss@lightfootlaw.com>; Amie A. Vague <avague@lightfootlaw.com>; AOrr <Aorr@nclrights.Org>; Jennifer Levi <jlevi@glad.Org>; Sarah Warbelow <Sarah.Warbelow@hrc.Org>; Cynthia Weaver <cynthia.Weaver@hrc.Org>; Andy Pratt <Apratt@kslaw.Com>; Misty Peterson <Mpeterson@kslaw.Com>; Brent Ray <Bray@kslaw.Com>; Abigail Terry <ATerry@kslaw.com>; Michael Shortnacy <Mshortnacy@kslaw.Com>; Scott McCoy <Scott.Mccoy@splcenter.Org>; Melody H. Eagan <meagan@lightfootlaw.com>; Adam Reinke <Areinke@kslaw.Com>; Diego Soto <Diego.Soto@splcenter.Org>; Jessica Stone <Jessica.Stone@splcenter.Org>; Montag, Coty (CRT) <Coty.Montag@usdoj.gov>; Marshall, Margaret (USAALN) <Margaret.Marshall@usdoj.gov>; Williams, Renee (CRT) <Renee.Williams3@usdoj.gov>; Toyama, Kaitlin (CRT) <Kaitlin.Toyama@usdoj.gov>; Bowdre, Barrett <Barrett.Bowdre@AlabamaAG.gov>; John Ramer <jramer@cooperkirk.com>
Subject: RE: Boe v. Marshall, No. 22-184 (M.D. Ala.) -- HHS Documents

Brian-

Does 2:30 ET still work for today's call? If so, the following dial-in information may be used by anyone who wishes to join.

WebEx2 (202) 600-2533, Attendee Access Code 96401039

Amie

From: Murphy, Amie (CRT)
Sent: Thursday, April 27, 2023 8:02 PM

To: 'Brian Barnes' <BBarnes@cooperkirk.com>

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

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

Brian:

Thank you for sending over your proposed edits to the search terms. Our comments are as follows:

1. By removing “transition!” Defendants are expanding most of the terms to anything to do with transgender youth rather than focusing on *transitioning* transgender youth, which goes far beyond the scope of the lawsuit as well as the Court’s order. In rejecting RFP 6 (“[a]ll Communications and Documents since January 1, 2017, concerning Transitioning or the treatment of Minors for Gender Dysphoria or a Related Condition,” the Court said that a search for anything relating to transitioning or treatment was too broad but that “effects of transitioning” was narrow enough. We cannot agree to any terms that go further than the court’s order.
2. Any term that refers to a medication, treatment, or Tanner Scale without the limiter “transgen!” or “transition!” goes far beyond the scope of this lawsuit.
3. The inclusion of “student” as a connector is not necessary and goes beyond the scope of the lawsuit. For example, the United States is not challenging the provisions in SB 184 about what teachers are required to disclose to parents re: information about a student’s gender identity.
4. We also have some concerns about the names such as Levine, Marci Bowers, Erica Anderson, etc. whose names were referenced in RFPs that Defendants chose not to include in their motion to compel.
5. At some point, the value of continuing to add search terms is outweighed by the additional time and cost it will incur to run them, particularly since HHS’s document search system runs

each search term consecutively. Put another way, a long list of broad terms will generate more documents, however it will not necessarily result in a larger production because many of the documents will likely be nonresponsive as they will be hitting on broad search terms but won't actually relate to the RFPs subject to the Court's order. If the narrower terms are meant to capture information that Defendants believe to be responsive and relevant, we suggest utilizing the narrow searches to find the information Alabama seeks rather than a long list of broader terms that will likely collect nonresponsive data that will require additional review time to weed out irrelevant documents, thereby delaying production.

We may have some more specific concerns that we can address tomorrow, but these are the ones that stood out at first glance. We look forward to discussing these tomorrow.

Amie

From: Brian Barnes <BBarnes@cooperkirk.com>
Sent: Tuesday, April 25, 2023 9:16 AM
To: Murphy, Amie (CRT) <Amie.Murphy2@usdoj.gov>
Cc: Cheek, Jason (USAALN) <JCheek@usa.doj.gov>; LaCour, Edmund <Edmund.LaCour@AlabamaAG.gov>; Wilson, Thomas <Thomas.Wilson@AlabamaAG.gov>; Davis, Jim <Jim.Davis@AlabamaAG.gov>; Seiss, Ben <Ben.Seiss@AlabamaAG.gov>; Christopher Mills <cmills@spero.law>; Pete Patterson <ppatterson@cooperkirk.com>; David Thompson <dthompson@cooperkirk.com>; Jeffrey P. Doss <jdoss@lightfootlaw.com>; Amie A. Vague <avague@lightfootlaw.com>; AOrri <Aorr@nclrights.Org>; Jennifer Levi <jlevi@glad.Org>; Sarah Warbelow <Sarah.Warbelow@hrc.Org>; Cynthia Weaver <cynthia.Weaver@hrc.Org>; Andy Pratt <Apratt@kslaw.Com>; Misty Peterson <Mpeterson@kslaw.Com>; Brent Ray <Bray@kslaw.Com>; Abigail Terry <ATerry@kslaw.com>; Michael Shortnacy <Mshortnacy@kslaw.Com>; Scott McCoy <Scott.Mccoy@splcenter.Org>; Melody H. Eagan <meagan@lightfootlaw.com>; Adam Reinke <Areinke@kslaw.Com>; Diego Soto <Diego.Soto@splcenter.Org>; Jessica Stone <Jessica.Stone@splcenter.Org>; Montag, Coty (CRT) <Coty.Montag@usdoj.gov>; Marshall, Margaret (USAALN) <mmarshall2@usa.doj.gov>; Williams, Renee (CRT) <Renee.Williams3@usdoj.gov>; Toyama, Kaitlin (CRT) <Kaitlin.Toyama@usdoj.gov>; Bowdre, Barrett <Barrett.Bowdre@AlabamaAG.gov>; John Ramer <jramer@cooperkirk.com>
Subject: [EXTERNAL] RE: Boe v. Marshall, No. 22-184 (M.D. Ala.) -- HHS Documents

Thanks, Amie. Let's plan to talk on Wednesday at noon Eastern, assuming that time still works on your end. I'll send around a dial-in we can use later this morning.

From: Murphy, Amie (CRT) <Amie.Murphy2@usdoj.gov>
Sent: Monday, April 24, 2023 7:57 PM
To: Brian Barnes <BBarnes@cooperkirk.com>
Cc: Cheek, Jason (USAALN) <Jason.Cheek@usdoj.gov>; LaCour, Edmund <Edmund.LaCour@AlabamaAG.gov>; Wilson, Thomas <Thomas.Wilson@AlabamaAG.gov>; Davis, Jim <Jim.Davis@AlabamaAG.gov>; Seiss, Ben <Ben.Seiss@AlabamaAG.gov>; Christopher Mills <cmills@spero.law>; Pete Patterson <ppatterson@cooperkirk.com>; David Thompson

<dthompson@cooperkirk.com>; Jeffrey P. Doss <jdoss@lightfootlaw.com>; Amie A. Vague <avague@lightfootlaw.com>; AOrr <Aorr@nclrights.Org>; Jennifer Levi <Jlevi@glad.Org>; Sarah Warbelow <Sarah.Warbelow@hrc.Org>; Cynthia Weaver <cynthia.Weaver@hrc.Org>; Andy Pratt <Apratt@kslaw.Com>; Misty Peterson <Mpeterson@kslaw.Com>; Brent Ray <Bray@kslaw.Com>; Abigail Terry <ATerry@kslaw.com>; Michael Shortnacy <Mshortnacy@kslaw.Com>; Scott McCoy <Scott.Mccoy@splcenter.Org>; Melody H. Eagan <meagan@lightfootlaw.com>; Adam Reinke <Areinke@kslaw.Com>; Diego Soto <Diego.Soto@splcenter.Org>; Jessica Stone <Jessica.Stone@splcenter.Org>; Montag, Coty (CRT) <Coty.Montag@usdoj.gov>; Marshall, Margaret (USAALN) <Margaret.Marshall@usdoj.gov>; Williams, Renee (CRT) <Renee.Williams3@usdoj.gov>; Toyama, Kaitlin (CRT) <Kaitlin.Toyama@usdoj.gov>; Bowdre, Barrett <Barrett.Bowdre@AlabamaAG.gov>; John Ramer <jramer@cooperkirk.com>

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

Hi Brian-

Thanks for sending these over. How is your availability for a call on Wednesday? I'm available from 11:00-2:00 ET, and again from 3:30-5:00 ET.

Amie

From: Brian Barnes <BBarnes@cooperkirk.com>

Sent: Monday, April 24, 2023 9:17 AM

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

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

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

Hi Amie,

I hope you had a nice weekend. I've attached some proposed revisions to the search terms for your consideration – I'd be happy to discuss our thinking on these changes to the extent useful.

Also, is there a time today or tomorrow when we could hop on the phone to discuss the schedule? To the extent that HHS needs more time to comply with the Court's discovery order than the current schedule allows, we think that it makes sense to alert the Court to this sooner rather than later.

Best regards,

Brian W. Barnes
Cooper & Kirk, PLLC

From: Murphy, Amie (CRT) <Amie.Murphy2@usdoj.gov>
Sent: Thursday, April 13, 2023 2:17 PM
To: Brian Barnes <BBarnes@cooperkirk.com>
Cc: Cheek, Jason (USAALN) <Jason.Cheek@usdoj.gov>; LaCour, Edmund <Edmund.LaCour@AlabamaAG.gov>; Wilson, Thomas <Thomas.Wilson@AlabamaAG.gov>; Davis, Jim <Jim.Davis@AlabamaAG.gov>; Seiss, Ben <Ben.Seiss@AlabamaAG.gov>; Christopher Mills <cmills@spero.law>; Pete Patterson <ppatterson@cooperkirk.com>; David Thompson <dthompson@cooperkirk.com>; Jeffrey P. Doss <jdoss@lightfootlaw.com>; Amie A. Vague <avague@lightfootlaw.com>; AOrr <Aorr@nclrights.Org>; Jennifer Levi <Jlevi@glad.Org>; Sarah Warbelow <Sarah.Warbelow@hrc.Org>; Cynthia Weaver <cynthia.Weaver@hrc.Org>; Andy Pratt <Apratt@kslaw.Com>; Misty Peterson <Mpeterson@kslaw.Com>; Brent Ray <Bray@kslaw.Com>; Abigail Terry <ATerry@kslaw.com>; Michael Shortnacy <Mshortnacy@kslaw.Com>; Scott McCoy <Scott.Mccoy@splcenter.Org>; Melody H. Eagan <meagan@lightfootlaw.com>; Adam Reinke <Areinke@kslaw.Com>; Diego Soto <Diego.Soto@splcenter.Org>; Jessica Stone <Jessica.Stone@splcenter.Org>; Montag, Coty (CRT) <Coty.Montag@usdoj.gov>; Marshall, Margaret (USAALN) <Margaret.Marshall@usdoj.gov>; Williams, Renee (CRT) <Renee.Williams3@usdoj.gov>; Toyama, Kaitlin (CRT) <Kaitlin.Toyama@usdoj.gov>; Bowdre, Barrett <Barrett.Bowdre@AlabamaAG.gov>; John Ramer <jramer@cooperkirk.com>
Subject: RE: Boe v. Marshall, No. 22-184 (M.D. Ala.) -- HHS Documents

Hi Brian-

Thanks for a productive call last week. Should we set something up for tomorrow? We are available between 11:00 and 4:00 EST, except from 1:00 to 2:00 EST.

In advance of our next call, I am attaching our suggestions to the list of search terms.

Amie

Amie S. Murphy
Trial Attorney
Housing and Civil Enforcement Section
Civil Rights Division
U.S. Department of Justice
Tel: (202) 305-5003

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amie.murphy2@usdoj.gov

From: Brian Barnes <BBarnes@cooperkirk.com>
Sent: Thursday, April 6, 2023 7:55 PM
To: Murphy, Amie (CRT) <Amie.Murphy2@usdoj.gov>
Cc: Cheek, Jason (USAALN) <JCheek@usa.doj.gov>; LaCour, Edmund <Edmund.LaCour@AlabamaAG.gov>; Wilson, Thomas <Thomas.Wilson@AlabamaAG.gov>; Davis, Jim <Jim.Davis@AlabamaAG.gov>; Seiss, Ben <Ben.Seiss@AlabamaAG.gov>; Christopher Mills <cmills@spero.law>; Pete Patterson <ppatterson@cooperkirk.com>; David Thompson <dthompson@cooperkirk.com>; Jeffrey P. Doss <jdoss@lightfootlaw.com>; Amie A. Vague <avague@lightfootlaw.com>; AOrr <Aorr@nclrights.Org>; Jennifer Levi <jlevi@glad.Org>; Sarah Warbelow <Sarah.Warbelow@hrc.Org>; Cynthia Weaver <cynthia.Weaver@hrc.Org>; Andy Pratt <Apratt@kslaw.Com>; Misty Peterson <Mpeterson@kslaw.Com>; Brent Ray <Bray@kslaw.Com>; Abigail Terry <ATerry@kslaw.com>; Michael Shortnacy <Mshortnacy@kslaw.Com>; Scott McCoy <Scott.Mccoy@splcenter.Org>; Melody H. Eagan <meagan@lightfootlaw.com>; Adam Reinke <Areinke@kslaw.Com>; Diego Soto <Diego.Soto@splcenter.Org>; Jessica Stone <Jessica.Stone@splcenter.Org>; Montag, Coty (CRT) <Coty.Montag@usdoj.gov>; Marshall, Margaret (USAALN) <mmarshall2@usa.doj.gov>; Williams, Renee (CRT) <Renee.Williams3@usdoj.gov>; Toyama, Kaitlin (CRT) <Kaitlin.Toyama@usdoj.gov>; Bowdre, Barrett <Barrett.Bowdre@AlabamaAG.gov>; John Ramer <jramer@cooperkirk.com>
Subject: [EXTERNAL] RE: Boe v. Marshall, No. 22-184 (M.D. Ala.) -- HHS Documents

Hi Amie,

In advance of tomorrow afternoon's call, please find attached a list of suggested search terms. We're providing this list in the hope that it will facilitate the negotiations, but these search terms will certainly need to be tweaked once we've agreed upon a list of custodians. Some of these terms may be too broad and others may be too narrow.

Best regards,

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

From: Brian Barnes
Sent: Tuesday, April 4, 2023 8:49 AM
To: Murphy, Amie (CRT) <Amie.Murphy2@usdoj.gov>
Cc: Cheek, Jason (USAALN) <Jason.Cheek@usdoj.gov>; LaCour, Edmund <Edmund.LaCour@AlabamaAG.gov>; Wilson, Thomas <Thomas.Wilson@AlabamaAG.gov>; Davis, Jim <Jim.Davis@AlabamaAG.gov>; Seiss, Ben <Ben.Seiss@AlabamaAG.gov>; Christopher Mills <cmills@spero.law>; Pete Patterson <ppatterson@cooperkirk.com>; David Thompson

<dthompson@cooperkirk.com>; Jeffrey P. Doss <jdoss@lightfootlaw.com>; Amie A. Vague <avague@lightfootlaw.com>; AOrr <Aorr@nclrights.Org>; Jennifer Levi <Jlevi@glad.Org>; Sarah Warbelow <Sarah.Warbelow@hrc.Org>; Cynthia Weaver <cynthia.Weaver@hrc.Org>; Andy Pratt <Apratt@kslaw.Com>; Misty Peterson <Mpeterson@kslaw.Com>; Brent Ray <Bray@kslaw.Com>; Abigail Terry <ATerry@kslaw.com>; Michael Shortnacy <Mshortnacy@kslaw.Com>; Scott McCoy <Scott.Mccoy@splcenter.Org>; Melody H. Eagan <meagan@lightfootlaw.com>; Adam Reinke <Areinke@kslaw.Com>; Diego Soto <Diego.Soto@splcenter.Org>; Jessica Stone <Jessica.Stone@splcenter.Org>; Montag, Coty (CRT) <Coty.Montag@usdoj.gov>; Marshall, Margaret (USAALN) <Margaret.Marshall@usdoj.gov>; Williams, Renee (CRT) <Renee.Williams3@usdoj.gov>; Toyama, Kaitlin (CRT) <Kaitlin.Toyama@usdoj.gov>; Bowdre, Barrett <Barrett.Bowdre@AlabamaAG.gov>; John Ramer <jramer@cooperkirk.com>

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

Hi Amie,

I'll follow up on the other items you raise in your note in the next day or so, but let's pencil in 3.30pm on Friday for a call if that still works for the relevant folks on your end.

Best regards,

Brian

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

Sent: Friday, March 31, 2023 11:53 AM

To: Brian Barnes <BBarnes@cooperkirk.com>

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

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

Hi Brian,

Thanks for your email. I will not be in the office next week until Friday, so that's the soonest we can

schedule a call. We will have counsel from HHS on the line, so hopefully that will streamline the conversation a bit. In the meantime, it would be helpful if you send us a few proposed search strings. They can be general since we are only using them to help identify custodians, and can fine-tune them once we have that list.

I appreciate your willingness to consider excluding certain operating divisions. We will take ACL, ASPR, and ATSD off the list, and are considering whether we have any to suggest as well. Regarding your question about other HHS offices that sit outside the operating divisions, are you referring to the Staff Divisions that fall under the Office of the Secretary? If so, we suggest excluding ASA, ASFR, ASL, ASPE, ASPA, DAB, OGC, OGA, OIG, OMHA, ONC, and OCIO.

Please let me know your availability between 11:00 ET and 4:30 ET next Friday.

Amie

From: Brian Barnes <BBarnes@cooperkirk.com>
Sent: Thursday, March 30, 2023 2:07 PM
To: Murphy, Amie (CRT) <Amie.Murphy2@usdoj.gov>
Cc: Cheek, Jason (USAALN) <JCheek@usa.doj.gov>; LaCour, Edmund <Edmund.LaCour@AlabamaAG.gov>; Wilson, Thomas <Thomas.Wilson@AlabamaAG.gov>; Davis, Jim <Jim.Davis@AlabamaAG.gov>; Seiss, Ben <Ben.Seiss@AlabamaAG.gov>; Christopher Mills <cmills@spero.law>; Pete Patterson <ppatterson@cooperkirk.com>; David Thompson <dthompson@cooperkirk.com>; Jeffrey P. Doss <jdoss@lightfootlaw.com>; Amie A. Vague <avague@lightfootlaw.com>; AOrr <Aorr@nclrights.Org>; Jennifer Levi <Jlevi@glad.Org>; Sarah Warbelow <Sarah.Warbelow@hrc.Org>; Cynthia Weaver <cynthia.Weaver@hrc.Org>; Andy Pratt <Apratt@kslaw.Com>; Misty Peterson <Mpeterson@kslaw.Com>; Brent Ray <Bray@kslaw.Com>; Abigail Terry <ATerry@kslaw.com>; Michael Shortnacy <Mshortnacy@kslaw.Com>; Scott McCoy <Scott.Mccoy@splcenter.Org>; Melody H. Eagan <meagan@lightfootlaw.com>; Adam Reinke <Areinke@kslaw.Com>; Diego Soto <Diego.Soto@splcenter.Org>; Jessica Stone <Jessica.Stone@splcenter.Org>; Montag, Coty (CRT) <Coty.Montag@usdoj.gov>; Marshall, Margaret (USAALN) <mmarshall2@usa.doj.gov>; Williams, Renee (CRT) <Renee.Williams3@usdoj.gov>; Toyama, Kaitlin (CRT) <Kaitlin.Toyama@usdoj.gov>; Bowdre, Barrett <Barrett.Bowdre@AlabamaAG.gov>; John Ramer <jramer@cooperkirk.com>
Subject: [EXTERNAL] RE: Boe v. Marshall, No. 22-184 (M.D. Ala.) -- HHS Documents

Hi Amie,

Thanks for your note. In looking over the list of HHS operating divisions, there are three of them that don't appear likely to us to have responsive documents: (1) the Administration for Community Living (ACL); (2) the Administration for Strategic Preparedness and Response (ASPR); and (3) the Agency for Toxic Substances and Disease Registry (ATSD). There may be additional operating divisions that it makes sense to exclude – we're open to adding others to the list but would need to know more about other divisions that you would propose to exclude. Our understanding of HHS's organizational structure is that the agency also has various offices that sit outside the operating divisions – if that's

right, it might make sense to go through a similar exercise for the offices.

We're also eager to engage with you on custodians and search terms. Would it make sense to set up a call to discuss early next week?

Best regards,

Brian

From: Murphy, Amie (CRT) <Amie.Murphy2@usdoj.gov>
Sent: Tuesday, March 28, 2023 9:21 PM
To: Brian Barnes <BBarnes@cooperkirk.com>
Cc: Cheek, Jason (USAALN) <Jason.Cheek@usdoj.gov>; LaCour, Edmund <Edmund.LaCour@AlabamaAG.gov>; Wilson, Thomas <Thomas.Wilson@AlabamaAG.gov>; Davis, Jim <Jim.Davis@AlabamaAG.gov>; Seiss, Ben <Ben.Seiss@AlabamaAG.gov>; Christopher Mills <cmills@spero.law>; Pete Patterson <ppatterson@cooperkirk.com>; David Thompson <dthompson@cooperkirk.com>; Jeffrey P. Doss <jdoss@lightfootlaw.com>; Amie A. Vague <avague@lightfootlaw.com>; AOrr <Aorr@nclrights.Org>; Jennifer Levi <Jlevi@glad.Org>; Sarah Warbelow <Sarah.Warbelow@hrc.Org>; Cynthia Weaver <cynthia.Weaver@hrc.Org>; Andy Pratt <Apratt@kslaw.Com>; Misty Peterson <Mpeterson@kslaw.Com>; Brent Ray <Bray@kslaw.Com>; Abigail Terry <ATerry@kslaw.com>; Michael Shortnacy <Mshortnacy@kslaw.Com>; Scott McCoy <Scott.Mccoy@splcenter.Org>; Melody H. Eagan <meagan@lightfootlaw.com>; Adam Reinke <Areinke@kslaw.Com>; Diego Soto <Diego.Soto@splcenter.Org>; Jessica Stone <Jessica.Stone@splcenter.Org>; Montag, Coty (CRT) <Coty.Montag@usdoj.gov>; Marshall, Margaret (USAALN) <Margaret.Marshall@usdoj.gov>; Williams, Renee (CRT) <Renee.Williams3@usdoj.gov>; Toyama, Kaitlin (CRT) <Kaitlin.Toyama@usdoj.gov>; Bowdre, Barrett <Barrett.Bowdre@AlabamaAG.gov>; John Ramer <jramer@cooperkirk.com>
Subject: Boe v. Marshall, No. 22-184 (M.D. Ala.) -- HHS Documents

Brian-

We are working with HHS to develop a plan for producing documents in the most efficient way possible, which I'm sure you know by now will be a massive undertaking. We can agree to discuss custodians and search terms, but before we do that, we would like to know which of the operating divisions within HHS you believe have relevant information. For instance, perhaps we can agree that HHS does not need to search the databases for divisions that have a very specific focus.

Once we receive your response, we will identify custodians for each of those divisions and begin considering division-specific search terms.

Please let me know if it would be helpful to discuss this or any other aspect of the plan in a call.

Amie

Amie S. Murphy
Trial Attorney
Housing and Civil Enforcement Section
Civil Rights Division
U.S. Department of Justice
Tel: (202) 305-5003
Fax: (202) 514-1116
amie.murphy2@usdoj.gov

From: Brian Barnes <BBarnes@cooperkirk.com>
Sent: Tuesday, February 14, 2023 1:03 PM
To: Murphy, Amie (CRT) <Amie.Murphy2@usdoj.gov>; Melody H. Eagan <meagan@lightfootlaw.com>; Montag, Coty (CRT) <Coty.Montag@usdoj.gov>; Bowdre, Barrett <Barrett.Bowdre@AlabamaAG.gov>; Adam Reinke <Areinke@kslaw.Com>; John Ramer <jramer@cooperkirk.com>
Cc: Cheek, Jason (USAALN) <JCheek@usa.doj.gov>; LaCour, Edmund <Edmund.LaCour@AlabamaAG.gov>; Wilson, Thomas <Thomas.Wilson@AlabamaAG.gov>; Davis, Jim <Jim.Davis@AlabamaAG.gov>; Seiss, Ben <Ben.Seiss@AlabamaAG.gov>; Christopher Mills <cmills@spero.law>; Pete Patterson <ppatterson@cooperkirk.com>; David Thompson <dthompson@cooperkirk.com>; Jeffrey P. Doss <jdoss@lightfootlaw.com>; Amie A. Vague <avague@lightfootlaw.com>; AOrr <Aorr@nclrights.Org>; Jennifer Levi <jlevi@glad.Org>; Sarah Warbelow <Sarah.Warbelow@hrc.Org>; Cynthia Weaver <cynthia.Weaver@hrc.Org>; Andy Pratt <Apratt@kslaw.Com>; Misty Peterson <Mpeterson@kslaw.Com>; Brent Ray <Bray@kslaw.Com>; Abigail Terry <ATerry@kslaw.com>; Michael Shortnacy <Mshortnacy@kslaw.Com>; Scott McCoy <Scott.Mccoy@splcenter.Org>; Diego Soto <Diego.Soto@splcenter.Org>; Jessica Stone <Jessica.Stone@splcenter.Org>; Marshall, Margaret (USAALN) <mmarshall2@usa.doj.gov>; Williams, Renee (CRT) <Renee.Williams3@usdoj.gov>; Toyama, Kaitlin (CRT) <Kaitlin.Toyama@usdoj.gov>
Subject: [EXTERNAL] RE: Boe v. Marshall, No. 22-184 (M.D. Ala.) -- HHS Documents

Hi Amie,

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

Best regards,

Brian

From: Murphy, Amie (CRT) <Amie.Murphy2@usdoj.gov>
Sent: Tuesday, February 14, 2023 9:29 AM

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

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

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

Good morning, Brian—

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

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

Best,

Amie

From: Brian Barnes <BBarnes@cooperkirk.com>

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

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

Cc: Cheek, Jason (USAALN) <JCheek@usa.doj.gov>; LaCour, Edmund <Edmund.LaCour@AlabamaAG.gov>; Wilson, Thomas <Thomas.Wilson@AlabamaAG.gov>; Davis, Jim <Jim.Davis@AlabamaAG.gov>; Seiss, Ben <Ben.Seiss@AlabamaAG.gov>; Christopher Mills <cmills@spero.law>; Pete Patterson <ppatterson@cooperkirk.com>; David Thompson <dthompson@cooperkirk.com>; Jeffrey P. Doss <jdoss@lightfootlaw.com>; Amie A. Vague <avague@lightfootlaw.com>; AOrr <Aorr@nclrights.Org>; Jennifer Levi <Jlevi@glad.Org>; Sarah Warbelow <Sarah.Warbelow@hrc.Org>; Cynthia Weaver <cynthia.Weaver@hrc.Org>; Andy Pratt

<Apratt@kslaw.Com>; Misty Peterson <Mpeterson@kslaw.Com>; Brent Ray <Bray@kslaw.Com>; Abigail Terry <ATerry@kslaw.com>; Michael Shortnacy <Mshortnacy@kslaw.Com>; Scott McCoy <Scott.Mccoy@splcenter.Org>; Diego Soto <Diego.Soto@splcenter.Org>; Jessica Stone <Jessica.Stone@splcenter.Org>; Marshall, Margaret (USAALN) <mmarshall2@usa.doj.gov>; Williams, Renee (CRT) <Renee.Williams3@usdoj.gov>; Toyama, Kaitlin (CRT) <Kaitlin.Toyama@usdoj.gov>
Subject: [EXTERNAL] RE: Boe v. Marshall, No. 22-184 (M.D. Ala.) -- HHS Documents

Hi Amie,

I'm writing on a couple of fronts.

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

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

Best regards,

Brian

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

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

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

Cc: Cheek, Jason (USAALN) <Jason.Cheek@usdoj.gov>; LaCour, Edmund <Edmund.LaCour@AlabamaAG.gov>; Wilson, Thomas <Thomas.Wilson@AlabamaAG.gov>; Davis, Jim <Jim.Davis@AlabamaAG.gov>; Seiss, Ben <Ben.Seiss@AlabamaAG.gov>; Christopher Mills <cmills@spero.law>; Pete Patterson <ppatterson@cooperkirk.com>; David Thompson <dthompson@cooperkirk.com>; Jeffrey P. Doss <jdoss@lightfootlaw.com>; Amie A. Vague <avague@lightfootlaw.com>; AOrr <Aorr@nclrights.Org>; Jennifer Levi <jlevi@glad.Org>; Sarah Warbelow <Sarah.Warbelow@hrc.Org>; Cynthia Weaver <cynthia.Weaver@hrc.Org>; Andy Pratt

<Apratt@kslaw.Com>; Misty Peterson <Mpeterson@kslaw.Com>; Brent Ray <Bray@kslaw.Com>; Abigail Terry <ATerry@kslaw.com>; Michael Shortnacy <Mshortnacy@kslaw.Com>; Scott McCoy <Scott.Mccoy@splcenter.Org>; Diego Soto <Diego.Soto@splcenter.Org>; Jessica Stone <Jessica.Stone@splcenter.Org>; Marshall, Margaret (USAALN) <Margaret.Marshall@usdoj.gov>; Williams, Renee (CRT) <Renee.Williams3@usdoj.gov>; Toyama, Kaitlin (CRT) <Kaitlin.Toyama@usdoj.gov>

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

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

From: Brian Barnes <BBarnes@cooperkirk.com>

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

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

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

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

Hi Amie,

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

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

aren't offering to abandon the request for a privilege log as to other RFPs, but we would agree to give up on a privilege log for purposes of RFPs 11, 12, and 13 if the United States agrees to our proposal on those RFPs.

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

Best regards,

Brian

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

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

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

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

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

Hi Brian-

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

1. Defendants are only seeking the administrative record, as defined and assembled by HHS;
2. Defendants agree that the administrative record does not include privileged materials (e.g., documents that fall within the deliberative process privilege, attorney-client privilege, and work product privilege). Since deliberative process materials, including internal memoranda, are not considered part of the administrative record, there will be no expectation that the United States

create a privilege log; and

3. RFP 11 is specific to the current Section 1557 NPRM. Since the rulemaking process is ongoing, please specify what Defendants are seeking with respect to this RFP.

Best,

Amie

From: Brian Barnes <BBarnes@cooperkirk.com>

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

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

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

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

Hi Amie,

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

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

We recognize that some documents responsive to some of our RFPs may be covered by the

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

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

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

Best regards,

Brian

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

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

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

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

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

Brian-

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

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

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

Amie

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U.S. Department of Justice
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Fax: (202) 514-1116
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From: Murphy, Amie (CRT)

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

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

Cc: Cheek, Jason (USAALN) <JCheek@usa.doj.gov>; LaCour, Edmund <Edmund.LaCour@AlabamaAG.gov>; Wilson, Thomas <Thomas.Wilson@AlabamaAG.gov>; Davis, Jim <Jim.Davis@AlabamaAG.gov>; Seiss, Ben <Ben.Seiss@AlabamaAG.gov>; Christopher Mills <cmills@spero.law>; Pete Patterson <ppatterson@cooperkirk.com>; David Thompson <dthompson@cooperkirk.com>; Jeffrey P. Doss <jdoss@lightfootlaw.com>; Amie A. Vague <avague@lightfootlaw.com>; AOrr <Aorr@nclrights.Org>; Jennifer Levi <Jlevi@glad.Org>; Sarah

Warbelow <Sarah.Warbelow@hrc.Org>; Cynthia Weaver <cynthia.Weaver@hrc.Org>; Andy Pratt <Apratt@kslaw.Com>; Misty Peterson <Mpeterson@kslaw.Com>; Brent Ray <Bray@kslaw.Com>; Abigail Terry <ATerry@kslaw.com>; Michael Shortnacy <Mshortnacy@kslaw.Com>; Scott McCoy <Scott.Mccoy@splcenter.Org>; Diego Soto <Diego.Soto@splcenter.Org>; Jessica Stone <Jessica.Stone@splcenter.Org>; Marshall, Margaret (USAALN) <mmarshall2@usa.doj.gov>; Williams, Renee (CRT) <Renee.Williams3@usdoj.gov>; Toyama, Kaitlin (CRT) <Kaitlin.Toyama@usdoj.gov>
Subject: RE: Boe v. Marshall, No. 22-184 (M.D. Ala.) -- HHS Documents

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

From: Brian Barnes <BBarnes@cooperkirk.com>

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

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

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

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

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

I hope you have a nice weekend.

Brian

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

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

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

<jramer@cooperkirk.com>

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

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

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

From: Brian Barnes <BBarnes@cooperkirk.com>

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

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

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

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

Dear Amie,

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

1. This issue will hopefully turn out to be academic, but we strongly disagree with your position

that HHS documents are beyond the scope of materials that the United States is required to review and produce under Rule 34. Under that rule, documents are in bounds if they are in the “responding party’s possession, custody, or control.” The “responding party” here is the United States. The United States—not the Attorney General or the Department of Justice—is the entity listed in the intervention papers and which now appears on the case caption. Nor could it be otherwise: the statute the United States relied on to intervene specifies that “the Attorney General *for or in the name of the United States* may intervene.” 42 U.S.C. § 2000h-2 (emphasis added). The Attorney General and the DOJ may serve as attorneys for the United States, but it is the United States itself that is the party. So it is the United States itself that is responsible for complying with discovery obligations *as a party*. The pertinent question is thus what documents the *United States* has in its “possession, custody or control.” And as relevant here, the answer is that the United States has “possession, custody, or control” over documents and communications at HHS because HHS is an executive agency of the United States.

2. As we discussed during our January 3 call, the fundamental thing we are after with most of the discovery requests directed to the United States is evidence relevant to the safety and efficacy of the treatments that are the subject of the lawsuit. We know that HHS has relevant evidence on this topic based on things that agency has said and done in recent years. Some of our RFPs are targeted requests that specifically seek documents concerning a subset of those actions that we view as especially likely to yield highly relevant documents –
 - a. RFP 18 (documents concerning an NIH-funded study on the impact of early medical treatment for transgender youth);
 - b. RFP 19 (documents concerning an NIH-funded study on the physiologic response to cross-sex hormones among transgender youth);
 - c. RFP 20 (documents concerning NIH-funded research by Natalie Nokoff regarding transitioning and gender dysphoria);
 - d. RFP 23 (documents concerning the FDA’s decision to add a warning about pseudotumor cerebri to the label for puberty blockers);
 - e. RFP 24 (documents concerning the FDA’s review of puberty blockers);
 - f. RFP 29 (documents concerning a topic brief on treatments for gender dysphoria by the Agency for Healthcare Research and Quality); and
 - g. RFP 30 (documents concerning a publication by the Office of Population Affairs on gender-affirming care and young people).

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

purposes of responding to some of the broader RFPs.

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

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

Best regards,

Brian

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

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

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

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

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

Hi Brian:

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

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

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

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

Best,

Amie

Amie S. Murphy
Trial Attorney
Housing and Civil Enforcement Section
Civil Rights Division
U.S. Department of Justice
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amie.murphy2@usdoj.gov

From: Brian Barnes <BBarnes@cooperkirk.com>

Sent: Friday, December 23, 2022 12:10 PM

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

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

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

Hi Amie,

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

1. The only document requests for which we don't think it's necessary to use HHS custodians are RFPs 4 and 5. Given that the core factual dispute in this case is over the safety and efficacy of medical treatments, our view is that HHS (including agencies housed within HHS such as FDA and NIH) is by far the most important place for the United States to look for relevant documents. We're of course open to a conversation about ways to limit the burden of responding to our document requests, including by narrowing the scope of some of the RFPs and identifying appropriate custodians and search terms. But it still isn't clear to us whether the United States is willing to search the ESI of HHS custodians and produce responsive materials (including emails). Please clarify the United States' position on that threshold issue.
2. The treatments referenced in my note of December 16 are the ones prohibited by Section 4

of S.B. 184. That includes: (1) puberty blocking medication, (2) cross-sex hormones, and (3) surgeries that sterilize, that artificially construct tissue with the appearance of genitalia, or that remove any healthy body part or tissue except male circumcision. We are puzzled by your statement that surgery “is not relevant here” given that the United States’ complaint asks the Court to permanently enjoin Section 4 of the Act in full, including the provisions that regulate surgeries. *See also* U.S. Complaint ¶¶ 38, 39, 42, and 51. If the United States no longer intends to challenge the Act’s regulation of surgeries, please let us know since that would affect our thinking about various discovery issues.

3. Provided that the same limitation applies to Defendants’ attorneys, we agree that there is no need for the United States to search DOJ attorneys’ ESI or log privileged responsive documents found in a DOJ attorney’s ESI.
4. We cannot agree to limit the United States’ production to documents that the United States may use to support its claims. RFP 4 requests all such materials, but the other document requests Defendants served on the United States are not so limited.

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

Best regards,

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

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

Sent: Wednesday, December 21, 2022 4:02 PM

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

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

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

Dear Brian,

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

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

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

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

Best,

Amie

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

Amie S. Murphy
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From: Brian Barnes <BBarnes@cooperkirk.com>

Sent: Friday, December 16, 2022 3:52 PM

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

Cc: Cheek, Jason (USAALN) <JCheek@usa.doj.gov>; LaCour, Edmund <Edmund.LaCour@AlabamaAG.gov>; Wilson, Thomas <Thomas.Wilson@AlabamaAG.gov>; Davis, Jim <Jim.Davis@AlabamaAG.gov>; Seiss, Ben <Ben.Seiss@AlabamaAG.gov>; Christopher Mills <cmills@spero.law>; Pete Patterson <ppatterson@cooperkirk.com>; David Thompson <dthompson@cooperkirk.com>; Jeffrey P. Doss <jdoss@lightfootlaw.com>; Amie A. Vague <avague@lightfootlaw.com>; AOrr <Aorr@nclrights.Org>; Jennifer Levi <jlevi@glad.Org>; Sarah Warbelow <Sarah.Warbelow@hrc.Org>; Cynthia Weaver <cynthia.Weaver@hrc.Org>; Andy Pratt <Apratt@kslaw.Com>; Misty Peterson <Mpeterson@kslaw.Com>; Brent Ray <Bray@kslaw.Com>; Abigail Terry <ATerry@kslaw.com>; Michael Shortnacy <Mshortnacy@kslaw.Com>; Scott McCoy <Scott.Mccoy@splcenter.Org>; Diego Soto <Diego.Soto@splcenter.Org>; Jessica Stone <Jessica.Stone@splcenter.Org>; Marshall, Margaret (USAALN) <mmarshall2@usa.doj.gov>; Williams, Renee (CRT) <Renee.Williams3@usdoj.gov>; Toyama, Kaitlin (CRT) <Kaitlin.Toyama@usdoj.gov>; Murphy, Amie (CRT) <Amie.Murphy2@usdoj.gov>

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

Dear Amie,

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

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

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

the ESI of HHS custodians for responsive documents using agreed-upon search terms?

3. Would those searches extend to the custodians' emails?

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

Best regards,

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

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