

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

3 UNITED STATES OF AMERICA,) CASE NO. 1:16CV425
4)
5 Plaintiff,)
6)
7 v.)
8)
9 STATE OF NORTH CAROLINA;)
10 PATRICK MCCRORY, in his)
11 Official capacity as Governor)
12 of North Carolina; NORTH)
13 CAROLINA DEPARTMENT OF PUBLIC)
14 SAFETY; UNIVERSITY OF NORTH)
15 CAROLINA; and BOARD OF)
16 GOVERNORS OF THE UNIVERSITY OF)
17 NORTH CAROLINA,)
18) Winston-Salem, North Carolina
19) June 22, 2016
20) 4:07 p.m.
21

13 TRANSCRIPT OF THE **TELEPHONE CONFERENCE/MOTION HEARING**
14 BEFORE THE HONORABLE THOMAS D. SCHROEDER
15 UNITED STATES DISTRICT JUDGE

16 APPEARANCES:

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24 Proceedings recorded by mechanical stenotype reporter.
25 Transcript produced by computer-aided transcription.

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1 P R O C E E D I N G S

2 **THE COURT:** Good afternoon, everyone. We are back
3 here on 1:16CV425, United States of America versus State of
4 North Carolina, et al.

5 Let me go ahead and ask everybody to go ahead and
6 introduce themselves if you are going to be speaking, starting
7 with the United States. I think Ms. Stoughton may be on the
8 line.

9 **MS. STOUGHTON:** Yes, Your Honor, thank you. This is
10 Corey Stoughton from the Civil Rights Division of the
11 Department of Justice.

12 **MR. FRANCISCO:** Your Honor, Noel Francisco on behalf
13 of the University of North Carolina and the Board of Governors.

14 **THE COURT:** How about from the State of North
15 Carolina and the Governor's Office?

16 **MR. STEPHENS:** Your Honor, this is Bob Stephens,
17 counsel for the Governor and the State, and Butch Bowers is
18 also on the line, and he will be speaking for both parties.

19 **THE COURT:** Okay. And then I understand I have
20 proposed intervenors on the line as well.

21 **MR. DUNCAN:** Yes, Your Honor. This is Kyle Duncan
22 for the proposed Intervenors, Senator Berger and Representative
23 Moore, along with Gene Schaeer.

24 **MR. STEVEN-GLENN:** **JOHNSON:** And this is
25 Steven-Glenn: Johnson, proposed Intervenor.

1 **THE COURT:** Okay. All right.

2 **MR. BOWERS:** Good afternoon. This is Butch Bowers.
3 I apologize. I was having trouble with my mute button, but I
4 am here. Thank you, Judge.

5 **THE COURT:** Is there everybody else who intends to
6 speak who has not been introduced?

7 **MS. PRATT:** Your Honor, this is Carolyn Pratt and Tom
8 Shanahan from the University of North Carolina. We are not
9 anticipating speaking, but just wanted to let you know we are
10 on the line.

11 **THE COURT:** Thank you.

12 **MR. RAND:** Same here. This is Ripley Rand from the
13 U.S. Attorney's Office, Judge Schroeder.

14 **THE COURT:** Okay. I wanted to get back on the phone
15 with all of you about the pending motion to enjoin the
16 automatic suspension of funds. I have received and read all of
17 the filings. I appreciate your doing that.

18 Before I go any further, let me ask: Have you all
19 had any further discussion among yourselves? Is there any
20 further report anybody thinks would be appropriate to make at
21 this time?

22 All right. Well, I hear radio silence, so I take
23 that as no further report.

24 Let me say this. I have reviewed, as I said, the
25 filings. I cannot say that I am at this moment in time

1 persuaded that I have the authority to sign the requested
2 injunction for the reasons that you all have indicated. The
3 statute and the regulations seem to make clear that the
4 preliminary injunction standard should be applicable. Of
5 course, in our circuit, that requires a clear showing of the
6 four prongs: Likelihood of success on the merits, likely to
7 suffer irreparable harm, balance of hardships tipping in one's
8 favor, and the public interest being served.

9 What strikes me as odd in this case is that the
10 parties are offering to stipulate not to the presence or
11 absence of these factors, but rather to the suspension of
12 funding, which is a corollary to the merits of the case.
13 Ordinarily, if I have parties who offer to enter into a consent
14 injunction, they usually offer to consent to refrain from
15 certain conduct or to engage in certain conduct pending the
16 resolution of a matter, and so it's merits based. Here, the
17 parties seek to be avoiding the merits discussion and simply
18 don't want the collateral consequence that the statute seems to
19 indicate applies.

20 I have not had cited to me any authority by the
21 parties for that proposition. The one that comes close is the
22 case the United States, I believe, cites, *Alexander v. Bahou*, a
23 1980 case from the Northern District of New York, but it seems
24 clear to me in that case that that's a different situation.
25 There it appears, although it's not clear from the case, that

1 the United States apparently granted a two-week extension on
2 the issue of withdrawal of funding. I'm not sure if they have
3 that authority, and then following that, after that time period
4 expired, the city was forced to request a TRO and then the
5 parties perfected an agreement.

6 So even though the United States relies on that case,
7 I think the critical language was in the case that the city's
8 funding would have been suspended on March 3, 1980, unless the
9 suspension had been enjoined, but there is no indication that
10 it was enjoined, at least not from that opinion.

11 So I still think I'm left here in an area where there
12 is no case law supporting the proposition that the parties are
13 offering. The parties are always free to stipulate as to
14 merits issues for limited purposes that would permit some type
15 of preliminary relief to be granted.

16 It appears to me that the parties are engaged in a
17 fairly high-stakes gamble, a high-stakes game of poker, and
18 they're pitching the question to the courts to decide in this
19 litigation. In the meantime, there's the potential for
20 significant collateral damage as to these programs under the
21 Violence Against Women Act.

22 I am not sure what I will do. I sense that the
23 parties are asking me to stretch the law and reach a result
24 that will temporarily relieve the parties of the bind in which
25 they find themselves. So I have one observation and that is

1 this: It appears, as I said, the parties are looking to the
2 courts to resolve the disputes about House Bill 2.

3 The issue seems to be whether the enforcement of Part
4 I is occurring. The University has taken the position that
5 it's not enforcing the law and does not intend to. I'm not
6 sure what the State says about that, and that may very well be
7 the University's position in the related case, so I don't want
8 to necessarily get into the merits of that, but I make that
9 observation.

10 One possibility, if the parties wish to avoid any
11 potential cataclysmic effect of any funding issue, is to
12 consider whether they can reach some consent agreement, which
13 would be along a traditional consent agreement for this kind of
14 a situation, as to the merits of the case, that is, whether
15 they can agree to the status quo ante. That would be
16 essentially that the bathroom/shower provisions of House Bill 2
17 would not be enforced until the Court has an opportunity to
18 reach the merits of the case without any regard to the parties'
19 position on the merits, in other words, without any waiver or
20 admission of liability. The parties could always be free to do
21 that.

22 My observation is simply this, and that is, as I
23 understand the posture of these cases, the House Bill 2 was
24 offered to be necessary in light of certain other legislation
25 that was enacted in Charlotte, and that the parties may very

1 well now be in a position that nonenforcement of the bathroom
2 portion of the legislation, that is, Part I, would return the
3 state to where it was before the law was passed, which I
4 understood the State's position always to be, that that's the
5 state of affairs that the State thinks is appropriate and
6 should not be overturned. I think the phrase used in the
7 State's briefing is the position that's been followed for a
8 millennia in the state of North Carolina.

9 So if there is some possibility the parties would
10 agree to that, then I could enter an appropriate order upon
11 consent of the parties and then resolve the issues in proper
12 course on the merits. That would resolve the funding issue
13 because there would no longer be any alleged violation for the
14 duration of the preliminary relief, and the Violence Against
15 Women Act funding could continue unabated.

16 In the absence of that -- as I said, I have not made
17 a final determination, but I have serious concerns about
18 offering the relief on the grounds or for the reasons that have
19 been cited so far.

20 Other than that, the parties can always decide how
21 they want to resolve this. One supposes the Department of
22 Justice can let the deadline pass. I'm not sure what the
23 enforcement mechanisms of that are, and, that is, whether the
24 Department of Justice, if it thinks it has the discretion
25 whether or not to waive the requirement under the statute, then

1 the Department presumably believes it has that discretion, that
2 it therefore can exercise it.

3 The withdrawal mechanism or suspension of funds
4 exists so long as the claim exists. It is not readily apparent
5 to the Court yet the relative importance of the VAWA claim
6 vis-a-vis all the other claims and whether its presence is
7 necessary to the Government's case, but that's up to the
8 Government as to how it wants to proceed.

9 So I think the parties have to ask themselves whether
10 they are willing to put these programs at risk that are funded
11 under the Violence Against Women Act over the current posture
12 of the litigation or whether there's some interim way they can
13 see to begin to relieve that by way of some consent as to
14 enforcement mechanisms for the short term until the Court
15 resolves the issue in the case.

16 I am not going to ask you to tell me now your
17 position on that, but I simply want to lay that out there
18 because it's become apparent to me that the parties should at
19 least be thinking about that. I will ask, though, that you
20 report back to the Court tomorrow whether or not a consensus
21 can be reached on those lines. I am not interested in knowing
22 nor do I want to know who is and is not interested in doing
23 that on a party-by-party basis. This is a case to be decided
24 by the Court and not a jury, and so I am not interested in
25 knowing the relative positions of the parties. I'm interested

1 only in knowing whether or not there can be some agreement
2 that's reached, and, if so, one that seems to resolve the
3 issue. Then I would be happy to entertain that and entertain a
4 proposed consent order in that regard.

5 That's what I wanted to tell you on that front. I
6 would be happy -- if you have any questions about that or any
7 comment, I would be happy to hear from you all on that at this
8 time.

9 **MR. FRANCISCO:** Your Honor, it's Noel Francisco. I
10 just have one question about your request that we report back
11 tomorrow. Understanding that you don't want a party-by-party
12 response, are you suggesting that what you are looking for is
13 an agreement that would include all of the parties?

14 **THE COURT:** It would have to include the parties
15 whose conduct would be relevant for the Violence Against Women
16 Act claim.

17 **MR. FRANCISCO:** Understood, Your Honor. Thank you.

18 **THE COURT:** I'm not sure if that answers the
19 question, but my understanding from various filings is that the
20 University has taken the position that it does not intend to
21 enforce the law, and it's already publicly stated that. I
22 don't know what the State's position is as to that.
23 Presumably, it's the executive's prerogative on how to enforce
24 laws, and then I have proposed intervenors, and I don't know
25 what the legislators' view is on that, but again I note they

1 are not yet in the case but have their motion pending to be
2 considered to allow to intervene.

3 If the parties were satisfied that they could reach
4 agreement on that issue and are satisfied that the parties who
5 agree are the ones that are required to agree in order to
6 ensure that Part I of House Bill 2 will not be enforced until
7 the Court reaches a merits decision on the case, I suspect that
8 would be acceptable to the Court.

9 **MS. STOUGHTON:** Your Honor, this is Corey Stoughton.
10 I'm conscious of the number of parties involved, the high
11 stakes of this, and the dynamics of even just one government
12 entity, and I'm wondering whether the Court would entertain a
13 temporary administrative order relieving us of the obligation
14 under the statute, which is triggered -- due tomorrow, to allow
15 a little bit more breathing room to explore this possibility?

16 **THE COURT:** As much as I appreciate the difficulty, I
17 don't think I can do that. I think you all need to sit down,
18 the clock is your guide right now, and decide whether you think
19 you can work that out or not. If there were some
20 representation as to preliminary consent that's appropriate, on
21 that basis, then I think I could enter an order appropriately
22 and then memorialize it following, but simply to grant more
23 time to consider resolving an issue to me does not seem to,
24 currently in my way of thinking, fit the statute.

25 I appreciate the problem. It's not entirely

1 unavoidable. A lot of this was presented at the eleventh hour
2 by the parties.

3 So report back tomorrow. I only need to know whether
4 or not it can be resolved. I guess the question is whether, if
5 it can be likely resolved, the parties want to have some type
6 of telephonic hearing, and I will be happy to do that. So
7 maybe I should do this. Maybe I should, just for the sake of
8 scheduling, set a hearing for tomorrow afternoon by telephone,
9 and you all can then report what the result is; and as I said,
10 I only want to know whether there is consensus or if there is
11 not a consensus, and I don't need to really know the breakdown.
12 That will give you all between now and the next 24 hours to see
13 whether the parties are willing to enter into some kind of
14 agreement and whether you have the authority to do that.

15 Having said that, I am going leave that in your court
16 for consideration. If it turns out you cannot agree, then I'll
17 make whatever decision I think I have to make under the law.
18 I'll continue to look at it, but that's where I am at this
19 point, and that's my concern.

20 Let me turn briefly, if I can, to the intervenors,
21 and I just have a simple question for the legislative
22 intervenors. It's not lost on me that we have various lawsuits
23 pending before three different judges, and it strikes me that
24 we are consuming a lot of judicial resources on these issues,
25 and we haven't even gotten to any of the merits-based issues

1 yet.

2 Can you say what the plan is for the legislators if
3 you are permitted to intervene in this case, as well whether
4 you are going to continue to press the cases in other areas in
5 other courts, and, if so, are they overlapping or duplicative
6 or not?

7 **MR. DUNCAN:** This is Kyle Duncan. It's a more than
8 fair question. We had a status conference with Judge Flanagan,
9 I think it was yesterday, where she essentially asked the same
10 question, and I'll try to say the same thing that we did on
11 that call, which is the legislators, along with the Governor,
12 filed the declaratory judgment actions in the Eastern District
13 on May 9th. Later that same day, as Your Honor knows, the
14 Justice Department brought their action in the Middle District.
15 We do see those actions as essentially overlapping in almost
16 all respects.

17 What has happened in the Eastern District is that the
18 legislators have moved to consolidate with the Governor's
19 lawsuit. That has been conditionally granted by Judge Boyle,
20 although Judge Flanagan is still weighing whether to also grant
21 that consolidation. On the call, we asked Judge Flanagan if
22 she would be willing simply to allow that consolidation to
23 happen so the Governor's action and the legislators' action
24 would be together in the Eastern District.

25 We are also aware that the Governor had moved to

1 transfer the Eastern District action to the Middle District.
2 We did not take a position on that at the time because we told
3 Judge Boyle and Judge Flanagan we thought the consolidation
4 should be worked out first. In principle, we don't oppose
5 transfer of the Eastern District actions to the Middle District
6 so that they can be tried along with this action, for example,
7 because, like I said, we see them as overlapping actions.
8 That's why we are trying to intervene, of course, in this
9 action to protect our clients' interests in the DOJ enforcement
10 action.

11 I think what the obvious complication here is that
12 the transfer motion by the Governor has been denied by Judge
13 Boyle, and so that leaves us with a foot in the Eastern
14 District and a possible foot in the Middle District. So it is
15 a complicated situation. We don't think -- or I can represent
16 on our clients' behalf, we don't think these actions should be
17 tried separately on an Eastern District front and a Middle
18 District front. That doesn't make any sense, and it would be a
19 waste of judicial resources; but by the same token, we don't
20 know what the proper resolution at this point is. It's between
21 the Eastern District and the Middle District.

22 So I am not sure that -- that probably doesn't answer
23 Your Honor's question, but that's the best I can do right now.

24 **THE COURT:** So it sounds like what you are saying is
25 that if you are permitted to intervene here, at least currently

1 your clients are intending to press their claims as well in the
2 Eastern District?

3 **MR. DUNCAN:** No, I don't think I make that
4 representation, Your Honor. I think if we are permitted to
5 intervene in this case, then our clients would believe that our
6 interests can be protected in this action.

7 Now, what we will do at that point with respect to
8 Eastern District -- we'll have to decide at that point. We
9 don't perceive pressing ahead on both fronts. What we want to
10 know, I think it's in our clients' interests to know, is where
11 the action will be pressed, whether it's the Middle District or
12 the Eastern District. We thought initially it would be more
13 likely that the actions would be consolidated in the Middle
14 District before Your Honor, but now that Judge Boyle has denied
15 transfer of the Governor's motion, we just don't know. So we
16 are not prepared right now to say we will stay the Eastern
17 District or voluntarily dismiss the Eastern District action,
18 but we don't intend to press forward with both actions because
19 I think that would be a waste of the parties' and judicial
20 resources.

21 **THE COURT:** All right. Well, thank you for that
22 report.

23 **MR. DUNCAN:** Sure.

24 **THE COURT:** What I'll do is have Ms. Engle send
25 around notice for a telephone conference call tomorrow

1 afternoon somewhere about this time, and let me say just so
2 that I am clear, as I currently read the law, the preliminary
3 relief ordinarily granted by consent would be merits based, and
4 in this case, it would appear to me that if, and I underscore
5 if, the parties were in agreement that the Part I of House Bill
6 2 would not be enforced pending the Court's resolution of the
7 claims in these cases, then that would appear to me to satisfy
8 the statutory requirement for preliminary relief by consent to
9 permit the continuation of the funds, and I believe I have the
10 authority to enter an order on that basis.

11 I understand that requires you all to make some tough
12 decisions, but I think there are going to be a lot of tough
13 decisions for all of us to make here coming up. So this one is
14 going to be your turn, and you all decide how you decide. Just
15 make a final report, or be prepared to, tomorrow on our call;
16 and then if there is some agreement and it seems to satisfy the
17 statute, then I think I could enter preliminary relief on that
18 basis and subject to it being memorialized in some consent
19 order. If there can't be any agreement, then I'll do whatever
20 I think is the appropriate thing to do.

21 Let me say clearly, it is not lost on me the
22 importance of the funding of these programs, and I'm sure all
23 lawyers who are on the phone feel the same way.

24 All right. Any other questions?

25 **MS. STOUGHTON:** Yes, Your Honor. Can I just clarify

1 one thing? Am I right in understanding that what the Court is
2 looking for is some kind of stipulation one way or the other as
3 to the merits issues and the critical elements, that the
4 parties are in agreement so that there should be a stipulation
5 as to the merits issues?

6 **THE COURT:** As I see it, if the parties agree that
7 the -- I call it Part I of the House Bill 2. It's my
8 understanding that's the portion about deciding facility use
9 based on biological sex. If the parties agree that that part
10 of it, which is allegedly discriminatory, not be enforced
11 pending the Court's resolution of these issues, it would seem
12 that that would then remove the alleged discriminatory conduct
13 portion that's the basis of the Government's claim, therefore
14 would permit the continuation of funding. That's my thinking.

15 If I'm wrong in any of those steps, you will need to
16 correct me on that; but if that's correct, then as long as the
17 parties would be in a position to agree to that, then I think,
18 if the parties can report that tomorrow, I would be in a
19 position, I believe, to enter a preliminary order to suspend
20 the -- to enjoin, rather, the suspension of payments, and that
21 would then have to be memorialized, but I will accept counsel's
22 representations to the Court as officers of the court for that
23 purpose.

24 **MS. STOUGHTON:** Thank you, Your Honor.

25 **THE COURT:** As I said, it seems to me at least --

1 **THE COURT REPORTER:** I'm sorry, Your Honor.

2 **THE COURT:** Hold on just a minute. Our court
3 reporter is having technical difficulties.

4 (Pause in the proceedings.)

5 **THE COURT:** Sorry about that.

6 Based on what I read, and I've read quite a bit so
7 far, it seems that the position of the State of North Carolina
8 is that the rules that were in place, if you will, before the
9 events of this litigation arose were the rules that were
10 acceptable and were the rules that the new legislation were
11 intended enforce; and if that's the case and if I'm correct in
12 that, and I may be wrong, but if that is the case, then it
13 would seem that agreeing to suspend that part of the bill in
14 light of the rest of the legislation, which currently preempts
15 any other effort across the state to the contrary, then it
16 seems that that returns the State to the position it was in
17 before all of this arose, which, again, I thought was the
18 position of the State and perhaps the legislators that was
19 trying to be protected here. That's why I thought maybe
20 there's some possibility the parties could get to that point,
21 which would then allow everybody more time to deal with the
22 merits of the case, and it will protect your funding for these
23 programs.

24 So that's the thinking behind it. If you all
25 disagree, and you are free to do that of course, and if you

1 think I'm wrong, then you may reach a different conclusion, and
2 we'll deal with whatever outcome that results in.

3 Okay. Any other questions? Thank you for your time
4 today. I appreciate the effort of the briefing. I know this
5 is a serious matter on all fronts. It's not been lost on me
6 what's at stake, and I appreciate your consideration of where I
7 think we all find ourselves at this time.

8 I will have Ms. Engle send around a note for our
9 conference call. It will probably be a little earlier in the
10 afternoon. We'll either shoot for 2:00 or 3:00, depending on
11 the schedule here.

12 All right. Thank you all. Have a good afternoon,
13 and we'll talk to you then tomorrow.

14 **MS. STOUGHTON:** Thank you, Your Honor.

15 (END OF PROCEEDINGS AT 4:44 P.M.)

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1 UNITED STATES DISTRICT COURT
2 MIDDLE DISTRICT OF NORTH CAROLINA
3 CERTIFICATE OF REPORTER

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5
6 I, Briana L. Nesbit, Official Court Reporter,
7 certify that the foregoing transcript is a true and correct
8 transcript of the proceedings in the above-entitled matter.

9
10 Dated this 23rd day of June 2016.

11
12 
13 Briana L. Nesbit
14 Briana L. Nesbit, RPR
Official Court Reporter