

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

REV. PAUL A. EKNES-)	
TUCKER; et al.;)	
)	
Plaintiffs,)	
)	Civil Action No.
)	2:22-cv-00184-LCB
vs.)	
)	
STEVE MARSHALL, in his)	
official capacity as Attorney)	
General of the State of Alabama;)	
et al.;)	
)	
Defendants.)	

**NON-PARTY EAGLE FORUM OF ALABAMA’S OBJECTION TO AND
MOTION TO QUASH DOCUMENT SUBPOENA, OR IN THE
ALTERNATIVE MOTION TO MODIFY SUBPOENA**

Eagle Forum of Alabama (“EFA”), which is not a party to this case, hereby objects to and moves to quash the subpoena directed to it which was issued by the U.S. Attorney’s office and received by EFA on August 10, 2022. In the alternative, EFA moves the Court to modify the subpoena as discussed further below. A copy of the subpoena and cover letter received by EFA from Asst. U.S. Attorney Jason R. Cheek is attached hereto as Exhibit A. A copy of e-mail correspondence with Mr. Cheek extending EFA’s deadline to file the present objection and motion is attached as Exhibit B. The grounds for EFA’s objection and motions are as follows:

1. Eagle Forum of Alabama (“EFA”) is a grassroots, non-profit Alabama corporation devoted to the cause of protecting Alabama’s families in public policy initiatives and reform efforts. It is a 501(c)(4) organization under the U.S. Internal Revenue Code. EFA has only one full-time paid employee, along with one part-time paid administrative assistant. Nearly all of the work done by EFA is done by volunteers. See the Declarations of Becky Gerritson and Margaret S. Clarke (Exhibits C and D hereto).

2. For several years, EFA and its membership have been very concerned about the provision of gender-altering medical treatment to minors in Alabama with gender dysphoria, and the permanent and adverse effects of such medical procedures on those minors. EFA put feet to its concerns by, among other things, speeches to various groups, communications to members of the Alabama Legislature about its concerns and possible legislation on this subject, informing its membership and encouraging members to contact their legislators about this subject, joining with other grassroots organizations with similar concerns in these efforts, assisting in drafting possible legislation to be considered by sponsoring legislators, and arranging for witnesses who could testify at legislative committee hearings. These efforts by EFA and other similar grassroots organizations occurred over several

years and particularly during the Alabama Legislature's sessions in 2020, 2021, and 2022. See the Declarations of Becky Gerritson and Margaret S. Clarke.

3. As the Court is aware, the "VCAP" statute (Alabama Vulnerable Child Compassion and Protection Act) – the constitutionality of which is the subject of this lawsuit -- was passed by both houses of the Alabama legislature during the 2022 legislative session, signed by Governor Kay Ivey, and became effective May 8, 2022. Again, EFA is not a party to this case, for the obvious reason that -- while it advocated for the legislation that was passed, and wholeheartedly believes that it was and is good policy -- EFA is a completely private association of concerned citizens that itself has no lawmaking capacity whatsoever. Indeed, this Court's May 13, 2022, Opinion and Order (Doc. 107, pp. 4-6) recognizes that the VCAP statute was the product of the Alabama Legislature which made the findings and conclusions contained in the statute.

4. The non-party document subpoena to EFA in this case was issued by Asst. U.S. Attorney Jason R. Cheek on August 9, 2022, and received by EFA on August 10, 2022. The subpoena purports to require production from EFA of eleven (11) broad categories of documents of information, over a multiple-year period of time from January 1, 2017, through the present. In general terms, the requested documents are EFA's own work product and communications arising from its

concerns about gender-altering medical treatment to minors and the VCAP legislation for which it and its membership was advocating. The subpoena is objectionable and due to be quashed in its entirety on several grounds.

5. First, the subpoena seeks documents which are outside the general scope of permissible discovery under Fed. R. Civ. P. 26(b)(1). As the Court is aware, that rule sets the outside limits of discovery as follows:

“... Parties may obtain discovery regarding any nonprivileged matter that is **relevant** to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. ...”

The issues in this case are simply whether, and to what extent, the VCAP statute passed by the Alabama Legislature and signed into law by Governor Ivey is Constitutional. EFA’s work product and communications concerning gender-altering medical treatment to minors and the VCAP legislation for which EFA and its membership advocated (as did a number of other like-minded similar organizations and numerous private citizens of this State) are simply not relevant to this case in any way.

To the extent that the U.S. argues that these documents from EFA could somehow be relevant to the Alabama Legislature’s (or individual legislators’) intent

in enacting the VCAP statute, there are three answers to such an argument. First, EFA's documents are not in fact relevant to such legislative intent, and the U.S. Attorney has not shown otherwise. Second, the intent of the Alabama Legislature, much less the intent of individual legislators, itself is not relevant to this case. As the U.S. Supreme Court has historically and quite recently again recognized:

“[I]nquiries into legislative motives ‘are a hazardous matter.’ Even when an argument about legislative motive is backed by statements made by legislators who voted for a law, we have been reluctant to attribute those motives to the legislative body as a whole. ‘What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it.’”

Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2256 (2022) (quoting U.S. v. O'Brien, 391 U.S. 367, 384 (1968)).¹ Third, even assuming purely *arguendo* that the U.S. is able to show some slight, theoretical relevance to some of EFA's documents, production of these documents -- particularly from a non-party² -- does not meet the proportionality test of Rule 26 under the factors underlined above.

¹ Accord, e.g., CBS Inc. v. PrimeTime 24 Joint Venture, 245 F.3d 1217, 1222 (11th Cir. 2001) (“We have also said just as frequently that ‘[w]hen the import of words Congress has used is clear ... we need not resort to legislative history, and we certainly should not do so to undermine the plain meaning of the statutory language.’”) (internal citations omitted); and State v. 223,405.86, 203 So. 3d 816, 831 (Ala. 2016) (internal citations omitted) (“The intention of the Legislature, to which effect must be given, is that expressed in the statute, and the courts will not inquire into the motives which influenced the Legislature or individual members in voting for its passage” Likewise, “[t]he motives or reasons of an individual legislator are not relevant to the intent of the full legislature in passing the bill.”).

² When a subpoena is directed to a non-party, the scope of discovery “must be limited even more. ... Bystanders should not be drawn into the parties’ dispute without some good reason,

6. Second, compliance with this subpoena would impose an undue burden on EFA, including an undue burden on its volunteer General Counsel as well as an undue burden on its Executive Director. For more detail on the nature and extent of this undue burden, see the attached Declaration of Margaret S. Clarke (para. 7, 9) and the attached Declaration of Becky Gerritson (para. 9-10). The subpoena is thus due to be quashed for that reason as well under Fed. R. Civ. P. 45(d)(3)(iv).

7. Third, the subpoena is also due to be quashed under Fed. R. Civ. P. 45(d)(3)(iii) because compliance with the subpoena would require disclosure of privileged or other protected matter. There are two categories of privilege protection to consider here.

First, the entire set of documents sought by the U.S. from EFA is protected by First Amendment privilege. The United States Constitution guarantees a right to associate to engage in activities which the First Amendment protects, including speech, assembly, and the exercise of religion. See, e.g., Roberts v. U.S. Jaycees,

even if they have information that falls within the scope of party discovery. ... A more demanding variant of the proportionality analysis therefore applies [C]ourts must give the recipient's nonparty status 'special weight,' leading to an even more 'demanding and sensitive' inquiry than the one governing discovery generally." Va. Dep't of Corrs. v. Jordan, 921 F.3d 180, 189 (4th Cir. 2019) (quoting In re Pub. Offering PLE Antitrust Litig., 427 F.3d 49, 53 (1st Cir. 2005)). The Court must consider: (1) the requesting party's need for the information sought, "meaning that the information likely (not just theoretically) ... offer[s] some value over and above what the requesting party already has"; (2) whether the requesting party can obtain the same or comparable information that would satisfy its needs from other sources; and (3) whether the request will impose a cognizable burden on the nonparty. Id. at 189-90.

468 U.S. 609, 618 (1984); National Ass'n for the Advancement of Colored People v. Alabama, 357 U.S. 449, 460-61 (1958). In the NAACP case, the Supreme Court noted as follows:

Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between freedom of speech and freedom of assembly. ... It is beyond debate that freedom to engage in association for advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. ... Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.

Id. (emphasis added). The Court went on hold that the NAACP (which the State had made a party to the case) was constitutionally protected from having to disclose its membership. NAACP, 357 U.S. at 460-67.

Nor is it just membership lists that are constitutionally protected from disclosure. In the context of discovery, the First Amendment creates a qualified privilege from disclosure of certain associational information. See Perry v. Schwarzenegger, 591 F.3d 1147, 1159-61 (9th Cir. 2010). The facts and background pertinent to the discovery dispute in Perry were as follows:

Proposition 8 amended the California Constitution to provide that only marriage between a man and a woman is valid or recognized in California. Two same-sex couples filed this action in the district court

alleging that Proposition 8 violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The official proponents of Proposition 8 (“Proponents”) intervened to defend the suit. Plaintiffs served a request for production of documents on Proponents, seeking, among other things, production of Proponents’ internal campaign communications relating to campaign strategy and advertising. Proponents objected to disclosure of the documents as barred by the First Amendment.

Id. at 1152. In evaluating the Proponents’ assertion of First Amendment Privilege to disclosure of their internal campaign communications, the court in Perry applied a burden-shifting analysis. The party objecting to the subpoena must make a *prima facie* showing that the privilege applies by demonstrating that enforcement of the discovery requests “will result in (1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or ‘chilling’ of, the members’ associational rights.” Id. at 1160 (internal citations omitted). If such a *prima facie* showing is made by the objecting party, “the evidentiary burden will then shift to the government ... [to] demonstrate that the information sought through the [discovery] is rationally related to a compelling governmental interest ... [and] the ‘least restrictive means’ of obtaining the desired information.” Id. (internal citations omitted). Applying that standard to the facts before it, the court in Perry ruled that Proponents had shown that the requested discovery “would likely have a chilling effect on political

association and the formulation of political expression,” and granted Proponents’ petition for a writ of mandamus on the basis of First Amendment privilege.

Similarly, EFA has demonstrated that production of the documents sought by the U.S. in the non-party document subpoena at issue here are protected by First Amendment privilege because they would have a chilling effect on the membership of EFA as well as other citizens in fully engaging in the political process and exercising their constitutional rights to free speech, assembly, and to petition the government. See the attached Declaration of Margaret S. Clarke; and the attached Declaration of Becky Gerritson.

Second, in addition to the First Amendment privilege which should be a basis to quash the entire subpoena, a number of the documents sought by the non-party subpoena are covered or potentially covered by the attorney-client and/or work product privileges. See the attached Declaration of Margaret S. Clarke, para. 7. The subpoena should therefore also be quashed or modified on that basis.

8. In the alternative, to the extent the Court rules that any part of this document subpoena should be complied with, EFA requests that the subpoena be modified as follows: (a) produce non-privileged documents responsive to only those categories, if any, of the subpoena that this Court deems relevant to the issues before it and proportional to the needs of the case; (b) allow for the redaction from the

documents to be produced of all references to the names of witnesses, potential witnesses, and other private citizens with whom EFA communicated; (c) to not require production of documents referencing communications with single legislators or multiple legislators that were not provided to all members of the Alabama Legislature; and (d) allow for more time for compliance – at least twenty-one (21) days after the Court rules on EFA’s present objection and motions.

/s/ John M. Graham

John M. Graham
ASB-5616-G70J

Attorney for Eagle Forum of Alabama

OF COUNSEL:

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E-Mail: John.Graham@phelps.com

CERTIFICATE OF SERVICE

I hereby certify that this 7th day of September, 2022, 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 in this case.

/s/ John M. Graham

OF COUNSEL



U.S. Department of Justice

*Prim F. Escalona
United States Attorney
Northern District of Alabama*

Jason R. Cheek
Assistant United States Attorney
(205) 244-2104
jason.cheek@usdoj.gov

Civil Division
1801 Fourth Avenue North
Birmingham, AL 35203-2101
(205) 244-2001
FAX (205) 244-2181

August 9, 2022

VIA FEDEX

Registered Agent: Eunice W. Smith
Eagle Forum of Alabama
4200 Stone River Circle
Birmingham, AL 35213

Re: *Eknes-Tucker et al. v. Marshall et al.*, No. 2:22-cv-00184-LCB (M.D. Ala.)
Subpoena to Produce Documents

Dear Ms. Smith:

I represent the United States in the above-referenced litigation. As part of the pending lawsuit, the United States seeks information related to Alabama Senate Bill 184 (2022) (“SB 184”), House Bill 266 (2022) (“HB 266”), and any related predecessor bills. SB 184 resulted in a law known as the Alabama Vulnerable Child Compassion and Protection Act (“VCAP”), the subject of this litigation.

In April of this year, the United States—along with Private Plaintiffs—sought to enjoin the enforcement of VCAP. During the preliminary injunction hearing, the Court asked who drafted the bill that resulted in VCAP. Several public statements suggest that Eagle Forum of Alabama staff may have had some involvement in drafting the legislation or its predecessor bills. As a result, the United States is issuing the enclosed subpoena for certain records in the Eagle Forum of Alabama’s possession from January 1, 2017 through the present.¹

Please note that the subpoena requests that you produce materials in native form when a document is ordinarily maintained in electronic form. So, for instance, I specifically request that you produce spreadsheets or emails in their native format (rather than converting them to PDF or some other format) when producing the documents.

I respectfully request that you produce the documentation responsive to this request to me on or before August 26, 2022, by emailing the material to me at jason.cheek@usdoj.gov. If email

¹ According to filed with the Alabama Secretary of State, you are listed as the registered agent for Eagle Forum of Alabama.

August 9, 2022

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is impracticable, please send the documentation to the address below, via Federal Express, UPS, or other express courier.

Jason R. Cheek
Assistant United States Attorney
U.S. Attorney's Office
Northern District of Alabama
1801 Fourth Avenue North
Birmingham, AL 35203
(205) 244-2104

When responding to this request for records, **please include an original, signed declaration along with a list of documents produced (as attached to this correspondence or on your organization's letterhead)** stating whether the records produced were (1) made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters; (2) kept in the course of regularly conducted activity; and (3) made by the regularly conducted activity as a regular practice. This step may relieve your office from having to produce someone at a later date to testify in court as to the authenticity of the documents produced or the manner in which they are maintained.

Please feel free to call me at (205) 244-2104 should you have any questions or concerns. Thank you in advance for your cooperation.

Very truly yours,

A handwritten signature in blue ink, consisting of a stylized 'J' followed by 'R' and 'C' with a flourish.

Jason R. Cheek
Assistant United States Attorney

Enclosures

AO 88B (Rev. 02/14) Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action

UNITED STATES DISTRICT COURT

for the
Middle District of Alabama

REV. PAUL A. EKNES-TUCKER et al.,

Plaintiff

v.

STEVE MARSHALL et al.,

Defendant

Civil Action No. 2:22-cv-00184-LCB (M.D. Ala.)

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS
OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION

To:

Eagle Forum of Alabama
4200 Stone River Circle, Birmingham, Alabama 35213

(Name of person to whom this subpoena is directed)

Production: YOU ARE COMMANDED to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection, copying, testing, or sampling of the material: See Attachment A.

Place: Office of the United States Attorney
1801 Fourth Avenue North
Birmingham, AL 25203

Date and Time:

08/26/2022 10:00 am

Inspection of Premises: YOU ARE COMMANDED to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place:

Date and Time:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 08/09/2022

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk



Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing (name of party) Plaintiff-Intervenor United States of America, who issues or requests this subpoena, are:

Jason R. Cheek, Assistant U.S. Attorney, (Address Listed Above), 205-244-2104, jason.cheek@usdoj.gov

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

AO 88B (Rev. 02/14) Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action (Page 2)

Civil Action No. 2:22-cv-00184-LCB (M.D. Ala.)

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____

on *(date)* _____ .

I served the subpoena by delivering a copy to the named person as follows: _____

_____ on *(date)* _____ ; or

I returned the subpoena unexecuted because: _____

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of \$ _____ .

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)**(c) Place of Compliance.**

(1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
 - (i) is a party or a party's officer; or
 - (ii) is commanded to attend a trial and would not incur substantial expense.

(2) For Other Discovery. A subpoena may command:

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

- (i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

ATTACHMENT A

You are hereby commanded to produce the following documents or information **from January 1, 2017 through the present** in your possession, custody, or control.

When producing the documents identified below, please produce them **in native form** if such documents are maintained in electronic form in the ordinary course of business. For example, please do not convert emails or documents maintained as spreadsheets to PDF form.

Definitions:

The term “predecessor bills” refers to any legislation, draft legislation, proposed legislation, or model legislation predating Alabama Senate Bill 184 (2022) (“SB 184”) or Alabama House of Representatives Bill 266 (2022) (“HB 266”), relating to the provision of gender affirming care to minors in Alabama, including Senate Bill 5 (2022), House of Representatives Bill 150 (2022), Senate Bill 10 (2021), House of Representatives Bill 1 (2021), Senate Bill 219 (2020), and House of Representatives Bill 303 (2020).

The terms “minors” or “youth” refer to persons 19 years of age or younger.

The term “VCAP” refers to the Alabama Vulnerable Child Compassion and Protection Act.

Requested Documents or Information:

1. Any draft legislation, proposed legislation, or model legislation relating to VCAP, SB 184, HB 266, or their predecessor bills that Eagle Forum of Alabama wrote, assisted in writing, provided feedback on, or reviewed.
2. Any materials considered by Eagle Forum of Alabama in preparing legislation, draft legislation, proposed legislation, or model legislation relating to VCAP, SB 184, HB 266, or their predecessor bills, including (1) any model or sample legislation from other third-party organizations or jurisdictions; and (2) medical studies, opinions, or evidence.
3. Any documents concerning Eagle Forum of Alabama’s legislative or policy goals, initiatives, and/or strategies relating to medical care or treatment of transgender minors, or minors with gender dysphoria.
4. Any documents provided to the Alabama State Legislature or any employee or member thereof in support of VCAP, SB 184, HB 266, or any predecessor bills, including written testimony, letters, emails, draft legislation, model legislation, or proposed legislation, reports, summaries, analyses, fact sheets, and/or talking points.

5. Any communications between Eagle Forum of Alabama and any employee, agent, assign, or member of the Alabama State Legislature, Alabama Governor's office, Alabama Lieutenant Governor's office, Alabama Attorney General's office, or any employee, agent, or assign of a District Attorney's office within Alabama concerning VCAP, SB 184, HB 266, and/or any predecessor bills.
 6. Any communications between Eagle Forum of Alabama and any other nongovernmental organization, consultant, or lobbyist concerning VCAP, SB 184, HB 266, and/or any predecessor bills.
 7. Any records or minutes of meetings concerning VCAP, SB 184, HB 266, and/or any predecessor bills.
 8. Any polling or public opinion data related to or concerning VCAP, SB 184, HB 266, predecessor bills, and/or legislation relating to medical care or treatment for transgender minors or youth.
 9. Any records or documents relating to presentations, videos, interviews, and/or speeches Eagle Forum of Alabama representatives have given or participated in regarding medical care or treatment related to gender identity, transgender minors or youth, "trans-identifying" minors or youth, or minors or youth with gender dysphoria.
 10. Any mass letters, newsletters, or emails that Eagle Forum of Alabama sent to members of a mailing or email list related to or concerning VCAP, SB 184, HB 266, and/or any predecessor bills.
 11. Any social media postings that Eagle Forum of Alabama issued concerning VCAP, SB 184, HB 266, and/or any predecessor bills.
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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

REV. PAUL A. EKNES-TUCKER *et al.*,

Plaintiffs,

v.

STEVE MARSHALL *et al.*,

Defendants.

CIVIL ACTION NO.
2:22-cv-00184-LCB

DECLARATION

I, _____, hereby declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, as follows:

1. I am currently employed at _____.
2. My official job title is _____.
3. I have worked in this position since _____,
and I am therefore personally acquainted with how documents are made,
stored, and retained.
4. I am a custodian of records for records maintained by this office, and I am therefore familiar with the above-referenced agency's policies related to the creation and maintenance of the records.
5. The records identified attached hereto are exact, full, true and correct copies of records maintained by this office.

6. The records included were made at or near the time of the occurrence of the matters set forth in these records, or from information transmitted by, a person with knowledge of those matters.
7. The records included were kept by the individual who normally performs that task.
8. The records included are kept in the course of the regularly-conducted activity of this office.
9. The records included were made by the regularly-conducted activity as a regular practice.
10. I declare under penalty of perjury that the foregoing is true and correct.

Date: _____

Signature

Printed Name

Printed Title

John Graham (7235)

From: John Graham (7235)
Sent: Monday, August 22, 2022 10:32 AM
To: 'Cheek, Jason (USAALN)'
Subject: RE: Eagle Forum of AL and Southeast Law Institute in Eknes-Tucker v. Marshall, No. 2:22cv184LCB (MDAL)

Thanks, I did (little less legal work involved given your courteous extension), and I hope you did also.

From: Cheek, Jason (USAALN) <Jason.Cheek@usdoj.gov>
Sent: Monday, August 22, 2022 8:19 AM
To: John Graham (7235) <John.Graham@phelps.com>; Mike Hurst (3330) <Mike.Hurst@phelps.com>
Subject: RE: Eagle Forum of AL and Southeast Law Institute in Eknes-Tucker v. Marshall, No. 2:22cv184LCB (MDAL)

Thanks, John. I appreciate the heads-up. Hope you had a nice weekend.

Jason R. Cheek
Deputy Chief, Civil Division
Assistant United States Attorney
Northern District of Alabama
(205) 244-2104

From: John Graham (7235) <John.Graham@phelps.com>
Sent: Monday, August 22, 2022 6:20 AM
To: Cheek, Jason (USAALN) <JCheek@usa.doj.gov>; Mike Hurst (3330) <Mike.Hurst@phelps.com>
Subject: [EXTERNAL] RE: Eagle Forum of AL and Southeast Law Institute in Eknes-Tucker v. Marshall, No. 2:22cv184LCB (MDAL)

Jason, I appreciate this courtesy. We do plan to object to and move to quash the subpoenas, and will plan to file those by September 7th. Thanks again.

John M. Graham
Phelps Dunbar LLP
2001 Park Place North
Suite 700
Birmingham, AL 35203
Direct: 205-716-5235
Fax: 205-716-5389
Email: john.graham@phelps.com



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From: Cheek, Jason (USAALN) <Jason.Cheek@usdoj.gov>
Sent: Saturday, August 20, 2022 3:05 PM
To: Mike Hurst (3330) <Mike.Hurst@phelps.com>
Cc: John Graham (7235) <John.Graham@phelps.com>
Subject: RE: Eagle Forum of AL and Southeast Law Institute in Eknes-Tucker v. Marshall, No. 2:22cv184LCB (MDAL)

Mike,

Thanks so much for the clarification. I did get the impression from our prior conversation that documents would be produced in response to the subpoena. I appreciate you being up front.

In light of the possibility that the third-parties' responses may challenge the entirety of the subpoena, can you please provide me with your clients' responses to the subpoena on September 7?

I look forward to working with you.

Thanks,
Jason

.....
Jason R. Cheek
Deputy Chief, Civil Division
Assistant United States Attorney
Northern District of Alabama
(205) 244-2104

From: Mike Hurst (3330) <Mike.Hurst@phelps.com>
Sent: Friday, August 19, 2022 5:13 PM
To: Cheek, Jason (USAALN) <JCheek@usa.doj.gov>; Mike Hurst (3330) <Mike.Hurst@phelps.com>
Cc: John Graham (7235) <John.Graham@phelps.com>
Subject: [EXTERNAL] Re: Eagle Forum of AL and Southeast Law Institute in Eknes-Tucker v. Marshall, No. 2:22cv184LCB (MDAL)

Hey Jason, thanks again for your response. John raised a good point with me, and we want to make sure we're clear and up front as to what I was requesting.

In my requesting an extension to respond to the subpoena, our response will most likely include our objection to the subpoena and it's request for improper items.

Again, we just got the case, so we have more research to do, but our initial reaction to reading it was that we would need to challenge some, if not all, of the subpoena on behalf of the clients.

I'm sorry if my previous email wasn't clear, as I didn't want to leave the wrong impression that "response" necessarily meant "producing." Just wanted to clarify.

Thanks and have a great weekend.

Mike

From: Cheek, Jason (USAALN) <Jason.Cheek@usdoj.gov>
Sent: Friday, August 19, 2022 4:36 PM
To: Mike Hurst (3330) <Mike.Hurst@phelps.com>
Cc: John Graham (7235) <John.Graham@phelps.com>
Subject: RE: Eagle Forum of AL and Southeast Law Institute in Eknes-Tucker v. Marshall, No. 2:22cv184LCB (MDAL)

Mike,

Very glad we connected. I'll get with my team and will be in touch early next week.

Hope you have a nice weekend,
Jason

Jason R. Cheek
Deputy Chief, Civil Division
Assistant United States Attorney
Northern District of Alabama
(205) 244-2104

From: Mike Hurst (3330) <Mike.Hurst@phelps.com>
Sent: Friday, August 19, 2022 4:10 PM
To: Cheek, Jason (USAALN) <JCheek@usa.doj.gov>
Cc: John Graham (7235) <John.Graham@phelps.com>
Subject: [EXTERNAL] Eagle Forum of AL and Southeast Law Institute in Eknes-Tucker v. Marshall, No. 2:22cv184LCB (MDAL)

Jason,
Great talking with you this afternoon. Thanks again for the call back. And I appreciate your kind consideration of our request for an extension to respond to subpoenas to our two clients above. I look forward to hearing back from you on whether our new deadline will be September 2nd or 9th.

My contact info is below, and you have my cell if you need me: 601-665-3322.

Thanks again and have a great weekend.

Mike

Mike Hurst
Phelps Dunbar LLP
4270 I-55 North
Jackson, MS 39211
Direct: 601-360-9330
Fax: 601-360-9777
Email: mike.hurst@phelps.com



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

**REV. PAUL A. EKNES-)
TUCKER; et al.;)**

Plaintiffs,)

**Civil Action No.
2:22-cv-00184-LCB**

vs.)

**STEVE MARSHALL, in his)
official capacity as Attorney)
General of the State of Alabama;)
et al.;)**

Defendants.)

DECLARATION OF BECKY GERRITSON

I, Rebecca (“Becky”) Gerritson, pursuant to 28 U.S.C.A. § 1746 (pertaining to declarations), declare under penalty of perjury that the following statements by me are true and correct to the best of my knowledge:

1. I am Rebecca (“Becky”) Gerritson, and I am over the age of nineteen (19) years and in no way disqualified from making this declaration, which is made from personal knowledge.

2. I have reviewed the non-party document subpoena issued by Asst. U.S. Attorney Jason R. Cheek and directed to Eagle Forum of Alabama (“EFA”), which EFA received on August 10, 2022. I understand that a copy of that subpoena will

be made Exhibit A to the Objection and Motion to Quash which is being filed on behalf of EFA.

3. Since January 2019, I have served as Executive Director for EFA. EFA is a grassroots organization devoted to the cause of protecting Alabama's families in public policy initiatives and reform efforts. EFA is incorporated in the State of Alabama and is registered with the federal government as a 501(c)(4) organization. We have no Political Action Committee and do not endorse or fund candidates. Our president and all board members have always been volunteers. Volunteers do nearly all the work done by EFA. I am the only full-time paid employee of EFA. We also employ a part-time office manager.

4. EFA's mission since its formation in 1977 has been to equip citizens with information, so they may know how, when, and where to make their voices heard on public policy issues of importance to them and their families. This includes instruction on how bills are passed and how to contact their elected officials at all levels of government. Such participation in the public policy process is their right and, indeed, their responsibility, as Americans.

5. EFA has an email list of approximately 3,500 people comprised of dues-paying members, supporters, volunteers, and any others who request to receive

the emails. These people receive weekly emails from EFA on issues of importance while the Alabama Legislature is in session and less often otherwise.

6. Over the past few years, EFA and its members have been concerned at the rise in the number of otherwise healthy children wanting to medically transition to the opposite sex. We had parents and counselors contact us about their concerns and personal experiences. With those concerns in mind, we began extensive study of the medical interventions being given to minors experiencing gender dysphoria. We were alarmed by the adverse and permanent effects from these interventions given to Alabama minors. After much research and consultation with parents, doctors, counselors, and attorneys, we developed proposed legislation to address these medical harms to minors. We arranged for witnesses who could testify at legislative committee hearings. By way of speeches, emails, and interviews, we educated citizens and legislators about the medical harms inflicted upon vulnerable children. We encouraged our members to contact their legislators about this subject, joining with other grassroots organizations with similar concerns in these efforts. These efforts occurred over several years, and particularly during the 2020, 2021, and 2022 Alabama Legislative sessions.

7. The legislation now at issue in this case, and the subject of this non-party document subpoena to EFA, was debated, amended, and passed after extensive

consideration in three successive legislative sessions. The bill was scrutinized in three Alabama Senate committee hearings, and four Alabama House committee hearings, in addition to exhaustive floor debate in both the House and the Senate before final passage by large majorities in both chambers. The resulting Vulnerable Child Compassion and Protection Act (“VCAP”) is the product of the Alabama Legislature and was signed by Governor Kay Ivey. It became law on May 8, 2022.

8. Much of EFA’s legislative efforts concerning VCAP was spearheaded by our (volunteer) General Counsel, Margaret Clarke. I was also heavily involved in briefing legislators and giving numerous speeches, briefings, and interviews on this subject (possibly as many as 100) and preparing our communications to members/supporters over several years.

9. Most if not all of the documents which would be potentially responsive to categories (1) through (8) of the subpoena would only be in the personal possession and control of Margaret Clarke, who again is a volunteer. I have reviewed her Declaration being filed in this matter concerning the burdens that it would impose on her to comply with this subpoena. I wholeheartedly agree with her concerns.

10. I would have access to EFA’s documents potentially responsive to categories (9) through (11) of the subpoena. They span over multiple years.

Searching our files for each of these documents and identifying them for possible production would be very burdensome and time-consuming since I am the only person who could do this.

11. More importantly, EFA's policy position and the rationale for that position is irrelevant to this current court case. EFA's communications prior to the bill's passage have no bearing on the Constitutionality of the VCAP law subsequently passed by the Alabama Legislature and now under consideration by the court.

12. It is the Constitutional right and responsibility of Alabamians and Americans to associate together, express their views freely, and approach their elected legislators without fear of reprisal. There is no question in my mind that the subpoena issued by the federal government in this case is a form of government harassment and retaliation for simple communications with the public and our elected officials to carry out our lawful purpose. If this subpoena is enforced, legitimate, law-abiding organizations like ours will be subject to scrutiny for engaging in constitutionally protected activities. Further correspondence by EFA, including emails, notes, presentations, speeches, interviews, etc. could be weaponized by government officials who hold (or are being required to assert) opposite political views. In addition, enforcement of the federal government

subpoena would set a precedent that would stifle other citizens who want to exercise their constitutional right to make their views known to their elected officials on public policy matters.

13. For all these reasons, I respectfully urge the Court to quash the subpoena in its entirety.

Signed this 6th day of September, 2022.

By: 
Rebecca Gerritson

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

**REV. PAUL A. EKNES-
TUCKER; et al.;**)

Plaintiffs,)

**Civil Action No.
2:22-cv-00184-LCB**

vs.)

**STEVE MARSHALL, in his
official capacity as Attorney
General of the State of Alabama;
et al.;**)

Defendants.)

DECLARATION OF MARGARET S. CLARKE

I, Margaret S. Clarke, pursuant to 28 U.S.C.A. § 1746 (pertaining to declarations), declare under penalty of perjury that the following statements by me are true and correct to the best of my knowledge:

1. I am Margaret S. Clarke, and I am over the age of nineteen (19) years and in no way disqualified from making this declaration, which is made from personal knowledge. I am a licensed Alabama attorney.

2. Since 2018, I have served in a volunteer role for Eagle Forum of Alabama (“EFA”) as its General Counsel. EFA is a non-profit Alabama 501(c)(4) social welfare advocacy organization under the U.S. Internal Revenue Code. EFA

has only one full-time paid employee (Executive Director Becky Garritson), along with one part-time paid administrative assistant. Nearly all of the work done by EFA is done by volunteers.

3. EFA has been dedicated to supporting and protecting strong families, constitutional liberty, personal responsibility, the sanctity of life, and the principle of free government in the State of Alabama for over forty-five (45) years. EFA advocates for these principles through the education of citizens and government officials including legislators, grassroots public policy initiatives and advocacy of legislative reform. In over 45 years of policy and legislative reform efforts, to my knowledge, EFA has never been subpoenaed to produce documents pertinent to its legislative reform efforts.

4. For several years, EFA and its membership have been very concerned regarding issues surrounding the provision of gender-altering medical treatments to minors in Alabama with gender dysphoria, and the permanent and adverse effects of such medical procedures on those minors. EFA began a public policy initiative and legislative reform effort by educating the public and legislators and offering proposed draft legislation and amendments to address its concerns. Those efforts were joined by other advocates including various Alabama and national associations, organizations, doctors, lawyers, counselors, psychiatrists, parents, de-transitioners

and individual Alabama citizens. It should be noted that an aggressive campaign was initiated by those who opposed VCAP. This occurred over several years and particularly during the Alabama Legislature's sessions in 2020, 2021, and 2022.

5. As the Court is aware, the Alabama Vulnerable Child Compassion and Protection Act ("VCAP"), the constitutionality of which is the subject of this lawsuit, was passed by both houses of the Alabama Legislature during the 2022 legislative session, signed by Governor Kay Ivey, and became effective May 8, 2022. The Alabama Legislature debated, amended and passed VCAP after extensive consideration over three successive legislative sessions, including seven public hearings (three Alabama Senate committee hearings and four Alabama House committee hearings) with expert testimony from all sides. Opponents and proponents were heavily involved in email campaigns to communicate with legislators. Both opponents and proponents were allowed an equal number of witnesses in every hearing. In addition, there was extensive floor debate in both the House and the Senate before final passage by large majorities in both chambers.

6. As (volunteer) General Counsel for EFA, I communicated with various EFA leadership and members from time to time as well as with Alabama legislators on this subject. I was involved in proposing draft legislation or amendments and submitting legal memos to legislators for their consideration over this three-year

period. I also interviewed and helped prepare numerous expert and fact witnesses, including parents of minor children,¹ to testify in these seven public hearings or to offer written testimony to the legislators.

7. On my personal computer, which I use for my volunteer work with EFA, are nearly 500 Word/PDF documents and over 2,000 email messages potentially related to the VCAP campaign. This does not include countless hard copies of documents saved in boxes and binders. These documents include personal notes reflecting my thoughts and impressions, surveys, brochures, opinion letters from attorneys, white papers, medical research and many other forms of documentation. I consider many of these documents to be my work product and covered by the attorney-client and work product privileges.

8. I also consider all of these documents to be protected and privileged by the First Amendment to the U.S. Constitution and the rights it guarantees to citizens of this country to free speech, assembly, and to petition the government. I consider the subpoena in this case issued by the federal government to be contrary to and an undermining of those fundamental values and recognized rights.

¹ During EFA's public policy initiative on this issue, a number of witnesses spoke with EFA regarding their experiences. Some of these potential witnesses – including parents, a doctor, and a de-transitioner -- were unwilling to go public and testify for fear of reprisal.

9. I have reviewed the non-party document subpoena issued by Asst. U.S. Attorney Jason R. Cheek and directed to Eagle Forum of Alabama which I understand is Exhibit A to the Objection and Motion to Quash which is being filed on behalf of Eagle Forum of Alabama. It would be a massive and undue burden for me as a volunteer to comply with this subpoena. I have no administrative assistant. I am a wife, mother and active church member, among other roles of service in our community. I also work on other issues. Compliance with this subpoena by EFA would (in addition to significant and unnecessary work it would impose on others associated with EFA) require me to open and read through each of the thousands of the documents in my personal files referenced above. It would be necessary, for each individual document of those thousands of documents, for me to: (a) determine whether it is responsive or possibly responsive to one of the eleven (11) broad categories of documents listed in the subpoena; (b) determine whether it is privileged or possibly privileged by the attorney-client or work product privileges (aside from the First Amendment issues and privilege referenced above); (c) make any necessary redactions; and (d) produce any such document which this Court might order to be produced. This task would easily take weeks of my time, as well as causing me to incur personal expense.

10. Another major problem with this subpoena is its irrelevance to the constitutional question of VCAP before this Court. Laws are written and passed by the legislature. The VCAP statute was the product of the Alabama Legislature's deliberations over three protracted years. Many opposing views were expressed. As stated by the Alabama Attorney General's office during the preliminary injunction hearing, the author of VCAP is simply the Alabama Legislature. Neither the intent of legislators nor that of others in the legislative process, whether opponents or proponents, are relevant to the constitutional question before this Court. Certainly, my private research, private communications with legislators, and other private documents are not relevant to this question, either.

11. In addition to the undue and unnecessary burden that it would place on me and others associated with Eagle Forum of Alabama, compliance with the federal government subpoena would also have a chilling effect on me and other citizens who choose to engage in our constitutional rights to free speech, free association, and freedom to petition the government, when our views happen to be contrary to the political views of the current Administration in Washington. I consider this subpoena to be political harassment. If this subpoena is enforced it will have a chilling effect on historically protected constitutional rights and legislative advocacy in Alabama and possibly around the country. It would certainly increase the chilling

effect in Alabama on others who already feel threatened or fear political harassment by either the government or private parties simply because they support VCAP. Others may choose not to become members of EFA, not associate with EFA or other similar grassroots organizations, or simply not participate in the political process at all.

12. Further, if this subpoena is enforced, EFA legislative advocacy efforts will be jeopardized. Disclosing my personal private thoughts and communications on policy matters or legislative efforts would subject me to further political harassment. As noted above, I communicated privately with many individuals and experts in various fields, including legislators, doctors, parents, teachers, counselors, psychiatrists, policy advocates and other potential witnesses, including some who were only willing to communicate confidentially. Many of those persons will feel betrayed and some will be less likely to participate in the political process in the future if they learn that the Department of Justice can obtain discovery of private documents and private communications of confidential information in controversial cases. America needs more not less citizen participation to make our Republic function at its best. Several witnesses who testified at the first committee hearing in 2020 refused to return to participate in later legislative sessions because they were harassed and put in fear of bodily harm by the opposition on the first day of

committee hearings. Other witnesses have asked for their names to be redacted from communications. The State House Security was notified and provided supporting affidavits of this harassments, and, in response, proponent VCAP witnesses were sequestered and given additional protection at all future hearings by State House Security. Since then, I have had genuine concerns for the physical well-being of anyone who publicly supports the VACP. My concern will increase if this subpoena is enforced.

13. If this subpoena is enforced, I will certainly be more reticent to volunteer and be much more cautious when I participate in the advocacy of controversial issues due to the burdensome impact this has had on me and my family. At a minimum, I will be less likely to communicate with EFA membership or legislators and will not preserve relevant documents related to my responsibilities even if it is privileged and valuable for making future decisions. I will also eliminate protected work product simply in order to assure confidentiality of myself and others. I will certainly need to limit the number of documents I preserve related to political issues, and I will have to consider that anything I write in any note, letter, etc. may one day be read and used for political purposes by a governmental administration which has a different political view, even if my communications were covered by privileges and constitutional protections. This is an unwarranted and

entirely improper burden to place on those who are exercising their constitutional rights to political free speech, freedom of association, and freedom to petition the government.

14. For all these reasons, I respectfully urge the Court to quash the subpoena in its entirety.

Signed this 2nd day of September, 2022.

By: Margaret S. Clarke
Margaret S. Clarke