UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

JOAQUÍN CARCAÑO, et al., *Plaintiffs*, v. PATRICK MCCRORY, et al., *Defendants and Intervenor-Defendants*.	No. 1:16-cv-00236-TDS-JEP

PLAINTIFFS' OPPOSITION TO DEFENDANT PATRICK L. MCCRORY'S MOTION FOR LEAVE TO CONDUCT EXPEDITED DISCOVERY IN ORDER TO MORE FULLY RESPOND TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Rule 26 of the Federal Rules of Civil Procedure 26 and Local Civil Rule 7.3(f), Plaintiffs Joaquín Carcaño; Payton Grey McGarry; H.S., by her next friend and mother, Kathryn Schafer; and American Civil Liberties Union of North Carolina (collectively, "Plaintiffs"), respectfully submit the following opposition to Governor McCrory's motion for discovery (ECF No. 52)—which seeks to delay proceedings on Plaintiffs' fully-briefed preliminary injunction motion for an extended period of discovery and supplemental briefing. Granting the motion would necessarily deprive Plaintiffs of their right to meaningful preliminary injunctive relief during the pendency of such discovery and further briefing. The burden to justify such a delay is Governor McCrory's to carry, but he makes no genuine effort to satisfy the relevant standard.

While courts have articulated various tests for expedited discovery, the gravamen of each is that the moving party must show irreparable harm in the absence of discovery, and that the discovery must be narrowly tailored to the specific preliminary relief sought. Governor McCrory does not even reference his burden to show irreparable injury, let alone make the required showing. Nor has he appropriately tailored his discovery requests to the scope of the preliminary relief sought here.

Moreover, the discovery schedule Governor McCrory seeks would allow Defendants time for full-blown discovery on the merits of Plaintiffs' claims, while depriving Plaintiffs of *any* opportunity to provide rebuttal testimony. *See* ECF No. 52 at 3 (allowing Defendants 45 additional days to introduce witnesses, after having had the full presentation of Plaintiffs' evidence for six weeks, while providing Plaintiffs no opportunity to present rebuttal testimony whatsoever). In fact, Governor McCrory suggests no discernable limits to the scope of his requested discovery, expressing instead an intent to test each and every merits issue raised by Plaintiffs' claims. ECF No. 52 at 4. But a party "is not required to prove his case in full at a preliminary-injunction hearing," because "a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981); *see also G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, No. 15-2056, -- F.3d. --, 2016 WL 1567467, at *10 (4th Cir. Apr. 19, 2016) ("preliminary injunction proceedings are informal ones designed to prevent irreparable harm before a later trial governed by the full rigor of usual evidentiary standards").

Governor McCrory's request for delay to test the merits of each and every one of Plaintiffs' claims should be rejected. The Court should instead consider the now fully-briefed preliminary injunction motion, which is in part governed by the Fourth Circuit's opinion in *G.G.*, which is now the settled law in this Circuit. *See* ECF No. 67-3 (Mandate, *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, No. 15-2056 (4th Cir. June 17, 2016)). If, however, limited expedited discovery is permitted, the Court should order the parties to meet and confer so as to a reasonable schedule.

STATEMENT OF THE FACTS

On February 22, 2016, the Charlotte City Council approved a non-discrimination Ordinance, which amended its existing code to prohibit discrimination in public accommodations based on "gender identity, gender expression" and "sexual orientation." ECF No. 23-2 at 5. Even before the Ordinance was approved, state lawmakers expressed outrage and an intent to overturn it. *See, e.g.*, ECF Nos. 23-6, 23-7, 23-8. Lawmakers convened a special session for that purpose, and Governor McCrory signed House Bill 2 ("H.B. 2") on March 23, 2016—fewer than 12 hours after the bill was introduced. ECF No. 23-23 at 3. The Ordinance was to take effect on April 1, 2016, but was nullified instead by H.B. 2, which took effect immediately upon its passage and signature by Governor McCrory on March 23, 2016. ECF No. 23-1 at 6. Part III of H.B. 2 provides that H.B. 2 "supersede[s] and preempt[s] any ordinance . . . adopted or imposed by a unit of local government . . . pertaining to the regulation of discriminatory practices in places

of public accommodation," and thus nullified the Charlotte Ordinance. ECF No. 23-1 at 4-5.

On March 28, 2016, five days after H.B. 2's enactment, Plaintiffs filed this action making clear that they intended to seek preliminary injunctive relief. ECF No. 1 at 3, 7, 44. On May 16, 2016, Plaintiffs filed a motion for preliminary injunction, seeking only to enjoin Defendants and those under their control "from enforcing Part I of House Bill 2." ECF No. 21 at 3. Part III of H.B. 2—which preempts the Ordinance—would *not* be enjoined under the preliminary injunction sought by Plaintiffs. Under this Court's local rules, Defendants had until June 9, 2016 to file their oppositions. *See* Local Civ. R. 7.3(f); Fed. R. Civ. P. 6(e). The UNC Defendants sought an extension by timely filing a request in advance of that deadline, but this Court denied that request. ECF Nos. 40, 45. Defendants McCrory and Intervenors never sought an extension to file their oppositions. They did, however, cite news reports in both of their oppositions that purport to substantiate their defense of H.B. 2. *See* ECF Nos. 55, 61. They also make legal arguments that they contend would permit this Court to adjudicate Plaintiffs' motion without consideration of evidence. *Id.* Plaintiffs' preliminary injunction motion is now fully briefed and submitted to this Court.

* * *

ARGUMENT

I. PLAINTIFFS HAVE MADE THE NECESSARY SHOWING FOR A PRELIMINARY INJUNCTION, PART OF WHICH IS MANDATED BY BINDING CIRCUIT PRECEDENT, AND THE COURT SHOULD THEREFORE NOT DELAY ITS ISSUANCE.

Governor McCrory's motion for expedited discovery and supplemental briefing should be denied because Plaintiffs have made the necessary showing that they are entitled to a preliminary injunction. Courts have routinely denied attempts by defendants to delay issuance of a preliminary injunction based on a purported need for discovery, particularly where plaintiffs had already made the requisite showing for a preliminary injunction. *See, e.g.*, *TGI Friday's Inc. v. Stripes Rests., Inc.*, No. 1:15-CV-00592-AWI, 2015 WL 2341991, at *2-3 (E.D. Cal. May 13, 2015) (denying defendants' request to delay preliminary injunction based on purported need for discovery); *Norstan v. Lancaster*, No. CV-12-481, 2012 WL 3155575 (D. Ariz. Aug. 3, 2012) (denying defendant's request to delay issuance of a preliminary injunction in order to permit discovery where there was already a sufficient basis for finding that plaintiffs were likely to succeed on the merits); *United Union of Roofers v. Composition Roofers Union*, No. C.A. 03-CV-1699, 2003 WL 21250627, at *7 (E.D. Pa. Mar. 28, 2003) (denying defendant's motions for continuance of preliminary injunction hearing and for expedited discovery where plaintiff had made showing for obtaining preliminary injunction); *U.S. v. Michigan*, 534 F. Supp. 668, 669 (W.D. Mich. 1982) (rejecting the government's request for additional delay to conduct discovery where movant had satisfied the standards for preliminary injunctive relief).

Indeed, Defendants' requested discovery is a red herring intended to deflect attention from their wholesale failure to carry their burden of production in responding to Plaintiffs' motion for a preliminary injunction. The only thing that stood between Defendants and the development of their own witnesses and evidence to substantiate their defense of H.B. 2—including their safety and privacy justifications—was Defendants themselves. Plaintiffs played no role in that failure, and neither did any purported discovery limitation.

Furthermore, the mandate now has issued in *G.G. ex rel. Grimm v. Gloucester County School Board.*, No. 15-2056, -- F.3d. --, 2016 WL 1567467, at *10 (4th Cir. Apr. 19, 2016) which governs the Title IX claims in this case. *See* ECF No. 67-3 (mandate in *G.G.*). *G.G.* therefore constitutes the settled law of this circuit. Given that the University of North Carolina defendants in this case, who are directly governed by *G.G.*, declined to join Governor McCrory's expedited discovery request and have expressed no need for discovery before the Court resolves Plaintiffs' preliminary injunction motion, at a minimum that portion of Plaintiffs' preliminary injunction motion should proceed unimpeded by Governor McCrory's effort to the stall proceedings.[1]

[1] Indeed, in *G.G.* itself, a preliminary injunction was issued on remand from the Fourth Circuit, even though no discovery had been taken. *See* ECF Nos. 73-3 (order originally adjudicating preliminary injunction without discovery), 73-5 (order granting preliminary injunction on remand).

II. GOVERNOR MCCRORY CANNOT MAKE THE SHOWING OF IRREPARABLE HARM REQUIRED FOR EXPEDITED DISCOVERY.

Governor McCrory also mischaracterizes the relevant standards both for Plaintiffs' underlying motion for preliminary injunction, and the Governor's request for expedited discovery. First, contrary to Governor McCrory's claims, ECF No. 53 at 4, the preliminary injunction Plaintiffs seek is prohibitory in nature, not mandatory. Plaintiffs' motion seeks to restore the parties to the status quo for the duration of this case by returning to "the last uncontested status between the parties which preceded the controversy"—*i.e.*, the state of the law before both the Ordinance and H.B. 2 were enacted. *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 236 (4th Cir. 2014). "'To be sure, it is sometimes necessary to require a party who has recently disturbed the status quo"—as occurred when H.B. 2 was adopted—"to reverse its actions, but . . . [s]uch an injunction restores, rather than disturbs, the status quo ante.'" *Id.* (quoting *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 378 (4th Cir.2012)) (internal quotation marks omitted).

As the legislative record makes clear, lawmakers and the Governor thought H.B. 2 was necessary because of the passage of Charlotte's non-discrimination Ordinance. *See, e.g.*, ECF No. 23-8 at 2 (quoting Speaker Moore's stated intention to "join [his] conservative colleagues and Governor McCrory in exploring legislative intervention to correct th[e] radical course" purportedly embodied in the Ordinance). Prior to the Ordinance, lawmakers saw no need to bar transgender people from single-sex spaces based on their birth certificate gender marker. Like the plaintiffs in *League of Women*

Voters, for example, who challenged a voter reform law "on the very same day it was signed into law," Plaintiffs challenged H.B. 2 within days after it was enacted. 769 F.3d at 236. "Without doubt, this is the language and stuff of a prohibitory injunction seeking to maintain the status quo." *Id.*

Selectively citing older authority and out-of-circuit cases, Governor McCrory also misrepresents the appropriate standard for expedited discovery. ECF No. 53 at 4-5. As this Court explained last year, the district courts have followed two approaches to expedited discovery requests. *Lewis v. Alamance Cnty. Dep't of Soc. Servs.*, No. 1:15CV298, 2015 WL 2124211, at *1 (M.D.N.C. May 6, 2015). "One [approach] looks to the reasonableness of the request, taking into account the totality of the circumstances, the other follows a modified form of the preliminary injunction test," requiring the party seeking discovery to make a showing under factors similar to those required for a preliminary injunction. *Id*. Under either test, however, a showing of irreparable harm by the party seeking discovery is required.[2] *Id.* at *2.

As in *Alamance*, it is unnecessary here to decide which of the two standards applies because the party seeking discovery cannot make the necessary showing under either one. *Id*. at *6. Governor McCrory conveniently omits from his argument that ***both***

[2] Tracing the history of these two tests, this Court explained in *Alamance* that the Eastern District adopted the reasonableness test in 2005, before the Supreme Court had set a stricter standard for preliminary injunctive relief in *Winter v. Nat. Resources Def. Council, Inc.*, 555 U.S. 7, 20 (2008). *Id.* at *1. After *Winter*, some district courts in the Fourth Circuit have concluded that the reasonableness standard no longer governs, because it does not comport with *Winter*'s reasoning. *Id.* at *2.

tests require the party seeking expedited discovery to demonstrate irreparable harm. *Id.* ("Specifically, the Court notes that under either test, the moving party must show a likelihood of irreparable harm without access to early discovery."); *see also Dimension Data N. Amer., Inc. v. NetStar-1, Inc.*, 226 F.R.D. 528, 532 (E.D.N.C. 2005) (applying the reasonableness test, and denying expedited discovery request for failure to show irreparable harm); *Carter v. Ozoeneh*, No. 3:08-cv-614, 2009 WL 1383307, at *3 (W.D.N.C. May 14, 2009) (applying a good cause standard, and rejecting plaintiff's request for failure to show irreparable harm); *United Healthcare Servs., Inc. v. Richards*, No. CIV.3:09-cv-215RJCDC, 2009 WL 4825184, at *2 (W.D.N.C. Dec. 2, 2009) (finding lack of good cause where party failed to show irreparable harm).

Governor McCrory makes no effort to demonstrate that he would face irreparable harm if he were denied expedited discovery—nor could he. As explained above, returning to the prior status quo—let alone denying expedited discovery—would not harm any Defendant. Just like the plaintiff's motion in *Alamance*, Governor McCrory's motion "fail[s] to address the issue of irreparable harm as it concerns access to expedited discovery," and it should be denied on that basis. *Id.* at *7.

III. GOVERNOR MCCRORY'S REQUEST FOR DISCOVERY SHOULD ALSO BE DENIED BECAUSE IT IS NOT TAILORED TO THE SCOPE OF THE PRELIMINARY RELIEF PLAINTIFFS SEEK.

Even if Governor McCrory could overcome the failure to demonstrate irreparable harm absent early discovery, which he cannot, his request should also be rejected for a lack of tailoring. The courts are unanimous that a request for expedited discovery must

be narrowly tailored to the scope of the preliminary relief sought. *See, e.g.*, *United Healthcare Servs.*, 2009 WL 4825184, at *1 (rejecting request where "the proposed discovery does not appear 'narrowly tailored' to obtain information relevant to a possible request for preliminary injunction"). When faced with overly broad requests—particularly coupled with a failure to show irreparable harm—North Carolina district courts have rejected them outright, including in the *Dimension Data* case that Governor McCrory urges this Court to follow. ECF No. 53 at 4-5; *see Dimension Data*, 226 F.R.D. at 532 (denying expedited discovery request which "could be more narrowly tailored to focus on information believed to be probative to the preliminary injunction analysis"); *Alamance*, 2015 WL 2124211, at *3 (rejecting plaintiff's request for expedited discovery where it was not "specifically relevant" to a preliminary injunction).

Nor is it sufficient tailoring to simply ask for discovery on the merits of Plaintiffs' claims, as Governor McCrory does here. This Court has made clear that it is not enough that the expedited requests "may bear relevance to the ultimate merits of Plaintiff's case (and thus might plausibly support a likelihood of success on the merits under the preliminary injunction standard)." *Alamance*, 2015 WL 2124211, at *3. But that is what Governor McCrory seeks here. *See* ECF No. 52 at 4 (explaining that Governor McCrory wants to take discovery on "[h]ow the State of North Carolina's interests in protecting privacy and safety are advanced by the Act"; "North Carolina's interest in distinguishing between transgender individuals who have changed their birth certificates and those who have not"; the "character and nature of gender identity and gender dysphoria, as well as

the necessary treatment therefor, according to current medical and psychological science"; and other subjects).

By contrast, a properly tailored request would demonstrate "irreparable harm as it concerns access to expedited discovery"—in other words, ***why a denial of early discovery*** would cause Governor McCrory irreparable harm. *Alamance*, 2015 WL 2124211, at *2; *Dimension Data*, 226 F.R.D. at 532 (denying expedited discovery request because it was not "narrowly tailored to focus on information believed to be probative to the preliminary injunction analysis," and therefore did not show the party would "be irreparably harmed by engaging in standard discovery procedures as set out in the Federal Rules of Civil Procedure"); *Carter*, 2009 WL 1383307, at *3 (rejecting request because plaintiffs failed to show they "will be irreparably harmed absent the requested expedited discovery"). Governor McCrory attempts no such showing. Instead he seeks full-blown discovery in the form of depositions of "each of the plaintiffs," and all of their "expert witnesses," without explaining how each deposition—or which specific lines of inquiry—relate to the preliminary injunctive relief Plaintiffs seek here. ECF No. 53 at 9; *compare Nutrition & Fitness, Inc. v. Progressive Emu, Inc.*, No. 5:12-CV-192-F, 2012 WL 1478734, at *3-4 (E.D.N.C. Apr. 27, 2012) (reformulating and narrowing the requested lines of inquiry to relate specifically to the form of preliminary relief at issue).

And Governor McCrory's request does not stop there. Governor McCrory goes on to say that he would like to depose "any person or entity described in plaintiffs' amended complaint"—and beyond that—any additional "person or entity . . . identified in

discovery." ECF No. 53 at 9-10. Governor McCrory's only effort to qualify these expansive requests is his claim that he would seek discovery to "the extent such testimony might be relevant to the immediate request for a preliminary injunction." *Id.* at 10. But he offers no explanation of what those supposed limits would be and—to the contrary—his description of the topics he would like to explore simply tracks generally the full range of issues pertinent to the merits of Plaintiffs' claims. ECF No. 52 at 4. This is not the narrowly "targeted" discovery required to justify a departure from the federal rules' ordinary discovery schedule. *Alamance*, 2015 WL 2124211, at *3.

Governor McCrory has not articulated how he would be harmed by a return to the pre-Ordinance state of affairs that satisfied lawmakers previously—let alone how he would be irreparably harmed without ***discovery*** relating to that request. Governor McCrory's request for full-blown discovery on the merits of all Plaintiffs' claims, before Plaintiffs may be heard on their request for preliminary relief, should therefore be denied.

IV. GOVERNOR MCCRORY'S PROPOSED DISCOVERY SCHEDULE IS PATENTLY UNREASONABLE AND DESIGNED TO DISADVANTAGE PLAINTIFFS.

Because Governor McCrory has failed to make the necessary showing for expedited discovery, the Court need not reach Governor McCrory's proposed schedule for discovery. If the Court does evaluate his proposal, however, the Court should reject it.

Governor McCrory notes that Plaintiffs had seven weeks to develop testimony in support of their preliminary injunction, ECF No. 53 at 2, but Governor McCrory has now

had several more weeks than that to prepare any responsive testimony.[3] Plaintiffs' 45-page complaint provided an extensive preview of their arguments in the case, as well as their intent to seek preliminary relief. ECF No. 1 at 3, 7, 44. Governor McCrory was aware of Plaintiffs' complaint the day it was filed, sharing his views on the case through interviews with NBC television news and other outlets that day.[4] While Plaintiffs had seven weeks to prepare the support for their preliminary injunction motion, Governor McCrory had more than ten weeks to prepare support by the time his opposition was filed. *See* Local Civ. R. 7.3(f). Governor McCrory nonetheless decided not to introduce any evidence supporting his arguments. His reward for doing so should not be another six months of delay before consideration of the relief Plaintiffs seek, since—unlike Governor McCrory—Plaintiffs have made a showing that they face serious, irreparable harm with each passing day. *See* ECF Nos. 22-4, 22-28, 22-9.

Governor McCrory's request is even more unreasonable when one considers that, by the time this motion is fully briefed, he will have had fifteen weeks to prepare any testimony supporting his position—more than *double* the time Plaintiffs had to prepare

[3] Intervenors preposterously suggest that Plaintiffs had "years" to prepare their evidence, ECF No. 61 at 9, even though H.B. 2 was only introduced and enacted mere months ago and is unlike any other previous state enactment.

[4] *See, e.g.*, Janet Shamlian & Jon Schuppe, *North Carolina Gov. Pat McCrory Calls LGBT Criticism 'Political Theater,'* NBC News (Mar. 28, 2016), *available at* http://www.nbcnews.com/news/us-news/north-carolina-gov-pat-mccrory-calls-lgbt-criticism-political-theater-n546846.

their evidentiary showing. His request for approximately six more months beyond that is unsupportable and should be denied.

Similarly, Governor McCrory's proposed schedule is unacceptably lopsided. He suggests that Defendants be given an additional 45 days to disclose their witnesses after the Court rules on this motion. ECF No. 52 at 3. But by the time briefing concludes on this motion in mid-July—and even before the proposed additional 45 days—Defendants will have had approximately two months to study Plaintiffs' supporting testimony submitted with their May 16, 2016 preliminary injunction motion, and formulate both affirmative and rebuttal testimony. Under the same proposed schedule, however, Plaintiffs would have to disclose any and all additional witnesses on the same day as Defendants' disclosures—leaving Defendants a total of three-and-a-half months to formulate rebuttal testimony, while Plaintiffs would have to submit any additional testimony blind, on the same day as Defendants first identified their witnesses, and with no opportunity for rebuttal. Defendants also propose that only they be given an opportunity to submit supplemental briefing after discovery, even though the rules entitle the moving party to submit the final reply brief. *See* Local Civ. R. 7.3(h). This proposal is absurd.

In fact, the proper course here is to rule on Plaintiffs' request for preliminary injunction—and, in the event the Court grants Plaintiffs some or all of their requested relief, allow Governor McCrory to ask the Court to "reconsider [its] ruling should Defendants be able to develop appropriately persuasive evidence in the course of further

discovery." *CVI/Beta Ventures, Inc. v. Custom Optical Frames, Inc.*, 859 F. Supp. 945, 951 (D. Md. 1994) (entering preliminary injunction); *see also Ciena Corp.*, 203 F.3d at 320 (affirming district court's grant of an injunction while remanding "for a period [of discovery] extending no longer than 30 days" while the injunction remains in effect).

CONCLUSION

In the event this Court is inclined to grant Defendants some form of discovery, Plaintiffs respectfully request 24 hours to confer with Defendants and present the Court with a consensus discovery and supplemental briefing schedule, if one can be achieved. But for the reasons above, the Court should consider the preliminary injunction motion on the merits. At a minimum, that must be the outcome for Plaintiffs' request to enjoin the University of North Carolina Defendants, since they have sought no discovery and the mandate now has issued in *G.G. ex rel. Grimm v. Gloucester County School Board*. Accordingly, Plaintiffs respectfully request that Governor McCrory's motion for expedited discovery be denied.

Dated: June 30, 2016

Respectfully submitted,

/s/ Christopher A. Brook

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*Appearing by special appearance pursuant to L.R. 83.1(d).

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CERTIFICATE OF SERVICE

I, Christopher A. Brook, hereby certify that on June 30, 2016, I electronically filed the foregoing, PLAINTIFFS' OPPOSITION TO DEFENDANT PATRICK L. MCCRORY'S MOTION FOR LEAVE TO CONDUCT EXPEDITED DISCOVERY IN ORDER TO MORE FULLY RESPOND TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION, with the Clerk of the Court using the CM/ECF system, and have verified that such filing was sent electronically using the CM/ECF system to all parties who have appeared with an email address of record.

/s/ Christopher A. Brook
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UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

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[PROPOSED] ORDER

Having reviewed Defendant Patrick L. McCrory's Motion for Leave to Conduct Expedited Discovery in Order to More Fully Respond to Plaintiffs' Motion for Preliminary Injunction, ECF No. 52, and the supporting papers, as well as Plaintiffs' opposition, it is hereby ORDERED that Defendant's Motion is DENIED.

Plaintiffs' Motion for Preliminary Injunction (ECF No. 21) remains submitted to this Court.

Dated: _____

_____
Hon. Thomas D. Schroeder
United States District Judge