

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

JOAQUIN CARCAÑO, et al.,

Plaintiffs,

v.

PATRICK McCRORY, in his official
capacity as Governor of North Carolina, et al.,

Defendants,

and

PHIL BERGER, in his official capacity as
President Pro Tempore of the North
Carolina Senate; and TIM MOORE, in his
official capacity as Speaker of the North
Carolina House of Representatives,

Intervenor-Defendants.

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF NORTH CAROLINA, et al.,

Defendants,

and

PHIL BERGER, in his official capacity as
President Pro Tempore of the North
Carolina Senate; and TIM MOORE, in his
official capacity as Speaker of the North
Carolina House of Representatives,

Intervenor-Defendants.

1:16CV236

1:16CV425

ORDER

This matter came before the Court on September 2, 2016, for a Status Conference in cases 1:16CV236 and 1:16CV425, which have been consolidated for discovery and scheduling. At the Status Conference, Attorney Scott Wilkens appeared for the Plaintiffs in 1:16CV236 (the “ACLU Plaintiffs”), and Attorney Corey Stoughton of the United States Department of Justice appeared for the Plaintiff United States in 1:16CV425 (the “USDOJ Plaintiff”). For Defendants, Attorney Butch Bowers appeared for the State of North Carolina, Governor McCrory, and the North Carolina Department of Public Safety (“the State Defendants”); Attorney Kyle Duncan appeared for Intervenor-Defendants Phillip Berger and Tim Moore (“the Legislative Intervenors”); and Attorney John Gore appeared for the University of North Carolina and the UNC Board of Governors and Chairman Bissette (the “UNC Defendants”) (collectively “Defendants”). Prior to the hearing, the Parties filed a Joint Notice of Issues for Status Conference [Doc. #136 in 1:16CV236 and Doc. #163 in 1:16CV425]. The Court enters this written order to memorialize the Parties’ positions and the Court’s rulings at the Status Conference, taking in turn the issues set out in the Joint Notice.

I. Defendants’ Motion to Stay Proceedings

The first issue set out in the Joint Notice for resolution at the Status Conference was a pending Motion to Stay Proceedings [Doc. #113 in 1:16CV236 and Doc. #141 in 1:16CV425], originally filed by Defendants. At the hearing, all of the Parties in both cases noted their agreement that the trial should be continued, and the Court granted the request in part, as further set out below.

Pursuant to this Court's Order entered on July 25, 2016, this Court set these cases for trial on November 14, 2016, having advanced the trial on the merits under Federal Rule of Civil Procedure 65(a). In light of that determination, the Court adopted an expedited discovery schedule. Defendants subsequently filed their Motion to Stay, requesting that the trial date and discovery proceedings be stayed in light of the Supreme Court's order granting a stay in Gloucester County School Board v. G.G. ex rel. Grimm, 136 S. Ct. 2442 (Aug. 3, 2016). The ACLU Plaintiffs originally opposed the Motion to Stay. However, while the Motion to Stay was pending, this Court granted the ACLU Plaintiffs' Motion for Preliminary Injunction in part and denied it in part [Doc. #127 in 1:16CV236], and the ACLU Plaintiffs filed a Notice of Appeal [Doc. #128 in 1:16CV236]. As a result, the ACLU Plaintiffs withdrew their opposition to Defendants' Motion to Stay, and joined in the request, asking that the Court stay the trial and discovery while the ALCU Plaintiffs' appeal is heard by the Court of Appeals for the Fourth Circuit. Additionally, in the Joint Notice, all Parties expressed concerns over their respective abilities to comply with the discovery schedule originally adopted by this Court, citing, *inter alia*, larger-than-expected volumes of discovery material and logistical difficulties in aggregating necessary materials.

At the Status Conference, the Court noted its intent to leave this case on the present schedule, with a trial in November 2016, unless all of the Parties agreed to another option that would still present these matters to the Court in an efficient and consolidated manner. The Court then heard from each of the Parties as to their respective positions. The ACLU Plaintiffs stated that that they felt strongly that discovery and trial should be stayed pending their appeal of the Court's preliminary injunction ruling, since the appeal could have important

implications for the scope of the case, including both discovery and trial. The ACLU Plaintiffs also noted that written discovery could proceed while the appeal was pending, but that given the discovery issues to be briefed and the volume of discovery anticipated, it would not be an efficient use of the Parties' resources to try to complete discovery in time for a November 2016 trial. For its part, the USDOJ Plaintiff took the position that the case did not need to be completely stayed while G.G. was pending in the Supreme Court and while the ACLU Plaintiffs' appeal was pending in the Fourth Circuit, but that a continuance until the spring of 2017 would be appropriate to allow a reasonable schedule for discovery, given that the volume of discovery was much greater than originally anticipated. The USDOJ Plaintiff specifically noted that if the case proceeded to trial in November as presently set, full discovery would not be feasible and the volume of anticipated discovery would need to be significantly restricted. The USDOJ Plaintiff also asserted that no evidentiary hearing would be needed on its Motion for Preliminary Injunction, which is still being briefed, and that the trial could be separated from the Motion for Preliminary Injunction, with discovery and trial re-set under the normal schedule that would apply pursuant to the Court's Local Rules. In response, the State Defendants noted that they agreed with the ACLU Plaintiffs regarding the need for a stay, in light of the pending appeals that could resolve legal issues that would bear on the trial in this case and in light of the volume of discovery and the discovery-related disputes that will need to be raised and resolved prior to trial. The Legislative Intervenors and UNC Defendants concurred.

Having considered the Parties' positions and the agreement by all Parties that a continuance was appropriate, the Court proposed that the USDOJ Motion for Preliminary

Injunction could be separated from the trial on the merits and considered without an evidentiary hearing, and the trial on the merits could be continued until May 2017, but discovery would proceed under the ordinary schedule set out in the Local Rules. The Parties all agreed to this proposal. Therefore, the Court will continue the trial in this case from November 2016 until May 2017, at the joint request of the Parties. As noted during the Status Conference, the Parties are to submit Supplemental Rule 26(f) Reports by September 12, 2016, proposing a new discovery schedule consistent with a May trial date. This case is set for a Supplemental Pretrial Conference and Status Conference on September 16, 2016 at 10:00 a.m. in Courtroom 3 of the United States Courthouse in Winston-Salem, North Carolina. If there are any additional issues that need to be addressed at the Status Conference, the Parties should include those in a Joint Notice filed by September 13, 2016. Finally, with respect to any remaining briefing on the ACLU Plaintiffs' Motion for Preliminary Injunction with regard to their Due Process Claim, at the ACLU Plaintiffs' request, any supplemental briefing will be due September 30, 2016, and responses due October 28, 2016, and any replies due November 11, 2016. As discussed during the Status Conference, if the Court determines that a hearing is necessary on that Motion or that the request should otherwise be addressed at the trial on the merits, the ACLU Plaintiffs do not object to that matter being continued until the May 2017 trial.¹

Finally, the Court notes that the UNC Defendants also requested that all discovery involving the UNC Defendants be stayed pending resolution of the UNC Defendants'

¹ The USDOJ Plaintiff also noted the possible filing of a Motion to Dismiss as to the counterclaims in 1:16CV425, to be filed by September 23, 2016. As discussed during the hearing, the Court will not preclude any Party from filing a Motion, but if it appears that the Motion is best resolved at the bench trial, the Court will address the Motion at the trial in May 2017.

pending Motions to Dismiss. However, at the prior Pretrial Conference in this case, the Court specifically noted that the UNC Defendants would need to participate in discovery, and the UNC Defendants agreed. Moreover, UNC would be involved in discovery as a third party even if it were not a party in this proceeding, and delaying discovery as to UNC would be inefficient, would cause unnecessary delay, and would potentially result in duplicative discovery. Therefore, to the extent the UNC Defendants separately requested a stay of discovery, that request is denied.

II. Assertion of Legislative Privilege by Defendants

The second issue set out in the Joint Notice for resolution at the Status Conference was the assertion of legislative privilege by Defendants. At the hearing, the Parties noted that this issue was not yet ripe for resolution by the Court, but the Parties anticipated that there would be disputes to present to the Court regarding the assertion of legislative privilege in this case. Therefore, in their Rule 26(f) Reports to be filed by September 12, the Parties should set out a framework for raising and briefing these issues, including with respect to any disputes regarding the proper standard to apply, any disputes regarding the various categories of documents that may be at issue in this case, and any disputes regarding the waiver of the privilege. As discussed during the hearing, the Court anticipates that any party or individual seeking to assert legislative privilege would need to file a Motion for Protective Order to assert that claim, and the schedule for any such filing should be included the Rule 26(f) Reports.²

² The proposal may also consider the possibility of limited disclosure of disputed documents only to counsel, without waiving any privilege or objection as provided in Federal Rule of Evidence 502(d), in order to try to resolve some issues of legislative privilege without Court involvement.

III. Deposition Scheduling

The third issue set out in the Joint Notice for resolution at the Status Conference related to the current deposition schedule for both fact and expert witnesses. In particular, the Parties noted concern with their inability to take all of the requested depositions in the time period allowed prior to the November 2016 trial. However, that concern has been alleviated by the continuance of the trial date. Therefore, in the Rule 26(f) Reports due September 12, the Parties should address this issue and should set out a specific schedule that will allow all of the depositions to be completed in the time available prior to trial in May 2017.

IV. Joint Protective Order Regarding Confidential Information

The fourth issue set out in the Joint Notice for resolution at the Status Conference related to the entry of a Joint Protective Order regarding the discovery of confidential information. Specifically, the Parties noted that they had agreed on a proposed Joint Protective Order in large part, but that additional disputes remained regarding the discovery of certain medical records. In light of the issues raised, and in order to facilitate the production of information for which no dispute has arisen, the Parties agreed to submit a proposed Joint Protective Order by September 12 to the extent they had otherwise agreed, and then to separately address their disputes regarding the discovery of medical records. The Rule 26(f) Reports submitted by September 12 should include a procedure and a schedule for raising these issues. As discussed during the hearing, it is anticipated that Plaintiffs will file a separate Motion for Protective Order with respect to any request for production that would involve the production of medical records that Plaintiffs would oppose producing under the terms of the Joint Protective Order. Likewise with respect to depositions, if Plaintiffs seek to limit

inquiry into particular areas, Plaintiffs will file a Motion for Protective Order prior to the deposition.³ The schedule and procedure for presenting these issues should be included in the Rule 26(f) Reports.⁴

V. Production of Electronically-Stored Information

The fifth and final issue set out in the Joint Notice for resolution at the Status Conference related to the schedule for the production of electronically stored information. However, it appears that most of the concerns raised in that regard related to the expedited discovery period prior to the November 2016 trial date, and those issues can now be further addressed by the Parties in light of the additional time allowed for discovery. Therefore, in the Rule 26(f) Reports filed by September 12, the Parties should address this issue and should set out a specific schedule for document discovery and production of electronically stored information, including resolution of any disputes regarding search terms and custodians for electronically stored information.

³ The Parties should work together informally to continue to attempt to narrow their disputes, and the Parties may consider the possibility of limited disclosure of disputed documents only to counsel, without waiving any privilege or objection as provided in Federal Rule of Evidence 502(d), in order to try to resolve some issues of scope without Court involvement.

⁴ At the hearing, the USDOJ noted that similar issues may be raised with respect to medical records of third party fact witnesses not in the possession of USDOJ. The Parties should address this issue in their Rule 26(f) Reports, with respect to whether discovery from these fact witnesses will proceed as party discovery or third party discovery and with respect to the schedule and procedure for raising any similar objections to requests for medical records.

IT IS THEREFORE ORDERED that Defendants' Motion to Stay Proceedings [Doc. #113 in 1:16CV236 and Doc. #141 in 1:16CV425] is GRANTED IN PART and DENIED IN PART, as set out herein.

IT IS FURTHER ORDERED that this matter is set for a Supplemental Pretrial Conference and Status Conference on September 16, 2016 at 10:00 a.m. in Courtroom 3 of the United States Courthouse in Winston-Salem, North Carolina. The parties are directed to file Rule 26(f) Reports by September 12, 2016, and to file a Joint Notice by September 13, 2016, setting out any additional issues that need to be addressed at the Status Conference.

This, the 6th day of September, 2016.

/s/ Joi Elizabeth Peake
United States Magistrate Judge