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, and PHIL BERGER, *et al.*, Intervenor-Defendants.	)	Case No. 1:16-cv-00425
NORTH CAROLINIANS FOR PRIVACY, Plaintiff, v. UNITED STATES OF AMERICA, *et al.*, Defendants.	)	Case No. 1:16-cv-00845

UNITED STATES' RESPONSE IN OPPOSITION TO MOTION TO STAY PROCEEDINGS BY ALL DEFENDANTS AND NORTH CAROLINIANS FOR PRIVACY

The United States of America ("United States") respectfully submits this response in opposition to the Motion to Stay Proceedings by Defendants State of North Carolina, Governor Patrick McCrory, and the North Carolina Department of Public Safety; Intervenor-Defendants President Pro Tempore Phil Berger and Speaker Tim Moore (together, "State Defendants"); and Defendants University of North Carolina and its Board of Governors (together, "UNC") (collectively, "Defendants"); and Plaintiff North Carolinians for Privacy ("NCFP") (jointly, "Movants"). ECF No. 141 (Defs.' and NCFP's Mot. to Stay Proceedings in Light of *G.G.*).[1]

INTRODUCTION

The Defendants are violating federal laws[2] by implementing and complying with Section 1.3 of North Carolina Session Law 2016-3, House Bill 2 ("H.B. 2" or "the Act"). H.B. 2, enacted in March of this year, denies transgender people access to sex-segregated bathrooms and changing facilities consistent with their gender identity unless they can produce an amended birth certificate. Despite the Act's ongoing discrimination against transgender people in North Carolina, Movants seek to delay the Court's adjudication of this matter based on the Supreme Court's recall and stay in *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 136 S. Ct. 2442 (2016). *See* ECF No. 129 at 11–12 (Defs.' Suppl.

[1] Except where expressly noted, all ECF numbers refer to Civil Action No. 1:16-cv-00425.

[2] As discussed in the United States' Motion for Preliminary Injunctive Relief and Memorandum of Law in Support, *see* ECF Nos. 73 & 76, the Defendants are in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.* ("Title IX"); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*. ("Title VII"); and the Violence Against Women Act, 42 U.S.C. § 13925(b)(13) ("VAWA").

Br. in Opp. to Mot. for Prelim. Inj. and Req. for Stay of Proceedings in Light of *G.G.*). As explained below, the Movants' arguments are unavailing because *Gloucester* is still controlling law, Movants are merely speculating about what the Supreme Court might do in *Gloucester*, and a reversal in *Gloucester* would not be dispositive of the United States' claims. Moreover, in the absence of the Court's issuance of a preliminary injunction, a stay would perpetuate the harms caused by H.B. 2's deprivation of transgender people's freedom to use bathrooms and changing facilities consistent with their gender identity in North Carolina. Finally, UNC has advanced no special entitlement to a stay of discovery against it and, in any case, makes this request too late to warrant the Court's consideration.

ARGUMENT

The Movants assert,[3] in relevant part, that: (1) the *Gloucester* decision "lies at the core" of the United States' case; (2) by issuing a stay in *Gloucester*, the Supreme Court sought to preserve the *status quo* allowing the Gloucester County School Board to continue enforcing its disputed restroom policy and, by extension, to permit enforcement of similar discriminatory laws such as H.B. 2; and (3) the "principles of judicial administration" weigh in favor of staying these proceedings, entirely or partially, until the Supreme Court denies certiorari or issues a decision on the merits in *Gloucester*. *See*

[3] According to their motion, all Defendants and NCFP seek to stay the scheduled trial and discovery in its entirety. In the alternative, the State Defendants and NCFP request a stay of the trial and deposition discovery period but will consent to written discovery proceeding against them pursuant to a modified schedule. All Defendants and NCFP assert that the Court should decide the United States' preliminary injunction according to the current schedule without an evidentiary hearing. UNC, however, asks the Court to stay all discovery against it, including written discovery, unless and until the Court denies its motion to dismiss. *See* ECF No. 141 ¶¶ 1–3; *see also* Letter from S. Kyle Duncan, James A. Campbell, Karl S. Bowers, Counsel for State Defendants and NCFP to Anita Engle, Case Manager 1–2 (Aug. 8, 2016); Letter from Noel J. Francisco, Counsel for UNC to Anita Engle, Case Manager 1–2 (Aug. 8, 2016).

ECF No. 129 at 11, 15. UNC separately argues that the Court should stay all discovery against it, including written discovery, because its motion to dismiss must be resolved before it is "subjected to the costs and burdens of discovery." ECF No. 143 at 3 (UNC Defs.' Br. in Supp. of Mot. by All Defs. to Stay Proceedings in Light of *G.G.*).

The Court should deny the Movants' stay request and direct the parties to proceed with trial and discovery according to the schedule memorialized in the Joint Rule 26(f) Report and this Court's Order. *See* ECF No. 104 (Joint Rule 26(f) Report); ECF No. 108 (July 25, 2016 Order). First, the Supreme Court's recall and stay of the Fourth Circuit's mandate does not provide any cause to stay this litigation, including the resolution of the pending preliminary injunction motion, because (a) the Fourth Circuit's *Gloucester* opinion remains binding on this Court; (b) Defendants are baselessly speculating about how the Supreme Court will resolve the *Gloucester* petition for certiorari; and (c) even if the Supreme Court grants the petition for certiorari, Defendants can only speculate as to whether the Court will consider questions beyond the holding of *Gloucester*, which is limited to the question of deference owed to federal agency interpretation of the relevant Title IX regulations. Second, staying this case and denying the United States' preliminary injunction motion would perpetuate the harm that transgender people in North Carolina are experiencing because of Defendants' implementation and enforcement of H.B. 2. Third, UNC's separate arguments in favor of a stay pending resolution of its motion to dismiss are unsupportable because, among other reasons, it consented to the Court-ordered discovery schedule after filing its motion to dismiss and has thus waited too long to request a stay. Therefore, in addition to the reasons articulated in Part I of the United States' and the *Carcaño* Plaintiffs' Second Joint

Supplemental Brief ("Plaintiffs' Second Joint Brief") and as further explained below, the United States opposes the motion to stay. *See* ECF 109 at 1–9 (Pls.' Second Joint Suppl. Br. (1:16-cv-00236)); ECF No. 126 (Notice to Ct. Regarding Pls.' Second Joint Suppl. Br. (1:16-cv-00425)).

I. The Supreme Court's Actions in *Gloucester* Provide No Basis for Delaying This Case.

A. *Gloucester* Remains Binding Fourth Circuit Law.

The Movants attempt to obscure a straightforward, prevailing rule: The Fourth Circuit's opinion in *Gloucester* remains binding precedent for this Court's consideration of the Title IX claim in this case. The Fourth Circuit has held that "[a] decision of a panel of this court becomes the law of the circuit and is binding on other panels unless it is overruled by a subsequent en banc opinion of this court or a superseding contrary decision of the Supreme Court." *See 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)); *Friel Prosthetics, Inc. v. Bank of America*, No. Civ. A. DKC 2004–3481, 2005 WL 348263, at *1 n.4 (D. Md. Feb. 9, 2005) (holding that a stay of a Fourth Circuit opinion "does not prevent . . . [it] from having precedential value and binding authority"). Other circuits have also adopted this position. *See, e.g., Martin v. Singletary*, 965 F.2d 944, 945 n.1 (11th Cir. 1992) ("Although the mandate in *Johnson* has not yet issued, it is nonetheless the law in this circuit. . . . The stay in no way affects the duty of this panel and the courts in this circuit to apply now precedent established by *Johnson* as binding authority. Thus, *Johnson* is the law in this circuit unless and until it is reversed,

overruled, vacated, or otherwise modified by the Supreme Court of the United States or by this court sitting en banc.").

In response, the Movants assert that "[a]uthority from other jurisdictions" "implies" that an appellate court's decision is not binding when its mandate has been recalled and stayed by the Supreme Court. *See* ECF No. 129 at 10 n.1. But the two cases Movants cite imply no such thing. In *Beardslee v. Brown*, 393 F.3d 899, 901 (9th Cir. 2004), the Ninth Circuit granted a habeas petitioner's request for a certificate of appealability because the law changed during the period of time between (a) the Supreme Court's denial of his petition for a writ of certiorari, and (b) the Ninth Circuit's issuance of its mandate affirming the district court's denial of habeas relief. If anything, *Beardslee* stands for the principle that courts continue hearing cases even when they pertain to legal questions that might, but have not yet, been taken up by the Supreme Court. Similarly, in *Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128, 1141 (D. Or. 2014), the court suggested a decision was not yet binding because it was under consideration for a rehearing en banc by the Ninth Circuit. Even if that proposition were true, it has nothing to do with the rule in the Fourth Circuit governing the effect of a stay on a mandate. Moreover, despite believing that an important controlling precedent was not binding and could be reconsidered en banc, the district court still decided the case, undermining Movants' ultimate request here. *Id.* at 1147-48. In sum, neither case supports the principle that an opinion loses its precedential effect because of a recall and stay or because of a petition for certiorari, let alone undermines the controlling case law from the Fourth Circuit indicating that *Gloucester* remains binding on this Court irrespective of the recall and stay of the mandate.

B. Defendants' Predictions About How the Supreme Court May Resolve the Petition for Certiorari in *Gloucester* Are Speculative at Best.

The Movants' arguments are undergirded by a fundamentally unsound assumption. They speculate that the "[*Gloucester*] decision will almost certainly not be the law of this Circuit beyond next Term, when it will have been superseded by a Supreme Court decision." ECF No. 129 at 9. The Movants, however, cannot foretell how the Supreme Court will resolve the petition for certiorari in *Gloucester*, let alone whether the Fourth Circuit's opinion will be superseded. There are ready examples where the Supreme Court stayed an appellate court mandate only to later deny certiorari. *See, e.g., North Carolina v. League of Women Voters of N.C.*, 135 S. Ct. 6 (2014) (recalling and staying the mandate of the Fourth Circuit's decision striking down aspects of North Carolina's voter identification law pending disposition of a petition for writ of certiorari); 135 S. Ct. 1735 (2015) (denying certiorari); *Philip Morris USA Inc. v. Scott*, 131 S. Ct. 1 (2010) (staying judgment of the Court of Appeal of Louisiana, Fourth Circuit, which required applicants to fund a 10-year smoking cessation for the benefit of the members of the plaintiff class); 564 U.S. 1037 (2011) (denying certiorari). Therefore, the Movants' speculation about the outcome of the certiorari petition in *Gloucester* and any potential decision on the merits does not support postponing resolution of the United States' claims that Defendants are violating federal laws.

C. A Reversal in *Gloucester* Would Not Be Dispositive of the United States' Claims.

Even if the Fourth Circuit's decision in *Gloucester* were no longer binding law, and even if the Court were persuaded by the Movants' speculation about its ultimate outcome in the Supreme Court, this Court should decide the United States' motion for a

preliminary injunction and adjudicate the United States' claims based on the plain language—and the federal courts' interpretation—of the federal statutes at issue. The United States' suit is not confined to Title IX. Indeed, the Movants concede that "portions of Plaintiffs' claims go beyond [*Gloucester*]." ECF No. 129 at 11. For example, the United States has also asserted a claim under VAWA, which prohibits funding recipients from discriminating on the basis of, *inter alia*, "sex" or "gender identity." 42 U.S.C. 13925(b)(13)(A); *see also* ECF No. 76 at 36 n.18 (U.S. Mem. in Supp. of Mot. for Prelim. Inj.) (explaining that Congress did not intend the inclusion of "gender identity" in VAWA to imply a limitation on the meaning of discrimination "based on . . . sex"). The Defendants' compliance with and implementation of H.B. 2 violates VAWA because it requires public agencies to treat transgender people differently from non-transgender people by barring transgender people from restrooms and changing facilities consistent with their gender identity. *See* ECF No. 76 at 35–36. Thus, regardless of the meaning of "sex" under VAWA or the Fourth Circuit's deference to the U.S. Department of Education's interpretation of its Title IX regulations in *Gloucester*, H.B. 2 constitutes discrimination on the basis of gender identity, in violation of VAWA's plain language. *See id.*

Because the Fourth Circuit in *Gloucester* found that the U.S. Department of Education's interpretation of its Title IX regulations was entitled to deference pursuant to *Auer v. Robbins*, 519 U.S. 452 (1997), a reversal of that decision would not necessarily be dispositive of the statutory Title IX claim in this case. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 720–21 (4th Cir. 2016). This Court may find that H.B. 2 violates Title VII's and, by similar legal reasoning, Title IX's and VAWA's

statutory prohibition on "sex" discrimination. *See* ECF No. 76 at 16 n.14, 18–33. Since the Supreme Court's decision in *Price Waterhouse v. Hopkins*, it is well-established that discrimination on the basis of "sex" includes differential treatment based on "sex-based considerations." 490 U.S. 228, 242 (1989) (plurality). Because a transgender person's transgender status is unquestionably a "sex-based consideration," the United States has alleged that laws like H.B. 2 discriminate against transgender people by denying them an opportunity or benefit based on a consideration related to sex. This includes discrimination based on the divergence between a person's gender identity and assigned sex at birth. *See* ECF No. 76 at 16 n.14, 18–33. Therefore, as explained in detail in the United States' preliminary injunction brief, the *Gloucester* decision is sufficient but not necessary to grant the injunction and adjudicate the merits of the United States' claims.

D. Movants' "Judicial Administration" Arguments Are Not Persuasive.

The Movants' arguments regarding "judicial administration," *see* ECF No. 129 at 15–18, are unpersuasive. The Movants cite a litany of inapplicable cases purportedly in support of their position. But in none of these opinions did courts decline to hear civil cases because of judicial administration; rather, they pointed to extraordinary circumstances where the Supreme Court had already granted certioriari or decided a case, or plaintiffs had an opportunity to argue a case elsewhere. *See, e.g.*, *Hickey v. Baxter*, 833 F.2d 1005 (Table) (4th Cir. 1987) (affirming district court's opinion to stay a case after certiorari had already been granted, not before); *Mey v. Got Warranty*, No. 5:15-CV-101, 2016 WL 1122092 (Slip Copy) (N.D.W. Va. Mar. 22, 2016) (granting a stay pending resolution of a case granted certiorari by the Supreme Court); *Harris v. Rainey*, No. 5:13CV00077, 2014 WL 1292803, at *2 (W.D. Va. Mar. 31, 2014) (explaining that

"a stay of a civil case should be undertaken only in extraordinary circumstances" where plaintiffs' motion to intervene in another related case in the Fourth Circuit had been granted); *Gross v. Pfizer, Inc.*, No. 10–CV–00110–AW, 2011 WL 4005266 (D. Md. Sept. 7, 2011) (granting a partial stay in order to brief the impact of a recently decided Supreme Court case). Similarly, *Fisher-Borne* does not set forth any precedent that a district court must stay a case when the Supreme Court orders a stay in another case. Rather, if anything, *Fisher-Borne* stands for the principle that the threshold for doing so is high and must include a detailed analysis of "clear and convincing circumstances" and "potential harm," which the United States has already demonstrated here. *Fisher-Borne v. Smith*, No. 1:12CV589, 2014 U.S. Dist. LEXIS 128887, at *6 (M.D.N.C. June 2, 2014); *see also Fisher-Borne v. Smith*, No. 1:12CV589, 2014 U.S. Dist. LEXIS 119405, at *1 (M.D.N.C. Aug. 27, 2014); *Wolf v. Walker*, 9 F. Supp. 3d 889, 891 (W.D. Wis. 2014) (denying stay where "[a]bstaining or staying the case would serve no purpose but to delay the case"); *Santos v. Frederick Cty. Bd. of Comm'rs*, No. WDQ–09–2978, 2015 WL 5083346, at *3 (D. Md. Aug. 26, 2015) (parties jointly requested a stay).

II. The Stay Sought by the Movants Will Cause Further Harm to Transgender North Carolinians Unless the United States' Preliminary Injunction Is Granted.

In contrast to the Movants' request to stay this litigation, the United States' preliminary injunction, if granted, would restore the pre-H.B. 2 status quo and immediately halt further harm to transgender individuals in North Carolina. Barring transgender people from public restrooms and changing facilities consistent with their gender identity is causing significant and irreparable physical, psychological, economic, social, and stigmatic harm to transgender people in the State. *See, e.g.*, ECF No. 76 at 1,

11–12, 26–33, 53–60. These individuals merely seek to participate and function in public institutions, workplaces, schools, and universities in a manner consistent with their gender identities—activities they were engaging in, without incident, prior to North Carolina's enactment and enforcement of H.B. 2. In other words, H.B. 2 does not simply segregate bathrooms and changing facilities between men and women, as Defendants argue. It categorically excludes a particular group of women from using facilities reserved for women and likewise for men. *See* ECF No. 76 at 26–33, 53–60 (citing witnesses' declarations describing harms experienced as a result of Defendants' compliance with and enforcement of H.B. 2); ECF No. 128 at 18–19 (Resp. in Opp. to UNC Defs.' Mot. to Dismiss) (same). Thus, the irreparable harms that transgender people are currently experiencing because of H.B. 2 outweigh the speculative "privacy and safety" injuries asserted by Defendants, ECF No. 129 at 21–22, and further support the United States' preliminary injunction motion. In contrast, the purported time- and resource-saving benefits of a stay are minimal. Not only do they mainly rest on speculation about what the Supreme Court may or may not do in *Gloucester*, but they fail to account for the fact that, regardless of the outcome there, further litigation will be necessary here to adjudicate the United States' VAWA claim.

Ultimately, the Defendants' compliance with and enforcement of H.B. 2 instantiates for thousands of transgender people—whose gender identity is inconsistent with their assigned birth sex—a pernicious message: They are not welcome, are not respected, and are not equal members of civic and cultural life in the State. To be sure, these harms would be mitigated if the Court issued the preliminary injunction requested by the Plaintiffs as it granted the stay of trial and discovery requested by the Movants.

But that scenario is precisely what the Court rejected when it decided to consolidate the hearing on the United States' preliminary injunction motion with an expedited trial on the merits. For the reasons stated in Part I, *supra*, Defendants provide no valid reason for the Court to reconsider its decision on that matter. The current schedule should remain in place.

III. The Court Should Not Grant UNC Any Special Dispensation from Discovery.

In addition to relying on speculation about *Gloucester*, UNC seeks to stay all discovery against it unless and until the Court denies its motion to dismiss. *See* ECF No. 141 ¶ 2. UNC complains that the costs and burdens of written discovery are too great and that staying all discovery against it would not delay the case. *See* ECF No. 143 at 4–7. UNC's position is untenable for the reasons stated above and for the following additional reasons.

First, UNC's request is not timely. It has *already agreed* to engage in discovery, including written discovery, and it did so *after* filing its motion to dismiss. UNC filed its motion to dismiss on July 18, 2016. *See* ECF No. 98 (UNC Mot. to Dismiss). Merely two days later on July 20, after substantial negotiation among the parties, UNC consented to a comprehensive schedule that established the discovery deadlines for all Defendants, the *Carcaño* Plaintiffs, and the United States. *See* ECF No. 104. UNC agreed, *inter alia*, to complete (1) written discovery by September 12, and (2) all fact and expert discovery by October 7. *See id.* ¶¶ 1(a), 1(f). Most importantly, the Court issued an order effectuating the parties' agreed-upon schedule on July 25 and also applied the schedule to NCFP's case for consolidated discovery. *See* ECF No. 108.

To the extent that UNC desired to stay all discovery against it, the appropriate time for UNC to file such a motion was over a month ago, which it could have easily done contemporaneously with its motion to dismiss and prior to the filing of the Joint Rule 26(f) Report and related Order. *See Baker v. Bank of Am., N.A.*, No. 5:13-CV-92-F, 2013 WL 6408221, at *1 (E.D.N.C. Dec. 6, 2013) (denying stay request where defendant sought "time to complete discovery at a later date in the event the court denies the motion to dismiss, potentially because it is [*sic*] has not diligently pursued discovery during the allotted time frame"). Moreover, motions to stay "are not favored because when discovery is delayed or prolonged it can create case management problems which impede the Court's responsibility to expedite discovery and cause unnecessary litigation expenses and problems." *Simpson v. Specialty Retail Concepts*, 121 F.R.D. 261, 263 (M.D.N.C. 1988) (denying motion to stay); *see also Kron Medical Corp. v. Groth*, 119 F.R.D. 636, 638 (M.D.N.C. 1988) (denying motion to stay for failure to show good cause and reasonableness).

Second, to stay discovery against UNC alone would create an unwieldy and counterproductive separate discovery track for UNC when the Court has repeatedly signaled to the parties its interest in efficiency. If the Court does not resolve UNC's motion to dismiss on roughly the same time frame as its resolution of this motion, the delay caused by a stay as to UNC will functionally result in a delay of trial, as the present schedule leaves no room for adjusting critical deadlines on document production and scheduling of depositions that ripen in the next week to ten days. If the Court does resolve UNC's motion to dismiss on roughly the same time frame as its resolution of this motion, then a stay is irrelevant.

CONCLUSION

For the foregoing reasons, the Court should deny the Motion to Stay Proceedings.

This the 22nd day of August, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2016, I electronically filed the foregoing Response in Opposition to Motion to Stay Proceedings by all Defendants and NCFP with the Clerk of the Court using the CM/ECF system and have verified that such filing was sent electronically using CM/ECF.

Respectfully submitted,

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