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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

LITTLE ROCK FAMILY PLANNING SERVICES; PLANNED PARENTHOOD OF
ARKANSAS & EASTERN OKLAHOMA; STEPHANIE HO, M.D., on behalf of
herself and her patients; and THOMAS TVEDTEN, M.D., on behalf of
himself and his patients,

Plaintiffs,

v. No. 4:19CV00449 KGB

LESLIE RUTLEDGE, in her official capacity as Attorney General of
the State of Arkansas; LARRY JEGLEY, in his official capacity as
Prosecuting Attorney of Pulaski County; MATT DURRETT, in his
official capacity as Prosecuting Attorney of Washington County;
SYLVIA D. SIMON, M.D., in her official capacity as Chairman of
Arkansas State Medical Board; ROBERT BREVING JR., M.D., in his
official capacity as member of the Arkansas State Medical Board;
VERYL D. HODGES, D.O., in his official capacity as member of the
Arkansas State Medical Board; JOHN H. SCRIBNER, M.D., in his
official capacity as member of the Arkansas State Medical Board;
OMAR T. ATIQ, M.D., in his official capacity as member of the
Arkansas State Medical Board; RHYS L. BRANMAN, M.D., in his
official capacity as member of the Arkansas State Medical Board;
RODNEY GRIFFIN, M.D., in his official capacity as member of the
Arkansas State Medical Board; MARIE HOLDER, in her official
capacity as member of the Arkansas State Medical Board; BRIAN T.
HYATT, M.D., in his official capacity as member of the Arkansas
State Medical Board; LARRY D. LOVELL, "Buddy," in his official
capacity as member of the Arkansas State Medical Board; TIMOTHY
C. PADEN, M.D., in his official capacity as member of the
Arkansas State Medical Board; DON R. PHILLIPS, M.D., in his
official capacity as member of the Arkansas State Medical Board;
WILLIAM L. RUTLEDGE, M.D., in his official capacity as member of
the Arkansas State Medical Board; DAVID L. STAGGS, M.D., in his
official capacity as member of the Arkansas State Medical Board;
and NATHANIEL SMITH, M.D., M.P.H., in his official capacity as
Director and State Health Officer of the Arkansas Department of
Health,

Defendants.

Friday, July 19, 2019
Little Rock, Arkansas
2:00 p.m.

TRANSCRIPT OF TELEPHONE CONFERENCE
BEFORE THE HONORABLE KRISTINE G. BAKER,
UNITED STATES DISTRICT JUDGE

1 APPEARANCES:

2

3 On Behalf of the Plaintiffs:

4 MS. BETTINA E. BROWNSTEIN, Attorney at Law
5 Bettina E. Brownstein Law Firm
6 904 West 2nd Street, Suite 2
7 Little Rock, Arkansas 72201

8 MS. LEAH GODESKY, Attorney at Law
9 O'Melveny & Myers LLP
7 Times Square
10 New York, New York 10036

9

10 On Behalf of the Defendants:

11 MR. NICHOLAS JACOB BRONNI, Solicitor General
12 MR. VINCENT MOORE WAGNER, Assistant Attorney General
13 Arkansas Attorney General's Office
323 Center Street, Suite 200
Little Rock, Arkansas 72201-2610

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25 Proceedings reported by machine stenography; transcript prepared utilizing computer-aided transcription.

1 P R O C E E D I N G S

2 THE COURT: We are on the record in Case No.
3 4:19CV449, Little Rock Family Planning Services versus Leslie
4 Rutledge. So that counsel are aware, I am in the courtroom in
5 the courthouse on the telephone with counsel. This is a
6 telephonic hearing, but this is how we've conducted telephonic
7 hearings in the past. If there is any interest in the public or
8 media in attending, they may certainly be present. For
9 counsel's information, no one is in the courtroom with us other
10 than court staff, a court security officer, and our court
11 reporter.

12 Counsel for plaintiffs, please introduce yourself for the
13 record.

14 MS. GODESKY: Good afternoon, Your Honor. This is
15 Leah Godesky for the plaintiffs.

16 MS. BROWNSTEIN: This is Bettina Brownstein for the
17 plaintiffs.

18 THE COURT: And is there anyone else on the line for
19 the plaintiffs, or are we waiting for anyone else?

20 MS. GODESKY: No, Your Honor. It's just me and Ms.
21 Brownstein.

22 THE COURT: Counsel for defendants, if you will please
23 do the same, introduce yourself, anyone on the line with you.
24 And let me know if we're waiting on anyone.

25 MR. WAGNER: Good afternoon, Your Honor. This is

1 Vincent Wagner for the defendants. And I have Nick Bronni here
2 with me, and we're not waiting on anyone else.

3 THE COURT: All right. I have scheduled this hearing
4 to take up the matter of the discovery dispute that was briefed
5 yesterday by the parties. And I am prepared to make a ruling on
6 that based upon the parties' written submissions. Does anybody
7 wish to address it before I do that?

8 Counsel for defendants, do you have anything you wish to
9 add?

10 MR. WAGNER: I think we would like to make one or two
11 points to maybe reiterate what it is we're talking about at this
12 point, Your Honor, if that's okay.

13 THE COURT: All right.

14 MR. WAGNER: So first I would like to say real quick
15 what it is we feel like the dispute is really centering on right
16 now. And that's the data that Lindo relied on in forming his
17 opinions. It's not that we're waiving any of our other
18 discovery requests. It's that, you know, this is pretty late in
19 the proceedings. We have the hearing on Monday. And we think
20 that Lindo's data in particular is crucial to defendants'
21 ability to defend against plaintiffs' motion for preliminary
22 relief.

23 And our review of that, of Lindo's analysis, points to
24 really five items that drove it. So for abortions starting on
25 May 1st, 2016, and ending April 30th, 2019, he used the county

1 of residence, where the abortion took place, the gestational age
2 of the aborted child, the procedure used to abort the child and
3 the practitioner who performed the abortion. So these five
4 points, none of these are personally identifiable information,
5 which is really what it sounds like plaintiffs are saying their
6 hang-up is with this discovery dispute, which makes us think
7 that it's kind of a red herring. So we're not really sure what
8 the deal is, why we're still fighting over this protective
9 order. We think it's really about keeping Lindo's data away
10 from defendants and not giving our experts a chance to really
11 test his analysis before the July 22nd hearing.

12 So with that clarification about what we're really seeking
13 at this point, I think that's all I'll say for now.

14 THE COURT: All right. Counsel for plaintiffs, do you
15 wish to address anything further with respect to this matter
16 before the Court rules? I should have started off -- I
17 generally do, but I didn't say it in this case. I've reviewed
18 thoroughly all of the written submissions by counsel with
19 respect to this matter.

20 Counsel for plaintiffs, anything further?

21 MS. GODESKY: Your Honor, this is Leah Godesky for
22 plaintiffs. I'll just add that with regard to the data that Dr.
23 Lindo relied on, we are ready, willing and able to turn it over
24 as soon as we have the assurance that it will be kept
25 confidential because our view is that information relating to

1 patients' procedure dates, the counties that these women are
2 coming from and the types of procedures that they are undergoing
3 are absolutely required to be protected. It should be kept
4 confidential. And other than that, we will rest on our papers.

5 THE COURT: All right. Defendants, it's your motion.
6 I'll give you the last word if you want it. You don't have to
7 take it, but you are welcome to.

8 MR. WAGNER: Yeah. Your Honor, if I may, just one
9 more quick point that I want to reiterate. This data that Lindo
10 apparently relied on is very similar to data that the *Jegley*
11 plaintiffs publicly filed on the Court's docket. You know, some
12 of the same plaintiffs are plaintiffs here. So we're not sure
13 if the data started being confidential since they publicly filed
14 it then or exactly why it's confidential now and wasn't
15 confidential then. With that, I think that's all I've got.

16 THE COURT: All right. I'll start. I'm going to just
17 start by making an observation. I've pulled the data from
18 *Jegley*. It's Docket 84-1. The defendants cite it in their
19 moving papers to the Court. It is a one-page chart. It lists
20 county, state, number of patients and distance to Little Rock.
21 That's all that's listed on it.

22 With respect to this dispute -- and bear with me for a
23 moment. I'm going to rule -- essentially rule from the bench on
24 this dispute at least preliminarily for purposes of the matter
25 today.

1 On July 2nd, in Docket 26, the defendants filed a motion
2 for expedited discovery.

3 On July 8th, Docket 33, the plaintiffs responded. The
4 plaintiffs pointed out that the defendants had not conferred
5 with the plaintiffs with respect to discovery.

6 So the Court, by order entered on July 9th, Docket 34,
7 directed the parties to confer and to file a joint status report
8 alerting the Court as to matters they could resolve and matters
9 they couldn't resolve.

10 Docket 40, filed July 12th, was a joint status report in
11 which the parties represented that they provisionally worked out
12 many of the discovery disputes but had a few exceptions. First,
13 the Court appreciates very much counsel's cooperation with one
14 another in talking about those issues and attempting to work
15 through those issues. Second, the Court entered an order on the
16 remaining disputes on July 15th. That's Docket 42.

17 The defendants filed a response to the motion for temporary
18 restraining order and preliminary injunction on July 17th,
19 Docket 43. They did not raise this discovery issue before
20 filing a written response. The written response and all of the
21 exhibits were tendered by defendants on that day.

22 At 2:36 p.m., on July 18th, by email, defendants first
23 raised this issue with the Court. The Court was not apprised
24 that there was an issue with a confidentiality and protective
25 order dispute until then. In Docket 40 the parties represented

1 that they were talking about the confidentiality order and
2 anticipated that they would present that matter to the Court
3 after talking to one another. In the email, the defendants
4 asked the Court to rule by six p.m. last evening with respect to
5 the dispute, but plaintiffs hadn't responded to the dispute.
6 Again, the docket numbers aren't time-stamped, so I don't know
7 when the motion was filed. The motion is Docket No. 56. But
8 the email came into the court at 2:36 p.m. yesterday.

9 The Court set a hearing on the matter for today.

10 Plaintiffs responded at 5:24 p.m. yesterday, July 18th.
11 They also filed Docket 60.

12 With respect to the defendants' request that the Court
13 strike the Lindo affidavit or postpone the hearing that's
14 scheduled for Monday, the Court denies the request. The
15 defendants did not raise this issue prior to filing a written
16 response to the motion for temporary restraining order and
17 preliminary injunction. They didn't indicate in their response
18 that this was an outstanding dispute that they needed the
19 Court's attention to resolve before filing, nor did they
20 indicate that in the filing.

21 As soon as the Court learned of the dispute, the Court took
22 the action it could take with respect to its calendar and docket
23 to address the matter timely. Based upon what the parties have
24 shared with the Court regarding the dispute, it wasn't a new
25 dispute. With respect to the terms of the protective order,

1 July 10th was the draft that was first circulated by the
2 plaintiffs to defendants' counsel. According to what plaintiffs
3 have represented, defendants' counsel first responded to that
4 request for the protective order on July 15th. On July 16th,
5 plaintiffs promptly responded, said they could not agree and
6 sent a counterproposal to defendants. Again, with respect to
7 defendants' written response to the motion for temporary
8 restraining order or preliminary injunction, it was docketed
9 July 17th. And the Court was first apprised of this dispute
10 July 18th.

11 With respect to the dispute, as to the defendants' point
12 that there's some notion of hiding the ball or not providing
13 information, I'm not certain -- I don't know of a provision in
14 which the plaintiffs are required to produce information in a
15 format demanded by the defendants if it's not the format in
16 which they would have kept the information. So with respect to
17 saying that there's an obligation by the plaintiffs to produce
18 information that mirrors Docket 84-1 in the *Jegley* case, the
19 Court is not aware of any authority to that effect. If
20 defendants have any, you certainly may make me aware of that.
21 But I think the plaintiffs do have an obligation to produce
22 information in the manner that they keep it or in a manner
23 responsive to the request. And I don't hear any argument that
24 they are refusing to do that or have refused to do that.
25 Instead, I hear the dispute centering on the confidentiality and

1 protective order.

2 With respect to the law supporting a confidentiality and
3 protective order, the Court heard from the parties, and many of
4 the same, although not identical, parties, in the *Jegley* case
5 and ruled on this issue there.

6 For the Court's purposes today, what I anticipate is that
7 when we conclude this hearing, I'm going to enter a
8 confidentiality and protective order very similar to the one
9 done in *Jegley*, perhaps not identical, but very similar. The
10 parties are welcome after I do that to issue a request for me to
11 reconsider that order if there's new authority or additional
12 authority that they want to make the Court aware of with respect
13 to these matters that's different from what the Court considered
14 prior to ruling in *Jegley*. But that's how I'm going to resolve
15 it today.

16 So I'll make a ruling on a protective order this afternoon
17 and enter it today. I'll give the parties a time period. You
18 can file a motion to reconsider whenever you wish for me to do
19 that. But what I enter today will govern the parties' conduct
20 in the discovery until I reconsider or issue a different ruling.

21 Are there any other matters with respect to that, counsel
22 for defendants?

23 MR. WAGNER: One question of clarification, Your
24 Honor. Does that mean that the plaintiffs will be required to
25 produce the information we're seeking, or what is the

1 implication for the protective order that will be entered today
2 for those discovery requests?

3 THE COURT: I don't know what the parties' agreement
4 was. I didn't get involved in that, nor was I asked to get
5 involved in that with respect to the timing of when the
6 plaintiffs were prepared or would turn over information when a
7 protective order was entered. So I don't know.

8 MR. WAGNER: Thank you, Your Honor.

9 THE COURT: And I'm happy to resolve a dispute if
10 there's one presented to the Court. But the way it was
11 presented in the status report is that the parties had worked
12 out those issues contingent upon agreement of a protective
13 order. Clearly, the parties couldn't agree to one. I was first
14 alerted that there was a dispute yesterday. I've made my ruling
15 on it today, and I'll enter a written order.

16 MS. GODESKY: Your Honor, this is Leah Godesky for
17 plaintiffs. I'm happy to clarify that if the protective order
18 is entered today, plaintiffs will produce the documents today.

19 THE COURT: All right. Thank you. Anything further
20 with respect to that matter? And I have a couple of other
21 points to raise with counsel while we're on the telephone today.
22 Anything else with respect to discovery, counsel for defendants?

23 MR. WAGNER: No, Your Honor. That's all we have on
24 the discovery issues.

25 THE COURT: Anything further, counsel for plaintiffs,

1 on the discovery issue?

2 MS. GODESKY: Nothing for plaintiffs.

3 THE COURT: One thing that I will say, I'm going to
4 say a few things about the hearing really on Monday. It's not
5 unusual for the Court to receive word from court security
6 regarding hearings in matters such as this. The Court has
7 presided over this litigation as well as litigation that has
8 involved other matters that generates a lot of interest from the
9 public and sometimes from the media. The Court was alerted
10 today with respect to that by the Marshal's Service with respect
11 to some security concerns. I'm going to say that on the record,
12 and then I'm going to seal what I'm going to say after this.
13 So, again, there's no one else in the courtroom with us. But
14 I'm going to put this part of the hearing under seal because it
15 relates to security.

16 (Proceedings sealed by order of the Court.)

17 THE COURT: All right. The next thing that I'll say
18 is with respect to the hearing itself -- so we'll go outside of
19 the seal. We don't need to be under seal anymore with respect
20 to this.

21 I said it in the initial hearing scheduling order that our
22 time is limited. I don't want to go into the evening, and I
23 won't go into the evening. I don't know if counsel have had the
24 opportunity to confer with one another about the length of time
25 they expect for the hearing. I am happy to keep a clock and to

1 divide time equally if that's what we need to do to make certain
2 that everyone has a fair opportunity to present their sides of
3 this matter to me at the hearing. I don't need to hear anything
4 that is repeated from what's already in the record. So I will
5 say that. I'm intimately familiar with your record at this
6 point. I expect by Monday I will be more intimately familiar
7 with it, having studied it in further detail over the weekend.
8 So if it is a matter that's already in the record, I don't
9 anticipate permitting much time, if any, to be devoted to it. I
10 will certainly permit you to make a proffer if I make a
11 determination that I've already got that matter in the record
12 sufficiently before me and you think there's something new or
13 different that I'm not appreciating. I'll certainly permit you
14 to make a proffer and make your record. But our time is
15 limited. I appreciate very much the parties' detail and the
16 work you've put into submitting written materials to me, and
17 I've studied and will have studied and reviewed those. So
18 please keep that in mind as you tailor your presentations to
19 Monday.

20 Have the lawyers had the opportunity to talk with one
21 another about the time they anticipate their presentations of
22 proof to require so that you can assure me that we're going to
23 get this finished by 5:15 on Monday, or do counsel prefer that
24 the Court keep a clock?

25 Counsel for the plaintiffs.

1 MS. GODESKY: Your Honor, the parties did exchange
2 some emails last night about potential ways to streamline the
3 hearing. One thing that plaintiffs suggested was that -- we
4 wanted to see if the Court is interested in hearing sort of
5 opening or closing statements or if the Court is fine just
6 proceeding with the witnesses given the limited time available
7 because that would be one way to limit the presentations of the
8 parties.

9 THE COURT: Generally in these instances I defer to
10 counsel. I don't need an opening hearing statement or a closing
11 hearing statement. I think everybody has done a superb job of
12 briefing the issues. But if you want to allot your time to
13 that, I also don't want to foreclose that if you feel that
14 that's necessary for your presentation in some way.

15 MS. GODESKY: May I ask, Your Honor, when you say
16 keeping the parties on a clock, are you referring to cumulative
17 time on both crosses and direct examinations?

18 THE COURT: Crosses, directs and objections.

19 MS. GODESKY: Okay. Plaintiffs are fine with the
20 Court's proposal that a clock be instated and then divided
21 equally between the parties.

22 THE COURT: All right. Counsel for defendants.

23 MR. WAGNER: Thank you, Your Honor. Defendants are
24 fine with that proposal as well, that the Court just keep a
25 clock and let us use the time as we see fit.

1 THE COURT: Well, I'll say the caveat is I'm not going
2 to let you use the time as you see fit if it's repetitive, so
3 understand and appreciate that. I'm going to keep a clock so
4 we're not here past the time. But what I opened with is I'm not
5 going to hear repeat arguments of matters that are already in
6 the record sufficiently such that it's duplicative. I don't
7 think that's a good use of anyone's time given the short
8 timetable that we have. Also, a hearing is not required in
9 these proceedings, so the hearing should benefit the Court if
10 we're going to have it. Being repetitive is not a benefit to
11 the Court given the timetable that we're under. So understand
12 and appreciate that.

13 I don't want anybody to misunderstand what I'm saying when
14 I say I'm going to institute a clock. I'm still going to have
15 the determination that if it's repetitive and I believe it's
16 repetitive of what's already in the record, I likely will ask
17 you to move along. I'll permit you to make whatever proffers
18 you wish to make with respect to that if you think my
19 determination with respect to it is incorrect. But that's my
20 determination to make at the hearing, and I may do that along
21 with instituting the clock.

22 So are there any questions about that? I don't want to
23 mislead anybody today. Are there any questions about that?

24 MR. WAGNER: Your Honor, this is Vincent Wagner for
25 the defendants again. That makes sense. That raises one

1 question in our minds about the plaintiffs have said a number of
2 times in their witness lists, exhibit lists, about a lot of
3 their presentation on Monday is going to depend on whether or
4 not their declarations are in the record. So we're wondering if
5 what you are saying implies a ruling on that or if it is a
6 ruling on their request that you decide whether or not those
7 declarations are part of the record at this point.

8 THE COURT: I don't think I have any objections to any
9 of the declarations yet, so I don't have any objections to rule
10 on. Right? I mean, the order that is instituted contemplates
11 the Court can make this determination on affidavits. That's
12 clear under the law. I give the parties the opportunity to
13 object to evidentiary materials, and I set a timetable to do
14 that. Given the compressed briefing schedule here, I recognize
15 that that time hasn't passed for objections, I don't believe, or
16 if the objections came in, we -- what the order says is I'm
17 going to rule on that on Monday morning basically. So I
18 understand and appreciate that that puts people in somewhat of a
19 box. But that's the timetable that we're under really. If I'm
20 misunderstanding and there are objections that have been lodged,
21 you can certainly let me know. But I'm not aware of any in this
22 record, and I've consulted with the docket several times today.

23 MR. WAGNER: I think I understand what you are saying,
24 Your Honor. That does raise one other point in my mind. It's a
25 little off-topic, but I'll kind of preview it. And you can tell

1 me if you would like me to talk about it more. It has to do
2 with the testimony of Jason Lindo and whether or not his
3 declaration is coming in. We have moved multiple times to
4 strike the declaration of Jason Lindo. We have moved to strike
5 that, and we want to know whether or not we're going to have the
6 ability to cross-examine Jason Lindo. Without the ability to
7 cross-examine him, I think we do object to his declaration being
8 in the record.

9 THE COURT: Well, help me understand, Mr. Wagner, what
10 the objection was. My understanding of the only objection was
11 based on the discovery, what was filed yesterday with respect to
12 the confidentiality and protective order. That's the only
13 objection that I'm aware of or motion to strike Mr. Lindo's
14 affidavit. I've ruled on that. I ruled on that at the
15 beginning of the hearing. And I denied it based upon the timing
16 of how the dispute arose and the fact that the defendants
17 responded to merits with the motion for temporary restraining
18 order and preliminary injunction without alerting to the Court
19 to any need for any further resolution by the Court of any
20 discovery matters. So I denied that motion to strike. Is there
21 another motion to strike that I'm not aware of that's out there?

22 MR. WAGNER: Let me clarify, Your Honor. It's that
23 we're objecting now to the extent that we will not have the
24 opportunity to cross Jason Lindo on the basis of the data that
25 the plaintiffs have represented here they are going to be

1 producing to us. We will object to his declaration being in the
2 record.

3 THE COURT: For the same reason that I denied the
4 motion to strike based upon the discovery dispute that was
5 raised, I deny the motion to strike at this time as well. It's
6 the same analysis and the same rationale in my view.

7 MR. WAGNER: Thank you, Your Honor.

8 MS. BROWNSTEIN: Your Honor, this is Bettina
9 Brownstein. Just one question. Do you know when the courtroom
10 will be open in the morning on Monday?

11 THE COURT: It will be open by eight o'clock in the
12 morning on Monday, and we're set to start our hearing at nine.

13 MS. BROWNSTEIN: Thank you.

14 THE COURT: Ms. Washington will definitely be here by
15 eight o'clock on Monday.

16 MS. BROWNSTEIN: Great. Thank you.

17 THE COURT: If you have any needs or anything, you
18 know, if you can't reach anybody in chambers, please let Ms.
19 Washington know. She will check chambers' email and check her
20 own email as well as phone. So if you have any issues that
21 arise on Monday morning, please let her know.

22 MS. BROWNSTEIN: Thank you.

23 MS. GODESKY: Your Honor, this is Leah Godesky for
24 plaintiffs. I just wanted to ask one clarifying question about
25 the concept of a clock for the parties' time so that we can sort

1 of plan over the weekend and streamline our presentation. Does
2 the Court have a sense of the total number of hours that would
3 be allotted to each side, or is the Court going to kind of gauge
4 that as the day unfolds?

5 THE COURT: Based upon the scheduling order that I
6 entered yesterday to the public, I reserved the right to modify
7 the timetable. But I'm reluctant to do that in this case given
8 the time constraints that everybody is working under. Based
9 upon that, it would be a total time of 6.75 hours. We would
10 start at nine. I will tell you I'm consulting with the
11 courtroom and media protocol. It's Docket No. 64. We'll start
12 at nine. We're going to take a morning recess, 10:30, for 15
13 minutes. Lunch recess is 12:15 to 1:15. If the parties want to
14 skip lunch, it's fine with the Court. You can tell me that. If
15 you skip lunch, I'll allocate that time equally. We're going to
16 take our afternoon recess at 3:15. It will be a 15-minute
17 recess. We're going to adjourn court at 5:15.

18 Assuming we take our lunch recess, that's 6.75 hours of
19 court time. And the Court is inclined to allocate three hours
20 to the plaintiffs for presentation, three hours to defendants
21 for presentation and then a 45-minute rebuttal period to the
22 plaintiffs since it's the plaintiffs' motion. Again, I would
23 count cross. I would count direct, cross and objections. If
24 you make the objection and I rule against you, it counts on the
25 time of the losing party.

1 MS. GODESKY: Thank you, Your Honor. We will contact
2 defendants to discuss the possibility of skipping lunch. May I
3 also ask one further clarifying question?

4 THE COURT: Sure.

5 MS. GODESKY: With regard to the Court's order that
6 objections to exhibits be lodged by Monday morning, at this
7 point I believe plaintiffs have about 110 documents that they
8 have identified as potentially seeking to introduce into
9 evidence. And defendants have 155, plus this morning they are
10 reserving the right to seek to enter the entire record from the
11 *Jegley* case. Is this a situation where if an objection is not
12 lodged to a particular document it automatically is accepted
13 into the record on the hearing, or will the parties sort of,
14 offering an exhibit through an examination of a witness, need to
15 lay the requisite foundation in realtime?

16 THE COURT: So my view of this is that the record is
17 what it is today in this case with the parties' written
18 submissions and the materials that are attached. Unless there's
19 a motion to strike that I grant with respect to that, then those
20 documents, what either side has submitted, will stay in the
21 record and will be considered by the Court for purposes of
22 ruling on this motion. Not raising an objection now in the
23 Court's view is not an automatic waiver. We can certainly argue
24 about waiver later if the parties really want to do that. But
25 given the time constraints, given the volume of the materials

1 presented by the parties, you know, my view is the record is
2 what it is unless I grant a motion to strike.

3 The Rules of Evidence are pretty lax at the temporary
4 restraining order/preliminary injunction phase. I've reviewed
5 this and looked at it in prior cases, and I've written
6 extensively on it in prior orders with respect to those matters.
7 So I don't view the law as having changed with respect to that.
8 You can certainly apprise me if you believe it has. But unless
9 there's a motion to strike that's granted something would be
10 excluded from the record, otherwise the record stands as it is
11 having been tendered to the Court.

12 With respect to hearing exhibits, the parties can set the
13 procedure for how they wish to do that. If you want to
14 supplement the record with documents and both sides are
15 agreeable to do that, the Court has no problem with that. If
16 the parties prefer that you have to introduce it through a
17 witness and get it admitted at this stage, then that's how we'll
18 operate at the hearing.

19 If the parties can't agree, the Court will set the rule.
20 And you can let me know that. Really, you can let me know that
21 over the weekend if you would like. We'll be here and around
22 over the weekend. I would say you guys can confer with respect
23 to that. And if you can't reach an agreement on documents at
24 the hearing, you can let me know that by noon tomorrow by email
25 directed to Jacob White, the law clerk in the case. We'll make

1 any emails part of the Court's record. But I'll rule on it that
2 way and give the parties clarification if you seek it with
3 respect to documents at the hearing only. As I said, my view is
4 the written record is what it is with respect to the motions,
5 the response and the supporting materials at this point subject
6 to any other motions to strike. Sorry we talked over each
7 other. I said subject to any other motions to strike.

8 MS. GODESKY: My apologies.

9 THE COURT: That's all right. It's hard to do on the
10 telephone, not to speak over one another.

11 Any other questions regarding the hearing protocol?

12 Counsel for plaintiffs, anything further with respect to
13 the hearing?

14 MS. GODESKY: No, Your Honor. Thank you.

15 THE COURT: Counsel for defendants, anything further
16 with respect to the hearing?

17 MR. WAGNER: Your Honor, I would like to make one
18 final point about Jason Lindo's testimony clear. From the
19 plaintiffs' witness list, it is still unclear to the defendants
20 whether or not he is going to be at the hearing on Monday. We
21 would appreciate knowing that now so that we can prepare a
22 subpoena for him if need be so we can get his testimony to test
23 his data.

24 THE COURT: Well, I'll let counsel talk about this
25 issue, and I'll rule on any matters that come up with respect to

1 it. The federal rules are pretty clear with respect to the
2 subpoena power of the Court. I don't know where Mr. Lindo is
3 located. But this is in part why I've asked the parties to
4 disclose to one another in advance and then to talk to one
5 another about whether people are going to appear by subpoena or
6 agreement. I'll let counsel talk about that issue. Again, if
7 there's a dispute with respect to that issue, you can certainly
8 raise it. We'll be around this weekend to rule on disputes as
9 well. You can call on the Court at that point if you need to.

10 MR. WAGNER: Thank you, Your Honor.

11 THE COURT: Anything else, counsel for defendants,
12 with respect to the matter?

13 MR. WAGNER: No, Your Honor. I think that that checks
14 everything off our list.

15 THE COURT: One thing that I would ask of both sides
16 is that if there's an agreement that you can put additional
17 documents in the record without going through a witness on the
18 stand, to the extent there are new documents to be presented at
19 the hearing that are not currently in this record, if you would
20 send the Court a PDF copy, courtesy copy. I don't need to
21 receive documents if you have the agreement that you are going
22 to put it in through a witness at the hearing. I'll receive
23 those as they come in if they come in. But if the parties have
24 an agreement that they are going to put additional documents in
25 the record at the hearing Monday, it would be helpful for the

1 Court to receive a courtesy PDF copy emailed to Mr. White by
2 noon tomorrow, Saturday, so that the Court can review those in
3 advance as well, noon Central Time, tomorrow. If it's something
4 that isn't easily sent by PDF, you can certainly alert the Court
5 to that, and we can deal with that accordingly. But if you have
6 it and it's a PDF and you can send it by email, we can get an
7 advanced look. If it's coming in by agreement, it would benefit
8 the Court.

9 MS. GODESKY: We will do that, Your Honor. Thank you.

10 THE COURT: Any further issues that we need to take up
11 this afternoon, counsel for plaintiffs?

12 MS. GODESKY: No, Your Honor.

13 THE COURT: Counsel for defendants?

14 MR. WAGNER: No, Your Honor.

15 THE COURT: All right. If there are any other
16 matters, as I said, we're here today. We'll be here over the
17 weekend. You can certainly reach out to the Court. We'll try
18 to facilitate this. Otherwise, we will see everyone on Monday
19 morning. I thank everyone for your time and attention and for
20 making yourselves available on short notice to take up these
21 issues with the Court. Have a good afternoon and a good
22 weekend.

23 MS. GODESKY: Thank you. You too.

24 MR. WAGNER: Thank you, Your Honor.

25 MS. BROWNSTEIN: Thank you.

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(Proceedings concluded at 2:37 p.m.)

REPORTER'S CERTIFICATE

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

/s/Elaine Hinson, RMR, CRR, CCR
United States Court Reporter

Date: July 24, 2019

Elaine Hinson, RMR, CRR, CCR
United States Court Reporter