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P R O C E E D I N G S

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2 **THE COURT:** Okay. We are on the record now in
3 1:16CV425, United States of America versus State of North
4 Carolina, et al.

5 I understand there are a number of folks on the
6 phone. Let me go ahead and have everyone note your appearance.
7 Let me start with the Plaintiff, United States. Who is
8 appearing today?

9 **MR. RAND:** Good afternoon, Judge Schroeder. This is
10 Ripley Rand with the U.S. Attorney's Office, and Corey
11 Stoughton from the Civil Rights Division of the Department of
12 Justice is also on the call, as well as I believe some other
13 folks.

14 **MS. STOUGHTON:** Your Honor, this is Corey Stoughton.
15 I'm here with Lori Kisch, Torey Cummings, Taryn Null, and
16 Dwayne Bensing from the Civil Rights Division.

17 **THE COURT:** All right. Welcome. How about for the
18 UNC Defendants, UNC and the Board of Governors?

19 **MR. FRANCISCO:** This is Noel Francisco of Jones Day
20 for UNC and the UNC Board of Governors. Also appearing in the
21 case with me are James Burnham of Jones Day and Carolyn Pratt
22 of the University of North Carolina General Counsel's Office.
23 Also on the phone with us is Vivek Suri of Jones Day.

24 **THE COURT:** And how about for the State of North
25 Carolina and the Governor, Governor McCrory?

1 **MR. BOWERS:** Good afternoon, Your Honor. This is
2 Butch Bowers. It is good to be with you again. I am here on
3 behalf of the Governor of the state and Secretary Perry, along
4 with Bob Stevens, Lindsey Wakely, and Jonathan Harris. All
5 three are from the Office of the Governor.

6 **THE COURT:** All right. And do I have the -- I guess
7 it's the intervenors -- proposed intervenors at this time?

8 **MR. DUNCAN:** Yes, Your Honor, good afternoon. This
9 is Kyle Duncan, and I'm joined by my colleague, Gene Schaerr,
10 and also our local counsel, Robert Potter. We represent the
11 proposed intervenors in this action, who are President Pro Tem
12 Phil Berger and the House Speaker, Tim Moore.

13 **THE COURT:** All right. Is there anybody else on the
14 phone that has not made an introduction?

15 All right. Hearing none, thank you for setting time
16 aside on short notice. Four or five days ago, maybe six days
17 ago, I think we -- I guess it looks like seven days ago,
18 June 10th, there was a filing of a motion as a joint motion to
19 enjoin the automatic suspension of funds received under the
20 Violence Against Women Act, Document 37 in the case.

21 I wanted to get you on the phone today because even
22 though it's presented to the Court as a consented-to motion, I
23 think there are some serious questions about whether the Court
24 has the authority to do what the parties are asking the Court
25 to do, and it looks like there is a deadline that's running. I

1 wanted to give everybody enough heads-up about that.

2 Simply put, it appears that under the statute that
3 whenever the attorney general files a civil action, which would
4 include the present action, that the Government must suspend
5 payments within 45 days of the filing of the action and that
6 the only exception to that is if the Court grants such
7 preliminary relief that may be available by law.

8 The cases in the Fourth Circuit and around the
9 country indicate that the standard to be applied is the
10 standard for a preliminary injunction. This presents an
11 unusual question in this case because there's no doubt that the
12 representation is that funds used here by the State of North
13 Carolina are for the extremely important services involving
14 programs that protect some of the most vulnerable in our
15 society, including these rape prevention programs.

16 What I am concerned about, though, is that what's
17 presented to me is, in essence, a consent agreement of the
18 parties that the Court should suspend the funds because that's
19 in the best public interest. My concern is that the statute
20 seems to clearly require the suspension of funds as a provision
21 of the statute that reflects the judgment of Congress, and I
22 have serious questions as to whether this Court has the
23 authority to stop that process merely by the entry of an order
24 because the parties agree to it in the case. I have a serious
25 question of whether that would override the will of Congress.

1 It seems, from what I can tell from my research, that
2 Congress drafted these laws to give the Federal Government
3 certain powers and to put certain pressures on other parties
4 who receive federal funds, and a condition of receipt seems to
5 be compliance with other important federal laws.

6 So I noticed in the briefing there was a statement on
7 page 6 of the brief that the likelihood-of-success factor is,
8 quote, of dubious value in light of the joint nature of the
9 motion. I'm not sure I can quite agree with that because,
10 based on what I understand the law to be, I would have to make
11 findings equivalent to those for preliminary relief under the
12 four-part preliminary injunction test, which would include a
13 finding that the Defendants can show likelihood of success on
14 the merits. It's not entirely clear to me, and I presume
15 otherwise that the Government is not conceding success on the
16 merits by filing this motion.

17 So it's postured in an unusual sense, and I am not
18 sure I'm in a position that I would even be able to sign a
19 consent order under these circumstances, certainly given the
20 present posture. The parties have not indicated to me my
21 authority to do that, and I have a concern that if I were
22 simply to do that because nobody disagrees with it, that that
23 would be overriding the will of Congress.

24 So in the absence of some other showing, it would
25 appear that I am not going to be in a position to grant the

1 relief the parties have moved for, and I wanted to give you the
2 opportunity to address that if you think there is some other
3 basis on which I could grant relief and to give you the
4 opportunity to brief that. Time seems to be of the essence.

5 I do note that this has been an issue that's been out
6 there for a while. I would have presumed that the parties were
7 aware of this earlier, but it does seem to be a significant
8 question and problem in the case; and if you read some of the
9 authorities, including the ones that the parties have cited, I
10 think the joint request has some significant issues.

11 Another concern I have is the showing of irreparable
12 harm under the case law. As important as these programs are,
13 and they appear to be extremely important, I don't have any
14 record before me that the elimination of funding for whatever
15 period of time would constitute irreparable harm. As a general
16 rule, the elimination of funding is not irreparable harm, and
17 there are many cases to that effect, including the ones the
18 parties have cited. That leaves open the possibility of
19 whether the programs themselves would have to shut down if the
20 funding were ended, and I don't know -- I don't have any facts
21 about what the funding situation is. I don't know if it's a
22 block grant for a period of time. I don't know when the next
23 funding would be. So I'm simply without information to make
24 any finding as to irreparable harm.

25 The last issue that concerns me is there's no doubt

1 the public interest would be served by the continuation of
2 these programs, but there is also a public interest alleged by
3 the Government, and that is the elimination of the H.B. 2 law
4 and the public interest served by the elimination of the law,
5 and there is zero discussion of that in the balancing of the
6 public interest here in the materials.

7 So I have significant questions about the posture of
8 the motion and my underlying authority to act, and I will be
9 happy to give you all more opportunity to brief it, if you
10 wish; but based on my research to date, I am not sure that you
11 will find anything that shows that I have the authority. If
12 that is the case, then the parties need to be prepared for
13 whatever consequences might flow from this, and that's why I
14 called you together today so you had a little bit of a
15 heads-up.

16 I would be happy to hear from any of you all if you
17 have some reaction to that.

18 **MS. STOUGHTON:** Your Honor, this is Corey Stoughton
19 from the Department of Justice, Civil Rights Division. I want
20 to thank you for the heads-up and for the opportunity to
21 address these issues.

22 I will start by saying that there is no question that
23 Congress' intent to give the attorney general the tool of
24 automatic suspension should be taken into account and weighed
25 in the Court's decision.

1 **THE COURT REPORTER:** I'm having trouble hearing her,
2 Your Honor.

3 **THE COURT:** Hold on just a minute, please. We are
4 having a little audio problem here. If you have a volume on
5 your phone, too, if you could turn it up, that would be
6 helpful.

7 **MS. STOUGHTON:** Is it better now?

8 **THE COURT:** Let's try that. Thank you.

9 **MS. STOUGHTON:** Your Honor, I was just beginning by
10 saying that I think there's no question that Congress' intent
11 to give the attorney general the tool of automatic suspension
12 to be a factor in the Court's analysis, but, respectfully, I
13 think the Court's authority to undertake this is in the statute
14 itself because Congress didn't merely include the automatic
15 suspension provision, but expressly included a process by which
16 the Court would have the opportunity to weigh various factors
17 that should come into play in considering whether that was an
18 appropriate exercise of power in a particular instance and come
19 to a different conclusion, which I think reflects not only
20 Congress' clear intent that automatic suspension should not
21 happen in every case, but also a clear grant of authority to
22 the Court to consider the factors that should come into play in
23 considering whether it should.

24 So I think in terms of the direct problem and I think
25 the most clear problems raised of authority, that that

1 authority is there in the statute itself.

2 I think, you know, it's -- obviously, it's clear, as
3 you said, that Congress drafted those laws to give certain
4 powers of enforcement to the Federal Government, but I think
5 it's also equally clear that Congress left and only leaves it
6 to the Executive Branch the discretion to determine how to
7 exercise and execute those powers.

8 In this case, the United States has taken a clear
9 position that, in the first instance, it is preferable and we
10 hope adequate to accomplish the public interest in enforcing
11 civil rights laws by obtaining an injunction that will bring
12 the funding recipients, the VAWA funding recipients, into
13 compliance with VAWA without jeopardizing important interests
14 that are served by the funding. In that circumstance, where
15 the United States has made that judgment, I think it is
16 consistent with Congressional intent that, you know, while
17 Congress gave that power -- again, it both clearly gave the
18 executive some power to make decisions about which amongst its
19 enforcement tools are the right tool for the job and also
20 clearly gave the Court authority to consider that judgment and
21 exercise its own discretion on whether to grant preliminary
22 relief from the automatic suspension provision.

23 I could address the other points, but I thought maybe
24 I would step down and give any other party an opportunity to be
25 heard before I turn to the other issues raised around

1 irreparable harm and the public interest.

2 **THE COURT:** Does anybody else want to be heard as to
3 the authority? I note that the statute says that once the
4 attorney general files a civil action alleging a pattern or
5 practice and neither party has, after such filing, been granted
6 such preliminary relief with regard to the suspension or
7 payment of funds as may otherwise be available by law, then the
8 funds shall be suspended, and it's mandatory language.

9 **MR. FRANCISCO:** Your Honor, this is Noel Francisco
10 for the University of North Carolina and the Board of
11 Governors.

12 I would just echo the Department of Justice's
13 position that it does -- this statute does, at least in our
14 view, appear on its face to give the Court the authority to
15 award the preliminary relief. As the Court noted, the standard
16 is the standard for granting of preliminary injunction, but my
17 understanding of that standard in the Fourth Circuit is that --
18 and also I think that, Your Honor, given that authority and the
19 standard that applies, and it's an equitable standard, we
20 believe that gives the Court sufficient authority to enter the
21 relief that --

22 **THE COURT:** How do I make a finding on likelihood of
23 success on the merits? I have no briefing on that so far in
24 this case.

25 **MR. FRANCISCO:** My understanding of the preliminary

1 injunction standard is that typically the Court can grant a
2 preliminary injunction based on essentially a sliding scale set
3 of factors. You don't need to make a finding on every one of
4 the factors. In this particular case, it would certainly seem
5 odd to reach the likelihood of success on the merits when the
6 other factors are the ones that, in our view, are what strongly
7 support the Government's position to exercise its discretion
8 not to withdraw the funds.

9 **THE COURT:** Anybody else wish to be heard?

10 **MS. STOUGHTON:** I don't mean to be dominating the
11 conversation, but a couple of things in addition, if I may.

12 First, again with respect to the authority, as you
13 pointed out, the language of the statute clearly is phrased in
14 mandatory terms, but I would urge the Court to see that
15 language and read it in the context of the entire statute,
16 including the provision granting the Court authority to issue
17 preliminary relief and to see that mandatory language as a
18 default, that it gives way, should the parties invoke the
19 process that's put into the statute, for seeking relief from
20 that provision and should the Court agree that under the
21 applicable standard that relief is warranted.

22 With regard to that standard, you know, I agree, Your
23 Honor. I understand that it is definitely the case the United
24 States does not concede and will not concede that the
25 Defendants have a likelihood of success on the merits of the

1 legal claim about H.B. 2's compliance with federal law, but in
2 this context what the briefing is meant to communicate is that
3 the logical application of the likelihood-of-success standard
4 is kind of a different beast than it might usually be, and
5 that's because in this case the relief that the United States
6 is seeking is not the suspension of funds in the first instance
7 or in the pleadings.

8 And so because of that, when a Court -- you know, for
9 example, in the cases from the '70s and '80s, when the Court
10 considered these questions in the context of the Phase Three
11 fact, and it was an opposed and contested motion, the argument
12 that was being made was that the funds should not be suspended
13 because at the end of the day the defendants in those cases
14 would prevail or were likely to prevail and, therefore, would
15 keep their federal funding because the cutoff for federal
16 funding was at issue.

17 In this case, that is not, at this stage, at issue;
18 and what the relief that the United States, the Plaintiffs, are
19 seeking is merely -- I mean, not merely. I don't mean to
20 diminish it, but it is not a funding cutoff. It is an
21 injunction to come into compliance with federal law. In that
22 sense, the question of success is not really about success on
23 the merits, but the success in keeping that funding and the
24 logic of kind of ensuring -- which I'm sure Congress had in
25 mind, the continuity of funding, if you are going to keep the

1 funding, at the end of the day is important, and I think that
2 interest remains the case here.

3 And so although I recognize this, I'm also going to
4 recognize and acknowledge that we don't have authority for
5 citing this, that the reason for that, of course, is because,
6 frankly, this hasn't been done before, and so the Court is
7 considering this in first impression; and so that was our
8 effort to kind of translate the meaning and import of the
9 likelihood-of-success standard into this novel context.

10 I did also want to address the question of
11 irreparable harm, and, you know, we had taken the position in
12 the pleadings that the question of irreparable harm would be
13 evident from the important purposes served by the funding and
14 the natural implication that interruptions in funding would be
15 disruptive toward the important goals of those programs; but I
16 will say if the Court is unsatisfied with that, I would ask for
17 the opportunity to provide some additional factual evidence
18 pertaining to the specific, as the Court seems to urge,
19 purposes that the funding is put towards, and we could obtain
20 perhaps a declaration or some kind of statement from -- I mean,
21 on our side, I'm sure we could obtain it from the OVW, the
22 Office on Violence Against Women --

23 **THE COURT:** Hold on just a minute. We're having
24 difficulty hearing when you go a little bit fast. So I am
25 going to have to ask you, Ms. Stoughton, if you don't mind just

1 to try to speak a little more slowly because we are having
2 audio issues here. Thank you.

3 **MS. STOUGHTON:** I apologize. I was just stating our
4 request to -- if the Court was willing to consider it, to
5 supplement the record on the question of irreparable harm, and
6 it may be that some of the other parties to the other motion
7 might want to do that as well.

8 **THE COURT:** Does anybody else wish to be heard this
9 afternoon?

10 Hearing none, I would be happy to give you additional
11 time to brief it. That's the precise reason I wanted to get
12 you on the phone today because I entertain serious concerns
13 about the relief requested. I don't doubt the motivation. I'm
14 doubting my authority. I can't act just because the parties
15 agree to something, particularly when Congress has reached a
16 determination as to how something should be done, and the
17 statute to me seems to be pretty clear. In fact, the
18 regulations implementing the statute make clear that the
19 standard for preliminary relief under the statute is the
20 standard for a preliminary injunction. In order to obtain a
21 preliminary injunction in the Fourth Circuit, you have to show
22 the likelihood of success on the merits, among other factors.

23 So if you want to brief it some more, I would be
24 happy to have you brief the various issues you think are
25 important, but I am concerned that I have the authority to

1 enter the requested relief. If you have any example where any
2 court has ever granted such relief, I would very much like to
3 see that. I would be surprised if there were any because I
4 think Congress wrote the statute, as far as I can tell, to give
5 the Government tremendous leverage, and that's why there's a
6 mandatory directive about suspending funds, which encourages
7 folks to work issues out; and once the Government decides to
8 file a civil action, then it kicks in the machinery of the
9 statute.

10 I understand that the United States has tremendous
11 discretion to exercise. A lot of the discretion to exercise,
12 of course, is in whether to bring a case; but once it's
13 brought, my understanding is that the Government enjoys this
14 tremendous leverage under the statute, and unless -- and not
15 only enjoys it, but Congress has demanded that it be used, and
16 I need some more indication from the parties as to my authority
17 to rule otherwise even with the parties' agreement. So I would
18 suggest you focus on the Fourth Circuit standard for
19 preliminary injunction whether there is, in fact, a need to
20 show likelihood of success on the merits. It's my current
21 understanding that that would need to be shown.

22 I'll be happy to entertain any more briefing and any
23 evidence on the irreparable harm point and the funding issue
24 and any other issue the parties want to address. If I'm
25 persuaded that there's grounds to enter it, I will enter the

1 order. I am not opposed to it by any means, but I'm concerned,
2 based on all my independent research and what the parties cited
3 to me, which was not very much, that everybody's assuming
4 something that seems to be contrary to the plain language of
5 the statute.

6 So if you have any case law where injunctive relief
7 was granted in the Fourth Circuit without any showing of
8 likelihood of success on the merits or without any finding as
9 to that, then, as well, I would like to see that.

10 I don't know where this will leave things if, for
11 some reason, I am ultimately not persuaded. I want you all to
12 at least have it on your radar. It seems that this issue
13 arises because of the Violence Against Women Act claim here. I
14 don't know if that leaves -- it may require procedural
15 responses from the parties. The options are all available to
16 the parties, however they want to do it, but the 45 days is
17 running. I think it expires next Thursday, and as I said, I'm
18 concerned that I don't have the authority to enter this.

19 So I would suggest -- if you want to brief additional
20 matters, you are welcome to brief it jointly or separately, but
21 I would suggest you have something filed by close of business
22 on Monday, and I would be happy to consider it; and if there is
23 a need for some kind of hearing, I would be happy to do that.

24 It's an important issue, but it may be that if I
25 don't -- if I'm not persuaded and if you conclude that the

1 authority may not be as clear as you had hoped it to be, then I
2 think you need to start making contingency plans as to how you
3 are going to deal with this issue. I have no idea based on
4 this record how significant the funding is and what the
5 ramifications would be, but you all certainly need to put that
6 on your radar. Either additional funds need to be found
7 somewhere else or -- you know, you have a myriad of options of
8 dealing with it, but I certainly wanted you all not to be
9 surprised if something like that were to happen.

10 So I will look for whatever you file by the end of
11 the day on Monday; and if you believe we need to have some type
12 of hearing, you're welcome to put a request in for that, and
13 I'll be happy to try to convene everybody again after that and
14 before the deadline.

15 Any other questions or anything further from anyone?
16 I'm not sure, Ms. Stoughton, I am yet persuaded as to your
17 interpretation of the statute. It seems to be pretty
18 straightforward and require the elimination of funding unless
19 there is a grant of preliminary relief. I don't know what
20 other escape valve there is from the statute. If you have any
21 authority for that, I would be very interested in seeing it. I
22 need to know what my options are rather than "just because the
23 parties have agreed to it" because that doesn't seem to fit, at
24 least as I see it, yet with the statute.

25 All right. Thank you all very much. I look forward

1 to whatever you can provide to me by close of business on
2 Monday. Thank you.

3 (END OF PROCEEDINGS AT 5:09 P.M.)

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USA v. NC, et al. - Motion Hearing - 6/16/16

1 UNITED STATES DISTRICT COURT

2 MIDDLE DISTRICT OF NORTH CAROLINA

3 CERTIFICATE OF REPORTER

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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 17th day of June 2016.

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Briana L. Nesbit

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Briana L. Nesbit, RPR
Official Court Reporter

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USA v. NC, et al. - Motion Hearing - 6/16/16