UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

JOAQUÍN CARCAÑO *et al.*, Plaintiffs, *v.* PATRICK MCCRORY *et al.*, Defendants	CASE NO. 1:16-CV-00236-TDS-JEP
UNITED STATES OF AMERICA, Plaintiff, *v.* STATE OF NORTH CAROLINA *et al.*, Defendants	CASE NO. 1:16-CV-00425-TDS-JEP

JOINT NOTICE OF ISSUES FOR STATUS CONFERENCE

Pursuant to this Court's Orders of July 25 and August 25 2016, counsel for all parties in the above captioned actions have conferred and submit this Joint Notice of Issues for Status Conference, presently scheduled for 10:00 A.M. on Friday, September 2, 2016. Where necessary, the respective parties will set forth their own characterizations of the pending issues.

I. STATE DEFENDANTS' PENDING STAY MOTION

On Monday, August 29, 2016, the *Carcaño* plaintiffs withdrew their opposition to Governor McCrory's, UNC's and Intervenor-Defendants' motion to stay trial and

discovery proceedings, and the *Carcaño* plaintiffs now join in that motion, with certain requested modifications (Docs. 129, 127, 113). In light of their appeal of the August 26, 2016 preliminary injunction order (Doc. 128), the *Carcaño* plaintiffs "no longer believe that expedited discovery and trial is an efficient use of judicial or party resources," and have proposed to "stay trial and discovery proceedings" in all three cases, "while allowing written discovery only to proceed on a less accelerated schedule." Doc. 129 at 2, 1. The United States does not agree that the *Carcaño* plaintiffs' appeal warrants a stay but agrees that the apparent inability to reach agreement on limiting the scope of discovery in a reasonable manner requires discussion of the viability of the current trial date absent swift agreement on such limits. Consequently, all parties believe it is important to discuss at the Friday conference the trial and pre-trial schedule.

II. LEGISLATIVE PRIVILEGE

Counsel for the *Carcaño* plaintiffs and the Intervenor-Defendants have begun discussions concerning the issue of legislative privilege. This issue will arise in different contexts, namely (1) Intervenor-Defendants' objections to written discovery; (2) the indication by the *Carcaño* plaintiffs that they intend to depose the Intervenor-Defendants; and (3) the United States' service on August 30, 2016 of a Notice of Rule 30(b)(6) Deposition on all Defendants including the Intervenor-Defendants, set for September 19. The *Carcaño* plaintiffs' counsel has suggested that by intervening in their lawsuit and engaging in discovery and motions practice, the Intervenor-Defendants have waived any otherwise applicable legislative privilege. For their part, Intervenor-Defendants' counsel rejects the suggestion that they have waived legislative privilege in any way by

intervening as agents of the State to defend H.B. 2, as they are authorized to do by North Carolina law. On August 30, 2016, counsel conferred on this issue and discussed the possibility of a compromise resolution, perhaps using as a lodestar this Court's legislative privilege rulings in *North Carolina State Conference of the NAACP v. McCrory*, No 1:13-cv-00658. However, given their apparently significant differences of opinion on the issue, and their agreement on its importance for the course of discovery and trial, counsel for the respective parties expect that resolving this issue may necessitate motions practice before this Court. They intend to raise this issue with the Court and seek the Court's guidance on an appropriate briefing schedule for addressing the issue.

Additionally, the State of North Carolina, Governor McCrory, UNC, and the North Carolina Department of Public Safety have also asserted privileges (including legislative privilege) to the *Carcaño* plaintiffs' written discovery and requests for depositions. The State Defendants and UNC have also asserted legislative privilege in response to the United States' document requests. Though counsel have likewise discussed these issues, as with the objections of the Intervenor-Defendants, it appears that motions practice before the Court will be necessary.

III. DEPOSITION SCHEDULING

The parties have identified a total of 32 fact witnesses and 18 expert witnesses to be deposed in a span of 27 calendar days—20 business days. Despite working assiduously to create a practicable global deposition schedule, depositions are nonetheless scheduled to take place in 14 different cities—six outside of North Carolina. Defendants wish to point out to the Court that even after the parties agreed today to

reschedule depositions scheduled for next week, the remaining weeks of the current schedule proposal have six days scheduled with two witnesses per day, three days with three witnesses per day, two days with four witnesses per day, and one day with five witnesses; and now that the depositions scheduled for this week and next week have been postponed, the depositions of eleven witnesses will have to be rescheduled into the remaining days in the schedule. It is estimated that a minimum of eight attorneys will attend each deposition. The time and resources that will have to be devoted to the service of deposition notices and subpoenas, as well as the arrangement of court reporters, travel, and hotel accommodations are daunting. The parties have been negotiating limits on the number of depositions (and thus, on the number of witnesses at trial) but have not yet reached agreement. The parties have, however, agreed to extend the deadline for fact depositions from September 23 to October 7 (to align with the deadline for expert depositions).

IV. JOINT PROTECTIVE ORDER REGARDING CONFIDENTIAL INFORMATION

Despite several attempts to resolve them, significant disagreement persists regarding the protective order governing disclosure of personally identifiable information, including medical and psychiatric histories. Because these issues directly impact depositions, they must be resolved as soon as possible.

State Defendants' position: Of principal concern to all defendants is that the medical records of the plaintiffs and certain fact witnesses have not yet been produced, and counsel for the plaintiffs have suggested they may object to questions about their medical histories during upcoming depositions. State Defendants have requested medical

and psychiatric information from all individual plaintiffs alleging harm. They also intend to subpoena medical records from fact witnesses claiming harm. Limitations on medical questioning in depositions would severely prejudice all defendants, given that plaintiffs and several other witnesses allege that they have suffered or will suffer physical and emotional harm from the Act, and also allege that they suffer from a specific medical condition whose treatment requires, *inter alia*, the use of restrooms and other facilities consistent with their gender identity. The medical and psychiatric histories of plaintiffs and these witnesses are thus undeniably relevant to the central issues before the court, including standing, credibility, damages, and causation. State Defendants also seek to share this medical and psychiatric information with expert witnesses and have experts present at depositions where such information is disclosed.

Carcaño plaintiffs' position: The *Carcaño* plaintiffs are concerned regarding the scope of medical and psychiatric discovery that State Defendants intend to pursue and are concerned that some lines of questioning in depositions and some lines of document discovery may be irrelevant and/or (unintentionally) harassing and or harmful to individual transgender plaintiffs. In order to try to find common ground, the *Carcaño* plaintiffs have asked State Defendants to provide them general topic areas regarding medical and psychiatric history that State Defendants would like to pursue. The *Carcaño* plaintiffs would then raise any particular areas of concern.

The United States' position: The United States agrees with the concerns raised by the *Carcaño* plaintiffs and is additionally concerned that the individuals alleging harm as part of the United States affirmative case are not parties to the case, and thus further

limits to State Defendants' access to their medical and psychiatric information are necessary. The United States' view is that discovery into any medical or psychiatric information must be pursuant to a protective order and disagree that there is any need to share this private information with experts retained by the State Defendants or NCFP, as there is no reason for such experts to have access to individual witnesses' personal medical or psychiatric information, where those witnesses are not seeking to establish standing or damages.

Because repeated negotiations have thus far failed to resolve these critical issues, court intervention will likely be necessary. Until these issues are resolved, proceeding with depositions of the individual plaintiffs and other fact witnesses would be fruitless.

V. STATUS OF RETRIEVAL, REVIEW, AND PRODUCTION OF ESI

On August 26, the parties exchanged lists of identified custodians and proposed search terms for the identification and retrieval of ESI, as well as their initial rounds of responses and objections to one another's Requests for Production. Communications are ongoing regarding the revision of the proposed search terms and custodians. Only the *Carcaño* plaintiffs have begun producing documents. The United States intends to begin producing documents later tonight. The UNC Defendants have indicated that they are unable to produce any responsive documents until the finalization of the proposed protective order governing confidential information and also notified plaintiffs of the overwhelming technological challenge of collecting and reviewing ESI from 17 separate campuses of the UNC system, as requested.

Governor McCrory's counsel have also advised plaintiffs of their inability to comply with document requests to produce ESI in a format other than .pdf, due to the limitations of the technology utilized by the relevant state government offices.

Counsel for Intervenor Defendants have recently succeeded in uploading an initial round of documents into the computerized search system to begin a privilege review; however, the full set of ESI that will need to be reviewed cannot be identified and collected until the search terms and custodian lists are agreed upon.

The initial search for documents conducted by the United States returned approximately 675,000 potentially responsive documents, which will need to be reviewed for responsiveness and privilege. Even if attorneys for the United States were able to review 100 documents per hour—which, based on previous experience, is a generous estimate—it would take 6,750 attorney hours to adequately review all of the documents.

Accordingly, the parties agree that there is a substantial amount of work still required before completing the necessary review and production of documents. Negotiations over limitations to the scope of discovery are ongoing, and the parties may need the Court's assistance with resolving any disputed issues that remain; however, the unresolved issues will likely not be fully identified for some time.

This the 31st day of August, 2016.

[*Signatures of counsel appear on the following pages.*]

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this date, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all CM/ECF participating attorneys.

This the 31st day of August, 2016.

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