UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

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

<u>*CARCAÑO* PLAINTIFFS' OPPOSITION TO</u>
<u>DEFENDANTS' MOTION TO STAY PROCEEDINGS</u>

A mere two months ago, citing the "complex legal and factual issues" presented by this case, the State Defendants[1] came before this Court insisting upon *expedited* discovery and a delay in the adjudication of Plaintiffs' preliminary injunction motion,

[1] Plaintiffs collectively refer to Defendant Patrick McCrory and Intervenor-Defendants Phil Berger and Tim Moore, all in their official capacities, as the "State Defendants." Plaintiffs collectively refer to Defendants University of North Carolina, the Board of Governors of the University of North Carolina, Chairman of the Board of Governors W. Louis Bissette, Jr. in his official capacity, and (to the extent that this Court grants Plaintiffs leave to file their Second Amended Complaint) President Margaret Spellings in her official capacity as "UNC Defendants." Plaintiffs collectively refer to State Defendants and UNC Defendants as "Defendants."

(ECF No. 52; *see also* ECF Nos. 55 and 61 (oppositions to Plaintiffs' preliminary injunction motion, seeking additional discovery)).

Now, in their Motion to Stay (ECF No. 113), Defendants seek the *opposite* relief: a *delay* in both discovery and the final adjudication in this case. This Court should reject Defendants' motion for what it is: the latest in a series of meritless procedural maneuvers intended to unduly prolong this litigation, with the effect of extending House Bill 2's unconstitutional and harmful discrimination against hundreds of thousands of LGBT North Carolinians.[2]

[2] State Defendants also suggest that a preliminary injunction entered yesterday in *Texas v. United States* (ECF No. 124-1) is "pertinent and significant" to the pending motion for preliminary injunction and motion to stay (ECF No. 124). However, the *Texas* preliminary injunction has no effect whatsoever on this case, as it is directed only against the federal government defendants in the *Texas* case, and enjoins them from enforcing the relevant guidelines only against the 13 state plaintiffs in that case, which do not include North Carolina. (ECF No. 124-1 at 37.) Moreover, the *Texas* district court judge indicated that he intends to explicitly narrow the scope of the preliminary injunction so that it will not "unnecessarily interfere with litigation currently pending before other federal courts" on the subject, upon the parties' filing a description of those cases. (*Id.*)

In any event, Defendants cannot now rely on the *Texas* decision, because in opposing Plaintiffs' motion for a preliminary injunction in their briefs and at the hearing (ECF Nos. 50, 55, 61, 103), Defendants failed to raise any argument under the Administrative Procedure Act or any contention that the Department of Education's interpretation of the Title IX regulation at issue is not entitled to *Auer* deference. Those arguments are therefore waived. *See Almanzar v. Bank of America, NA*, No. 1:13-cv-146, 2013 WL 6893966, at *3 n.3 (M.D.N.C. Dec. 31, 2013). To the extent that this Court does consider the merits of the *Texas* decision, however, it is not only erroneous, but in clear conflict with the Fourth Circuit's decision in *G.G.*, which expressly held (contrary to the district court in *Texas*) that the Title IX regulation at issue in this case is ambiguous and that the Department of Education's interpretation of it is entitled to *Auer* deference. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 721-23 (4th Cir. 2016).

That Defendants' motion is lacking in merit is evident from the relief Defendants do *not* seek: a delay in the adjudication of Plaintiffs' motion for preliminary injunction. This omission undermines entirely Defendants' rationale for a stay in proceedings: their contention that there is too much uncertainty to proceed with discovery makes no sense in light of their concession that the motions for preliminary injunction can and should be adjudicated now. And while Supreme Court precedent makes it clear that Defendants "must make out a clear case of hardship or inequity in being required to go forward," *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936), the only hardship that Defendants are capable of asserting—namely, "the expense and annoyance of litigation" itself—does not constitute "irreparable injury," *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980).

In short, discovery in this case should proceed apace, and no stay is warranted.

I. DEFENDANTS DO NOT SEEK ANY DELAY IN ADJUDICATING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION, AND THE SUPREME COURT'S STAY PROVIDES NO REASON TO DENY IT.

Just as important as what Defendants seek in this motion is what they do *not* seek: any delay in this Court's adjudication of Plaintiffs' pending motion for preliminary injunction (ECF No. 21), which has now been fully briefed and argued, and which is ready for this Court's decision. As Defendants themselves state in their motion, they seek only to "stay the scheduled trial and discovery proceedings." (ECF No. 113 at 2; *see also* proposed order, ECF No. 113-1.) While Plaintiffs contend that Defendants are not

entitled to the relief they do seek, *see infra* Parts II and III, Plaintiffs note that this limitation in Defendants' motion to stay is nevertheless a significant one.

Further, for the reasons set forth in Plaintiffs' Joint Second Supplemental Brief (ECF No. 109), which Plaintiffs incorporate herein by reference, the Supreme Court's grant of a stay provides no reason to deny the motion for preliminary injunction. The Fourth Circuit's opinion in *G.G. ex rel. Grimm v. Gloucester County School Board*, 822 F.3d 709, 723 (4th Cir. 2016), remains operative and continues to bind this Court "unless it is overruled by a subsequent en banc opinion of [the Fourth Circuit] or a superseding contrary decision of the Supreme Court.'" *United States v. Collins*, 415 F.3d 304, 311 (4th Cir. 2005) (quoting *Etheridge v. Norfolk & W. Ry. Co.*, 9 F.3d 1087, 1090 (4th Cir. 1993)). There is no ambiguity in the Fourth Circuit's holding in *Collins*; and because neither of the circumstances that *Collins* enumerates has come to pass, there can be no doubt that *G.G.* continues to govern this Court's decision on Plaintiffs' preliminary injunction motion.

The rule for which Defendants advocate makes little sense as a practical matter. Defendants effectively contend that lower courts should undertake their own interpretations of the Supreme Court's opaque stay orders and automatically assume that the same equities apply in cases that they deem to raise similar issues. Such a rule needlessly invites lower courts to arrive at inconsistent interpretations of the Supreme Court's one-line stay orders. A more certain rule of decision is created if the precedents existing at the time of the Supreme Court's stay remain in effect pending its explicit

communication otherwise. There is no prejudice to Defendants from this rule, for they would remain able to seek a stay of any decision granting a preliminary injunction from the Supreme Court itself.

To the extent that this Court compares this case to *G.G.*, however, the harm is broader in this case. The discrimination mandated by Part I of House Bill 2 is thousands-fold greater in its reach than the single school district restroom policy at issue in *G.G.* Moreover, as counsel for Intervenor-Defendants *themselves* admitted and advocated to the Supreme Court (*see* ECF No. 112-3 at 15, 42-43), G.G. had access to single-user facilities, although he alone was required to use them and barred from using the men's room. While forcing transgender individuals into single-user restrooms is neither legal nor constitutional, the record in this case demonstrates that numerous transgender North Carolinians lack even such access in many of the government facilities that House Bill 2 governs.[3]

In sum, Defendants do not seek—and this Court should not grant—any further delay in adjudication of Plaintiffs' motion for preliminary injunction. Rather, this Court should grant Plaintiffs' motion.

[3] *See, e.g.*, Declaration of H.S. in Support of Plaintiffs' Motion for Preliminary Injunction (ECF No. 22-8) ¶ 27 (outside of H.S.'s dorm room, there were no single-user restrooms available to her at UNCSA-HS in the spring semester of 2016, and it was disruptive to H.S.'s education not to have ready access to restrooms in the buildings where she attended class); Tr. of Aug. 1, 2016 Hearing (ECF No. 103) at 70:11-13 (counsel for State Defendants admitting that single-occupancy facilities "won't always be available")).

II. THE SUPREME COURT'S STAY IN *G.G.* DOES NOT MERIT A STAY OF DISCOVERY OR TRIAL IN THIS CASE.

As to the merits of Defendants' motion, as Plaintiffs set forth in their Second Supplemental Brief, the Supreme Court's stay of discovery provides no basis to stay the proceedings in this Court.

The Supreme Court has made it clear that "[o]nly in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both," and that, to merit a stay, Defendants "must make out a clear case of hardship or inequity in being required to go forward," *Landis*, 299 U.S. at 255. Yet it is equally clear under Supreme Court precedent that the only hardship that Defendants have articulated—namely, "the expense and annoyance of litigation" itself—does not constitute "irreparable injury," *Standard Oil*, 449 U.S. at 244; *see also Petroleum Exploration, Inc. v. Pub. Serv. Comm'n*, 304 U.S. 209, 222 (1938); *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974); *cf. Mohawk Indus. v. Carpenter*, 558 U.S. 100, 108-09 (2009) ("[w]e routinely require litigants to wait until after final judgment to vindicate valuable rights").

Defendants' arguments to the contrary (ECF No. 112 at 10-22) are focused almost entirely on encouraging this Court to imaginatively read explanations into the Supreme Court's stay, and are fatally flawed. For example, counsel for Defendants contend that the Supreme Court's standard for a stay is a searching one, but they contradict the standard that they *themselves* articulated in their stay application. (*See* ECF No. 112-3 at

26.)[4] Defendants contend that a stay is "generally a prelude to granting certiorari" (ECF No. 112 at 5), ignoring that the opposite was true for at least three stays granted in 2015 alone. *See Johnson v. Lombardi*, 136 S. Ct. 443 (2015) (granting stay), *cert. denied*, 136 S. Ct. 601 (2015); *Mellouli v. Lynch*, 136 S. Ct. 18 (2015) (granting stay), *cert. dismissed*, 136 S. Ct. 1155 (2015); *Bower v. Texas*, 135 S. Ct. 1197 (2015) (granting stay), *cert. denied*, 135 S. Ct. 1291 (2015).[5] Defendants suggest that the Supreme Court will be deeply interested in using *G.G.* as a vehicle to examine the continued validity of *Auer* deference, ignoring that the Court recently denied certiorari in another case thought to strongly present that precise issue. *See United Student Aid Funds, Inc. v. Bible*, 136 S. Ct. 1607, 1608 (2016) (Thomas, J., dissenting from denial of certiorari) ("This is the appropriate case in which to reevaluate *Seminole Rock* and *Auer*.").[6]

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[4] Indeed, Defendants egregiously accuse *Plaintiffs* of misstating the Supreme Court's stay standard, when Plaintiffs quoted the very standard articulated by counsel for State Defendants in their briefing. *See Hollingsworth v. Perry*, 558 U.S. 183, 189 (2010) (per curiam) (quoted in ECF No. 112-3 at 26 and ECF No. 109 at 3-4).

[5] Further, in an additional two cases in 2015 alone, the Supreme Court granted a stay and certiorari, only to leave the decision below intact. *See Duncan v. Owens*, 136 S. Ct. 500 (2015) (granting stay), *cert. dismissed as improvidently granted*, 136 S. Ct. 651 (2016); *Glossip v. Gross*, 135 S. Ct. 1197 (2015) (granting stay), *judgment below aff'd*, 135 S. Ct. 2726 (2015). Thus, in total, the decision below remained intact after the Supreme Court's grant of a stay in five cases just last year.

By comparison, Plaintiffs are aware of only three cases from 2015 in which a stay was granted and the decision below either reversed or vacated. (Compilation of 2015 stay statistics based on Adam Feldman, *Quick Note: Supreme Court Stay Applications 2015/2016*, Empirical SCOTUS (Aug. 5, 2016), https://empiricalscotus.com/2016/08/05/stay-applications/).

[6] Further, Defendants themselves argued at the preliminary injunction hearing that *G.G.* does not present the constitutional questions that Defendants assert are implicated by the

Perhaps most glaringly, in asking this Court to speculate as to the likelihood of a grant of certiorari (or an eventual reversal on the merits) based on the Supreme Court's stay in *G.G.*, Defendants ignore that Justice Breyer's vote was not intended to be a vote on the merits, but rather was granted only as a "courtesy." *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, No. 16A52, 2016 WL 4131636, at *1 (U.S. Aug. 3, 2016) (Breyer, J., concurring) (citing his dissent in *Medellin v. Texas*, 554 U.S. 759, 765 (2008), in which he expressed his disappointment that "no Member of the majority has proved willing to provide a courtesy vote for a stay" in a death penalty case). To the extent that this vote means anything, it suggests that the Court would affirm the Fourth Circuit or deny certiorari to avoid the potential for an equally divided court. Furthermore, the outcome of *G.G.* certainly will not dictate the outcome of Plaintiffs' due process claims nor the constitutionality of Part II of House Bill 2 and its preemption of local nondiscrimination protections—all of which will need to be litigated in any event.

Defendants' concession that this Court should proceed to adjudicate Plaintiffs' motion for preliminary injunction underscores that this Court should not grant a stay. If there is no obstacle to adjudication of the preliminary injunction motion, then there is equally no impediment to the parties proceeding in discovery. Indeed, by declining to ask this Court to delay adjudication of Plaintiffs' preliminary injunction—while simultaneously asking this Court to stay the proceeding and thus effectively expand the

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agency interpretation that Defendants challenge in this case and that they claim would be relevant to the reasonableness of any agency interpretation. Tr. of Aug. 1, 2016 Hearing (ECF No. 103) at 83:14-18.

time during which such a preliminary injunction could be in effect—the State Defendants effectively *waive*, at least in part, their interest in seeing House Bill 2 in effect during this litigation.

In the end, Defendants offer no cognizable reasons to grant a stay of this proceeding—much less one of the substantial period they request here. Having previously asked this Court for expedited discovery (ECF Nos. 52, 55, 61), they cannot now protest at having to shoulder its burdens. Defendants demonstrate no particular hardship in searching for documents regarding the enactment and effect of House Bill 2, nor in preparing for depositions—and they have had ample warning to prepare for both.[7] Nor do they contest that the real hardships of a stay will be borne by the tens of thousands of transgender North Carolinians denied access to restrooms and other single-sex facilities in the places where they live, learn, and work, and the hundreds of thousands of LGBT North Carolinians deprived of the ability to petition their local government for non-discrimination protections.

III. THE PENDENCY OF UNC DEFENDANTS' MOTION TO DISMISS PROVIDES NO CAUSE TO STAY DISCOVERY.

For their part, UNC Defendants object to *any* discovery proceeding against them, on a novel rationale that relies on the pendency of their motion to dismiss. But UNC Defendants ignore entirely that it is *their* repeated delay and procedural maneuvering that

[7] And although Defendants lament that Plaintiffs listed a large number of individuals in their initial disclosures—as the federal rules require them to do in the interests of candor, *see* Fed. R. Civ. P. 26(a)—Plaintiffs have already disclaimed any intention to call all but a small number at trial.

resulted in discovery proceeding while their motion to dismiss remains pending. And in any event, the pending motion to dismiss provides no reason to grant a stay.

A. UNC Defendants Are to Blame for Any Overlap Between Discovery and Their Motion to Dismiss.

UNC Defendants contend that they are prejudiced from the fact that discovery is proceeding while their motion to dismiss remains pending. But this is entirely their fault, in that they (1) delayed filing a motion to dismiss, (2) voluntarily withdrew their prior motion to stay, which raised the same issues, and (3) waited another month before filing the present motion to stay.

UNC Defendants waited until almost *three months* after the filing of the First Amended Complaint (ECF No. 9, filed April 21, 2016) to file their motion to dismiss (ECF No. 89, filed July 18, 2016). This delay was of their own making: UNC Defendants explicitly requested, and were granted, significant additional time to respond to the First Amended Complaint. (ECF No. 40.) And this delay was especially undue given that UNC Defendants had raised the *same* justiciability arguments as in their motion to dismiss previously, in both their opposition to Plaintiffs' preliminary injunction filed a month before (ECF No. 50, filed June 9, 2016) and in their motion to stay proceedings filed another month before that (ECF Nos. 38, 39, filed May 27, 2016).

Further, UNC Defendants *previously* filed a motion to stay this case, more than three months ago. (ECF Nos. 38, 39.) It raised the same justiciability arguments as in their motion to dismiss and that they now assert as a basis to stay proceedings (ECF Nos. 114, 115), was fully briefed, and had been scheduled to be heard by this Court at the

preliminary injunction hearing (ECF No. 86 at 3). But the UNC Defendants *voluntarily withdrew it* without explanation (ECF No. 98), thus further delaying resolution of these issues.

Even after they filed their motion to dismiss, UNC Defendants waited an *additional* month to request a stay of discovery (*see* ECF No. 113, filed August 17, 2016), even though the parties had submitted a joint discovery plan contemplating extensive discovery a mere two days after UNC Defendants' motion to dismiss was filed (*see* ECF No. 92, filed two days after motion to dismiss). Indeed, their insistence on a stay now is especially perplexing given that, at the time they withdrew their first motion to stay (ECF No. 98, filed July 27, 2016), their motion to dismiss had *already been filed* (ECF No. 89, filed July 17, 2016) and Magistrate Judge Peake had already set forth a comprehensive Pretrial Scheduling Order outlining discovery (ECF No. 96).

In short, the prejudice that UNC Defendants complain of—that their motion to dismiss remains pending while discovery proceeds—is entirely a problem of their own making. They should not be permitted to profit from their own delay in this matter.

B. UNC Defendants Have Not Established Any Harm from Proceeding with Discovery, and Cannot Do So.

In any event, the alleged prejudice to which UNC Defendants claim they will be subject is no prejudice at all. Plaintiffs have established a case or controversy sufficient to entitle them to discovery from UNC Defendants, and UNC Defendants have not articulated any cognizable hardship from permitting discovery to continue.

As an initial matter, as set forth in Plaintiffs' opposition to UNC Defendants' motion to dismiss (ECF No. 110), which Plaintiffs incorporate herein by reference, UNC Defendants remain proper defendants in this case and thus *should* be subject to discovery. UNC Defendants' briefing on this issue conspicuously fails answer two main arguments made by Plaintiffs: that (1) whatever the legal interpretive gloss urged by counsel, the April 5 guidance by President Spellings was a clear message to the administration, faculty, and staff at UNC—the individuals with whom Plaintiffs interact—that House Bill 2 is in effect on campus, and (2) this and UNC Defendants' other actions created "concrete, negative effect[s]" flowing from House Bill 2, which is sufficient under binding Fourth Circuit case law to create an actionable controversy under Title IX. *See Jennings v. UNC*, 482 F.3d 686, 699 (4th Cir. 2007).

Indeed, UNC Defendants ignore that governing Supreme Court precedent does not require Plaintiffs to extensively plead their standing: "general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (edit in original; internal quotation marks omitted); *see Liberty Univ. v. Lew*, 733 F.3d 72, 90 (4th Cir. 2013) (reaffirming *Lujan* standard that "general factual allegations of injury" suffice).

UNC Defendants also ignore that, to the extent that this Court thinks the justiciability of this case has yet to be conclusively established, discovery *itself* is the

remedy—not dismissal. *See Rich v. United States*, 811 F.3d 140, 147 (4th Cir. 2015) ("Discovery provides a procedural safeguard when a jurisdictional inquiry would require the consideration of merits-based evidence."). UNC Defendants' only response to this is a tautological and unsupported assertion that enforcement is a "jurisdictional issue." To the extent that UNC Defendants suggest that all issues are easily cleaved into "jurisdictional" and "merits" issues, the Fourth Circuit disagrees. *Id.*; *see also Kerns v. United States*, 585 F.3d 187, 193 (4th Cir. 2009) (recognizing that the two may be intertwined). The question of enforcement is self-evidently one that is subject to factual disputes and is indeed tied to the merits of Plaintiffs' claim for injunctive relief—as is evident from the fact that UNC Defendants *themselves* raised this precise issue as bearing on the *merits* of Plaintiffs' motion for preliminary injunction. (ECF No. 50 at 2, 24-26.)

UNC Defendants do not articulate any actual harm that will result from discovery proceeding in this case. They failed to support their motions with affidavits or evidence suggesting any substantial burden on UNC Defendants' time or resources or any manner in which this litigation will substantially interfere with their operations. This Court is not required to credit their general complaint regarding the burdens of discovery, and indeed should not do so in light of the Supreme Court's clear holding that "the expense and annoyance of litigation" does not constitute "irreparable injury." *Standard Oil*, 449 U.S. at 244. And UNC Defendants certainly have not shown how any such burden would outweigh the harm inflicted upon Plaintiffs and other individuals as a result of House Bill 2.

Indeed, UNC Defendants will be subject to discovery even if they are not parties to this case. The UNC Defendants suggest that, even if they are absent from the case, the effect of House Bill 2 on UNC campuses may still legitimately be a part of this case, if through different Defendants. (ECF No. 105.) While Plaintiffs do not accept this representation,[8] this concession by UNC Defendants obviates any necessity to stay this case pending the motion to dismiss. Discovery will still be required from UNC Defendants whether they themselves are parties to this action or mere third parties acting in privity with other defendants.

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In short, even when the pendency of UNC Defendants' Motion to Dismiss is considered, there is simply no basis to grant a stay of these proceedings.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny Defendants' Motion to Stay in its entirety, and permit this action to proceed on the schedule already set forth by this Court.

[8] Indeed, Plaintiffs note that UNC Defendants have significantly undermined their theory that they are not essential to this case by refusing to concede that UNC would be bound by any subsequent holding of this Court if they were not a party. (*See generally* ECF No. 105.)

Dated: August 22, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Christopher A. Brook, hereby certify that on August 22, 2016, I electronically filed the foregoing CARCAÑO PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO STAY PROCEEDINGS, 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.

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