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

UNITED STATES OF AMERICA,)	CASE NO. 1:16CV425
)	
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,)	
)	Winston-Salem, North Carolina
)	June 23, 2016
Defendants.)	3:02 p.m.

TRANSCRIPT OF THE **TELEPHONE STATUS CONFERENCE**
BEFORE THE HONORABLE THOMAS D. SCHROEDER
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: COREY STOUGHTON, ESQ.
LORI KISCH, ESQ.
U. S. DEPARTMENT OF JUSTICE
Civil Rights Division
950 Pennsylvania Avenue, NW
Washington, DC 20530

LYNNE KLAUER, AUSA
101 S. Edgeworth Street, 4th Floor
Greensboro, North Carolina 27401

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

1 APPEARANCES: (Continued)

2 For the Defendants:

3 (State of NC,
4 Governor McCrory,
5 DPS)

KARL S. BOWERS , JR., ESQ.
BOWERS LAW OFFICE, LLC
P.O. Box 50549
Columbia, South Carolina 29250

6

7

8

9

10

11 (UNC)

ROBERT C. STEPHENS, ESQ.
LINDSEY WAKELY, ESQ.
JONATHAN HARRIS, ESQ.
OFFICE OF THE GENERAL COUNSEL
OFFICE OF THE GOVERNOR
116 W. Jones Street
Raleigh, North Carolina 27699

12

13

14

15

16

17 (Intervenors)

NOEL J. FRANCISCO, ESQ.
JAMES BURNHAM, ESQ.
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001

18

19

20

21 Court Reporter:

CAROLYN C. PRATT, ESQ.
UNIVERSITY OF NORTH CAROLINA
P.O. Box 2688
Chapel Hill, North Carolina 27517

22

23

24

25

GENE SCHAERR, ESQ.
ROBERT POTTER, ESQ.
SCHAERR DUNCAN, LLP
1717 K Street, NW, Suite 900
Washington, DC 20006

BRIANA NESBIT, RPR
Official Court Reporter
P.O. Box 20991
Winston-Salem, North Carolina 27120

P R O C E E D I N G S

1
2 **THE COURT:** All right. We are all gathered here
3 again on 16CV425, United States of America versus State of
4 North Carolina, et al. I think I have a list of everyone who
5 is on the phone, but just so that I am clear, let's start with
6 the United States.

7 **MS. STOUGHTON:** Your Honor, this is Corey Stoughton
8 from the Civil Rights Division of the Department of Justice.

9 **THE COURT:** Good afternoon. Anybody else on behalf
10 of the United States who will be speaking today? All right.
11 UNC Defendants?

12 **MR. FRANCISCO:** Your Honor, Noel Franciso on behalf
13 of the UNC Defendants. I'm with James Burnham, and I believe
14 that Carolyn Pratt is on the phone as well.

15 **THE COURT:** All right. Good afternoon to you as
16 well. How about from the State and the Governor's Office?

17 **MR. STEPHENS:** Your Honor, this is Bob Stephens,
18 Governor's General Counsel, and I have with me Lindsey Wakely
19 and John Harris, but Butch Bowers, who I believe is on the
20 line, will be speaking on behalf of the Governor and the State.

21 **THE COURT:** All right. Mr. Bowers, are you with us?

22 **MR. STEPHENS:** Your Honor, earlier he announced he
23 was and that he was having difficulty with his mute button.

24 **THE COURT:** He had that problem yesterday. If you
25 are on with us, Mr. Bowers, just let us know at the appropriate

1 time that you have gotten that fixed.

2 I have proposed Intervenors as well; is that right,
3 Mr. Schaerr?

4 **MR. SCHAERR:** That's correct, Your Honor.

5 **THE COURT:** And do I have, Mr. Steven-Glenn?

6 **MR. STEVEN-GLENN: JOHNSON:** Yes, Your Honor, I'm
7 present.

8 **THE COURT:** All right. Okay. This was largely to be
9 a status report, and I hope you all had the opportunity to
10 consider what I said yesterday and make a determination of
11 whether there could be an agreement sufficient to what I think
12 is necessary to suspend the funding. I don't know if somebody
13 wants to be spokesperson, but I all really need to know without
14 knowing various interests of the parties is whether or not you
15 all were able to come to a consensus.

16 Does anybody wish to speak to that?

17 **MR. FRANCISCO:** Corey, do you want to address it for
18 the group?

19 **MS. STOUGHTON:** Well, I will. Your Honor,
20 unfortunately, the parties were not able to come to a
21 consensus.

22 **THE COURT:** Okay. I will -- I don't know that
23 there's much else I need to discuss with you all then. You all
24 know what the issues are and you know what the exposure is to
25 all sides. So unless there is anything further anybody wants

1 to be heard on, that's all I think we need to have at this
2 time.

3 Does anybody else have anything else that they need
4 to raise?

5 **MS. STOUGHTON:** Your Honor, if I could ask a question
6 on process? Does the Court know one way or the other whether
7 it intends to rule today?

8 **THE COURT:** I don't know. I'm concerned that the
9 bases the parties have stated don't fit with the law. I don't
10 expect to be ruling by the end of today. So if the parties are
11 worried about how it may affect them, then I think they need to
12 make some consideration about that.

13 I appreciate the situation everyone's in, but the
14 statute is designed to operate in a certain way, and everybody
15 has been aware of how it operates, and there are consequences
16 that flow from its operation. So I am not unsympathetic to the
17 pressures and concerns of the parties.

18 **MR. FRANCISCO:** I would just like to briefly point
19 out that we think that the -- we fully support the Government's
20 position that when the Government is the movant here, it would
21 certainly be anomalous to require that it demonstrate that the
22 Defendants are likely to succeed on the merits, and so we
23 completely agree with them on that; but to the extent the Court
24 feels otherwise, we would just point out in our papers that we
25 have provided an alternate basis that applies to the UNC

1 Defendants on that issue.

2 **THE COURT:** I appreciate that. The -- is the funding
3 any differently -- or different for the UNC Defendants? In
4 other words, is there any way to carve out the UNC Defendants
5 on the funding issue from the DPS Defendants?

6 **MR. FRANCISCO:** I believe so, Your Honor. I believe
7 they are different grants, and Ms. Stoughton can correct me if
8 she disagrees, but I believe there are separate grants that go
9 to the UNC entities. So an order suspending funding -- or a
10 suspension of funding as to the DPS does not automatically flow
11 to the UNC Defendants. I think you can separate them out.

12 **MS. STOUGHTON:** Your Honor, I think that's correct.

13 **THE COURT:** Do you know which grants those are?

14 **MS. STOUGHTON:** Yes, Your Honor, we do. There are
15 separate -- there are several grants that go to UNC, some to
16 the Chapel Hill campus and some to the Wilmington campus. We
17 have those identified.

18 **THE COURT:** Are they set out in Margaret Spellings'
19 affidavit?

20 **MS. STOUGHTON:** Your Honor, I don't know. I'm sure
21 Mr. Francisco can speak to that. They are set out in the
22 affidavit of Nadine Neufville, which is submitted with our
23 supplemental papers.

24 **MR. FRANCISCO:** And they are set out, not in
25 Ms. Spellings' declaration, but in Ms. Smith's declaration that

1 was attached to our supplemental papers.

2 **THE COURT:** Okay. Well, I'll see if I can pay a
3 little closer examination of that. Hold on just a minute.

4 So, Mr. Francisco, is it your position that the UNC
5 Defendants' statements that they don't intend to enforce the
6 provisions relating to Part I of H.B. 2 on the various campuses
7 is sufficient to avoid any indication of -- well, sufficient to
8 avoid any discrimination at least insofar as those programs
9 that are funded are being conducted through the UNC campuses?

10 **MR. FRANCISCO:** Yes, Your Honor, that's exactly our
11 position.

12 **THE COURT:** Does the United States agree with that?

13 **MS. STOUGHTON:** Unfortunately, we don't agree with
14 that for the reasons set forth in the footnote in our
15 supplemental papers. We disagree with the characterization
16 based on the -- the underlying undisputed facts about what UNC
17 has done and stated, that UNC is not -- that H.B. 2 is not
18 being enforced on UNC's campus. So we would not agree that
19 based on the current statement that there is not a violation of
20 federal law. In other words, we do believe that UNC is in
21 violation of federal law, Title IX and VAWA, at the moment.
22 That would not necessarily be the case if we were to pursue the
23 route that Your Honor suggested on our last call, but certainly
24 based on the current representations and our understanding of
25 the current status quo, we would not agree either that UNC is

1 likely to succeed on the merits or that any predicate for the
2 application of the funding suspension provision is eliminated.

3 **MR. FRANCISCO:** And, Your Honor, I may even be able
4 to narrow the issue further because obviously on that -- on the
5 level that Ms. Stoughton just put it, I think the parties are
6 in disagreement, but I think that for purposes of funding, it's
7 quite clear that right now there is no current allegation that
8 any particular individual on UNC campuses have been denied the
9 use of the bathroom of their choice, nor is there any
10 suggestion that they are likely to be denied use of the
11 bathroom of their choice in the near future given
12 Ms. Spellings' statement.

13 And regardless of whether UNC is in some other sense
14 in violation of VAWA and Title IX, and we would disagree on
15 that, but even putting that aside, I think it's fair to say
16 that there is nothing currently happening with respect to these
17 funds that constitutes an ongoing current violation of VAWA
18 right now. So I think it would be permissible then to enter
19 the order that the parties have requested, understanding that
20 if things changed and there were some suggestion of a
21 particular action that the University was taking to deny
22 somebody of the use of the restroom of their choice, then you
23 could retrigger the requirement that the funds be suspended.

24 **THE COURT:** Remind me, Ms. Stoughton, what exactly is
25 it that the Department of Justice and the United States claims

1 is the ongoing violation at the university right now?

2 **MS. STOUGHTON:** Well, Your Honor, first, let me be
3 clear. Obviously, the United States' position is that the
4 funding suspension provision shouldn't apply in the totality of
5 the circumstances, that the varying interests are better served
6 by seeking an injunction as quickly as possible.

7 But having said that, to address UNC's argument, the
8 reason why there is an ongoing violation of federal law with
9 respect to UNC is that H.B. 2 is a mandate on public agencies,
10 including UNC, that multiple-occupancy segregated bathrooms
11 shall not be used by transgender people, that those bathrooms
12 shall not be acceptable to them consistent with their gender
13 identity, and all the documentation, including the
14 documentation that UNC itself has submitted, has stated that it
15 is the president's position and UNC's position that H.B. 2 does
16 apply on campus, which means it's currently the policy on UNC's
17 campus that the transgender student may not access bathrooms
18 and changing facilities consistent with their gender identity.

19 I understand -- we understand that UNC has no
20 specific intention at this time to itself enforce that, but
21 that, respectfully, is not the question. The question is
22 whether the application of H.B. 2 as a policy on campus is in
23 conflict with federal law, and it's our position that it is.

24 I will also add, if I may, that UNC has distributed
25 and informed people on campus about the application of H.B. 2,

1 which creates the expectation of compliance. So from the
2 perspective of a transgender person on campus, I don't think
3 there is any question that they would expect that they would
4 not be permitted to use facilities that align with their gender
5 identity.

6 **THE COURT:** Well, I couldn't help but notice,
7 because, like many others, I keep up with current events --
8 it's my understanding that the City of Charlotte has now
9 announced in its school districts that it's not going to abide
10 by H.B. 2. I'm sure the parties on the phone are all aware of
11 that.

12 **MS. STOUGHTON:** Yes, Your Honor, and I think that
13 draws a useful contrast with what UNC has said because UNC, to
14 the contrary, has said that it will and is obliged to comply
15 with H.B. 2. It's described in public statements and in
16 statements to -- and filings to this court in a related case
17 that H.B. 2 is a presumptively valid state law. So I think
18 that that serves to highlight the United States' position with
19 regard to H.B. -- with regard to UNC.

20 **MR. FRANCISCO:** Your Honor, may I respond?

21 **THE COURT:** Yes.

22 **MR. FRANCISCO:** So we would strongly disagree that
23 H.B. 2 reflects the policy of the University of North Carolina
24 and its campuses, and I think we've laid out in detail
25 Ms. Spellings' various statements, as well as the statements

1 from other officials in our briefs, that show that's not the
2 case; but even if it were the case that in some theoretical
3 sense that H.B. 2, by virtue of it being state law, constituted
4 policy also of the University of North Carolina, the real issue
5 is whether that policy is being enforced or whether it's likely
6 to be enforced.

7 As Ms. Stoughton accurately explained, it is quite
8 clear here that even if that policy does exist, it is not
9 currently being enforced on UNC's campuses, and Ms. Spelling
10 has made clear that it's not going to be enforced on UNC's
11 campuses mainly because we believe there is no obligation for
12 UNC officials to engage in that kind of enforcement.

13 So I think that's why, even if in some sense H.B. 2
14 violates the law at a certain level of generality, there is no
15 basis here to conclude that under VAWA, and specifically with
16 respect to the VAWA funding provision, that the UNC campuses
17 and UNC officials are engaged in any specific conduct that
18 would constitute an enforcement of the policy that the
19 Government believes is contrary to VAWA, Title IX, and Title
20 VII.

21 **THE COURT:** All right. Does the State of North
22 Carolina -- has it stated a position as to whether the
23 University of North Carolina is permitted to take the view that
24 it's taking as to enforcement of H.B. 2 on its campuses?

25 **MR. STEPHENS:** Your Honor, this is Bob Stephens. In

1 the absence of Mr. Bowers, let me address that and perhaps make
2 a few other comments.

3 Yes, Your Honor, we have taken the position that the
4 University of North Carolina, like any other entity, is bound
5 by the provisions of H.B. 2, and that includes the
6 Charlotte-Mecklenburg school system, and we have taken that
7 position with the Charlotte-Mecklenburg school system publicly
8 and with UNC at least internally and I believe perhaps
9 publicly, but that they cannot unilaterally avoid enforcing or
10 complying with H.B. 2.

11 I will say, too, Your Honor, that the suggestion that
12 you made yesterday that we consider some provision of not
13 enforcing H.B. 2, that the Governor and the State took that to
14 heart. We gave that due consideration and, at the end,
15 concluded that we simply don't have the authority to make that
16 representation on behalf of the State. The Governor can't
17 simply say we're not going to enforce a particular law, whether
18 that's this law or some law that applies to prohibiting drivers
19 from not obeying red lights, or whatever it is.

20 But, Your Honor, I just had a -- was confused about
21 one thing. Let me say I appreciate the fact that the Court has
22 shared its concerns with this motion with the parties and have
23 given the parties an opportunity to address those concerns.
24 Quite frankly, I wish other judges would take Your Honor's
25 leave on that, but it was my understanding that Your Honor had

1 concerns about being able to find the four prongs, or tests,
2 that were necessary to grant a preliminary injunction, and I
3 didn't see how agreeing not to enforce, or the fact that it's
4 not being enforced, H.B. 2 would help the Court meet more and
5 more of those prongs.

6 So I just had a little bit of confusion about that.

7 **THE COURT:** All right. Anybody else?

8 **MR. BOWERS:** Your Honor, this is Butch Bowers. I
9 apologize for my earlier technical difficulties. They have
10 been resolved now. I have been on the line the entire time.
11 Mr. Stephens thankfully pinch hit for me and did a better job
12 of articulating our position than I ever could have.

13 I would like to add one other note, and, that is, I
14 had a conversation with Ms. Stoughton earlier today about in
15 the event that we get an adverse ruling from Your Honor denying
16 the motion, we are in general agreement of filing an appeal and
17 seeking a stay of enforcement of Your Honor's order. Again, if
18 it's an adverse ruling, seeking a stay of that pending the
19 resolution of the appeal. We haven't discussed the details of
20 it, but as soon as we file the notice of appeal, maybe one or
21 both of us -- and I haven't spoken with Mr. Francisco about
22 this either, but I would like to just report to the Court for
23 Your Honor's situational awareness that we have at least
24 reached some outline of an agreement in terms of an appeal, if
25 it comes down to that.

1 **THE COURT:** All right. Well, you all should do
2 whatever you think you should do, as always, to protect the
3 rights of your clients.

4 I should say at the outset that there was some
5 comment made about the statute and the anomalous situation in
6 which we find ourselves, but the language in the statute about
7 preliminary injunction I think applies to both sides. My
8 understanding of these cases is ordinarily the State or the
9 Defendant would seek to enjoin the suspension of funds by
10 showing that it's likely to succeed on the merits of any
11 defense in the case. Otherwise, the Federal Government that
12 has the leverage in the case would seek to enjoin the
13 suspension of funds by also showing that it's entitled to
14 preliminary relief in the case, but I don't -- in which case,
15 then there would be an injunction against any further
16 discriminatory or allegedly discriminatory conduct by the
17 Defendants, and then that would satisfy the purpose of the
18 statute, which is to allow funding to occur.

19 We find ourselves in this unusual situation because
20 neither side has moved off the diamond in this case. The
21 Government did indicate in its briefing it was intending to
22 file a motion for a preliminary injunction. I don't know if
23 you know what the timing of that's going to be, Ms. Stoughton.

24 **MS. STOUGHTON:** Well, Your Honor, thank you for the
25 opportunity to address that. I can't give you an exact timing

1 because we are still working to assemble the record that we
2 think would be necessary for a full consideration of that
3 motion, but I can certainly estimate that it will be within the
4 next two weeks.

5 And given that and given the, albeit, abbreviated
6 showing that the United States put forth in its supplemental
7 papers that it is likely to succeed on the merits, a showing
8 that turns largely on the fact that VAWA, unlike the other
9 statutes, expressly prohibits discrimination based on gender
10 identity and, therefore, expressly covers discrimination
11 against transgender people, as well as the debate that you
12 heard today between the United States and the University of
13 North Carolina, I wonder if Your Honor might consider on that
14 basis issuing a preliminary form of preliminary relief, if you
15 will, until the United States can prepare that fulsome record
16 for its impending motion for preliminary injunction so that the
17 important interests served by the statute can be protected on a
18 temporary basis while the Court reserves its ultimate judgment
19 on the question of whether it deals with the prerequisite for
20 relief throughout the entire course of the case and whether the
21 funding suspension provision is warranted.

22 **THE COURT:** I appreciate the concern and the
23 interest. It's one step removed from even the relief that the
24 statute seems to contemplate, so I would not be inclined to be
25 concluding that I had the authority to do it on that basis. I

1 read the statute the way that I do, and maybe I'm wrong, but I
2 think Congress wrote the statute for a purpose to provide this
3 kind of leverage and also to then require quick acting; and the
4 Department of Justice made the decision to file a lawsuit, and
5 then the statute starts clicking away on the 45 days. I
6 presume Congress had reasons for writing a statute that seems
7 to be clear.

8 Mr. Stephens, I didn't mean to ignore your question,
9 but my reading of the statute is preliminary relief can be
10 granted either way, and, frequently, defendants agree to
11 certain merits issues only for purpose -- limited purposes
12 without admission of liability and without waiver of any
13 rights, and frequently in litigation, people do that by way of
14 consent orders.

15 One possibility was that the Defendants agree, but
16 only for the purposes of interim preliminary relief, that the
17 Government's satisfied its -- or would satisfy its conditions,
18 but that's without any admissions of liability as to the
19 elements entitling it to preliminary relief.

20 The flip side is the Department of Justice could
21 reach that conclusion, but only for purposes of the issue of
22 suspension of funds until the Court reaches the merits of the
23 case; but, in any event, the parties are reaching a
24 merits-based conclusion by way of some consent, but it appears
25 to me the parties are unable to do so. That's the parties'

1 prerogative.

2 Mr. Bowers indicated, as is appropriate -- everybody
3 should do everything they can to protect their clients'
4 interests. I simply wanted to let the parties to know my
5 concerns about how they are reading the statute and my
6 hesitation as to the legal analysis that's been presented so
7 far.

8 I will continue to look at the issue. I'll do what I
9 can. I am very concerned about the situation in which
10 everybody finds themselves that is threatening to inflict harm.
11 It's been represented to be significant harm to wholly innocent
12 third parties and victims. So I will do what I can within my
13 authority. If I can convince myself of some other basis that I
14 have authority to do something, I'll act as quickly as I can.
15 All right.

16 **MS. STOUGHTON:** Your Honor, may I say one more thing?

17 **THE COURT:** Yes.

18 **MS. STOUGHTON:** At the risk of belaboring a point
19 that you've already addressed, I just want to go back to the
20 proposal I made to issue some form of temporary relief under
21 the funding suspension provision and go back to the case that
22 Your Honor identified in our papers, the *Alexander v. Bahou*
23 case from the Northern District of New York, and just one last
24 time suggest that perhaps a form of temporary relief while we
25 quickly and expeditiously proceed to file the motion for

1 preliminary injunction is somewhat analogous to what that Court
2 did by temporarily extending the deadline for the funding
3 suspension.

4 In that case, the parties were, I think, sorting out
5 a much more final resolution of the case, but, ultimately, to
6 serve the same purposes, and so I would just ask that the
7 Court, as it goes back to consider the authority, perhaps look
8 at that case and see that as a precedent for the relief, but
9 somewhat different from the relief that we just discussed
10 today.

11 **THE COURT:** I would be happy to do that. Did you
12 ever determine whether, in fact, in that case the Justice
13 Department voluntarily granted a two-week extension without any
14 court intervention?

15 **MS. STOUGHTON:** No, Your Honor, we don't have the
16 record from that case on hand and haven't been able to get our
17 hands on them to confirm one way or the other. Unfortunately,
18 our knowledge is just limited to what's recorded in the
19 decision.

20 **THE COURT:** As I recall the case, the City ended up
21 filing a motion for a temporary restraining order. Here, it
22 sounds like you are asking me to extend the period so that the
23 Department of Justice would have more time to file such a
24 request?

25 **MS. STOUGHTON:** Well, yes, Your Honor. What I would

1 conceive of it is the Court granting that request with the idea
2 that the forthcoming motion for preliminary injunction that we
3 intend to file will serve as that instead of that temporary
4 restraining order. So that rather than -- in other words,
5 skipping a step over a TRO and going directly to the
6 preliminary injunction, which will entail a finding of what
7 Your Honor has articulated as what you require to meet the
8 statutory requirements to provide relief from the funding
9 suspension provision.

10 **THE COURT:** Okay. I'll take a hard look at it, as I
11 have all of this. I appreciate the request. It is one step
12 removed. Whether I think I have that authority, we'll see.
13 It's -- just to be clear, it's not that I don't want to do what
14 I can to protect these programs. I'm a court of limited
15 jurisdiction, and when Congress speaks clearly, I should
16 listen. So that's what I am trying to do here.

17 All right. Thank you all. I'll -- I think you can
18 rest assured that I have taken a hard look at it and will
19 continue to do that. All right. You all have a good
20 afternoon. Thank you for your time.

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

22 (END OF PROCEEDINGS AT 3:31 P.M.)

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1 UNITED STATES DISTRICT COURT

2 MIDDLE DISTRICT OF NORTH CAROLINA

3 CERTIFICATE OF REPORTER

4

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.

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Briana L. Nesbit, RPR
Official Court Reporter

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USA v. NC, et al. - Status Conference - 6/23/16