

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF NORTH CAROLINA;
PATRICK MCCRORY, in his official
capacity as Governor of North Carolina;
NORTH CAROLINA DEPARTMENT OF
PUBLIC SAFETY; UNIVERSITY OF
NORTH CAROLINA; and BOARD OF
GOVERNORS OF THE UNIVERSITY OF
NORTH CAROLINA,

Defendants.

PHIL BERGER, President Pro Tempore of
the North Carolina Senate; TIM MOORE,
Speaker of the North Carolina House of
Representatives,

Intervenor-Defendants.

Case No. 1:16-cv-00425-TDS-JEP

**INTERVENORS' RESPONSE TO UNITED STATES' CONDITIONAL WAIVER
OF REPLY BRIEF AND OPPOSITION TO EXPANSION OF AUGUST 1, 2016
PRELIMINARY INJUNCTION HEARING**

On the afternoon of Friday, July 15, 2016, the United States filed a "notice" conditionally waiving its reply brief in support of its preliminary injunction motion "in the event that the Court expands" the hearing currently set for August 1, 2016 to include consideration of the United States' motion. Doc. 95. Intervenor-Defendants Phil Berger and Tim Moore ("Intervenors") oppose the United States' apparent request for an

expansion of the August 1 hearing for the following reasons. Undersigned counsel has conferred with counsel for all other Defendants, who concur in this opposition

1. First, this Court's order of July 14, 2016 expressly provides that the August 1 proceedings are intended only for a "hearing on the Carcaño plaintiffs' motion for a preliminary injunction," and not on the United States' motion, given that "the United States only recently filed its motion for preliminary injunction." Doc. 86, at 3. Thus, the Court's order makes clear that the August 1 hearing will consider only the Carcaño motion. Moreover, at no time during the Court's July 13 telephone conference with the parties was it suggested that the August 1 hearing could be "expanded" to include the United States' preliminary injunction motion.

2. Second, the July 14 order also expressly provides that the Court was exercising its discretion to "advance the trial on the merits of ... the United States' action *to be consolidated with the hearing on the United States' motion for preliminary injunction,*" Doc. 86, at 3-4 (emphasis added), and that the trial would be conducted "in late October or early November 2016." *Id.* at 4. Thus, it is clear from the July 14 order that the hearing on the United States' preliminary injunction motion will occur in conjunction with the trial in October or November. Again, nothing in the Court's order suggests that the August 1 hearing could be "expanded" to include the United States' preliminary injunction motion. If the United States wishes to have its motion heard on August 1, contrary to the Court's July 14 order, it should make a proper motion for reconsideration of that order, to which all Defendants would be entitled to respond.

3. Third, the United States' notice predicts that its preliminary injunction motion will be "fully briefed" before the August 1 hearing because Defendants' and Intervenors' responses are currently due by July 29. Doc. 95, at 2. But that July 29 due date is no longer appropriate given that the Court has now consolidated hearing of the United States' preliminary injunction motion with a trial to take place in October or November. Doc. 86, at 4. Before trial, the parties will engage in discovery and other proceedings, and any briefing in response to the United States' arguments will have account for those yet-to-be-completed discovery proceedings. Thus, at a minimum, Defendants and Intervenors will seek an extension of the July 29 response deadline in order to be able to respond adequately to the United States' preliminary injunction motion.

4. Fourth, the Court and the Magistrate Judge have already ordered the parties to confer and propose a schedule concerning discovery and other pre-trial proceedings in advance of the October or November trial. Doc. 86, at 5; Doc. 88. The parties will confer early this week, and during that conference Defendants and Intervenors will propose a sensible pretrial briefing schedule that will allow all parties the opportunity to respond to each others' arguments, in light of the pretrial schedule the parties will endeavor to work out. Any such briefing schedule will likely supersede the current July 29 response date to the United States' motion. Indeed, it would serve no purpose for the Defendants and Intervenors to respond now to the United States' motion, and then respond again in subsequent pre-trial briefing following discovery.

5. Finally, expanding the August 1 hearing to include the United States' preliminary injunction motion would severely prejudice the interests of the Defendants and Intervenors in defending the validity of the North Carolina law at issue. The United States' voluminous motion includes hundreds of pages of supporting affidavits from numerous expert and fact witnesses, and Defendants and Intervenors cannot possibly provide an adequate response to those materials—including their own expert and fact witnesses—by the July 29 filing deadline (which, as explained above, is now inappropriate in light of the October or November trial date). Furthermore, the United States has had months to prepare its motion and supporting evidence: it filed its complaint on May 9, 2016 (Doc 1), and did not file its preliminary injunction motion until nearly two months later on July 5 (Doc. 73). Defendants and Intervenors should have at least a commensurate time for responding. And, as was made clear during the July 13 hearing, discovery will be necessary before Defendants and Intervenors can properly respond to the United States' motion. *See* Doc. 86, at 3 (noting, “[m]oreover, Defendants have argued that they should be entitled to conduct discovery prior to [the United States’] motion being heard”). Finally, as counsel for the United States made clear at the July 13 telephone conference, unlike the narrower Carcaño motion, the United States' motion seeks broad statewide relief against the North Carolina law. It would be highly prejudicial to the Defendants' and Intervenors' interests in defending the statewide validity of the law to require them to respond substantively to the United States' broad motion by July 29.

For those reasons, the Court should deny the apparent request by the United States to expand the August 1 hearing to include its preliminary injunction motion.

Respectfully submitted,

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Civil Rule 83.1(d)*

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CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2016, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

/s/ S. Kyle Duncan
S. Kyle Duncan
Attorney for Intervenor-Defendants