No. 16-1989

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOAQUÍN CARCAÑO, *et al.*,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees,

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,

Intervenors/Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of North Carolina
No. 1:16-cv-00236-TDS-JEP

PLAINTIFFS-APPELLANTS' OPPOSITION TO MOTION TO DISMISS APPEAL

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Appellees, in their Motion to Dismiss Appeal for Lack of Jurisdiction (4th Cir. D.E. 44-1) (hereinafter, "Mot."), concede that the district court's August 26, 2016 opinion and order "denied a . . . preliminary injunction on [Plaintiffs'] equal protection claim." Mot. at 1. Appellees do not—and cannot—contest that: (1) Congress has explicitly granted this Court jurisdiction to hear interlocutory appeals from district court orders "granting, continuing, modifying, refusing or dissolving injunctions," 28 U.S.C. § 1292(a)(1) ("section 1292(a)(1)"), or that (2) Plaintiffs timely appealed the district court's denial of injunctive relief to this Court. Instead, Appellees suggest that, because certain injunctive relief remains pending before the district court, this Court lacks jurisdiction to entertain what Appellees refer to as a "piecemeal appeal[]." Mot. at 4.

The holding for which Appellees advocate would create an unprecedented and unwarranted limitation on this Court's express statutory jurisdiction to hear interlocutory appeals from district orders denying motions for injunctive relief. This proposed new rule finds no support in the text of section 1292(a)(1), in the extensive Fourth Circuit case law interpreting that provision, or in common sense. Indeed, this Court and others have explicitly *rejected* attempts to narrow the jurisdiction to hear interlocutory appeals under section 1292(a)(1) by incorporating a "finality" requirement such as the one urged by Appellees. To the contrary, this

Court has recognized section 1292(a)(1)'s grant of jurisdiction as a "statutory mandate" to hear interlocutory appeals falling within that section.

The undue limits on this Court's jurisdiction advocated by Appellees would effectively foreclose appeals in cases—such as this one—in which this Court's intervention is necessary to prevent ongoing and irreparable harm. Every day until Part I of North Carolina's House Bill 2 ("H.B.2.") is enjoined, thousands of transgender North Carolinians like Plaintiffs are required to live, work, and learn under its discriminatory mandate. They are confronted on a daily basis not only with the stigma of the second-class status the State has imposed upon them, but also the very urgent and practical dilemma created by H.B.2—that, in most government facilities, they no longer have a safe place to use the restroom.

This Court should reject Appellees' motion and recognize its jurisdiction to entertain Plaintiffs' appeal.

ARGUMENT

I. The Unprecedented Jurisdictional Limitation that Appellees Seek Conflicts with the Text of Section 1292(a)(1) and Numerous Lines of Fourth Circuit Precedent.

Appellees propose that this Court read into section 1292(a)(1) an unprecedented jurisdictional limitation—akin to the final judgment rule—forbidding what they deem to be "piecemeal appeals." Mot. at 4. Although Appellees do not define the contours of this limitation beyond the instant case, they

suggest that Plaintiffs are unable to seek appellate review because certain injunctive relief remains pending before the district court. Simply put, Appellees' argument is not only foreclosed on multiple grounds, but also entirely alien to the jurisprudence interpreting and applying section 1292(a)(1).

As an initial matter, Appellees' proposed jurisdictional limitation conflicts with the unambiguous Congressional grant of jurisdiction in section 1292(a)(1). The text of that provision could not be clearer that this Court "shall have" jurisdiction to hear appeals from "[i]nterlocutory orders of the district courts of the United States . . . granting, continuing, modifying, *refusing* or dissolving injunctions." 28 U.S.C. § 1292(a)(1) (emphasis added). Congress did not limit the grant of jurisdiction to exclude situations where a separate request for a preliminary injunction, based on a different legal ground, remained under consideration in the district court. To the contrary, this Court has interpreted section 1292(a)(1) as creating a bright-line rule permitting interlocutory appeals of orders denying preliminary injunctive relief: "[I]t is clear that an order denying a preliminary injunction is an appealable interlocutory order under 28 U.S.C. § 1292(a)(1)." *Doe v. Charleston Area Med. Ctr., Inc.*, 529 F.2d 638, 641 n.5 (4th Cir. 1975); *see also Hughes Network Sys., Inc. v. InterDigital Commc'ns Corp.*, 17 F.3d 691, 693 (4th Cir. 1994) ("The decision on a preliminary injunction motion is an appealable order. *See* 28 U.S.C. 1292(a)(1)."). Appellees' proposed

jurisdictional limitation thus conflicts with both the text of section 1292(a)(1) and this Court's interpretation of that statute.

Indeed, this Court has suggested that it could not craft exceptions to 1292(a)(1)'s grant of jurisdiction even if there were a persuasive reason to do so. In *NationsBank Corp. v. Herman*, this Court described its jurisdiction to hear appeals of preliminary injunctions under section 1292(a)(1) as not merely a question of discretion, but as a "*statutory mandate* to hear [a party's] interlocutory appeal of the preliminary injunction." 174 F.3d 424, 427 (4th Cir. 1999) (emphasis added) (contrasting the Court's discretion to address additional questions intertwined with injunctive relief). In other words, this Court cannot—as Appellees advocate—simply decline to exercise jurisdiction when a party has timely and properly filed an appeal from a decision denying a preliminary injunction. Rather, its "statutory mandate" is to hear appeals, such as this one, that fall within the scope of Congress's jurisdictional grant. *Id.*

Indeed, in at least two instances within the last ten years, this Court has in fact exercised jurisdiction to hear what Appellees characterize as "piecemeal appeals." In *Everett v. Pitt County Board of Education*, this Court addressed an appeal by parents whose motion to enjoin a school board from implementing a particular school assignment plan had been denied. 678 F.3d 281, 287-88 (4th Cir. 2012). The school board challenged this Court's jurisdiction, contending that the

district court's order was not final, because the district court had indicated its intent to reconsider certain merits issues underlying the denial of injunctive relief: "[T]he School Board argues that the district court's denial of Appellants' motion is not a 'final order' pursuant to 28 U.S.C. § 1291 because the district court 'has expressed its clear intention to take up the issue of unitary status after the submission of the parties' reports no later than 31 December 2012.'" *Id.* at 288. Citing the plain text of section 1292(a)(1), this Court explicitly refused to hold that its jurisdiction could be circumscribed by rules of finality: "[W]e reject the School Board's jurisdiction argument [because] 28 U.S.C. § 1292(a)(1) provides this Court with jurisdiction over district court decisions 'granting, continuing, modifying, refusing or dissolving injunctions.'" *Id.* This Court accordingly addressed the district court's order on the merits.

Similarly, in *Norfolk Dredging Co. v. Wiley*, this Court addressed a district court's order dissolving in part an injunction it had issued, in which it had (1) enjoined all suits against a dredging operator in other courts or venues, and (2) accepted as a limit on the dredging operator's liability the value of the tugboat that was involved in the accident. 439 F.3d 205, 207 (4th Cir. 2006). In its dissolution order, the district court modified its prior injunction to permit additional suits against the dredging operator, but specifically left unresolved the key question of the operator's liability beyond the asserted value of the tugboat

under the so-called "flotilla doctrine," holding that it would "reconsider the flotilla doctrine argument if [plaintiff's] judgment were to exceed $80,000 and [he] again filed the motion to increase the fund." *Id.* at 208. Addressing the district court's modification on appeal, this Court was not deterred by the lack of finality in the district court's ruling, and instead—merely citing section 1292(a)(1)—accepted jurisdiction to hear the dredging operator's appeal from the order partially dissolving the prior injunction. *Id.*

This Court's assumption of jurisdiction in cases such as *Everett* and *Norfolk Dredging*—in which significant issues as to injunctive relief remained unresolved in the district court—is flatly inconsistent with the notion that section 1292(a)(1) somehow incorporates considerations of finality. And in fact, this Court's assumption of jurisdiction in such cases is consistent with a uniform line of cases from other circuits unambiguously articulating that section 1292(a)(1) "has no requirement pertaining to finality of judgment," and thus that the existence of unresolved issues simply has no relevance to an appellate court's ability to entertain an interlocutory appeal. *Am. Cyanamid Co. v. Lincoln Labs., Inc.*, 403 F.2d 486, 488 (7th Cir. 1968); *see also, e.g., Schulner v. Jack Eckerd Corp.*, 706 F.2d 1113, 1114 (11th Cir. 1983) ("[i]t is well-established that the granting of an injunction is appealable as an interlocutory order even though the trial court may have reserved its determination of remaining issues"); *SquirtCo v. Seven-Up Co.*,

628 F.2d 1086, 1090 (8th Cir. 1980) ("Notwithstanding reservation of the damages issue for later determination, this court had jurisdiction under 28 U.S.C. § 1292(a)(1) to review the grant of the injunction and all matters related to it."); *King Instrument Corp. v. Otari Corp.*, 814 F.2d 1560, 1562 (Fed. Cir. 1987) ("Courts have interpreted § 1292(a) as conferring jurisdiction on courts of appeals when a trial court has issued an order involving any injunctive relief regardless of whether all other issues have been finally adjudicated."). The sheer volume of judicial language from this and other circuits that would be upended if Appellees' proposed rule were to be adopted should be seen as a measure of how unprecedented and unwarranted their position is.

And tellingly, this Court and others have already explicitly rejected a necessary consequence of the finality requirement that Appellees advocate for: that if a district court denied injunctive relief as to fewer than all parties or on fewer than all claims, aggrieved parties would be required to obtain a certification under 28 U.S.C. § 1292(b) or a partial judgment under Federal Rule of Civil Procedure 54(b) to pursue an appeal. In *Allstate Insurance Co. v. McNeill*, this Court held that there was simply no room for section 1292(b) certifications in appeals of injunctions, holding that section 1292(a)(1) is "self-executing without need of permission under 1292(b)." 382 F.2d 84, 87-88 (4th Cir. 1967). Every other circuit to address the issue likewise has held that partial judgment under Federal

Rule of Civil Procedure 54(b) cannot be required in order to take an interlocutory appeal under section 1292(a)(1), even when an injunction is not adjudicated as to all claims or parties.[1] That this Court and others have been unable to foresee any intersection between section 1292(a)(1) and either section 1292(b) or Rule 54(b) demonstrates how foreign the rule advocated for by Appellees is to the current structure of interlocutory appeals.

II. The Line of Authority Cited by Appellees Pertains Solely to Orders Having the *Effect* of Denying an Injunction, and Thus Provides No Support for Their Proposed Rule.

The line of Seventh Circuit authority upon which Appellees rely (Mot. at 5-6) provides no support for the jurisdictional limitation that they advocate. Indeed, not one of the authorities cited by Appellees is one in which an appellate court was reviewing a decision denying an actual motion for preliminary injunctive relief. Instead, what was at issue in these cases was an order dismissing an underlying claim or count in the complaint (or recognizing that a plaintiff had failed even to

[1] *See Gray Line Motor Tours, Inc. v. City of New Orleans*, 498 F.2d 293, 295 n.1 (5th Cir. 1974) (noting that, under section 1292(a)(1), "an appeal may be perfected . . . even when the action involves local claims or multiple parties," because injunctive orders are "considered to be outside the scope of Rule 54(b)"); *Ransburg Electro-Coating Corp. v. Lansdale Finishers, Inc.*, 484 F.2d 1037, 1038 (3d Cir. 1973) ("[Rule] 54(b) does not affect the appealability of orders 'granting . . . injunctions.'"); *Atl. Richfield Co. v. Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO*, 447 F.2d 945, 947-48 (7th Cir. 1971) (citing cases from additional circuits, holding that "a 54(b) certificate is not required when an appeal may be prosecuted as a matter of right pursuant to 28 U.S.C. § 1292(a)").

plead such a count in the complaint), which therefore arguably had the *effect* of denying such injunctive relief.

In *Albert v. Trans Union Corp.*, for example, defendants moved to "dismiss certain counts" of the complaint for which plaintiffs sought injunctive relief, and the district court granted *that* motion, holding that "private plaintiffs are not entitled to injunctive relief under the [Fair Credit Reporting Act]" because "Congress intended to provide injunctive relief only to the FTC." 346 F.3d 734, 736 (7th Cir. 2003). Plaintiffs sought "immediate review of the dismissal." *Id.* Similarly, in *Onyango v. Downtown Entertainment LLC*, an unpublished disposition, the district court entered an order striking from the complaint a count for injunctive relief, on the ground that plaintiff "did not plead facts sufficient for the Court to conclude that there is a substantial likelihood that future violations will occur." 525 F. App'x 458, 460 (7th Cir. 2013). The Seventh Circuit noted specifically that plaintiff "did not file a timely appeal of the denial of his motion for a *preliminary* injunction" and that only the separate dismissal of the claim was at issue. *Id.* Finally, in *Cherry v. Berge*, another unpublished disposition, the plaintiff had moved for a preliminary injunction—but he did so on a retaliation claim that he "had not presented . . . in his complaint" and that the district judge, as a rule, required to be presented in a separate lawsuit from the other claims at issue. 98 F. App'x 513, 515 (7th Cir. 2004). The district court "did not reach the merits

of [the] motion" but rather dismissed it with leave to refile the claim in a separate action. *Id.* Thus, the issue before the Seventh Circuit was the denial of what it deemed "a request to amend [plaintiff's] complaint to add a new claim." *Id.* at 516.[2]

The treatise that Appellees cite also recognizes the fundamental distinction between orders addressing an actual request for injunctive relief and those that have the *effect* of doing so. As that treatise explains, "The language of § 1292(a)(1) should be read at face value when an order expressly refuses an explicit request for a preliminary injunction." 16 Wright & Miller, *Fed. Prac. and Proc.* § 3924.1. Such appeals are contrasted, however, with "appeals . . . attempted from a wide variety of interlocutory orders on the ground that they have effectively refused a permanent injunction," and specifically those cases dealing with "appeal[s] from interlocutory orders that strike claims for injunctive relief." *Id.* Although Appellees fail to acknowledge as much, it is only this latter discussion that they quote—and that discusses the Seventh Circuit line of authority they cite.

[2] In *Cherry*, the decision as to injunctive relief also was effectively moot, since plaintiff had—between the original filing of his interlocutory appeal and its adjudication—filed a separate suit enumerating the same retaliation claim, moved anew for identical injunctive relief in the district court, and already unsuccessfully appealed the denial of that injunctive relief to the Seventh Circuit. *Id.* at 515-16 (citing *Cherry v. Frank*, 83 F. App'x 135 (7th Cir. 2003)).

In the scenario in which an order does not actually adjudicate a motion for injunctive relief—but rather adjudicates some motion that might have *the effect of* foreclosing injunctive relief—courts have been more circumspect in permitting interlocutory appeals. A different standard may be justified in such cases, because: (1) such appeals are not specifically enumerated in section 1292(a)(1)'s jurisdictional grant; (2) the number and variety of orders that arguably *have the effect* of adjudicating injunctive relief is far greater than with orders that actually adjudicate motions for injunctive relief; and (3) in certain circumstances, hearing interlocutory appeals of orders that have the *effect* of somehow foreclosing injunctive relief might be in derogation of a separate Congressional mandate—namely, the final judgment rule.[3] Thus, when the Supreme Court extended jurisdiction under section 1292(a)(1) to orders that do not by their terms refuse an injunction but "ha[ve] the practical effect of doing so," it limited that extension to only those orders that have a "serious, perhaps irreparable, consequence." *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 86 (1981).

But courts—including this Court—have explicitly rejected attempts to apply heightened requirements in interlocutory appeals from orders that adjudicate an

[3] This third point is particularly salient when—as in *Albert* and *Onyango*—the court has done no more than dismiss a claim for relief sought in a complaint when a plaintiff had not otherwise pressed for such relief. In such cases, an interlocutory appeal would more obviously flout the normal rules governing the dismissal of one claim, count, or party from an action.

actual motion for injunctive relief. In *NationsBank*, the plaintiff urged, based on *Carson*, that "a court of appeals should only exercise jurisdiction under section 1292(a)(1) when the injunction is 'of serious, perhaps irreparable, consequence.'" 174 F.3d at 427 n.1. This Court rejected such additional requirements not rooted in the statutory text:

> [I]n *Carson*, the Court set forth the standard governing appeals of interlocutory orders that have effects similar to those of injunctions, but that technically are not injunctions. **When, instead, a trial court enters an actual injunction, as in this case, *Carson* is inapplicable, and section 1292(a)(1) applies directly.**

Id. (internal citation omitted; emphasis added). The Seventh Circuit itself has also refused to apply the heightened *Carson* requirement to orders falling within the explicit text of section 1292(a)(1). *See Holmes v. Fisher*, 854 F.2d 229, 231-32 (7th Cir. 1988) ("Section 1292(a)(1) is decently plain: all interlocutory orders denying injunctions are appealable. . . . Asking whether an order plainly denying an injunction also caused irreparable injury would add a gratuitously complicating factor to the simple statutory rule."); *see also* 16 Wright & Miller § 3924.1, at n.3 (collecting cases from other circuits).

In short, although compelling reasons may exist to limit jurisdiction when—as in the Seventh Circuit cases cited by Appellees—a court strikes a claim in a complaint that includes a prayer for injunctive relief, these cases provide no rationale for narrowing this Court's exercise of the explicit statutory jurisdiction

granted to it in section 1292(a)(1) in cases such as this one in which the district court actually ruled upon a motion for preliminary injunction.

III. Appellees' Proposed Jurisdictional Limitation Cannot Be Justified by Generalized Concerns Regarding "Piecemeal Appeals," and Would Permit Urgent, Irreparable Harms Such as Those in This Case to Go Unaddressed.

Unable to support their proposed jurisdictional limitation with actual precedent, Appellees fall back on a general policy disfavoring "piecemeal appeals." Mot. at 1. Whatever this Court's general opinion toward "piecemeal appeals," however, Appellees are unable to point to even one case in which this Court has applied this rationale to narrow its exercise of the jurisdiction conferred in section 1292(a)(1). The case that they cite for this proposition, *Cassidy v. Virginia Carolina Veneer Corp.*, in fact recognizes that interlocutory appeals should properly be entertained when section 1292 permits. 652 F.2d 380, 383 (4th Cir. 1981).[4] And indeed, such a narrowing of jurisdiction would be impossible to

[4] In *Cassidy*, defendants appealed a district court order that granted a permanent injunction against them and that also stated that it would award attorneys' fees—though it postponed the actual enumeration of the fees. *Id.* at 382. This Court specifically noted that, as long as injunctive relief (the "substantive issue") was pressed on appeal, it properly had jurisdiction to hear the appeal. *Id.* at 383. However, defendants had "abandoned the [preliminary injunction] issue on the merits," and thus this Court held that, when all that remained in the appeal was an order awarding attorneys' fees in principle, the appeal lacked finality. *Id.* Thus, nothing in *Cassidy* supports Appellees' proposed jurisdictional limitation; if anything, the Court's original willingness to entertain the appeal while issues remained unresolved before the district court cuts against Appellees' proposed rule.

reconcile with this Court's recognition, in *NationsBank*, that section 1292(a)(1) imposes a "statutory mandate" to hear interlocutory appears of preliminary injunctions, 174 F.3d at 427, and its bright-line rule that "an order denying a preliminary injunction is an appealable interlocutory order under 28 U.S.C. § 1292(a)(1)," *Doe*, 529 F.2d at 641 n.5.

Indeed, Appellees' suggestion that this Court should discourage "piecemeal appeals" ignores the fact that section 1292(a)(1) expressly permits serial appeals from orders merely "modifying" or "dissolving" (or refusing to modify or dissolve) injunctions. *See, e.g.*, *Norfolk Dredging*, 439 F.3d at 208 (adjudicating an appeal from partial dissolution of preliminary injunction); *United States ex rel. Rahman v. Oncology Associates*, 198 F.3d 489, 494 (4th Cir. 1999) (adjudicating an appeal from "the district court's order denying the motion to dissolve the injunction"); *see also* 16 Wright & Miller § 3924.1 (noting the possibility of serial appeals from repeated district court denials of motions for injunctions). Even when this Court has noted the potential for serial litigation caused by interlocutory appeals from preliminary injunctions, it has not suggested that the proper cure is to curb its jurisdiction to hear such appeals: instead, taking such *seriatim* jurisdiction as a given, this Court has suggested that the proper response is to strictly enforce the substantive requirements for granting injunctive relief. *See Hughes Network Sys.*,

17 F.3d at 694 (noting that, to account for such concerns, "courts have insisted that the harm necessary to justify issuance of a preliminary injunction be irreparable.").

From a purely logistical perspective, it is telling that Appellees' articulation of their proposed jurisdictional rule is short on details regarding its scope and implementation. For example, Appellees seem to suggest (though do not actually state) that such a jurisdictional limitation would apply only to the denial of injunctive relief, and not its grant. Mot. at 4. Yet section 1292(a)(1) has never before been asymmetrically construed as applying to orders granting injunctions in a different manner than those denying them. And Appellees do not state whether such a similar rule would apply to orders dissolving or modifying (or failing to dissolve or modify) injunctions. Nor, even as applied to orders denying injunctions, do Appellees ultimately provide a clear principle as to when this Court should find an appeal is sufficiently final so as to permit interlocutory review. If an injunction is denied as to one party but not another, does that detract from its finality? Appellees simply do not say. Ultimately, Appellees ask this Court to replace a clear, bright-line rule with a set of difficult finality considerations that even they cannot resolve—ignoring that, with respect to jurisdictional issues in particular, clarity is of singular importance. *See Budinich v. Becton Dickinson and Co.*, 486 U.S. 196, 202 (1988) (noting that, with regard to rules of appellate jurisdiction, "[c]ourts and litigants are best served by [a] bright-line rule").

Appellees also ignore the fact that their proposed rule will have tremendous practical consequences in foreclosing the ability of parties to seek the intervention of appellate courts to prevent serious and irreparable harms—or, worse, inviting gamesmanship by parties or district judges to forestall appellate review. Appellees' proposed jurisdictional limitation would grant district courts the ability to deny an injunction on one ground while simultaneously forestalling appellate review of its decision by declining to adjudicate another ground for relief that, if recognized, would afford the same injunctive relief. The reason for delaying the alternative claim may be benign—in this case, for example, the Court requested additional briefing. However, under the rule Appellees seek, a party could strategically delay the adjudication of *all* grounds for injunctive relief by, for example, seeking extensive discovery as to one claim or raising procedural barriers to the adjudication of one issue. The result is that urgent and irreparable harms will be perpetuated without any recourse to appellate review—or, worse, that plaintiffs may be forced to abandon otherwise meritorious claims so as to more quickly seek appeal.

Here, Appellees seek to use the sequence of events in the district court to cast blame on Plaintiffs-Appellants themselves. But that is meritless. When the district court deferred deciding whether a preliminary injunction based on Plaintiffs-Appellants' due process claims was warranted, it offered the opportunity

for additional briefing and even posed specific supplemental questions. Mot. Exh. A at 82 (JA992). It also indicated that any further oral argument on those claims would occur *at the time of trial*. Mot. Exh. A at 82-83 (JA992-93). Under these circumstances, Plaintiffs-Appellants had every reason to provide the additional briefing requested by the court. They did so secure in the knowledge that they had already filed a valid appeal of the denial of preliminary relief based on equal protection. It is absurd to suggest these actions somehow retroactively deprived this Court of the jurisdiction it had the day the appeal was filed.

Finally, it is important to understand what is at stake here. Plaintiffs-Appellants seek only a return to the status quo before H.B.2's enactment. As the district court found, transgender individuals like Plaintiffs had been using sex-separated facilities matching their gender identity long before H.B.2, "without complaint," "without causing any known infringement on the privacy rights of others," and "without posing a safety threat to anyone." Mot Exh. A at 45, 76-77 (JA955, JA986-87). Indeed, counsel for Governor McCrory conceded that he was "certain" that transgender people had likely used restrooms matching their gender identity before H.B.2, and he was "not aware of any problem with that." Exh. 1 at 4 (JA832).

But now that H.B.2 has changed the *status quo ante*, the harm to Plaintiffs from being denied access to restrooms and other facilities is acute. The

preliminary injunction granted by the district court under Title IX was limited to the facilities of the University of North Carolina and the three individual transgender Plaintiffs. Mot. Exh. A at 81-82 (JA991-92). Thus, absent intervention from this Court, when Plaintiff Joaquín Carcaño visits state government offices as part of his normal job duties, he will have no place to safely use the restroom. Exh. 2 at 5 (JA129). Nor will he have a safe place to use the restroom at the highway rest areas he previously used when driving to Atlanta to visit his brother. Exh. 2 at 6 (JA130). As the district court recognized, a failure to enjoin the law would "cause substantial hardship to the individual transgender Plaintiffs, disrupting their lives." Mot Exh. A at 74 (JA984). The same is no less true with regard to the thousands of other transgender North Carolinians who are prejudiced by H.B.2, including the many transgender members of the ACLU of North Carolina whose rights are being enforced here by that associational plaintiff.

* * *

This Court should reject Appellees' radical and unwarranted jurisdictional limitation. For the much same reasons, the Court should also reject Appellees' alternative request that this proceeding be held in abeyance. As the discussion above illustrates, this Court and others have regularly proceeded with interlocutory appeals of preliminary injunctions while district court proceedings continued. *See, e.g.*, *Everett*, 678 F.3d at 288 (proceeding with appeal and dismissing as irrelevant

the potential that the district court might issue further rulings). Indeed, Appellees cannot credibly argue for such relief given their argument below that the district court should stay proceedings on the ground that *this appeal* would "provide guidance" to that court. Exh. 3 at 4 (Dist. Ct. D.E. 143 at 29); *see also* Exh. 3 at 8-9, (Dist. Ct. D.E. 143 at 36-37) (arguing for a stay below in part because Appellees would be "seeking guidance from the Fourth Circuit").

CONCLUSION

For the foregoing reasons, Plaintiffs ask that this Court heed section 1292(a)(1)'s "statutory mandate" and entertain this appeal without delay.

Dated: October 31, 2016

/s/ Jon W. Davidson

Jon W. Davidson
Peter C. Renn
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
4221 Wilshire Blvd., Ste. 280
Los Angeles, CA 90010
Phone: (213) 382-7600
jdavidson@lambdalegal.org
prenn@lambdalegal.org

Tara L. Borelli
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
730 Peachtree Street NE, Suite 640
Atlanta, GA 30308-1210
Phone: (404) 897-1880
tborelli@lambdalegal.org

Kyle A. Palazzolo
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
105 W. Adams, 26th Floor
Chicago, IL 60603-6208
Phone: (312) 663-4413
kpalazzolo@lambdalegal.org

Paul M. Smith
Scott B. Wilkens
Nicholas W. Tarasen
JENNER & BLOCK LLP
1099 New York Ave. NW, Suite 900
Washington, DC 20001-4412
Phone: (202) 639-6000
psmith@jenner.com
swilkens@jenner.com
ntarasen@jenner.com

James D. Esseks
Leslie Cooper
Chase B. Strangio
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
Phone: (212) 549-2500
jesseks@aclu.org
lcooper@aclu.org
cstrangio@aclu.org

Elizabeth O. Gill
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111
Phone: (415) 343-0770
egill@aclunc.org

Christopher A. Brook
AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA LEGAL FOUNDATION
Post Office Box 28004
Raleigh, NC 27611
Phone: (919) 834-3466
cbrook@acluofnc.org

Counsel for Plaintiffs-Appellants

INDEX OF EXHIBITS

Exhibit No.	Description
Exhibit 1	Excerpt from Transcript of Preliminary Injunction Hearing before District Judge Schroeder (Aug. 1, 2016) (JA767-68, JA831-33)
Exhibit 2	Declaration of Joaquín Carcaño in Support of Plaintiffs' Motion for Preliminary Injunction (JA125-30)
Exhibit 3	Excerpt from Transcript of Status Conference before Magistrate Judge Peake (Sept. 2, 2016) (Dist. Ct. D.E. 143 at 1-2, 28-30, 35-38)

CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2016, the foregoing PLAINTIFFS-APPELLANTS' OPPOSITION TO MOTION TO DISMISS APPEAL, including all exhibits thereto, was served on all parties or their counsel of record through the CM/ECF system.

/s/ Jon W. Davidson
Jon W. Davidson

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

JOAQUIN CARCAÑO, et al.,) 1:16CV236
)
Plaintiffs,)
)
V.)
)
PATRICK McCRORY, in his)
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.)
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UNITED STATES OF AMERICA,) 1:16CV425
)
Plaintiff,)
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V.)
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STATE OF NORTH CAROLINA, et al.)
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and)
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PHIL BERGER, in his official)
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Tempore of the North Carolina)
Senate; and TIM MOORE, in his)
Official capacity as Speaker of)
The North Carolina House of) Winston-Salem, North Carolina
Representatives,) August 1, 2016
) 10:00 a.m.
Intervenor-Defendants.)
_____

EXHIBIT 1

TRANSCRIPT OF THE **PRELIMINARY INJUNCTION HEARING**
BEFORE THE HONORABLE THOMAS D. SCHROEDER
UNITED STATES DISTRICT JUDGE

APPEARANCES:

1:16CV236

For the Plaintiff: PAUL M SMITH, ESQ.
SCOTT B. WILKENS, ESQ.
JENNER & BLOCK, LLC.
1099 New York Avenue, NW Suite 900
Washington, DC 20005

CHRISTOPHER A. BROOK, ESQ.
AMERICAN CIVIL LIBERTIES UNION OF NC
P. O. Box 28004
Raleigh, North Carolina 27611-8004

1:16CV425

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

RIPLEY RAND, U.S. ATTORNEY
101 S. Edgeworth Street, 4th Floor
Greensboro, North Carolina 27401

For the Defendants:

(State of NC, Governor McCrory, DPS) KARL S. BOWERS , JR., ESQ.
BOWERS LAW OFFICE, LLC
P.O. Box 50549
Columbia, South Carolina 29250

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

MS. STOUGHTON: I think the answer to your question is, yes, there is conduct that would be reached by the constitutional claims that is broader than that which is covered by the three statutes.

THE COURT: That's what I thought. All right. Thank you.

Mr. Bowers.

MR. BOWERS: Thank you, Your Honor.

THE COURT: Tell me, what was the problem that this portion of Part I of H.B. 2 was remedying that preexisted for a millennia in North Carolina?

MR. BOWERS: I'm not sure I understand your question, Your Honor.

THE COURT: Well, I assume the statute was passed to make sure that there was some problem that was cured. What was the problem?

MR. BOWERS: It was in -- Your Honor, speaking solely on behalf of the Governor -- Mr. Duncan here, of course, is here to speak for the Legislature Intervenors -- the problem was simply the overreach by the City of Charlotte in their local ordinance.

THE COURT: But if you strike down that ordinance, which Part II of H.B. 2 effectively did, then why do you need Part I? What is it doing?

MR. BOWERS: It's clarifying what the public policy

of the state of North Carolina is, and it's also reaffirming the important government interests of ensuring privacy in the most intimate -- some of the most intimate segments in life.

THE COURT: Did the state have transgenders using restrooms that was of the sex they identified with prior to H.B. 2?

MR. BOWERS: I'm certain that's probably the case.

THE COURT: Was there any problem with that?

MR. BOWERS: I am not aware of any problem with that.

THE COURT: Is there any legislative record here that indicated that there was a problem that needed to be addressed?

MR. BOWERS: Your Honor, to my knowledge, though I will defer to Mr. Duncan on that, I know there were some legislative record, but I can't say that there was, as I stand here today.

THE COURT: Okay. So what's wrong with the State going back to the policy it had before the Charlotte ordinance was passed from a -- I don't mean wrong, I mean, from a point of protecting the interests that the State says it's seeking to protect?

MR. BOWERS: Your Honor, that's an interesting question, and I would say that -- I would turn that on its head actually, and I would say in the context of this preliminary injunction hearing, what's wrong with H.B. 2 on its face reaffirming the important government interests in ensuring

privacy in that setting?

THE COURT: Well, as I understand the argument from the Plaintiffs, the argument is, in part, that it doesn't do that, that it doesn't reaffirm the policy, that the protections in place in North Carolina were there with the various laws, trespass and others, which is why I asked about those, and that what this actually does is now exclude a certain group of people who previously were using restrooms and showers and changing facilities apparently without incident all the way up until the time Charlotte passed its ordinance. That's their position, I think. They can correct me, but --

MR. BOWERS: Right. Well, Your Honor, I'll just go back to Mr. Smith's arguments a little while ago -- or his statements, rather, is that there is a privacy interest in not being exposed to people, and that privacy interest applies to everyone, transgender or otherwise, and again H.B. 2 simply reaffirms and ratifies that that privacy interest --

THE COURT: Is that privacy interest protected by the indecent exposure and trespass and peeping laws and laws like that that I think you all pointed out to me as well in your briefing?

MR. BOWERS: Yes, Your Honor, I think that's true.

THE COURT: Why aren't those sufficient to protect those interests, or are they?

MR. BOWERS: Your Honor, I would say, like in the

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

JOAQUÍN CARCAÑO; PAYTON GREY MCGARRY; H.S., by her next friend and mother, KATHRYN SCHAFER; ANGELA GILMORE; KELLY TRENT; BEVERLY NEWELL; and AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA,

Plaintiffs,

v.

PATRICK MCCRORY, in his official capacity as Governor of North Carolina; UNIVERSITY OF NORTH CAROLINA; BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA; and W. LOUIS BISSETTE, JR., in his official capacity as Chairman of the Board of Governors of the University of North Carolina,

Defendants.

No. 1:16-cv-00236-TDS-JEP

DECLARATION OF JOAQUÍN CARCAÑO

I, Joaquín Carcaño, declare as follows:

1. My name is Joaquín Carcaño, and I am 27 years old.

2. I work for the University of North Carolina at Chapel Hill's ("UNC-Chapel Hill") Institute for Global Health and Infectious Disease as a Project Coordinator. My project provides medical education and services such as HIV testing to the Latino/a population.

EXHIBIT 2

3. I am a member of the ACLU of North Carolina.

4. Below is a current photograph of me.

5. I am a man.

6. I am transgender. The sex I was assigned at birth was female, which is what is reflected on my birth certificate, but my birth certificate does not match my gender identity or sex, which are male.

7. In public, I am recognized as a man, and prior to the passage of H.B. 2, I was treated like all other men at UNC-Chapel Hill.

8. I was born and raised in South Texas. Since I was very young, around 7 or 8 years old, I was aware that I did not feel like a girl, but I did not know how to express how I felt.

9. It was not until later in my adult life that I was ready to accept that I am male.

10. Since 2013, I have been in the continuous care of a licensed mental health clinician, who diagnosed me with gender dysphoria. I initially sought treatment for depression, which was caused in part by my gender dysphoria.

11. I began using Joaquín as my first name in January 2015. My friends, family, and coworkers recognize me as a man, and they refer to me using my male name and male pronouns.

12. As part of my treatment, my physician has recommended and prescribed hormone treatment, which I have been receiving since May 2015. The hormone treatment has deepened my voice, increased the growth of my facial hair, and given me a more masculine appearance.

13. The hormone treatment has helped alleviate the distress that I was experiencing due to the disconnect between the sex I was assigned at birth and my male identity, and it has made me feel more comfortable with who I am.

14. In addition, and as part my treatment for gender dysphoria, I also obtained chest surgery (bilateral mastectomy) in January 2016.

15. As part of my social transition, I began using the men's restroom at work and elsewhere in late 2015, which occurred without incident for the five months or so before H.B. 2's enactment. My therapist had specifically recommended that I only use the men's restroom, because she was concerned that use of the women's restroom would compromise my mental health, well-being, and safety. Her concern was valid. By late 2015, I had noticeable facial hair growth as a result of my hormone treatment and others would recognize me as a man based on my physical appearance.

16. Prior to the passage of H.B. 2, I just went to the multi-user men's restroom on my floor when I had to use the restroom like all other men in the office.

17. I am now comfortable with the status of my treatment related to my gender dysphoria and, aside from the distress now caused by the passage of H.B. 2, my distress has been managed through my treatment. I plan to continue my treatment under the supervision of medical professionals based on my medical needs.

18. The only restrooms on the floor where I work at UNC-Chapel Hill are multiple-occupancy and are designated either for men or for women. H.B. 2 thus excludes me from using the same restrooms that my coworkers typically use.

19. In the initial period after H.B. 2's passage, I generally used a single-occupancy gender-neutral restroom in another building on campus, which was approximately a 20-30 minute roundtrip walk away from my building.

20. I was told later by administrative staff in the building where I work that they had learned of a single-occupancy restroom based on building floor plans. It is accessible using a special service elevator, and the restroom is tucked away in a cubby down a hallway in a part of the building used for housekeeping.

21. I feel humiliated by being singled out and forced to use a separate restroom from all my coworkers. Because using the special service elevator several times a day would attract even greater attention to the fact that I am not able to use the same restrooms as my coworkers, I have generally resorted to leaving the building and using a restroom in another building on-campus. I now have to plan out my trips to the restroom as part of my schedule. For example, I cannot simply make a quick trip to the restroom

before a meeting is about to start, as my coworkers are able to do. All of this often causes me to delay or avoid going to the restroom, or to limit my fluid intake.

22. I am afraid for my safety because of the passage of H.B. 2. The idea of being forced into the women's restroom causes significant anxiety and emotional distress for me.

23. Apart from the building where I work at UNC-Chapel Hill, I also used men's restrooms elsewhere on campus without incident for approximately five months prior to H.B. 2's passage.

24. Using the women's restroom is not an option for me, just like it is not an option for non-transgender men on campus. Forcing me to use the women's restroom would create significant mental and emotional distress for me, and I worry it could lead to violence and harassment against me.

25. In addition to using the restrooms on campus at UNC-Chapel Hill, I have also visited North Carolina public agencies, such as the Division of Motor Vehicles to obtain my driver's license, and I will likely have to visit these locations again in the future. Because of H.B. 2, I will no longer be able to use the men's restroom when I go to such public agency locations.

26. As part of my job at UNC-Chapel Hill, I also have had to visit the offices North Carolina Department of Health and Human Services many times in the past, and I will continue to need to do so in the future. Prior to passage of H.B. 2, I used the men's restroom while at their offices, but I will be banned from doing so in the future under H.B. 2.

27. Similarly, I have visited state courthouses in Chapel Hill as part of the process to change my legal name, which includes a traditionally female first name, to Joaquín, the name I currently use. Because my name change process is ongoing, I will continue to visit state courthouses in the future, but I will be banned from using the men's restroom there under H.B. 2.

28. In traveling throughout the state, I have also used and will continue to use the North Carolina Rest Area system, which has public restrooms along highways and is operated by the North Carolina Department of Transportation. I often use restrooms provided by that system when I travel approximately once a month to visit my brother in Atlanta, and when I visit Washington, D.C. periodically. In addition, when traveling further out of state, I have also used and will continue to use the Raleigh-Durham International Airport, which also has restrooms. I will need to continue to use those restrooms in the future, but I will be banned from using the men's restroom under H.B.2.

29. When out in public, such as at restaurants and stores, I use the men's restroom.

30. There have been no incidents or complaints that I am aware of, regarding my using the men's restroom.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on May 13th, 2016.

By: Joaquín Carcaño

Joaquín Carcaño

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

JOAQUIN CARCAÑO, et al., Plaintiffs, v. PATRICK McCRORY, in his 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.	1:16CV236
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.	1:16CV425 Winston-Salem, North Carolina September 2, 2016 10:07 a.m.

EXHIBIT 3

TRANSCRIPT OF THE **STATUS CONFERENCE**
BEFORE THE HONORABLE JOI E. PEAKE
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

1:16CV236

For the Plaintiff: SCOTT B. WILKENS, ESQ.
JENNER & BLOCK, LLC.
1099 New York Avenue, NW Suite 900
Washington, DC 20005

JENIFER R. WOLFE, ESQ.
BROWN & BUNCH, PLLC.
101 North Columbia Street
Chapel Hill, North Carolina 27514

1:16CV425

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

For the Defendants:

(State of NC, Governor McCrory, DPS) KARL S. BOWERS , JR., ESQ.
BOWERS LAW OFFICE, LLC
P.O. Box 50549
Columbia, South Carolina 29250

WILLIAM W. STEWART, JR.
MILLBERG GORDON & STEWART, P.L.L.C.
1101 Haynes Street, Suite 104
Raleigh, North Carolina 27604

think that was the Court's anticipation, too, that this would be handled together. So I have some concern about setting it out indefinitely when the United States isn't asking for that.

MR. WILKENS: Your Honor, that's fine. We would not object to setting a trial date. Certainly, I mean, we can set one, and, obviously, as happens all the time, if that becomes difficult for some reason or it should be adjusted for some reason, we can come back to the Court on that.

THE COURT: I think that's true. I will tell you that ordinarily in this district trial dates don't get moved easily. So once it's set, I would anticipate that, you know, we're moving forward. Even with the November date, I'm not sure it works to move it unless there is enough of a way to make that happen.

MR. WILKENS: I appreciate that, Your Honor. I don't practice here very often, so to understand that trial dates stick is important for me. Thank you.

THE COURT: All right. Yes, sir, what's the State Defendants' position?

MR. BOWERS: Your Honor, I'm happy to answer any questions or go into sort of the reasons why we believe a stay is warranted, but I think it's probably more efficient to just start and say we do believe -- I agree largely with -- on behalf of the State Defendants, I agree largely with what Mr. Wilkens said in his opening remarks that a stay is warranted

and for the reasons we've set forth in our briefing, but also the discovery has been -- has become more burdensome than I think any of us anticipated for a variety of reasons.

Again, we can go into that. If the Court pleases, I am happy to do that, but I think we all agree that there are plenty of disagreements among the parties. I will say I have been very pleased with the professionalism that all the lawyers have engaged in, but there's some legitimate disagreements. I think Mr. Wilkens is right that there are -- there's likely some issues that are becoming ripe that will be subject to motions practice, and so to us it makes sense to stay depositions, stay the trial, and move forward with written discovery and try to resolve some of those discovery issues in the meantime.

You know, we appreciate -- of course, when we filed our motion to stay, the Carcano Plaintiffs had not yet filed their appeal. So that was not a basis for our motion, but we agree that the Fourth Circuit's decision there would provide guidance.

Also -- and Mr. Duncan will have more to say about this probably, but I think whether or not the Supreme Court takes up the *G.G.* case, which, if I'm not mistaken, Judge Schroeder mentioned seems likely, then that also has a bearing on the proceedings.

So in terms of a schedule, you know, we are not

really wed to any particular date, but we do believe that it should be pushed off and the dates that you were discussing with the Plaintiffs, whether it's March or April or whether it's June or July, we don't take a strong position on either one. So that's basically where we are.

THE COURT: So I have a few different sort of variations on the proposal to stay indefinitely versus just to continue the trial and keep things on what would ordinarily be sort of the Court's local rules for a discovery schedule. Whether the stay is linked to something happening in the Fourth Circuit or it's just based on the need for additional time for discovery, I think there's some slight variations that I have over here that I would want to make sure I understood the State Defendants' position on. I understand maybe you are not wedded to any particular one of those, but just generally what your thoughts would be about that.

MR. BOWERS: Sure.

THE COURT: Then, in addition, I want to know what you would propose to do with the preliminary injunction requests that are still outstanding. I had some conversations obviously with respect to pieces that may be tied together with the evidentiary presentation, that the Court then advanced the trial so all of that would happen together at the trial on the merits, which pieces of that, if any, could go ahead and proceed, particularly as to any of the Title IX pieces, and

Supreme Court?

MR. BOWERS: I think that accurately captures our position, yes, ma'am.

THE COURT: All right. I am going to let the other folks here speak.

MR. BOWERS: Good.

THE COURT: And then -- if there is anything they want to add and then see if there is anything else, and then I am going to take a break to let you all discuss -- to discuss with each other to sort of confirm your answers to some of the questions that I have posed here and to take a look at the Court's calendar and what my options might be for whether that's something we are going to entertain or whether we are going to stick with November.

MR. BOWERS: Thank you, Your Honor.

THE COURT: All right. Yes, sir.

MR. DUNCAN: Thank you, Your Honor. I just want to add to -- just add some context to what Mr. Bowers was saying, I guess a few things, some legal and some sort of factual issues.

The legal issues that have arisen since we came up with the original schedule are both the *G.G.* stay order and cert. petition and now the Carcano appeal. They sort of intertwine with each other because they both could potentially resolve, in some way or the other, legal issues that would bear

on the trial. The *G.G.* case, for example, which we represent the school board in that case as well, so I can speak with some detail about that --

THE COURT: Okay.

MR. DUNCAN: -- we filed the cert. petition on August 29th. If the parties adhere to the schedule set by the Supreme Court, and I have a feeling they will since the Supreme Court denied my motion to extend time to file the cert. petition, but we got it in anyway, then the case will be -- there will be an opposition on October 3. They could file it earlier, I guess. I don't know what they are going to do. There would be an opposition on October 3. By my calculations, the Court would then conference the case by November 4, or early Novemberish.

So that would mean that if we are going to a November trial, we would have the possibility of the Supreme Court granting cert. in that case right around the time that we're going to trial, which I think presents all sorts of legal difficulties. It's just not something you'd want to do when you're going to trial in a case where the issues could well overlap. As we know, the Court has already ruled that the *G.G.* Fourth Circuit ruling is controlling on the Title IX claim.

So the Carcano appeal just adds another layer to that. We're evidently going to be in the Fourth Circuit briefing. I assume the equal protection issue, maybe other

issues -- I don't know what they are going to raise. We'll be briefing those and seeking guidance from the Fourth Circuit. Like Mr. Wilkens, I don't know what the Fourth Circuit schedule is going to be. I don't know how quickly it's going to resolve those issues, and then, quite frankly, Your Honor, if, let's say, the Court grants in *G.G.* and the Fourth Circuit decides something on the equal protection claim, those issues are intertwined, and I think there would be the real possibility of seeking Supreme Court review from the Fourth Circuit's opinion if it went against -- if it went one way or the other since the issues are very obviously closely intertwined on equal protection and Title IX. So there is all sorts of legal difficulties that have arisen since we came up with this schedule.

With respect to the sort of difficulties in discovery -- I mean, we'll talk about that in a more granular level when we come back after our halftime break.

THE COURT: Right.

MR. DUNCAN: One issue I would like to emphasize is the privilege issue, the legislative privilege issue. Although Mr. Wilkens and I have had some productive conversations about it, we have a real difference of opinion on the issue, particularly as it relates to waiver of legislative privilege, and that's going to need to be briefed. It's a very important issue to our clients obviously.

THE COURT: Now, as I understand, it relates only just to your specific legislator clients. It's not -- I mean, that's -- it wouldn't preclude discovery under the standards that this Court has previously had to examine legislative immunity and the categories that might be at issue. It's just as to waiver -- whether there's been a waiver by your clients by intervening; is that correct?

MR. DUNCAN: I can't answer that because I don't know the answer to that. I don't know what position precisely the Carcano Plaintiffs are taking. Mr. Wilkens can correct me if I'm mistaking something.

All I understand is there's the suggestion of a waiver because of the intervention of our clients in the case as agents of the State to defend H.B. 2. I don't know what their argument is as to the extent of that waiver. I don't know how it relates to the rest of the legislature. I just don't know that yet.

My point is is that it's a very important issue. It impacts -- it potentially impacts in a dramatic way how quickly discovery can proceed because, for example, if we followed the example that Your Honor and Judge Schroeder did in the voter ID case where there are certain categories that are privileged and other categories that are not and there's certain categories where one doesn't even have to produce a privilege log, we've suggested to the Plaintiffs that that could be sort of a