

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

3 JOAQUIN CARCAÑO, et al.,) 1:16CV236

4 Plaintiffs,)

5 V.)

6 PATRICK McCRORY, in his)
7 Capacity as Governor of North)
8 Carolina, et al.,)

9 Defendants,)

10 and)

11 PHIL BERGER, in his official)
12 capacity as President Pro)
13 Tempore of the North Carolina)
14 Senate; and TIM MOORE, in his)
15 Official capacity as Speaker of)
16 the North Carolina House of)
17 Representatives.)

18 Intervenor-Defendants.)

19 UNITED STATES OF AMERICA,) 1:16CV425

20 Plaintiff,)

21 V.)

22 STATE OF NORTH CAROLINA, et al.)

23 Defendants,)

24 and)

25 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 PHIL BERGER, in his official) 1:16CV844
capacity as President Pro)
2 Tempore of the North Carolina)
Senate; and TIM MOORE, in his)
3 official capacity as Speaker of)
the North Carolina House of)
4 Representatives,)
)
5 Plaintiffs,)
)
6 v.)
)
7 UNITED STATES DEPARTMENT OF)
JUSTICE, et al.,)
8)
Defendants.)

9 _____
10 NORTH CAROLINIANS FOR PRIVACY,) 1:16CV845
an unincorporated nonprofit)
11 association,)
)
12 Plaintiff,)
)
13 V.)
)
14 UNITED STATES DEPARTMENT OF)
JUSTICE, et al.) Winston-Salem, North Carolina
15) July 22, 2016
Defendants.) 1:06 p.m.

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19 TRANSCRIPT OF THE **PRETRIAL SCHEDULING CONFERENCE**
20 BEFORE THE HONORABLE JOI E. PEAKE
UNITED STATES MAGISTRATE JUDGE

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

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USA et al v. NC et al-Scheduling conference 7/22/16

P R O C E E D I N G S

1
2 **THE COURT:** All right. Good afternoon. I am going
3 to ask the clerk to call the four cases that are on the
4 calendar this afternoon.

5 **THE CLERK:** The Court calls Case Number 1:16CV236,
6 Carcano, et al. versus McCrory, et al.; Case Number 1:16CV425,
7 United States of America versus State of North Carolina, et
8 al.; Case Number 1:16CV844, Berger, et al. versus United States
9 Department of Justice, et al.; and Case Number 1:16CV845, North
10 Carolinians for Privacy versus United States Department of
11 Justice, et al.

12 **THE COURT:** All right. I believe the clerk has
13 everyone organized fairly well. What I am going to do is ask,
14 if you would, just stand and announce for me for the record who
15 you are and your representation in this case. Yes, sir.

16 **MR. WILKENS:** Good afternoon, Your Honor, Scott
17 Wilkens from Jenner & Block on behalf of the Carcano
18 Plaintiffs.

19 **THE COURT:** All right. Very good, thank you.

20 **MS. STOUGHTON:** Your Honor, Corey Stoughton on behalf
21 of the United States as Plaintiff.

22 **THE COURT:** All right.

23 **MR. GARDNER:** Good afternoon, Your Honor, I'm Josh
24 Gardner on behalf of the United States on behalf of Berger and
25 North Carolinians for Privacy, the defense suits.

1 **THE COURT:** All right. Thank you. That's
2 Mr. Gardner; is that right?

3 **MR. GARDNER:** Yes, ma'am.

4 **THE COURT:** Thank you. Yes, sir.

5 **MR. BOWERS:** Good afternoon, Your Honor, may it
6 please the Court, Butch Bowers here for Governor McCrory, the
7 Department of Public Safety, and the State of North Carolina.

8 **THE COURT:** All right.

9 **MR. DUNCAN:** Good afternoon, Your Honor, Kyle Duncan
10 here for the Intervenor Defendants, Senator Phil Berger and
11 Representative Tim Moore.

12 **THE COURT:** Okay. Yes, sir.

13 **MR. FRANCISCO:** Good afternoon, Your Honor, Noel
14 Franciso for the University of North Carolina Defendants, and
15 with me in the courtroom are John Gore and Carolyn Pratt.

16 **THE COURT:** All right. Very good.

17 **MR. DALTON:** Good afternoon, Your Honor, Caleb Dalton
18 on behalf of North Carolinians for Privacy as Plaintiffs and
19 Proposed Intervenors.

20 **THE COURT:** All right. Very good. I think that
21 covers all the groups I have. Is there everybody else we need
22 to include at this point?

23 All right. What I intend to do is start with the
24 joint Rule 26(f) report that's been filed in what I am going to
25 refer to as the 236 and 425 cases, which would be the Carcano

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1 case and the Department of Justice versus McCrory case. I am
2 going to use the shorthand 236 and 425. If that creates some
3 confusion or if I misstate that at some point, please let me
4 know. We'll correct it and make sure we're all on the same
5 page.

6 Then once we've gone through the joint report, set
7 that schedule and taking care of everything, I'll turn to
8 cleaning up and then the separate reports in what I am going to
9 call the 845 case. Then we'll see what else needs to be
10 addressed.

11 Any objections from anybody to proceeding that way?

12 All right. So beginning then with the 236 and the
13 425 case, what I may do is just summarize here the deadlines,
14 as I understand it, and where I have questions, I'll ask
15 questions; but I want to make sure this is interactive, so if
16 you all have suggestions or clarifications or questions about
17 any of it, go ahead and resolve all of that today.

18 Any objection to proceeding that way?

19 **MR. BOWERS:** No, Your Honor.

20 **MR. WILKENS:** No, Your Honor.

21 **THE COURT:** So the first thing is the track for
22 discovery. There isn't a particular track that would apply
23 here, and I think we've covered everything or will cover
24 everything, so I am not going to designate a particular track;
25 but if there are any issues that we need to have a filler, we

1 can do that. I have the date to close all the discovery would
2 be October 7, 2016. That means under the local rules all
3 discovery would need to be served in time to be completed by
4 October 7, so everything would be answered and finished by
5 October 7.

6 Is that everyone's understanding on this then?

7 **MR. BOWERS:** Yes, Your Honor.

8 **MR. WILKENS:** Yes, Your Honor.

9 **THE COURT:** All right. Initial disclosures would be
10 August 5, 2016. You all would meet by August 5 as well to work
11 out details for a protective order and a 502(d) order, things
12 along those lines.

13 As far as written discovery, requests for production,
14 initial requests would be served August 12, document discovery
15 completed September 12, and, as I understand, your response and
16 objection would be within 14 days and then a rolling production
17 from 14 days up to 30 days; is that correct?

18 **MR. WILKENS:** Yes, Your Honor.

19 **MR. BOWERS:** Yes, ma'am.

20 **THE COURT:** As a practical matter for me, it looks
21 like if your initial requests are August 12 and you have a
22 rolling production up to 30 days, everything is going to have
23 to be served August 12 in order to have a response for document
24 discovery to be completed September 12. So as a practical
25 matter, it would be everything by August 12, is that right, or

1 do we need to clarify anything along those lines?

2 Let me start with you, Mr. Wilkens, for the Carcano
3 Plaintiffs. Do you understand the question?

4 **MR. WILKENS:** Your Honor, I do, and I take the point.
5 I would say that we had talked about whether we could agree to
6 a production of the documents shorter than 30 days, and the
7 compromise we've come up with was this idea of a rolling
8 production.

9 **THE COURT:** Right.

10 **MR. WILKENS:** We would certainly want the ability to
11 serve additional requests after the initial set and we see what
12 we get from the other side, and it may be that if we did that,
13 we could do it in relatively short order, although it wouldn't
14 leave 30 days; it might leave, I don't know, three weeks or a
15 shorter period to comply with.

16 **THE COURT:** We could have document discovery
17 completed by September 12 with the 14 day as the date, with an
18 additional 14 days for completion of rolling productions.
19 Would that satisfy your request on that?

20 **MR. WILKENS:** That would satisfy our request.

21 **THE COURT:** So September 12 would be completion of
22 everything, including responses and objections, for anything
23 that could be provided within 14 days, but if there was a
24 rolling production still ongoing, it could continue for another
25 14 days after September 12. Would that be the request?

1 **MR. WILKENS:** Yes, Your Honor.

2 **THE COURT:** Let me ask then for the Department of
3 Justice. Is it Ms. Stoughton? I want to say your name
4 correctly.

5 **MS. STOUGHTON:** That's right.

6 **THE COURT:** Would that be what your understanding
7 would be?

8 **MS. STOUGHTON:** Your Honor, we would be fine with
9 that. Just to be clear, I think this is what everyone is
10 saying, but the additional window would be for any later-served
11 discovery after August 12?

12 **THE COURT:** That's right. So August 12 -- as I
13 understand what we'd be just clarifying here, you could have an
14 initial request up to August 12. You would essentially get
15 another 14 days to make additional requests from August 12 so
16 that by September 12th, you had everything answered that was
17 served August 12, including all your rolling production, and
18 then if there is rolling production ongoing, it's still
19 completed within 14 days after September 12; is that right?

20 **MS. STOUGHTON:** All I want to clarify is that with
21 respect to any discovery served on August 12, the time for
22 complete production on that round of discovery is still 30
23 days.

24 **THE COURT:** So maybe the way to clarify is that
25 initial requests are served by August 12 and all requests are

1 served no later than 14 days after August 12. So you've got 14
2 days, and then if there is still rolling production continuing
3 on those later requests, all of it is due with -- 14 days for
4 responses and objections, rolling production of 14 to 30 days
5 from the date the request was served.

6 **MS. STOUGHTON:** Yes, Your Honor. To be clear, what
7 I'm obviously concerned about is the back-end date to ensure
8 that if the discovery is served on August 12, that it does --

9 **THE COURT:** That you still get it by September 12?

10 **MS. STOUGHTON:** Right. And I'm concerned about --
11 primarily because of depositions that might be --

12 **THE COURT:** That need to be added. So essentially
13 everything that you want completed by September 12, you need to
14 serve on August 12. If you serve it later, you've got an
15 additional 14 days to serve it later. The 14-day response and
16 objection period and the rolling production of 14 to 30 days
17 will apply to those, which means that you might have responses
18 to those rolling productions -- or ongoing rolling production
19 that extend up to 14 days after September 12 for those
20 later-served requests.

21 **MS. STOUGHTON:** Yes, Your Honor.

22 **THE COURT:** I think we are on the same page. It's
23 not a bad thing to repeat it different ways to make sure
24 everybody understands.

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

1 **THE COURT:** Mr. Gardner, is that your understanding
2 as well?

3 **MR. GARDNER:** Yes, it is.

4 **THE COURT:** Are you in agreement with that?

5 **MR. GARDNER:** Yes.

6 **THE COURT:** All right. Mr. Bowers, do you understand
7 that?

8 **MR. BOWERS:** I think I do. No objection.

9 **THE COURT:** All right. Is there any part you want to
10 clarify any further to make sure we are all on the same page?

11 **MR. BOWERS:** No, ma'am, I think we are good.

12 **THE COURT:** All right. Mr. Duncan?

13 **MR. DUNCAN:** We understand, Your Honor. No
14 objection.

15 **THE COURT:** All right. Okay. Yes, sir.

16 **MR. FRANCISCO:** We're fine with that as well, Your
17 Honor.

18 **THE COURT:** And then, Mr. Dalton? At this point
19 North Carolinians for Privacy isn't part of this particular
20 conversation, but if there is something that you need to be
21 heard on for some reason, then I'll let you be heard on that,
22 if we need to take something up.

23 **MR. DALTON:** Your Honor, if granted intervention, we
24 are fine with joining whatever agreed-to discovery schedule.

25 **THE COURT:** All right. Thank you. Mr. Dalton, just

1 to follow up with that, I am not going to keep coming back
2 around to you then as part of this conversation, but if you
3 need to interject at some point, that would be okay. Just let
4 me know.

5 **MR. DALTON:** Thank you, Your Honor.

6 **THE COURT:** All right. We are going to only add just
7 a minor clarification then. Then all the requests for
8 production dates and the deadlines would be as provided in the
9 joint report. I guess the only difference was that document
10 discovery completion may go for an additional 14 days after
11 September 12, but the deadlines for 14 days for responses and
12 objections and the rolling production of 14 to 30 days after
13 service of the request would still apply.

14 All right. As to interrogatories and requests for
15 admission, it would be 24 interrogatories per side in each case
16 and 50 requests for admission per side in each case. I read
17 that as per side, meaning that that would be used jointly
18 between the Carcano Plaintiffs in that case and then all of the
19 State Defendants, the legislative Intervenor Defendants and the
20 UNC Defendants in the Carcano case, and then the Department of
21 Justice Plaintiffs and each of those group of Defendants in the
22 425 case. Is that correct?

23 **MR. WILKENS:** Yes, Your Honor.

24 **THE COURT:** All right. And just so I understand,
25 that would be 24 in each case. So the Carcano Plaintiffs would

1 have 24 interrogatories and 50 requests for admission, and then
2 the Department of Justice Plaintiffs would have 24
3 interrogatories and 50 requests for admission; is that right?

4 **MR. WILKENS:** Yes, Your Honor.

5 **MS. STOUGHTON:** Yes, Your Honor.

6 **THE COURT:** And then the Defendant groups, Mr.
7 Bowers, Mr. Duncan, Mr. Francisco, you all would share the 24
8 interrogatories and the 50 requests for admission in each case;
9 is that correct?

10 **MR. BOWERS:** That's correct.

11 **MR. DUNCAN:** Yes, Your Honor.

12 **MR. FRANCISCO:** Yes, Your Honor.

13 **THE COURT:** All right. As to the -- is there
14 anything else we needed on any of that? All right.

15 As to the number of depositions, it looks like you
16 all will meet August 8 to decide the number of depositions.
17 Fact depositions will take place between August 15 and
18 September 23, expert depositions between September 5 and
19 October 7.

20 Are those limits still appropriate in light of the
21 additional 14 days for document production if there were
22 late-served requests? Is there any adjustment we need to make
23 to any of that, as far as Plaintiffs?

24 **MS. STOUGHTON:** Your Honor, I don't think so. I
25 think that was the concern -- the reason I raised that concern

1 is to make sure we get documents needed. As long as we plan
2 appropriately, I think we should be fine.

3 **THE COURT:** Okay. All right. And, Mr. Wilkens?

4 **MR. WILKENS:** That's also our position, Your Honor.

5 **THE COURT:** All right. As far as -- let me just --
6 any of the Defendants have anything else they would need to add
7 as to that?

8 **MR. FRANCISCO:** No, Your Honor.

9 **THE COURT:** As far as the number of depositions, I
10 can leave that open for you all to decide unless you think it
11 would be helpful for me to go ahead and give some indication.
12 If it's better for you all to meet on that first, I can do
13 that. I just don't want that to linger as a problem. Any
14 reason to address that today?

15 **MR. WILKENS:** Your Honor, I think we would prefer to
16 see the initial disclosures and the expert disclosures, and
17 then we would have a better sense of how many depositions that might
18 be needed, and then we can actually negotiate that. It might
19 be better to leave it until we've got those disclosures done.

20 **THE COURT:** All right. I can do that. Any objection
21 to that?

22 **MR. BOWERS:** No objection.

23 **MR. DUNCAN:** No objection.

24 **THE COURT:** All right. As far as expert summaries
25 and reports, I actually did have some question about this

1 because, looking at the joint report, I was trying to reconcile
2 paragraphs 1C and 1D. I just want to make sure I am following.

3 It looks like under paragraph 1C the Defendants are
4 required to identify and give topics by August 5, and then
5 Plaintiffs have to identify rebuttal experts one week after
6 expert reports from Defendants, but then Plaintiffs' and
7 Defendants' reports are all due August 12 and rebuttal reports
8 are all due September 9.

9 Is that what you anticipate, Mr. Wilkens, or do we
10 need all of those in there?

11 **MR. WILKENS:** Well, actually, Your Honor, this is one
12 issue that I wanted to raise, and it's for the first time here
13 today, and I haven't raised it yet with all the other parties.

14 While we don't expect -- so we've named a number of
15 experts in our PI, preliminary injunction, papers, and they
16 have put in declarations. We don't anticipate at this time
17 appointing additional experts other than potential rebuttal
18 experts, but because we want to keep that possibility open,
19 subparagraph C, which right now just talks about the Defendants
20 disclosing expert witnesses by the 5th, because they haven't
21 done any such disclosures yet, we would want the ability to
22 also, if we choose to, add an additional expert or change
23 experts versus what we have in the PI, for example. We would
24 also want to under C be able to make any such disclosure on
25 August 5. So it would be open to the Defendants as well the

1 Plaintiffs.

2 **THE COURT:** Well, it makes sense to make them
3 parallel somehow, at least to the extent that 1D seems to
4 contemplate expert reports from Plaintiffs or Defendants by
5 August 12; is that right?

6 **MR. WILKENS:** Yes. And, Your Honor, we -- this is
7 why you see the sentence that talks about designating. We had
8 talked about the possibility and we want to certainly have the
9 ability to designate the declarations that have been put in for
10 the preliminary injunction as expert reports so that we
11 wouldn't necessarily have to redo the reports for those
12 experts. That's the second sentence under D.

13 **THE COURT:** Right. So you may designate any of
14 those, but nothing that I see here limits you to that.

15 **MR. WILKENS:** That's correct.

16 **THE COURT:** And you just want to clarify that?

17 **MR. WILKENS:** We want to clarify that we can -- that
18 not only can we put in reports from the declarants that are in
19 the preliminary injunction papers, but we could also put in a
20 report from a newly identified expert, if we were to do that,
21 on the 5th under C.

22 **THE COURT:** Right. So as you understand -- and maybe
23 I should take one step back before we add you in. As you
24 understand the way these dates would work for Defendants,
25 Defendants would need to identify and give topics by August 5,

1 do their reports by August 12, and then within one week after I
2 guess the reports, you would identify rebuttals, and then
3 rebuttal reports would be September 9; is that right?

4 **MR. WILKENS:** Right.

5 **THE COURT:** So we're just clarifying 1D includes
6 reports from both Plaintiff and Defendant. The whole pattern
7 of identifying first would apply both to Plaintiffs and
8 Defendants, and to the extent there might have been some prior
9 discussion or uncertainty about it, you just want to clarify
10 that you might have witnesses other than those you've
11 identified for preliminary injunction?

12 **MR. WILKENS:** Yes. As I said earlier, it's not
13 something that we currently plan on doing, but it's something
14 that we just want to keep the possibility open.

15 **THE COURT:** All right. Before I go over to
16 Defendants, let me see, is there anything else that the
17 Department of Justice needs to add on that?

18 **MS. STOUGHTON:** No, Your Honor.

19 **THE COURT:** As far as designated experts, do you
20 intend to designate some experts for Department of Justice
21 then?

22 **MS. STOUGHTON:** We don't intend to designate any
23 experts beyond the experts we've already identified in the
24 preliminary injunction papers. We may designate rebuttal
25 experts after seeing the Defendants' experts, but that's

1 obviously a separate process.

2 **THE COURT:** Okay. All right. Thank you. So, yes,
3 sir, Mr. Bowers?

4 **MR. BOWERS:** I don't have any objection to the
5 proposed amendment. That's sounds reasonable to me.

6 **MR. DUNCAN:** Same position here. No objection to
7 that, Your Honor.

8 **MR. FRANCISCO:** Agreed, Your Honor.

9 **THE COURT:** All right. So let's just clarify then
10 how 1C and 1D are going to work. Disclosure of the identity
11 of -- let's say -- instead of each of the Defendants, we'll say
12 the identity of any expert witness and each specific topic area
13 on which each expert intends to present evidence shall be
14 exchanged by August 5, 2016. That would be any expert witness
15 for either party would need to be identified. And does that
16 cover your request?

17 **MR. WILKENS:** Your Honor, just a suggestion, it may
18 be easier if we leave the wording "Defendants' expert
19 witnesses," and then after that, we put a comma, "and any not
20 yet disclosed Plaintiffs' experts," so we wouldn't have --
21 because they have our declarations in the preliminary
22 injunction. We wouldn't have to do disclosures for those
23 experts where they already have the full declaration.

24 **THE COURT:** And the only reason I'm pausing is
25 because I know you've identified them for preliminary

1 injunction. Are you intending to include all of them, or do
2 they need to have some indication from you that -- if there is
3 some subgroup of those that you would be using or whether you
4 intend to use all of them?

5 **MR. WILKENS:** Your Honor, my apologies. That makes
6 sense. So we can certainly do the disclosures, Your Honor,
7 evenhandedly on the 5th.

8 **THE COURT:** Then they might be ones you've already
9 disclosed for preliminary injunction, but it's just to clarify
10 that it's for trial purposes now?

11 **MR. WILKENS:** Yes.

12 **THE COURT:** So it would be disclosure of the identity
13 of any expert witnesses and each specific topic area by
14 August 5, and then I don't know if you even need that last
15 sentence. Both parties would have rebuttal experts. I guess
16 do you want the requirement of identifying them within one week
17 after production of the expert reports -- let me make sure I am
18 following along on that -- or whether you just wait until
19 rebuttal reports are due on September 9?

20 **MR. WILKENS:** Your Honor, I think -- so under -- I
21 mean, D certainly deals with rebuttal reports. We wanted to
22 make it clear that they wouldn't be limited to the experts that
23 put in the initial reports, but that new experts could be
24 designated at the rebuttal phase. That's why that sentence is
25 in C.

1 **THE COURT:** So we could put that for both sides then:
2 Any party in the above-captioned actions reserves the right to
3 identify rebuttal experts to be identified no later than one
4 week after production of affirmative expert reports.

5 Does that cover what you're looking for?

6 **MR. WILKENS:** Yes, Your Honor.

7 **MS. STOUGHTON:** Your Honor, that's fine.

8 **THE COURT:** Does that work for Defendants?

9 **MR. BOWERS:** Yes, ma'am, that's good for us.

10 **MR. DUNCAN:** Yes, Your Honor.

11 **MR. FRANCISCO:** Yes, Your Honor.

12 **THE COURT:** All right. Good. Thank you.

13 All right. So we then have identify experts with
14 their topics by August 5, provide reports by August 12,
15 identify rebuttal experts one week after the reports are
16 provided, and then provide rebuttal reports September 9. This
17 case probably doesn't have non-retained experts, but to the
18 extent there would be disclosures for non-retained experts,
19 those same deadlines would apply as retained experts under Rule
20 26.

21 Any question or anything else we need to clarify as
22 to any of those things for Plaintiffs or for Defendants?

23 **MR. BOWERS:** No, ma'am.

24 **THE COURT:** All right. Deadline to amend would be
25 August 15. Deadline for supplementation would be September 16.

1 Discovery disputes, attorney conferences would be held within
2 three days of identifying any dispute. If a motion needed to
3 be filed, it would be filed within five days, responses within
4 five days, and replies within three days.

5 What I can also consider doing -- and I'll let you
6 confirm that that's what you intended as far as those
7 deadlines, but also let me know whether it would be helpful to
8 go ahead and set, say every other week, a preliminary telephone
9 hearing so we know it was set on the calendar. We can take up
10 of any issues, if there are any issues. If there are no
11 issues, you can let the case manager know. We'll just cancel
12 the hearing. If it looks like there are more issues than are
13 appropriate for a telephone hearing, we'll switch it to an
14 in-person hearing, but at least everybody knows there's a
15 possibility you might need to be here that day or at least
16 available for a telephone conference.

17 Would that be helpful to go ahead and do in this case
18 for Plaintiffs?

19 **MR. WILKENS:** Yes, that would be very helpful, Your
20 Honor.

21 **THE COURT:** Ms. Stoughton?

22 **MS. STOUGHTON:** Yes, Your Honor, thank you.

23 **THE COURT:** Mr. Bowers?

24 **MR. BOWERS:** Yes, ma'am, that sounds good.

25 **MR. DUNCAN:** Yes, that would be fine.

1 **MR. FRANCISCO:** Yes, Your Honor.

2 **THE COURT:** All right. What I'm looking at doing,
3 and I'll take your suggestions on this as well, if we look at,
4 say, Fridays, I have criminal duty in the afternoons, but I
5 should be able to do hearings in the mornings on some Fridays
6 in August and September, and so if we set them for, say,
7 10:00 on Friday -- and we can look at when we need to start,
8 but it looks to me like there won't be much underway for
9 disputes to have arisen until, say, the 19th. So it would be
10 August 19, September 2, September 16, and September 30. That's
11 every other Friday during what looks to be the most intense
12 part of the discovery period in this case.

13 Any objections to those days and times, Mr. Wilkens?

14 **MR. WILKENS:** No objections, Your Honor.

15 **THE COURT:** Any objection to that, Ms. Stoughton?

16 **MS. STOUGHTON:** No, Your Honor.

17 **THE COURT:** Mr. Bowers, how does that work for you
18 all?

19 **MR. BOWERS:** No objection, Your Honor.

20 **MR. DUNCAN:** No objection.

21 **MR. FRANCISCO:** No objection, Your Honor.

22 **THE COURT:** All right. So what I am going to do is
23 ask the clerk to set this case for telephone status conference
24 on those dates, and that would be August 19, September 2,
25 September 16, and September 30 at 10:00. My intent is to set

USA et al v. NC et al-Scheduling conference 7/22/16

1 them for a telephone hearing, but I'm giving notice to the
2 parties now that I may, as late as the Wednesday before, let
3 you know it needs to be an in-person hearing, and so we'll set
4 it for here if we have to if there are issues that need to be
5 heard and resolved other than by telephone hearing.

6 What would be helpful to me is if that Wednesday by
7 close of business you all can submit a joint statement that
8 just tells me what issues you have, if any, to resolve at the
9 telephone conference. That lets me know what it is to expect
10 that I might need to hear. You can just do a brief page or two
11 summarizing what the dispute is or what the parties' positions
12 are. I don't need a whole lot on that, but it would be helpful
13 to have just a joint statement letting me know what is on or
14 what would be before me. If there are motions that have been
15 briefed or are in the process of being briefed, we can take a
16 look at whether there are issues that can be resolved at the
17 hearing or whether we need to set it on for the next scheduled
18 hearing or set a separate hearing for that.

19 **MR. WILKENS:** Your Honor, would those joint
20 statements be by letter or would they be filed on ECF?

21 **THE COURT:** So the joint statements, it would be
22 helpful to have those filed on ECF so that it's in the record
23 that way, and I can have access to it on ECF that way. If you
24 all decide you don't need a hearing, you can file a joint
25 statement, or you can just let the case manager. On that, my

1 case manager is Kimberly Garrett. Judge Schroeder's case
2 manager is Ms. Engle, who's here. You can go to Ms. Engle
3 first. If you can't get her, you can go to Ms. Garrett.
4 They'll be working together on this. You can touch base with
5 them if you have questions about that or if you need to touch
6 base on coordinating or scheduling, but if you've got a joint
7 statement that sets out the issues, you can file that on ECF.
8 If you just want to let me know you don't need a hearing, you
9 can just let the case manager know, and they can do a docket
10 entry and cancel that hearing.

11 Feel free to cancel those hearings if you all can
12 work these things out, but it's probably helpful to set those
13 in case there are issues we need to resolve so it doesn't delay
14 any of the discovery in this case.

15 As far as dispositive motions, I think we are now at
16 some of the concluding and pretrial dates, but just to go over
17 those, it looks like dispositive motions and *Daubert* motions
18 would be due October 14. Responses would be due within 14
19 days, so that would be October 28. Replies would be 7 days,
20 which would be November 4. So it's fully briefed by
21 November 4. We are looking at a November 14 trial date.
22 Obviously with 14 days from the close of dispositive motion
23 briefing and the trial date, it may be that the trial can also
24 function to some extent as a hearing on those dispositive
25 motions if they are not issues that can be readily resolved

1 prior to trial. Those can function that way. It would seem
2 that if there are issues that can be resolved readily prior to
3 trial, that can happen as part of the pretrial proceeding in
4 that ten days; but, otherwise, if it's a bench trial and it
5 gets rolled over into some hearing on dispositive motions, then
6 that may be how that ends up working out.

7 **MR. FRANCISCO:** Your Honor, may I?

8 **THE COURT:** Yes.

9 **MR. FRANCISCO:** We have filed motions to dismiss in
10 both cases. My understanding is that those aren't governed by
11 this schedule, that this is separate, but I think -- I'm not
12 sure we had an opportunity to clarify that with --

13 **THE COURT:** As far as the deadlines for responses and
14 replies?

15 **MR. FRANCISCO:** Yes.

16 **THE COURT:** Right. So I think that it's worth
17 addressing. My intent would be that the UNC Defendants are
18 still part of this discovery scheduling plan. And you are
19 still participating in everything else?

20 **MR. FRANCISCO:** Absolutely.

21 **THE COURT:** But the ordinary response and reply times
22 under the local rules will apply to your motions that have
23 already been filed?

24 **MR. FRANCISCO:** Yes, Your Honor.

25 **THE COURT:** All right. I think that that would be my

1 understanding. Anything else we would need to hear on that,
2 Mr. Wilkens?

3 **MR. WILKENS:** That's our understanding as well.

4 **THE COURT:** All right. Ms. Stoughton?

5 **MS. STOUGHTON:** It's our understanding as well,
6 although we may be calling you to ask about those dates in the
7 near future.

8 **THE COURT:** If there are requests for extensions of
9 time, I'll let you handle those, but the ordinary deadlines
10 would be the deadlines provided in the local rules.

11 **MR. FRANCISCO:** Thank you, Your Honor.

12 **THE COURT:** All right. As far as motions in limine
13 that are not *Daubert* related, those would be due October 26,
14 responses November 2, no replies. Exhibits and witness
15 designations due October 24 with any objections November 2.

16 If there are joint stipulations of fact that you all
17 can make, I think that would obviously be helpful. You can
18 potentially do that at least either with your designations or
19 with your pretrial briefs November 7, and we'll just go ahead
20 and -- I am going to include that with the pretrial briefs on
21 November 7, any joint stipulations, including stipulations of
22 fact.

23 Anything, Mr. Wilkens, to add or suggest on that?

24 **MR. WILKENS:** No, Your Honor, that's fine.

25 **THE COURT:** Okay. Anything, Ms. Stoughton, on that?

1 **MS. STOUGHTON:** No, Your Honor.

2 **THE COURT:** Anything for Defendants on that?

3 **MR. BOWERS:** No, Your Honor.

4 **MR. DUNCAN:** No, Your Honor.

5 **MR. FRANCISCO:** No, Your Honor.

6 **THE COURT:** The trial date would be November 14. As
7 I understand it, the anticipated length of trial is one week
8 and at an outside maximum of no more than eight trial days,
9 which, if you took all eight, would take you to the Wednesday
10 before Thanksgiving. Is that what it looks like to you all?

11 **MR. WILKENS:** Your Honor, we would just like to note,
12 just given how -- well, we're not that far out from trial, but
13 we would just ask for some flexibility in terms of the length
14 of the trial, given that we just don't know exactly what the
15 issues are yet, and it may be the case that eight days don't
16 prove to be enough.

17 **THE COURT:** Well, I think that the district judge
18 would certainly also retain some flexibility as to when in the
19 time frame, once you all have some more suggestion as to your
20 anticipated length and then what the district judge determines,
21 in terms of how long he is going to give you for trial. So I
22 am not going to set that other than that's what you anticipate
23 right now, and we'll set for now a November 14 trial date. If
24 that needs to be revisited at some point or if the district
25 judge needs to include some additional limitations on that,

1 then those would be things you could visit at the pretrial
2 conference, and if you know earlier, then certainly something
3 you would want to go ahead and raise earlier so that can be
4 addressed.

5 **MR. WILKENS:** Thank you, Your Honor.

6 **THE COURT:** Does that take care of it for the
7 Department of Justice?

8 **MS. STOUGHTON:** Yes, Your Honor.

9 **THE COURT:** For the Defendants?

10 **MR. BOWERS:** Yes, Your Honor.

11 **MR. DUNCAN:** Yes, Your Honor.

12 **MR. FRANCISCO:** Yes, Your Honor.

13 **THE COURT:** That is what I have for the joint 26(f)
14 report. I think that I have made the assumption there and
15 would intend to do explicitly that the 236 and 425 cases are
16 consolidated for discovery. With respect to how they are
17 tried, that remains at the discretion of the trial judge. They
18 are on the same schedule, and they are consolidated for
19 discovery, and then the trial judge will take up any issues
20 with respect to how they might be presented for trial.

21 Anything else before we get into other issues as far
22 as the 26(f) report itself? Mr. Wilkens, anything for your
23 clients?

24 **MR. WILKENS:** No, Your Honor.

25 **THE COURT:** Anything else for your client?

1 **MS. STOUGHTON:** No, Your Honor.

2 **THE COURT:** Anything else, Mr. Bowers?

3 **MR. BOWERS:** Nothing further.

4 **THE COURT:** Anything else, Mr. Duncan?

5 **MR. DUNCAN:** No, Your Honor.

6 **THE COURT:** Mr. Francisco?

7 **MR. FRANCISCO:** Nothing further, Your Honor.

8 **THE COURT:** All right. The other issues I have are
9 not in a particular order, but I am going to take them up just
10 as I have them noted here.

11 I have the first issue to address with respect to the
12 844 case, that is, the legislators' case. As far as I am
13 aware, there weren't separate individual reports filed in this
14 case. So it's my assumption then that you are intending to
15 dismiss that case, but let me hear from you, Mr. Duncan. Is
16 that where we are with that?

17 **MR. DUNCAN:** Yes, Your Honor. We have agreed with
18 the Carcano Plaintiffs and the Department of Justice that we
19 will voluntarily dismiss that case, and we'll proceed with our
20 claims in that case as counterclaims in the 236 and 425. As I
21 understand it, I think DOJ is working on this, there will be a
22 joint notice filed sometime today before 5:00 setting forth the
23 parties' agreement in detail.

24 **THE COURT:** All right. So that would be an
25 anticipated stipulation of dismissal of the 844 case, so we

1 don't need to take anything else up with that one?

2 **MR. DUNCAN:** Exactly, Your Honor.

3 **THE COURT:** Is that correct?

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

5 **THE COURT:** Is that correct as far as you're aware as
6 well, Ms. Stoughton and Mr. Wilkens?

7 **MR. WILKENS:** Yes, and I think the agreement will
8 also just provide some further detail with respect to the
9 Plaintiffs as to which the counterclaims are directed.

10 **THE COURT:** I think that would probably be helpful.
11 That's one of the other things on my list. I don't want to
12 jump ahead of what your agreement might be, but it might help
13 just to talk through that to make sure. I have a couple of
14 questions about that. The counterclaims in the 236 case are
15 also the subject of a motion to strike; is that correct?

16 **MR. WILKENS:** That is correct. And correct me if I
17 have the agreement wrong, but I think what's going to happen is
18 the -- there's an agreement that the counterclaims will now be
19 directed only at the ACLU of North Carolina, no longer at the
20 individually named plaintiffs.

21 **THE COURT:** All right.

22 **MR. WILKENS:** And then with respect to the current
23 motion to strike, we would withdraw the first argument in
24 there, as to the -- that they're duplicative -- that they
25 should be dismissed as duplicative, the counterclaims, but we

1 would leave standing, pardon the pun, the standing argument in
2 that motion to strike, but we still want to -- will be
3 asserting that there is no standing with respect to those
4 counterclaims.

5 **THE COURT:** As counterclaims. Now, the same issues
6 are raised as defenses, and you are not raising any objection
7 to that; is that right?

8 **MR. WILKENS:** Um --

9 **THE COURT:** These would be defenses that they have
10 intervened to raise. The only question is whether they are
11 raised as counterclaims; am I right? Am I following? Maybe
12 I'm not.

13 **MR. WILKENS:** Your Honor, I am not entirely -- as I
14 stand here, I am not entirely sure. I think that's right, but
15 I don't want to --

16 **THE COURT:** Well, I am venturing into this not
17 because I am going to have that to resolve myself so much as if
18 we can clean it up further today and not have to send this to
19 Judge Schroeder to resolve or for you all to keep briefing
20 while you are trying to do discovery, I think that would be
21 ideal.

22 My question -- and you might be able to speak to
23 this, Mr. Duncan. If you can assert these which you've
24 designated as counterclaims as defenses that you would be
25 entitled to be heard on, is there any reason why you have to

1 assert them as a claim now that you've been allowed to
2 intervene? It would be still asserted as a defense, and you've
3 been allowed to intervene as a defendant to assert the
4 defenses, but they wouldn't be affirmative claims against the
5 ACLU for a declaratory judgment.

6 It seems the only difference would be that then if
7 the ACLU decided to voluntarily dismiss the claims, the case
8 would go away. Otherwise, I am trying to imagine what your
9 claims would still be if the ACLU dismissed the claims, whether
10 you would still be asserting a claim against them for some kind
11 of declaration.

12 **MR. DUNCAN:** You raise a good point, Your Honor, and
13 it may be something we need to think about further and talk to
14 the ACLU about.

15 At this point, let me say this: If they voluntary --
16 if the ACLU voluntarily dismissed their claims, which we
17 realize --

18 **THE COURT:** Right.

19 **MR. DUNCAN:** If they did, I think at that point, we
20 would still want a declaratory judgment that the law at issue
21 is lawful under the federal statutes.

22 **THE COURT:** Wouldn't that be against the ACLU?
23 That's what I am trying to figure out.

24 **MR. DUNCAN:** That's a good question because we are
25 raising the same thing with respect to DOJ. I do think it

1 makes sense --

2 **THE COURT:** Right. So you're in that case. You
3 would still have your counterclaims as to DOJ, but whether you
4 can just assert them as defenses in the 236 case --

5 **MR. DUNCAN:** Why don't we talk further, because to be
6 perfectly transparent, we talked to ACLU with respect to the
7 counterclaims; we haven't talked about any other issue with
8 respect to the thing that Your Honor is raising.

9 **THE COURT:** Well, again, I am not intending to rule
10 on anything as to those motions, and I think ultimately they
11 would go to Judge Schroeder rather than to me. Again, my
12 intent is just to try to help you all think through those
13 things and clean them up, if we can. So if you can moot the
14 motion to strike by agreeing that the counterclaims will be
15 asserted as affirmative defenses rather than counterclaims in
16 the 236 case and then you would still have your counterclaims
17 in the 425 case, that might resolve that issue.

18 **MR. DUNCAN:** Correct. Just to be clear, what Mr.
19 Wilkens said was accurate with respect --

20 **THE COURT:** Right, where you were so far.

21 **MR. DUNCAN:** I just want to confirm that what he said
22 was accurate, but the motion to strike would be withdrawn with
23 respect to the duplicative nature of the claims. It would
24 persist in asserting justiciability claims on the standing
25 issue.

1 **THE COURT:** Right.

2 **MR. DUNCAN:** What Your Honor is suggesting we talk
3 about I think goes a little bit beyond that, so we want to talk
4 to them about it. The intent here, of course, is to clean it
5 up as much as possible.

6 **THE COURT:** Absolutely, and that's my intent here.
7 It may be, as I go through my list, there are other things that
8 are in a similar-type posture where it makes sense to take a
9 30-minute recess and let you all have some more conversations
10 about this so that we can clean up as much we can while we are
11 here today, but I will leave that then for you all to talk a
12 little further on that.

13 **MR. DUNCAN:** Thank you, Your Honor.

14 **THE COURT:** Yes, anything else?

15 **MR. WILKENS:** Your Honor, I wanted to ask. So I'm
16 assuming -- and we may -- I just -- we may not be able to get
17 to an answer today.

18 **THE COURT:** Right.

19 **MR. WILKENS:** So we would still, I think, plan to --
20 that the filing by 5:00 would happen without dealing with this
21 question of affirmative defenses, but then we would have that
22 conversation to potentially amend that filing if appropriate.

23 **THE COURT:** And I think that would be all right if
24 there is an opportunity to note in the filing that there is
25 still the possibility that you are working this out in light of

1 our conversation today. Then you can do that, and then if you
2 are not able to resolve it, it is where you've left it that
3 way.

4 **MR. DUNCAN:** Sure, I think that's fine, because it
5 sounds like where we may be thinking about going would be a
6 place that would moot out their motion altogether.

7 **THE COURT:** It moots, right, the motion to strike,
8 and it takes the counterclaims out as affirmative counterclaims
9 from the 236 case, but keeps the issues in as affirmative
10 defenses and keeps the counterclaims in the 425 case.

11 **MR. DUNCAN:** Understood, Your Honor.

12 **THE COURT:** All right. We are at least on the same
13 page as to what that would involve?

14 **MR. WILKENS:** Yes, we are on the same page.

15 **MR. DUNCAN:** And we do agree that we would like to
16 file the joint notice today since I think we are ordered to do
17 it by 5:00.

18 **THE COURT:** Right. Right. Right. As far as just
19 the preliminaries of that kind of conversation, is there
20 anything else, if you went down that road, that you want to
21 raise today or think through in terms of that option?

22 **MR. WILKENS:** Not at this time, Your Honor.

23 **THE COURT:** All right. Anything else you can think
24 of that we need to talk through on that?

25 **MR. WILKENS:** Not on that. Not on that. I think we

1 will be able to just talk through those issues together and
2 come to some resolution quickly.

3 **THE COURT:** All right.

4 **MR. DUNCAN:** Right. And, Your Honor, this is with
5 respect to the Carcano Plaintiffs. With respect to the DOJ, we
6 have sort of a similar but distinct agreement that will be in
7 the joint notice as well.

8 **THE COURT:** All right. And that might be the next
9 place to go then. Does that resolve where we are in terms of
10 the 844 case then, which was just as to the 236; right?

11 **MR. DUNCAN:** Well, that's right. The 844 case is
12 only against the Justice Department. We are talking about the
13 ACLU case just because it's --

14 **THE COURT:** -- all related --

15 **MR. DUNCAN:** -- it's all in this universe.

16 **THE COURT:** -- now that we've consolidated to some
17 degree. So the 844 case you are dismissing in light of your
18 counterclaims in the 425 case; am I right?

19 **MR. DUNCAN:** That is correct, Your Honor.

20 **THE COURT:** All right. And that is where you all are
21 going in your joint --

22 **MR. DUNCAN:** I can only say that because I have
23 numbers written on my paper.

24 **THE COURT:** I don't intend to use the numbers to make
25 it more confusing.

1 **MR. DUNCAN:** I think the numbers are helpful.

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

3 **MR. DUNCAN:** But let me just -- I mean, Mr. Gardner
4 may want to confirm what I said about the agreement with DOJ.

5 **THE COURT:** Is that correct?

6 **MR. GARDNER:** That's correct, Your Honor. The
7 agreement we have is somewhat similar to the ACLU's in that the
8 Berger Plaintiffs will dismiss their affirmative complaint,
9 they will maintain their counterclaims, and then the United
10 States will challenge them on any or all grounds with the
11 exception that we will not argue that they are duplicative,
12 which was the first argument that was raised by the ACLU in
13 their motion to strike.

14 I will say, Your Honor, that for the reasons you
15 intimated with respect to the ACLU lawsuit, the United States
16 doesn't really see a need for the Berger Plaintiffs to maintain
17 these as counterclaims. I think the notion that the United
18 States would be dropping its lawsuit is remote, and that their
19 interests would be protected. I think -- and I don't want to
20 mischaracterize what -- the conversation Mr. Duncan and I had
21 previously, but I think one of Mr. Duncan's concerns was that
22 if the United States somehow lost the lawsuit and lost for
23 failure to meet its burden of proof, the legislature may not
24 have sufficient protection because they would not be able to
25 obtain a declaration.

1 Candidly, Your Honor, I think these are mostly legal
2 issues, and the way this case likely will get resolved is based
3 on those legal issues. So I think that the Berger Plaintiffs
4 have the protection they need. So we don't really see the need
5 for those counterclaims, and we think it would be more
6 efficient to just proceed as defenses.

7 **THE COURT:** I think I will let you all develop that
8 with briefing how you need to. To me, it's a little clearer in
9 the 236 case that that might be appropriate. In the 425 case,
10 there might be some separate considerations or determinations
11 to make with respect to whether there is a basis for the
12 counterclaims there.

13 **MR. DUNCAN:** I think that's fair, Your Honor. I
14 think we should talk about them separately.

15 **THE COURT:** Separately, right. So it may be that you
16 can reach some agreement on the 236 case that's separate from
17 some remaining issue on the 425 case. On the other hand, I
18 would encourage you not to spend a lot of time litigating those
19 issues while you are also trying to do this expedited discovery
20 because I don't know that it changes or helps anything. If
21 those legal issues are there, they're still going to be there
22 when you get to the bench trial, and Judge Schroeder will still
23 be able to sort those out. Litigating briefing -- rounds of
24 briefing on that ahead of time is just going to divert you from
25 being able to do discovery.

1 **MR. DUNCAN:** We could not agree with you more.

2 **MR. GARDNER:** And that thought is a conversation that
3 Mr. Duncan and I have actually had, so I think we are on the
4 same page.

5 **THE COURT:** I would say this: By not disputing them
6 bringing the counterclaims, we could certainly at least sort of
7 agree or I could let you make that determination with the
8 caveat from the Court that that's not a waiver of any argument
9 you might make that they lack standing or shouldn't be able to
10 bring these claims as counterclaims in the case.

11 **MR. DUNCAN:** Right. As I understand the agreed
12 schedule, those might be better dealt with during dispositive
13 motions as part of some dispositive motion, which might be the
14 better --

15 **THE COURT:** -- way to resolve all those issues
16 together?

17 **MR. DUNCAN:** That's right.

18 **THE COURT:** I will encourage you all to see if you
19 can at least put those issues into the framework that we have
20 for a schedule here, rather than having it going sort as
21 another separate thing while you are also trying to do
22 discovery.

23 **MR. DUNCAN:** Noted, Your Honor.

24 **MR. GARDNER:** I am confident that we can do that.

25 **THE COURT:** All right. So I think that's all I

1 had -- well, actually, I do have one more question for you,
2 Mr. Duncan. On the 425 case and the counterclaims, there is a
3 jury trial request. Are you still requesting a jury trial?

4 **MR. DUNCAN:** No, Your Honor.

5 **THE COURT:** All right. So we can go ahead and strike
6 the jury trial request?

7 **MR. DUNCAN:** Yes, Your Honor.

8 **THE COURT:** And I think that was in the 236
9 counterclaim as well.

10 **MR. DUNCAN:** Yes, same, Your Honor.

11 **THE COURT:** We'll strike the jury trial request on
12 the counterclaims.

13 **MR. DUNCAN:** Your Honor, if I may raise one thing? I
14 don't think I should have raised this during the discussion of
15 the 26(f) report, but there is an issue with respect the
16 July 29 deadline for responding to the United States'
17 preliminary injunction. I think that's sort of separate, but
18 in my mind, it's related to the 26(f) report. So I just note
19 it, and we can discuss it when you want to.

20 **THE COURT:** I have the preliminary injunction just as
21 a question to raise, whether we can coordinate some schedules
22 on that, so we will come to that then.

23 So I've stricken the jury trial request. I think
24 everyone is in agreement that it's on for a bench trial.
25 Anything as to any of the Plaintiff groups?

1 **MR. WILKENS:** No, Your Honor.

2 **THE COURT:** Anything from any of the other Defendants
3 on that?

4 **MR. BOWERS:** No, Your Honor.

5 **THE COURT:** All right. And so I think that takes
6 care of everything with respect to the 844 case; is that right?

7 **MR. DUNCAN:** I think so, Your Honor.

8 **THE COURT:** Is that right, Mr. Gardner? Everything
9 -- we've taken care of everything we need to address as far as
10 the 844 case?

11 **MR. GARDNER:** Yes, Your Honor.

12 **THE COURT:** All right. All right. Before I then get
13 into the motions that are pending otherwise with respect to the
14 Carcano case or the 425 case, just in terms of coordinating
15 other cases, I am going to wait and come back around to the
16 845, the North Carolinians for Privacy case. I know there's
17 one case remaining in the Eastern District of North Carolina as
18 to that. Just so I understand, I believe that's the McCrory
19 and the State; is that correct?

20 **MR. BOWERS:** Yes, Your Honor.

21 **THE COURT:** Are you still intending to pursue that
22 case as well, or what is the status of that?

23 **MR. BOWERS:** The status is the Department has filed a
24 motion to dismiss and our response is due today, so we'll be
25 filing a response to that today. If I recall correctly, the

1 Court in the Eastern District set a July 26 reply date for the
2 Department, and then we'll likely hold a hearing on that motion
3 at some point after the 26.

4 **THE COURT:** So I understand, is that a mirror, to
5 some extent, of the 425 case or your counterclaims in the 425
6 case; is that right?

7 **MR. BOWERS:** I think that's an accurate depiction,
8 yes, Your Honor.

9 **THE COURT:** But at least for now, you are still
10 pursuing both; is that right?

11 **MR. BOWERS:** At least for now, we are still pursuing
12 both, yes, ma'am.

13 **THE COURT:** Are you contemplating dismissing that
14 one, or we'll just let them both go at this point?

15 **MR. BOWERS:** We've had active discussions with the
16 Department about possibly resolving that case. They've been
17 good exchanges, but we haven't come to any agreement on a way
18 to do that. I think it's fair to say that we're contemplating
19 it, but no decisions have been made.

20 **THE COURT:** Is there anything that we can do here, in
21 terms of confirming your ability to bring counterclaims in this
22 case in lieu of some agreement in that case, that would be
23 helpful where you've got the Court approving an agreement that
24 you all might have that you can assert those claims here,
25 preserving whatever defenses you might otherwise -- or that

1 they might otherwise want?

2 **MR. BOWERS:** That certainly wouldn't hurt, Your
3 Honor, and we would be grateful for any assistance in that
4 regard.

5 **THE COURT:** All right.

6 **MR. GARDNER:** I think the challenge, Your Honor, very
7 candidly is, as you know, the other case is before the Eastern
8 District, and so it's a bit of a challenge. We can only ask
9 this Court to do so much.

10 **THE COURT:** Right.

11 **MR. GARDNER:** The Government is concerned about the
12 duplicative, mirror-image nature. We did not want to have to
13 file a motion to dismiss in the Eastern District. We were
14 hoping it could have gotten resolved sort of the way the Berger
15 case is going to get resolved. I understand it can't happen
16 that way at least now, but we don't want to be in the position,
17 I don't think, frankly, the Governor wants to be in the
18 position, where we are litigating the exact same claims in two
19 different courts at the same time.

20 **THE COURT:** It may be that an agreement to let them
21 assert these counterclaims with any defenses that you might
22 want to raise reserved for the dispositive motion period would
23 allay their concerns on that.

24 The only other question I had, while I have you, is
25 with respect to whether the United States is going to raise

1 some issue that the individual secretary of education or
2 secretary of the Department of Justice needed to be a party in
3 the case in order for them to file their counterclaims?

4 **MR. GARDNER:** No, Your Honor.

5 **THE COURT:** If you're content that whatever claims
6 they can raise, they can raise -- if they could raise them as
7 affirmative claims in the Eastern District case, then they can
8 raise them as counterclaims in this case?

9 **MR. GARDNER:** Yes, Your Honor. I mean, again,
10 consistent with, you know, any other legal arguments we might
11 have with respect to standing and such, yes, absolutely.

12 **THE COURT:** But it would not be an issue where they
13 are giving something up by trying to assert them as
14 counterclaims here as opposed to affirmative claims there?

15 **MR. GARDNER:** No, Your Honor. I mean, we are not
16 here to sandbag. We are not trying to trick them into
17 dismissing and then going "aha." It's not nothing like that at
18 all. I think everyone here, everyone, including Mr. Bowers,
19 wants to litigate this case efficiently. We don't see any
20 efficiencies to be gained by particularly litigating these
21 mirror-image claims in two different districts.

22 We are fine with having the Governor litigate these
23 claims in the Middle District, and we would obviously reserve
24 our right to challenge those counterclaims at the appropriate
25 time in exchange for dropping their separate lawsuit in the

1 Eastern District, similar to what we've discussed with counsel
2 for the legislature.

3 **THE COURT:** And, again, it might be slightly
4 different in terms of the time. You may be able to reach some
5 agreement with the Carcano group and their agreement, that it's
6 different for that case as opposed to whether the counterclaims
7 can exist as counterclaims against the United States as opposed
8 to against private -- the ACLU, private entity, or private
9 individuals; but if there were some agreement that any issues
10 with respect to the counterclaims in the 425 case would be
11 raised on the dispositive motion deadline that we've set out in
12 the scheduling order so that everybody knows they are not going
13 to have to fight those fronts while we are going through the
14 discovery period but that you're reserving the right to be able
15 to make those defenses, although none of those defenses would
16 be any different than the defenses that would apply if it were
17 the affirmative suit that were otherwise brought, would that be
18 something you're willing to agree to?

19 **MR. GARDNER:** I think that's something that we ought
20 to have a discussion about. I think there are some logistics
21 there. For example, would we have to still answer the
22 counterclaims, and that gets a little dicey given the timing of
23 when our response would be due vis-a-vis the dispositive
24 motions schedule that we've all agreed to. I think if we could
25 work out those kind of particulars, and I am confident we can,

1 I think that's an approach that makes a lot of sense to me.

2 **MR. BOWERS:** I would tend to agree, Your Honor. Just
3 to be clear, I do believe that the proposal that Your Honor is
4 making would help with the efficiencies, but also want to be
5 clear that our conversations have been very professional. In
6 no way am I insinuating or suggesting that they are going to
7 sandbag us. I think -- and I know you weren't saying that. I
8 just want to make clear that we are not doing that, that we
9 don't allege that.

10 Also, the Court is probably aware of this, but just
11 for the record, you know, we did file a motion to transfer
12 venue in the Eastern District, and that motion was denied. So
13 we did give it the old college try at least once.

14 **THE COURT:** Well, if your alternative -- now, I don't
15 want to go too far into the Eastern District case. What I want
16 to do is make sure we do everything we can in this case or the
17 cases that are here so that they can get sort of cleaned up as
18 efficiently as possible.

19 I will leave that to you, but it sounds like there
20 are some discussions that you all might be able to have that
21 would let both sides feel comfortable with a stipulation of
22 dismissal in the Eastern District case without prejudice to
23 pursuing the claims here as counterclaims in the 425 case with
24 some additional logistics that may need to be addressed on
25 that. That's not something I would even begin to try to direct

1 you to do, but that is a suggestion for possibly conversation
2 that might make sense in terms of where you might be able to
3 clean this up and put it on a schedule that then would have
4 those issues on the briefing schedule we've set out for
5 dispositive motion briefing.

6 **MR. GARDNER:** That makes a lot of sense, Your Honor.

7 **MR. BOWERS:** It does to me as well, Your Honor.

8 **THE COURT:** All right. So I think that takes care of
9 what I wanted to cover with where that other proceeding stood.

10 **MS. STOUGHTON:** Your Honor, can I just raise two
11 issues related to this discussion?

12 **THE COURT:** Sure.

13 **MS. STOUGHTON:** Just two concerns I just want to get
14 out there to frame the discussion we need to have.

15 **THE COURT:** Okay.

16 **MS. STOUGHTON:** One is I am little bit concerned
17 about the assumption that postponing consideration of these
18 defenses until the dispositive motion deadline accomplishes the
19 goal of making discovery more expeditious, because if you look
20 at our schedule, dispositive motions are due one week after
21 discovery closes.

22 **THE COURT:** Right.

23 **MS. STOUGHTON:** And in my experience, discovery is
24 the most intense at the end. So I think that's something that
25 the parties should discuss, but I did just want to put that out

1 there. The second --

2 **THE COURT:** Well, certainly nothing prevents you from
3 working on them earlier. It would just be a matter of
4 responses -- and you can file them earlier, if you wanted to do
5 so. I think what we could agree is that the responses wouldn't
6 be due or the replies wouldn't be due until the briefing
7 schedule that's set so we wouldn't have serial motions coming
8 to the Court. I think that's part of the concern, too, is
9 having all of this teed up, for lack of a better word, for the
10 district judge to be able to resolve all of it without having
11 to get sort of pieces along the way.

12 I don't know that it makes any difference for the
13 scope of discovery because those exist, to some extent right
14 now, at least as defenses, and the intervention has been
15 allowed at least that far. If that's something that we need to
16 address separately -- but I don't know if it will have been
17 briefed in time to get that resolved before it will --
18 discovery will already have been undertaken.

19 **MS. STOUGHTON:** Well, Your Honor, first, thank you on
20 the first thing. That was very helpful to help me think it
21 through. The second thing you raised was exactly the second
22 thing I was going to raise, which is that I can't think of any
23 reason why the presence of these issues as counterclaims would
24 change the scope of discovery as opposed to defenses, but I
25 think that's a critical piece in our ability to move toward an

1 agreement on that.

2 **THE COURT:** So to the extent you need some input from
3 the Court on scope of discovery issues, it looks to me like
4 regardless of whether these are raised as defenses or
5 counterclaims, they are all still within the scope of what
6 would be part of discovery in this case.

7 If the contention is there shouldn't be any discovery
8 on this because this whole defense or this whole intervenor
9 should be dismissed completely, I think that's not going to get
10 resolved before the discovery period. So I don't think there
11 is a basis I am going to preclude discovery. Does that make
12 sense?

13 **MS. STOUGHTON:** Yes, and that's not our position with
14 regard to any of these parties --

15 **THE COURT:** Okay. All right. So does that help
16 address those?

17 **MS. STOUGHTON:** Yes, thank you, Your Honor.

18 **THE COURT:** Okay. All right. Anything else before
19 we move on to some of the other pending motions as to what
20 we've covered so far?

21 All right. I show a motion, Number 52, by the State
22 Defendants to conduct expedited discovery related to the
23 preliminary injunction. It looks to me like that's moot in
24 light of the schedule we've adopted here and in light of Judge
25 Schroeder setting the hearing August 1. Is that right?

1 **MR. BOWERS:** Yes, Your Honor, that's moot.

2 **THE COURT:** All right. So I am going to let the
3 clerk go ahead and note in the 236 case, Motion Number 52 is
4 moot.

5 Now, as I understand it, if your contention is at the
6 hearing that you need discovery or that some piece should be
7 resolved at the expedited or the advanced trial, then that's
8 something that you can address with Judge Schroeder, but there
9 is not any expedited discovery we would be doing obviously at
10 this point; is that right?

11 **MR. BOWERS:** That's right, Your Honor.

12 **THE COURT:** All right. Is that as far as the
13 Plaintiffs understand; is that correct?

14 **MR. WILKENS:** Yes, Your Honor.

15 **THE COURT:** All right. And then I think that's
16 everything I had with respect to the preliminary injunction in
17 the Carcano case. Is there anything else -- the 236 case,
18 anything else that would be something we'd need to get just
19 cleaned up prior to the August 1 hearing in that case?

20 **MR. BOWERS:** No, Your Honor.

21 **MR. WILKENS:** Not that I'm aware of, Your Honor.

22 **THE COURT:** All right. There's the not yet fully
23 briefed preliminary injunction requests by the United States in
24 the 425 case, and just so I understand that, I think that there
25 are -- let me make sure what I have here. There's the

1 Department of Justice's motion, the waiver of the reply, and as
2 I understand it, that's opposed by the Legislative Defendants
3 and the other Defendants as well, and a request for extension
4 of time to respond. I'm not going to take any of that up
5 substantively. To the extent there's something you want to
6 raise or address with Judge Schroeder at the hearing, you can
7 do that, but what I want to determine is everyone's just
8 general position on that and whether there is anything we can
9 do right now to sort of address those things or clean those
10 things up that would be helpful here today.

11 As far as the Department of Justice, anything we need
12 to do on that?

13 **MS. STOUGHTON:** I don't think so, Your Honor.

14 **THE COURT:** Just so I understand, are you asking for
15 your preliminary injunction to be heard August 1?

16 **MS. STOUGHTON:** Well, Your Honor, we had understood
17 that the reason Judge Schroeder was not -- let me back up. We
18 had understood that Judge Schroeder preferred to try to deal
19 with things collectively as much possible in all of these
20 cases.

21 **THE COURT:** Right.

22 **MS. STOUGHTON:** And we had understood that the reason
23 why Judge Schroeder did not set the United States' preliminary
24 injunction hearing alongside the hearing for the Carcano
25 preliminary injunction was because it would not be fully

1 briefed in time; and when that date was set for August 1, what
2 we realized was that if we waived our reply brief, it would be
3 fully briefed. So our intention was to just identify that to
4 the judge and give him an opportunity, if his preference was
5 to, in fact, hear them together, to hear them together. That
6 was the nature of the filing, and that's the United States's
7 position.

8 **THE COURT:** All right. To the extent there are
9 issues with respect to any discovery that the Defendants might
10 contend they need, that would be as part of the discovery that
11 we are setting here today.

12 **MS. STOUGHTON:** Your Honor, I understood the
13 Defendants' request for discovery to be as a general matter as
14 to all of these preliminary injunctions. I certainly can't
15 think of a reason why they would need discovery with regard to
16 the United States' motion that wouldn't apply equally to the
17 other preliminary injunction that they raised. There are
18 additional legal issues, but they are not of a different legal
19 or factual nature than the claims in the other preliminary
20 injunction. So I didn't see that as a distinction that would
21 change the judge's approach to whether discovery was necessary
22 to decide those matters on a preliminary injunction basis.

23 **THE COURT:** All right. And, again, I'm not going to
24 begin to try to address what Judge Schroeder is going to choose
25 to do with it, but if Judge Schroeder's determination or

1 preference is to deal with the United States and whatever part
2 of the Carcano motion for preliminary injunction he determines
3 at an advanced trial on the merits, and so that's going to be
4 part of that advanced trial, is there a reason to do more
5 preliminary injunction briefing, or would it just get rolled
6 into the briefing that we already have? Does that make sense?

7 **MS. STOUGHTON:** Yes, Your Honor. Your Honor, I
8 understood, at least at the present time, that the preliminary
9 injunction briefing schedule was still in place.

10 **THE COURT:** Right.

11 **MS. STOUGHTON:** I think our preference is that that
12 remain in place.

13 **THE COURT:** So that would still get briefed, but then
14 if Judge Schroeder ultimately waits to rule on that at the
15 advanced trial on the merits, then that would be where it all
16 gets rolled in; is that right?

17 **MS. STOUGHTON:** Correct, Your Honor. I think for our
18 purposes, I think, especially given the compressed period of
19 discovery, there is usefulness to having the preliminary
20 injunction motion briefed even if it's not decided until the
21 trial that we scheduled for November.

22 **THE COURT:** All right. I think I understand your
23 position on that. All right. Yes, sir?

24 **MR. DUNCAN:** Your Honor, yes, and I understand that
25 you don't intend to rule on any of these matters, but I would

1 like our position on the record to be clear.

2 **THE COURT:** That will be helpful.

3 **MR. DUNCAN:** Because our position is quite different
4 from the United States. I guess the premise of it is -- during
5 the telephone conference I believe on July 13, followed by
6 Judge Schroeder's order on July 14, we thought the clear
7 premise of that is to roll the United States' preliminary
8 injunction motion into an advanced trial that would take place
9 in late October or early November. Given that that's the
10 premise that I still understand it to be, it doesn't -- it's
11 not appropriate to have a preliminary injunction response due
12 on July 29 before we engage in any of the discovery and, you
13 know, further briefing, frankly, that we are going to have in
14 advance of the trial. So the July 29 date is just sitting
15 there, difficult to understand what it's doing there in light
16 of what Judge Schroeder's order said in the July 14 order.

17 **THE COURT:** And I believe that one is to be referred
18 to Judge Schroeder anyway, so I don't think it's actually
19 coming to me; in which case, then Judge Schroeder can make that
20 determination, whether he wants you to file a response to the
21 preliminary injunction or whether he wants to roll it all into
22 the trial on the merits. I guess that's your request, and
23 maybe I should say it this way: I think if that's going to be
24 your request, then you can make that request explicit in terms
25 of when you propose that the response to the preliminary

1 injunction would be due, or how you propose to respond to their
2 motion for preliminary injunction, if at all, what your
3 proposal is.

4 As I understand it, the Department of Justice says,
5 okay, well, even if it gets rolled in under this schedule that
6 we have, we would still appreciate having a response to the
7 motion for preliminary injunction now even if it's not
8 determined by the Court until after the hearing in November.

9 **MR. DUNCAN:** Well, I guess we have two responses, and
10 I'm not sure if I'm making it to you or to Judge Schroeder, but
11 I'll just make it anyway.

12 **THE COURT:** Right. Go ahead.

13 **MR. DUNCAN:** So the two responses are that the
14 schedule that we've now agreed to ought to supercede the
15 July 29 deadline, and so it should simply go away, and we tried
16 to make that point in our motion for extension of time.

17 **THE COURT:** Okay.

18 **MR. DUNCAN:** The motion -- the reason we also made a
19 motion for extension of time is because the United States filed
20 its notice on Friday, I forget the date, but a Friday,
21 suggesting that its PI motion be heard on August 1. Now, we
22 felt like we had no choice but to file a motion for extension
23 of time because we had understood that that PI hearing was
24 being rolled over into October, November. So it's purely
25 defensive because we simply -- we have a deadline sitting

1 there, but it's not clear that it makes -- it's appropriate
2 anymore.

3 **THE COURT:** All right. I think I understand, and to
4 be clear, I'm not going to make some determination about what
5 Judge Schroeder intends to do or what he did, but I think that
6 if there are some issues with respect to what gets heard at the
7 August 1 hearing, Judge Schroeder can make that determination.

8 The second piece, with respect to whether we roll
9 some preliminary injunction briefing into the schedule we have
10 here, nothing I am doing today right now supercedes whatever
11 you might need to do or clarify with Judge Schroeder unless we
12 can make some agreement on that today. It does not sound like
13 there's going to be some agreement on that, but that's why I
14 raised the question, if you follow.

15 **MR. DUNCAN:** I do. If I may make one more point?

16 **THE COURT:** Yes, sir.

17 **MR. DUNCAN:** It is our understanding of Judge
18 Schroeder's order, which I believe was on July 14, that the
19 United States' preliminary injunction motion has, in fact, been
20 rolled over into the October, November trial date. We believe
21 that the order says that. So if the United States wants to
22 have its preliminary injunction motion heard, the substance of
23 its motion, on August 1, it's up to the United States to make a
24 motion to do that, and there is no such motion. That's why we
25 were somewhat confused by the notice that was filed. We didn't

1 know how to interpret that, as a motion or not.

2 **THE COURT:** Well, I think it is a fair point that if
3 you all want some or need some determination ahead of the
4 hearing to clarify this dispute you have, then we need to get
5 that sort of presented in a way that it can be addressed
6 without me venturing too far into trying to give you a
7 preliminary determination on that.

8 Let me actually make sure other Defendants are sort
9 of similarly situated in terms of your position on this.

10 **MR. BOWERS:** Yes, Your Honor, we echo everything
11 Mr. Duncan just said.

12 **THE COURT:** All right.

13 **MR. BOWERS:** I would add just one point.
14 Ms. Stoughton mentioned that, you know -- I think she did. I
15 don't want to mischaracterize it -- something about they would
16 like to have a response to their PI motion at some point prior
17 to trial, and we would be willing -- at least on behalf of my
18 clients, we would be willing to discuss a reasonable time
19 period within which we would file such a response, beyond
20 July 29 of course.

21 **THE COURT:** All right.

22 **MR. BOWERS:** So we are not trying to keep them
23 from --

24 **THE COURT:** If there is some reason -- or something
25 that would be helpful to them to know what your response would

1 be, then you could do that; it would just be not by the 29th?

2 **MR. BOWERS:** That's correct, Your Honor.

3 **MR. DUNCAN:** Yes, that's our position as well, Your
4 Honor.

5 **THE COURT:** All right.

6 **MR. DUNCAN:** We would be happy to work something out.
7 We just didn't know if it needed to be worked out in light of
8 the schedule.

9 **THE COURT:** Where things are. All right.
10 Mr. Francisco, anything else?

11 **MR. FRANCISCO:** Your Honor, we concur with
12 Mr. Duncan's position.

13 **THE COURT:** So, Ms. Stoughton, let me come back to
14 you. It sounds like if it's just a matter of having some
15 response to preliminary injunction so that you can know what
16 their response position issues will be, that might be something
17 that you can work out with them in terms of a date when they
18 might file that with the assumption, if we go down that track,
19 that it's going to be substantively for the Court rolled over
20 into the trial.

21 If you are asking for your motion to preliminary
22 injunction to be heard on August 1, it does make sense to me
23 that if that's a request that you are making, that you make
24 that as a request so that it can actually go to Judge
25 Schroeder, and he can make a determination on that.

1 **MS. STOUGHTON:** Understood, Your Honor.

2 **THE COURT:** Is that fair enough?

3 **MS. STOUGHTON:** Yes.

4 **THE COURT:** So I will leave it this way. If then you
5 want to be heard on that and you think that there is some room,
6 even in light of what Judge Schroeder did at the prior
7 telephone conference and order, then I will leave it to you to
8 make a decision whether you want to make such a request, but to
9 the extent that you want to, you would need to file that as a
10 separate motion.

11 **MS. STOUGHTON:** I understand.

12 **THE COURT:** I am trying to be careful that I am not
13 directing you to file that --

14 **MS. STOUGHTON:** I understand.

15 **THE COURT:** -- or making some indication about
16 whether there's room for that so much as if that's a position
17 that you take and something you want to pursue, you need to
18 file a motion so that it can go to Judge Schroeder, and he can
19 make that determination.

20 **MS. STOUGHTON:** I completely understand, Your Honor.

21 **THE COURT:** And so --

22 **MR. DUNCAN:** May I ask for one clarification, Your
23 Honor?

24 **THE COURT:** Yes.

25 **MR. DUNCAN:** I can consult a docket, but I am just

1 asking. Our motion for extension of time to respond to the
2 United States' preliminary injunction, is it -- I don't
3 understand whether it's been submitted or not to Judge
4 Schroeder.

5 **THE COURT:** I think that's docketed at Number 97.
6 Ms. Engle can tell us that.

7 **THE CLERK:** That was submitted.

8 **MR. DUNCAN:** Thank you.

9 **THE COURT:** It was submitted to Judge Schroeder; is
10 that right?

11 **THE CLERK:** It was submitted to Judge Schroeder on
12 July 18.

13 **THE COURT:** So that request for extension of time is
14 submitted to Judge Schroeder. I am trying to -- what I think
15 might make sense is for you to all to have a conversation about
16 where you are on that. If the Government is not going to make
17 that kind of request for hearing on some piece of your
18 preliminary injunction on August 1, then it seems that you all
19 can work out some agreement that would moot that request for
20 extension of time, but if you are going to proceed with your
21 request, then I think Judge Schroeder can consider all of those
22 things together.

23 **MS. STOUGHTON:** Yes, Your Honor.

24 **THE COURT:** Does that sound right?

25 **MS. STOUGHTON:** Yes.

1 **MR. DUNCAN:** Yes.

2 **THE COURT:** So I will leave that then as it is. If
3 the United States decides not to file a request with respect to
4 its preliminary injunction for the August 1 hearing, then the
5 parties will have some further discussion that might moot the
6 pending requests for extension of time, and I will leave that
7 to you all; but nothing about the schedule that we are adopting
8 today affirmatively supersedes anything that's otherwise set
9 with respect to that briefing schedule, and we'll just leave
10 that for separate determination. Does that sound right to you
11 all?

12 **MR. DUNCAN:** Thank you, Your Honor.

13 **MS. STOUGHTON:** Yes, thank you.

14 **THE COURT:** I believe we already jumped ahead and
15 addressed this when I had the -- in the 236 case, the motion to
16 strike the counterclaims. I think we've discussed that,
17 whether those could be affirmative defenses rather than
18 counterclaims. So I don't think there is anything else we
19 needed to address. We covered that, yes, Mr. Wilkens?

20 **MR. WILKENS:** Yes, that's right, Your Honor. And we,
21 I think, clarified that this agreement or stipulation will go
22 in by 5:00, and then we will have further conversations about
23 whether we can proceed with the defenses.

24 **THE COURT:** All right. Yes.

25 **MR. WILKENS:** Just to be clear on the record, and I

1 think it will be clear in the statement that's filed, but with
2 regard to the pending motion to strike, the first argument, we
3 would withdraw that on the duplicative nature of the
4 counterclaims, but we would keep the -- pages 9 through 15 on
5 standing would still be a live argument that we've agreed would
6 remain.

7 **THE COURT:** Would remain?

8 **MR. WILKENS:** Yeah.

9 **THE COURT:** And I will ask you -- I don't know the
10 logistics of your timing on this -- is there the ability still
11 to note that in light of our discussions here today, you'll
12 continue having conversations about that, or is that already
13 prepared and filed?

14 **MS. STOUGHTON:** Your Honor, I don't know the answer
15 to that question because there are -- there is another attorney
16 back in Washington who was tasked with doing that while we are
17 here today. So that's all I know.

18 **THE COURT:** I understand. So we will just note for
19 the record as part of these proceedings that, in addition to
20 whatever is included in the joint report, there is also this
21 additional possibility that you all will continue having those
22 discussions that may result in the motion to strike being
23 rendered moot, if the counterclaims are treated as affirmative
24 defenses that would still allow all of those to be raised as
25 issues in the case. Is that where we are?

1 **MR. DUNCAN:** Yes, Your Honor. As I understand it, we
2 are supposed to keep talking. We are going to file our joint
3 notice, but we can talk further and that we may have another
4 joint notice.

5 **THE COURT:** You may be able, right, to take care of
6 that.

7 I already covered this as well with you, Mr.
8 Francisco, but with respect to the motions to stay and motions
9 to dismiss by the UNC Defendants, those are still being
10 briefed. They would be on the ordinary briefing schedule under
11 the local rules, but unless or until there is a stay or a
12 dismissal, the UNC Defendants would be participating fully in
13 all these deadlines for discovery.

14 **MR. FRANCISCO:** Yes, Your Honor, on the stay motion,
15 it's fully briefed, and I think it's scheduled to be heard at
16 the same time as the Carcano PI motion on August 1.

17 **THE COURT:** Would that attempt to stay the discovery,
18 or is it just staying some other piece?

19 **MR. FRANCISCO:** Your Honor, it would be an attempt to
20 stay the discovery. It's obviously become a lot more
21 complicated in light of everything that's gone forward. It is
22 unclear where that will go, but for now, it is fully briefed,
23 and it is noted to be heard on August 1.

24 **THE COURT:** Well, to the extent that there is
25 discovery ongoing, it certainly -- my sense is that it is most

1 efficient and makes sense for the UNC Defendants to be
2 participating in the discovery while it's ongoing so we don't
3 have to repeat discovery later if --

4 **MR. FRANCISCO:** Yes, Your Honor.

5 **THE COURT:** -- those Defendants were then proceeding
6 at some point. I don't think anyone would want the discovery
7 to be repeated.

8 **MR. FRANCISCO:** We would agree.

9 **THE COURT:** Otherwise, until there is some other
10 ruling to the contrary, you would be participating then in all
11 the discovery?

12 **MR. FRANCISCO:** Yes, Your Honor.

13 **THE COURT:** Anything else we need to take up today as
14 far as that goes?

15 **MR. FRANCISCO:** No, Your Honor.

16 **THE COURT:** All right. I think that takes me then to
17 the 845 case and the motion to intervene by the North
18 Carolinians for Privacy, but before I do that, I want to give
19 you a chance for these 236 and 425 cases with respect to
20 anything else other than the 845 case issues that we would need
21 to address today? Mr. Wilkens?

22 **MR. WILKENS:** Not for the Carcano Plaintiffs, Your
23 Honor.

24 **THE COURT:** All right. Ms. Stoughton?

25 **MS. STOUGHTON:** Not for the United States either.

1 **THE COURT:** And, Mr. Gardner, to the extent you are
2 otherwise involved, anything else before I move on to that?

3 **MR. GARDNER:** No, Your Honor.

4 **THE COURT:** All right. Yes, sir, Mr. Bowers?

5 **MR. BOWERS:** No, Your Honor, I think we've covered
6 everything.

7 **MR. DUNCAN:** Nothing further, Your Honor.

8 **MR. FRANCISCO:** Nothing further, Your Honor.

9 **THE COURT:** All right. So let me just ask you before
10 I completely move to that case then. In the joint report in
11 the 236 and 425 cases, the parties stated that the schedule
12 presumes no intervention by the North Carolinians for Privacy
13 and that the schedule would have to be adjusted if they
14 intervene. Let me just ask you, based on that statement, what
15 you anticipate or how you anticipate it would need to be
16 adjusted if they were allowed to intervene in the 425 case?

17 **MR. DUNCAN:** Your Honor, if I may clarify one thing?

18 **THE COURT:** Yes.

19 **MR. DUNCAN:** We don't believe the joint report is
20 saying that we, the Defendants, think the discovery schedule
21 would need to be adjusted.

22 **THE COURT:** Okay. That's helpful. Let's see where
23 we are.

24 **MR. DUNCAN:** Let me just find the language. The
25 language we have here is "Plaintiffs believe" --

1 **THE COURT:** -- "believe that if the Court permits...,
2 the following schedule likely will need to be adjusted." All
3 right. Well then, while I have you, though, if I -- I am not
4 going to hear the motion to intervene. That's not before me,
5 but if the discovery were consolidated or later the
6 intervention were allowed, what would your position be with
7 respect to the North Carolinians for Privacy being included in
8 the discovery order in this case?

9 **MR. DUNCAN:** We have no objection to them being
10 included in the discovery order as it stands, and we don't know
11 of any reason why it would have to be adjusted, which is why we
12 insisted on the language that it's not us.

13 **THE COURT:** All right. If there is a designation of
14 number of interrogatories and requests for admission per side,
15 if the North Carolinians for Privacy were included as part of
16 your side, would you still be able to divide that same number
17 up among all of the --

18 **MR. DUNCAN:** I don't want to take a position for
19 them. I don't know any reason --

20 **THE COURT:** I am going to come around to them in a
21 minute, but right now, as far as your clients are concerned,
22 you wouldn't have any problem with keeping all the numbers as
23 is if they were rolled into discovery?

24 **MR. DUNCAN:** Speaking for the Defendant Intervenors,
25 no, we have no problem with that.

1 **MR. BOWERS:** Same here, Your Honor. We specifically
2 contemplated that when we were working on this. We would have
3 no objection to that.

4 **THE COURT:** No problem with that?

5 **MR. BOWERS:** No problem with that at all.

6 **THE COURT:** Mr. Francisco?

7 **MR. FRANCISCO:** Same position, Your Honor.

8 **THE COURT:** All right. So then I think I come over
9 here. Let me ask -- I think it's in the joint Rule 26(f)
10 report, but, Mr. Gardner, if you want to address that for the
11 Department of Justice, then that's fine.

12 **MR. GARDNER:** Yes, Your Honor. I am going to
13 cross-reference because both North Carolinians for Privacy's
14 and the Department of Justice's separate Rule 26(f)s
15 acknowledge that the case ought to be resolved on cross-motion,
16 and I think that's largely because North Carolinians for
17 Privacy's case is qualitatively different than the other cases
18 that we just addressed.

19 **THE COURT:** Okay. Well, here is the thing. I will
20 let you be heard on all of that, and I am going to hear from
21 their attorney on all of that, but if I could sort of jump you
22 ahead --

23 **MR. GARDNER:** I am cutting to the chase right now,
24 Your Honor.

25 **THE COURT:** -- how it would have to be adjusted in

1 terms of the dates.

2 **MR. GARDNER:** So a few things. One, we think that
3 the dispositive motion deadline would need to be much earlier,
4 and that's because North Carolinians for Privacy have raised
5 primarily APA claims. We typically don't have trials in APA
6 cases, and, typically, we don't even have discovery in APA
7 cases.

8 So just as a threshold matter, allowing North
9 Carolinians for Privacy to be a participant in discovery in a
10 case that largely is a case under the Administrative Procedure
11 Act seems atypical at best, to be sure; but now, beyond that
12 scheduling issue about moving up the dispositive motion, I do
13 think it adds complexity to add yet another party to this
14 carefully crafted Rule 26(f) that the Carcano and the United
15 States Plaintiffs developed in terms of dividing up discovery
16 requests, expert witnesses, and the like. So that complexity I
17 do think --

18 **THE COURT:** Well, they're saying they can roll them
19 all in. So that's what I am trying to get at is would it take
20 you longer if they were included? You need more time?

21 **MR. GARDNER:** Well, to the extent that North
22 Carolinians for Privacy want to also identify additional
23 experts, additional fact witnesses potentially, serve
24 additional discovery requests, the -- let me take that because
25 the parties -- if they accept that schedule, there would not be

1 additional discovery requests, but it could potentially
2 increase the number of witnesses.

3 **THE COURT:** It would potentially address the number
4 of expert witnesses, but if it's proceeding as a separate case
5 and I let them have expert witnesses, there are going to be
6 expert witnesses there.

7 **MR. GARDNER:** There would be, but that would be a
8 separately handled case on a separate track, and I do think
9 that does make a difference because I think the parties have
10 obviously agreed, the United States and the Carcano Plaintiffs
11 and the Defendants here, to have this expedited schedule that
12 will presumably result in a trial in late October, early
13 November; but North Carolinians for Privacy, because the nature
14 of those claims are very different, including interjecting
15 those additional different issues, potentially additional
16 witnesses, I do foresee that it could create hiccups in this
17 really carefully crafted schedule.

18 **THE COURT:** All right. Let me let Mr. Dalton get
19 involved in this conversation a little bit, and then I'll come
20 back to you. Yes, sir.

21 **MR. DALTON:** If I may, Your Honor?

22 **THE COURT:** Yes.

23 **MR. DALTON:** Yes, I feel like the United States'
24 position is somewhat inconsistent in between the two different
25 Rule 26(f) positions. In their Rule 26(f) response in the

1 North Carolinians for Privacy case, they say that no discovery
2 is necessary and just want to proceed on dispositive motions,
3 and, yet, their position on the joint report is that allowing
4 us to intervene with the exact same claims, to join in similar
5 claims, legal and factual claims, would again -- would somehow
6 delay the discovery process, add more witnesses.

7 **THE COURT:** That's what I've sort of drilled down
8 here with Mr. Gardner. It sounds like the concern really -- to
9 the extent you're sharing the discovery that's already agreed
10 to, the primary concern would be maybe with adding expert
11 witnesses.

12 Let me take this tack with you. Ordinarily, in an
13 APA case, you are going to have, if any discovery, pretty
14 narrow discovery. It looks like you are going to still have to
15 get the administrative record sort of at some point as part of
16 this so we know what that is, and then if your request is that
17 you might have some experts that you want to include, that is
18 relatively limited and may be able to be managed as part of the
19 larger discovery. What I would want to make sure of is that
20 letting you do that doesn't complicate, delay, or otherwise
21 cause unnecessary disputes in the discovery period.

22 **MR. DALTON:** Absolutely, Your Honor. To be clear,
23 the primary reason that we are seeking discovery is because the
24 United States has introduced facts that put in dispute some of
25 the legal questions that will be before the Court that are in

1 both cases. The United States in their preliminary injunction
2 motion has produced expert witnesses and other testimony,
3 declarations that put facts at issue that will impact our
4 client's legal claims; and because of that, we need the ability
5 to either take discovery ourself in our separate case or to
6 join the discovery schedule in the other cases in order to
7 protect our client's interests and not have them be
8 detrimentally impacted by the experts that have been put
9 forward by the United States already.

10 **THE COURT:** All right. I'm going to hear from
11 Mr. Gardner, explore this a little more with him, and then I'll
12 come back to you. Yes, sir.

13 **MR. GARDNER:** I think, Your Honor, there may be a
14 misunderstanding amongst the parties. The Government's
15 position is that these issues are legal issues, and in the
16 preliminary injunction, we said quite clearly here, "The legal
17 conclusion that discrimination based on sex includes
18 discrimination on account of transgender status is bolstered by
19 an informed understanding of the real-life meaning of the term
20 'sex.'"

21 The Government in a defensive posture in an APA case
22 doesn't intend to put on evidence. We intend to, as a matter
23 of law, move to dismiss. So North Carolinians for Privacy's
24 concern that we are going to be introducing experts in defense
25 to an APA case is just a very different posture than what the

1 United States is doing in its affirmative case, and that
2 explains the difference, Your Honor.

3 **THE COURT:** Well, so here is what I am looking at,
4 though. In the 425 case, in the Legislative Intervenor's
5 counterclaims, it looks like Counterclaim Number 2 is that H.B.
6 2 does not violate Title IX, which seems to at least generally
7 match or overlap with the 845 claim that there is not a
8 violation of Title IX, and that the Berger-Moore counterclaim
9 in the 425 case, Roman Numeral IV, I think, is that the DOJ's
10 interpretation violates the APA, and that's the APA piece of
11 this, so that in the 845 case, it's not just an APA case, but
12 the two claims that are raised are tracked as counterclaims
13 with the Intervenors.

14 Here is where I am going. I don't intend to open up
15 some broader discovery for them, and if they're complicating or
16 delaying the discovery process or asking for discovery
17 themselves that's beyond what is appropriate, I would have a
18 problem with that. We would address it. On the other hand,
19 even if it's a separate case and they are not allowed to
20 intervene, it seems to make sense to me to consolidate them
21 just for discovery so that if there's an administrative record
22 issue about what the record is for the APA, that all gets
23 sorted out in the discovery period. If there is some expert
24 issue or limited issue, it overlaps and we can do it all as
25 part of a single discovery. So I'm also not setting hearings

1 at noon on every other Friday for the 845 case that we've got
2 to deal with as well.

3 **MR. GARDNER:** I completely understand that, Your
4 Honor, and the Government does have an interest in efficiency
5 and not duplication. I do think, though, the difference here
6 is if we took all these other cases away, and we were just
7 dealing with North Carolinians for Privacy, presumably we
8 wouldn't really even be talking about discovery. We would in
9 typical course move to dismiss, get that resolved if there are
10 any claims remaining, and there should be because they are
11 legal claims, and at that point figure out a path forward. It
12 doesn't seem, though --

13 **THE COURT:** Just so I can follow, though, so your
14 motion to dismiss in terms of standing issues, is that -- or
15 your motion to dismiss in terms of -- or are you actually more
16 like a motion for summary judgment on the actual APA claims?

17 **MR. GARDNER:** That's exactly right. I should say,
18 Your Honor -- that was a compound question, and I fell for it.

19 A couple of things. One, I actually don't even see
20 the need to certify an administrative record in this case given
21 the nature of what's being challenged here. They are
22 essentially challenging policy guidance on various APA
23 principles, including the fact that it didn't go through notice
24 and comment rulemaking. Those kind of APA challenges typically
25 don't even require an administrative record. We just decide,

1 as a matter of law, is this the type of the guidance that is
2 subject to the procedural requirements of the APA. So that's
3 sort of the first answer.

4 The second answer -- and I'm not sure I remember the
5 two-part question now, so I apologize.

6 **THE COURT:** Well, it was the ideal -- or you have
7 some preliminary motions or is this summary judgment on the APA
8 and the other non-APA claims?

9 **MR. GARDNER:** Thank you. We would envision a
10 dispositive motion that covers what I will call the substance
11 as well as any procedural issues.

12 **THE COURT:** My concern is why would it help to have
13 that on a separate track from similar overlapping issues being
14 raised as counterclaims in the 425 case?

15 **MR. GARDNER:** Sure, because I think a few things.
16 One, I recognize there's some level of overlap. The Government
17 is not saying these cases are completely unrelated, and,
18 certainly, in terms of the general subject matter, there is
19 overlap. One example I can give you is let's say the Carcano
20 Plaintiffs are successful in prevailing on their constitutional
21 claims and that H.B. 2 is struck down as being
22 unconstitutional. My sense is North Carolinians for Privacy's
23 lawsuit goes on, and it goes on because they are challenging
24 separate documents, those policy guidance documents, and I
25 think that example --

1 **THE COURT:** So that makes sense as a reason to keep
2 them separate and not let North Carolinians for Privacy
3 intervene but to put them on the same discovery order and track
4 so that if those issues do have to get resolved, they are all
5 at least resolved in an orderly way. My determination could be
6 a recommendation that there not be a discretionary
7 intervention, but that there be -- this case proceed separately
8 but be consolidated for discovery, and then the district judge
9 can consider the dispositive issues at the November time
10 period.

11 **MR. GARDNER:** I certainly understand that. I guess
12 where I'm pushing back a little bit is on the notion that North
13 Carolinians for Privacy need discovery in the first instance,
14 given that in the defensive posture, we are going to be moving
15 as a matter of law, and our argument is as a matter of law,
16 Title IX, Title VII, and the Violence Against Women Act are
17 consistent with the policy guidance that they are challenging.

18 So I think if there were a case, Your Honor -- and
19 let me be clear. If this is a case where we felt we were going
20 to be introducing experts or fact witnesses and the like, we
21 would be taking a different position here, Your Honor. We'd
22 say, look, for efficiency, it does make sense for them to
23 participate, but we don't deal with North Carolinians for
24 Privacy's lawsuit as implicating factual- or expert-type issues
25 that the affirmative lawsuits brought by the United States and

1 the Carcano Plaintiffs implicate, and that's sort of the bigger
2 point here.

3 **THE COURT:** One more question, and then I will come
4 back to you.

5 So -- actually, it's two parts again. I understand
6 that's your position with the APA. Even as to the APA, there
7 would be the issue where, even if the United States believed
8 that there wasn't any need for discovery, I would consider
9 whether there was some limited discovery if they could show me
10 some piece or part for that discovery, and, if so, then whether
11 it makes sense for that to be consolidated as well.

12 The second part is the non-APA claim and whether
13 there's some basis there, whatever discovery, even if you
14 believe it's limited, would be appropriate if those things
15 would be some potential discovery that they might be entitled
16 to, and, if so, then why we would have that on a separate
17 track?

18 **MR. GARDNER:** Sure. I think I can answer both of
19 those questions, and let me take them backwards. Even with
20 respect to Count Two and Count Three, Your Honor, we think, as
21 presented by North Carolinians for Privacy, those are legal
22 issues. Either Title IX and VAWA permit or do not permit
23 inclusion of transgender individuals to use the bathroom with
24 which they identify -- which is consistent with their gender
25 identity.

1 But with respect to discovery more generally, Your
2 Honor, it seems to me that one approach we could take is the
3 Government files its dispositive motion. If North Carolinians
4 for Privacy believe that in order to respond to our motion,
5 they need discovery, they can file a Rule 56(d) motion, and at
6 that conjuncture, it would be teed for the Court to decide
7 whether or not the Government's arguments are presenting legal
8 arguments or arguments that require some form of discovery to
9 respond to.

10 **THE COURT:** Well, I understand why, if it were a
11 standalone case, that might make sense to do, but I am not sure
12 whether it makes sense to do since we've got all these other
13 overlapping claims and issues proceeding on this expedited
14 discovery track statement at the same time.

15 I am going to go over here for a minute, and then
16 I'll come back to you. Yes, sir.

17 **MR. DALTON:** If I may, just, I think, a point of
18 clarification, North Carolinians for Privacy's case is not
19 different than the issues already presented. We present only
20 two additional claims under the APA that are not already
21 presented by the Intervenors, and those two issues would be the
22 free exercise and the RFRA claim, which, if this case were
23 resolved on the other issues, the Court wouldn't even need to
24 reach those, and we don't anticipate extensive or additional
25 discovery on those issues.

1 So that being the case, the other APA claims that are
2 brought by North Carolinians for Privacy are already at issue
3 in the United States' case. It would make sense -- to the
4 extent discovery is necessary, for example, that will require,
5 at least under one of our claims, a determination of the
6 meaning of what -- what does Title IX mean, what does sex mean,
7 and the United States has put factual evidence at issue in
8 their preliminary injunction motion as to the meaning of the
9 word "sex." And we, in order to protect our client's
10 interests, need the ability to respond to that, and that's why
11 we do need discovery, whether it's separately or in conjunction
12 with the other discovery that's taking place.

13 **THE COURT:** If it were in conjunction, then -- and
14 you were included in a consolidated discovery but still left as
15 a separate case for purposes of just trial and management, you
16 would be limited in terms of your interrogatories, requests for
17 admission in terms of the total number for the Defendants, and
18 you would be joining that; but even with that, I think I want
19 to make sure and understand exactly what or how much discovery
20 you're anticipating, and then it sounds like the main thing
21 that might be anything in addition to what otherwise would be
22 already happening would be the possibility of an expert witness
23 that you would designate or a rebuttal to an expert that the
24 United States has designated.

25 Do you anticipate -- or what do you anticipate? Do

1 you anticipate just that, or can you tell me a little bit about
2 that?

3 **MR. DALTON:** Yes, Your Honor. We would anticipate
4 coordinating with the current Defendants to reduce any
5 duplicative discovery. As far as experts go, it would be
6 primarily rebuttal experts to rebut the ones that the United
7 States has already put forward and also any witnesses to rebut
8 other witnesses that they put forward within their motion for
9 preliminary injunction. No, we don't anticipate expanding the
10 scope of discovery whatsoever beyond the claims that are
11 already before this Court. As I said, they are very similar.
12 That's why we are moving to intervene is they are the same
13 questions of law and fact presented in our case and the United
14 States' case with only the very small difference, as we
15 included the free exercise and the RFRA claims. Beyond that,
16 there are the same issues of law, same issues of fact, and we
17 believe it would be most efficient to try them on the same
18 discovery schedule.

19 **THE COURT:** And I understand the rebuttal expert.
20 What other expert or non-- are there non-expert witnesses that
21 you are anticipating? Can you help me with that?

22 **MR. DALTON:** Well, Your Honor, the United States has
23 put forth over 500 pages of evidence attached to its
24 preliminary injunction motion. That includes both expert
25 witnesses, lay witnesses talking about the impacts that House

1 Bill 2 has on individuals, and because of the individuals that
2 we represent and the impacts it might have on them, it's
3 possible we could also put forth those types of declarations at
4 least or witnesses.

5 **THE COURT:** So it wouldn't necessarily be any
6 additional discovery that you are trying to get from the United
7 States other than the administrative record. You are talking
8 about the possibility of presenting a rebuttal expert and
9 presenting other witnesses' declarations on your own; is that
10 right?

11 **MR. DALTON:** Yes, Your Honor.

12 **THE COURT:** All right. And then if there is an issue
13 or question with respect to the admissibility of those, then
14 that's something that Judge Schroeder would have to consider.

15 **MR. DALTON:** Absolutely.

16 **THE COURT:** Let me let you respond to that.

17 **MR. GARDNER:** Thank you. Your Honor, I really
18 appreciate that because --

19 **THE COURT:** It helps; right?

20 **MR. GARDNER:** Well, that's precisely our concern is
21 that I am not as concerned about North Carolinians for
22 Privacy's initial discovery against us as much as I am
23 concerned about them now introducing new experts, new fact
24 witnesses, who the Government is now going to have to depose
25 within this very compressed period of time, and I am still

1 somewhat struck by their need to introduce witnesses to respond
2 to the United States' witnesses in a separate case when we are
3 not going to be raising or using those types of experts to
4 defend the United States' interests in North Carolinians for
5 Privacy. That's why --

6 **THE COURT:** So is that the distinction, whether they
7 are allowed to intervene, because that's still out there as a
8 possibility?

9 **MR. GARDNER:** Absolutely.

10 **THE COURT:** As I understand part of the reason for
11 not letting them intervene is because they've got their own
12 case; but if then in their own case they are not able to do
13 everything they could if they intervened, then that actually,
14 to me, leaves me to conclude maybe we should just let them
15 intervene, rather than a separate case with discovery.

16 Do you understand?

17 **MR. GARDNER:** I understand exactly what you're
18 saying, Your Honor. I think actually the reason why they don't
19 need to intervene is because their separate case is different,
20 because they don't need to develop a factual record because the
21 Government again is making legal arguments here.

22 I mean, again, if in North Carolinians for Privacy
23 the Government was going to be introducing expert testimony or
24 fact witnesses, then I would understand North Carolinians for
25 Privacy's need for discovery much more. The reason I don't,

1 though, again not to reiterate, is because these are legal
2 arguments that North Carolinians for Privacy raises, their need
3 for discovery to respond to the Government seems unnecessary;
4 and, again, if they do have a concern that they need discovery,
5 it seems that the appropriate vehicle for addressing that is in
6 response to our earlier dispositive motion.

7 Now, with respect to intervention, if intervention is
8 granted, the concern there is, again, we crafted a very
9 carefully, very tight schedule for getting through discovery,
10 and now I hear from North Carolinians for Privacy that, well,
11 now they may want to introduce experts and fact witnesses.

12 **THE COURT:** Well, it would be on the same schedule.

13 **MR. GARDNER:** Exactly, and that's the concern is that
14 this is a very tight schedule for getting a lot of stuff done
15 very quickly, and now we're talking about introducing yet more
16 witnesses. So that's the concern in terms of -- to respond to
17 Your Honor in terms of why we believe the schedule might have
18 to be adjusted, it's for these reasons.

19 **THE COURT:** All right. I am going to give you a
20 choice. I don't think you are going to like either one. So if
21 this were the choice -- and I am going to get a response from
22 everybody, but I think it's ultimately going to be -- my guess
23 is that the rest of the interested parties would agree to
24 either of these, but I will find out.

25 The choice is either I recommend intervention as a

1 discretionary determination and we roll all of this in and deal
2 with it on the same schedule and simplify it down to just the
3 two cases, or I recommend that they not be allowed to
4 intervene, they stay a separate case, so that there's not some
5 issue of concern limiting their ability to protect their
6 interests; and just for the Court's efficiency and simplicity,
7 we keep everything moving along the same track, I consolidate
8 them just for discovery purposes without limiting in either
9 event your ability to make your arguments as to what discovery
10 specifically is ultimately going to be allowed to be presented.

11 **MR. GARDNER:** My colleague can slap me in the back of
12 the head if I misstate things, but I would choose Option B. I
13 think Option B makes much more sense here, that they would
14 proceed on their discovery case on a separate track. To the
15 extent Your Honor believes it is appropriate for them to
16 participate just for purposes of discovery, so be it. Again,
17 we would --

18 **THE COURT:** I understand you are not agreeing to
19 that.

20 **MR. GARDNER:** But between those two choices, Option B
21 makes much more sense to the Government.

22 **THE COURT:** I am going to come over here. My guess
23 is that either of those options works for North Carolinians for
24 Privacy; is that right?

25 **MR. DALTON:** Yes, Your Honor.

1 **THE COURT:** So if given the choice, not necessarily
2 again by agreement, but understanding that I am going to pick
3 one of those, if the Government is selecting Option B, then you
4 don't have any objection to Option B? And to clarify, Option B
5 being then you would not be intervening in any of the
6 existing -- the 236 or the 425 case, but you would be
7 proceeding as a separate case, consolidated for discovery so
8 you are on the same schedule, and then any issues with respect
9 to your claims or what you can present or how they'd be
10 presented would be taken up by Judge Schroeder in November.

11 **MR. DALTON:** No objection to that, Your Honor.

12 **THE COURT:** All right. Let me see if any of the
13 other Defendants has any objection to that.

14 **MR. BOWERS:** No objection, Your Honor.

15 **MR. DUNCAN:** No objection, Your Honor.

16 **MR. FRANCISCO:** No, Your Honor. UNC Defendants have
17 taken no position on intervention, so we are indifferent
18 between those two options.

19 **THE COURT:** Between either of those things, all
20 right. I don't think it affects the Carcano Plaintiffs at all,
21 except that under either scenario, they are participating in
22 discovery. Understanding where we are, is there anything that
23 you all would need to raise on that?

24 **MR. WILKENS:** Your Honor, I would just say, in terms
25 of -- well, to the extent that it's Option B and issues can

1 be -- legal issues can be then resolved in the separate case
2 and that that might alleviate some of the crush of discovery
3 that we have in the other cases, that would be preferable from
4 our point of view. It may simplify discovery if these legal
5 dispositive issues can be dealt with early on in the separate
6 case, so we would have a preference for B in that sense.

7 **THE COURT:** All right. I guess you are asking for B
8 plus a separate dispositive schedule in the 845 case; is that
9 right?

10 **MR. WILKENS:** Well, maybe I misunderstood. I assumed
11 that if -- under Option B, if there is a separate case going
12 on, even though there is coordination for discovery, it
13 wouldn't preclude a motion as a matter of law being brought
14 early in the other separate case.

15 **THE COURT:** I think that nothing would preclude any
16 motion -- and Ms. Stoughton and I talked about this earlier --
17 any motion from being filed earlier. If there is a request for
18 an earlier responsive period that would otherwise apply or a
19 particular motion that you would want a different response time
20 to run, I can consider that, and certainly you can always file
21 a motion earlier. I don't know that it will be reached
22 separately from the November determination.

23 **MR. GARDNER:** Understood, Your Honor. One point of
24 clarification, if in the Option B North Carolinians for Privacy
25 of their separate case -- I understood that both parties in

1 their 26(f) proposed an earlier dispositive briefing schedule
2 than that which the Carcano and the United States Plaintiffs
3 agreed to. They were different schedules, to be sure, but they
4 were earlier. I believe North Carolinians for Privacy wanted
5 cross-motions simultaneously. The United States' view would be
6 that it should be sort of an A, B, A, B schedule, but it does
7 seem that if North Carolinians for Privacy does remain its own
8 separate concern, that it might be helpful to reach an
9 agreement now on what the time should be for dispositive
10 motions.

11 **THE COURT:** So you would be consolidated for
12 discovery, which means all of the deadlines up through
13 October 7, which is the close of discovery, are going to apply?

14 **MR. GARDNER:** Correct.

15 **THE COURT:** But if you want to set an earlier
16 dispositive motion briefing schedule still with the October 7
17 close of discovery, then I can entertain that request.

18 Any objections, Mr. Dalton, to considering that?

19 **MR. DALTON:** I'm sure we can discuss it. I don't
20 particularly see a need to move up dispositive motions earlier
21 than the already agreed-to schedule in the United States' case.

22 **THE COURT:** Let me see. What's the proposal you
23 would make?

24 **MR. GARDNER:** So North Carolinians for Privacy, in
25 fact, proposed a date of September 30, 2016, for cross-motions.

1 In the United States' 26(f), we proposed a slightly different
2 schedule where the Plaintiff would move for summary judgment on
3 or before August 19. We would then file our opposition and
4 then cross-motion on September 9. Plaintiffs' opposition reply
5 would be due on September 30, and then the United States' reply
6 would be filed on or before October 14.

7 **THE COURT:** All right. Let me tell you where I am
8 going with this. I am not going to give -- I am going to risk
9 making some misstatement because we're talking about defendants
10 and plaintiffs, and I want to make sure the parties stay
11 straight because you all flip depending on which posture you
12 are in.

13 If we are in a separate case and the plaintiff in
14 that case is North Carolinians for Privacy, I am not going to
15 put an earlier deadline on North Carolinians for Privacy to
16 raise a motion, but I am not going to preclude you from raising
17 an earlier dispositive motion, and then we can talk about what
18 their response time would be. Does that make sense?

19 **MR. GARDNER:** That makes sense, Your Honor.

20 **THE COURT:** So then North Carolinians for Privacy, if
21 they want to make it their own dispositive motion, they have
22 all the way up through the deadlines that otherwise apply, if
23 they haven't already been dismissed for some reason on a prior
24 motion by you. If you want to make an earlier motion, then we
25 can talk about that today, or you can make your motion and

1 request that they be given a response time consistent with the
2 local rules, rather than waiting to respond until later.

3 **MR. GARDNER:** Understood. Perhaps the best approach,
4 Your Honor, is for the parties to meet and confer and try to
5 work out a schedule that works for both parties, and,
6 hopefully, that can resolve that issue. If not, then obviously
7 we'll just file something with the Court stating what our
8 positions are.

9 **THE COURT:** Right. Let's do it this way. If all can
10 reach an agreement on that -- and you understand, Mr. Dalton, I
11 am not going to put an earlier deadline on you. You can use
12 the deadlines that exist if you're still -- your case is still
13 proceeding in the case. They are free to file an earlier
14 motion. Ordinarily, there would be the deadlines that apply in
15 the local rules. If either of you wants something different
16 than the deadlines that would apply in the local rules, then
17 you can file that as a request. So if you file your motion,
18 whatever it might be, and are requesting an earlier response
19 time or some different response time than what the ordinary
20 rules would be under the Court's local rules, then you would
21 need to make that as a separate request.

22 If you, Mr. Dalton, want more time than the local
23 rules would otherwise require that would still be no longer
24 than what otherwise would apply under the scheduling order that
25 I'm adopting in this case, then you can make that request; but

1 at the outside, at the very latest, any deadlines are going to
2 be what's set out in the scheduling order.

3 **MR. DALTON:** Understood.

4 **THE COURT:** Is that clear enough?

5 **MR. GARDNER:** With one final point of
6 clarification -- or request for clarification. In the event
7 Judge Schroeder does conclude that intervention is appropriate,
8 we'd still ask for an earlier dispositive motion deadline.

9 **THE COURT:** Well, I am letting this happen under the
10 assumption that I am either recommending that there not be
11 intervention, and really my preference would be -- the choice
12 that I am giving to Mr. Dalton is I'm going to let you
13 intervene -- I am going to let you be consolidated for
14 discovery purposes if you then withdraw your motion for
15 intervention so that your claims are included in the broader
16 case as part of the discovery, resolved however they might
17 otherwise be, but that you are not also proceeding with the
18 intervention request, again with the notion that we are trying
19 to simplify these things so that we don't have too many other
20 outside issues.

21 **MR. DALTON:** Absolutely, Your Honor. We would have
22 no objection to that so long as our dispositive motion deadline
23 was not before the conclusion of discovery.

24 **THE COURT:** All right. I think that's what we've
25 covered.

1 **MR. GARDNER:** I think that's right, Your Honor.
2 That's acceptable.

3 So as I understand it, North Carolinians for Privacy
4 will withdraw their intervention motion. They will be able to
5 participate in discovery. The United States can chose a
6 deadline, hopefully working with counsel for North Carolinians
7 for Privacy, for a dispositive motion, and North Carolinians
8 for Privacy will be able to file any cross-motion by no later
9 than the deadline for dispositive motions in the Carcano and
10 the United States affirmative cases?

11 **THE COURT:** That's right. So if you have some basis
12 you want to proceed earlier because you think that the case
13 would be resolved earlier that way, then you can do that; but,
14 otherwise, it will just be on the same schedule as the
15 dispositive motions that we're adopting here. There is no
16 obligation for North Carolinians for Privacy to go earlier than
17 that deadline.

18 **MR. GARDNER:** Understood.

19 **THE COURT:** Are you agreeing with all of that then,
20 Mr. Dalton; is that right?

21 **MR. DALTON:** Yes, Your Honor.

22 **THE COURT:** All right. For what my order today would
23 be then is that the 845 case is proceeding as a separate case,
24 that North Carolinians for Privacy has agreed to withdraw their
25 motion to intervene with the understanding, as part of the

1 agreement, that their discovery for the 845 case would be
2 consolidated with the 425 and 236 cases; is that accurate?

3 **MR. DALTON:** Yes, Your Honor.

4 **THE COURT:** Is that your understanding?

5 **MR. GARDNER:** Yes, Your Honor.

6 **THE COURT:** So then we can let the clerk mark the
7 motion to intervene in the 425 case that's Document Number
8 58 -- so we can mark that one as withdrawn in light of the
9 discovery order and determinations that the Court has made here
10 today; is that accurate? I am not going to -- or require you
11 to say by agreement of the parties because I understand that
12 wasn't necessarily your first choice, but with the
13 determination that the Court gave you, that's where we are; is
14 that right?

15 **MR. GARDNER:** Correct, Your Honor.

16 **THE COURT:** Is that right, Mr. Dalton?

17 **MR. DALTON:** Yes, Your Honor. Just for the record,
18 it's not our first choice either.

19 **THE COURT:** I understand. Very rarely do people
20 leave with their first choice, but I think it's something that
21 everybody can live with. Is that right?

22 **MR. DALTON:** Yes, Your Honor.

23 **THE COURT:** Everybody can live with that just for
24 trying to move these through the piece here in terms of the
25 discovery and the scheduling so that you can get to the

1 underlying determinations that need to be made by Judge
2 Schroeder.

3 That shows then Number 58 in the 425 case being
4 withdrawn, the 845 case being a separate case, but the
5 discovery schedule covering the 845 case as well, which means
6 that for discovery purposes, I am going to caption all three
7 cases if there are discovery orders, and you all can proceed
8 with those as consolidated for discovery.

9 Anything for any of the Plaintiffs that we would need
10 to further clarify as to that? Mr. Wilkens, anything you need
11 to add on that?

12 **MR. WILKENS:** No, I don't believe so. I was thinking
13 through how the hearings -- the telephonic conferences would
14 go. If there are disputes that only exist between the folks in
15 the 425 case, that we wouldn't necessarily need to be on the
16 phone for that?

17 **THE COURT:** I will set those hearings and conduct
18 those hearings for any disputes that come up and need to be
19 heard. Let me give you my thought process. My first thought
20 is, you know, if you don't want to be on the call, then you
21 won't be heard, and so I am not going to require it. On the
22 other hand, they are all captioned together, so I can't promise
23 that we are not going to cover something that might affect
24 something in all three cases as a whole.

25 **MR. WILKENS:** Yes, Your Honor. We likely will be on

1 the phone.

2 **THE COURT:** So I think that's probably where I will
3 leave it with that. If you choose not to -- and it may be for
4 that matter that North Carolinians for Privacy chooses not to
5 participate in some part of or piece of discovery or any other
6 one of you may choose not to do that, but I think that for my
7 purposes and for the discovery, they are all captioned
8 together, so I am not going to have pieces of them broken out
9 for hearings or for depositions or whatever else you might be
10 doing. It's all together, and so you can participate or not at
11 your choice, but you can't protest if something happens that
12 you weren't there and part of. Does that make sense?

13 **MR. WILKENS:** Yes, it does, Your Honor.

14 **MR. BOWERS:** Yes, Your Honor.

15 **THE COURT:** All right. Let me look at my list and
16 see if there's anything else. I think that's everything that I
17 had. I am going to let you think through a moment, too, while
18 I look at the pending motions and see if you all have anything
19 else that you want to bring to the Court's attention while we
20 are all here today.

21 (Pause in the proceedings.)

22 I think we've covered everything, and I don't want to
23 attempt to restate it all at the risk of missing something or
24 misstating, but if there's any questions and anything else, I
25 am going to go through with each of you and see if there's

1 anything else we need to cover or any questions or anything
2 else we need to raise.

3 Mr. Wilkens, anything for the Carcano Plaintiffs?

4 **MR. WILKENS:** Nothing further, Your Honor.

5 **THE COURT:** Ms. Stoughton, anything for the
6 Department of Justice Plaintiffs?

7 **MS. STOUGHTON:** No, Your Honor.

8 **THE COURT:** And, Mr. Gardner, anything for the
9 Department of Justice?

10 **MR. GARDNER:** Nothing further, Your Honor.

11 **THE COURT:** Thank you. Mr. Bowers?

12 **MR. BOWERS:** Nothing further from my clients, Your
13 Honor.

14 **THE COURT:** Anything else, Mr. Duncan?

15 **MR. DUNCAN:** Nothing further, Your Honor.

16 **THE COURT:** Mr. Francisco?

17 **MR. FRANCISCO:** Nothing further, Your Honor.

18 **THE COURT:** Mr. Dalton?

19 **MR. DALTON:** No, Your Honor.

20 **THE COURT:** All right. That completes then the
21 pretrial conference today. I intend to enter a summary order
22 that covers what we did and adopts the 26(f) report with the
23 additions here. If my order is somehow different than what you
24 all understood or anticipate, I would ask you to discuss with
25 each other first and make sure you are all on the same page, to

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1 the extent you can, and then you can file a request for
2 clarification, if you need to do that, if there is something
3 that we need to address further.

4 Otherwise, I think we are set for August 19 with a
5 telephone conference, and you can be in touch with Ms. Engle or
6 Ms. Garrett in order to get the information for calling in for
7 the telephone conference. If there is anything else before
8 then or if there are motions, the schedule that you all have
9 set for any discovery motions would apply, and then if we need
10 to set those for a separate hearing, we can do that, or I can
11 take them up at the telephone hearing, whatever seems most
12 appropriate at that point.

13 All right. Thanks all very much.

14 (END OF PROCEEDINGS AT 3:03 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 29th day of July 2016.
11

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14 Briana L. Nesbit, RPR
15 Official Court Reporter
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