

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

JOAQUIN CARCAÑO, et al.,

Plaintiffs,

v.

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

Defendants,

and

PHIL BERGER, in his official capacity as
President Pro Tempore of the North
Carolina Senate; and TIM MOORE, in his
official capacity as Speaker of the North
Carolina House of Representatives,

Intervenor-Defendants.

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF NORTH CAROLINA, et al.,

Defendants,

and

PHIL BERGER, in his official capacity as
President Pro Tempore of the North
Carolina Senate; and TIM MOORE, in his
official capacity as Speaker of the North
Carolina House of Representatives,

Intervenor-Defendants.

1:16CV236

1:16CV425

ORDER

This matter came before the Court on November 14, 2016, for a Scheduling Conference in cases 1:16CV236 and 1:16CV425, which have been coordinated for discovery and scheduling. At the Scheduling Conference, which was conducted by telephone, Attorney Scott Wilkens spoke on behalf of the Plaintiffs in 1:16CV236 (the “ACLU Plaintiffs”), and Attorney Corey Stoughton of the United States Department of Justice spoke on behalf of Plaintiff United States in 1:16CV425 (the “USDOJ Plaintiff”). For Defendants, Attorney Butch Bowers spoke on behalf of the State of North Carolina, Governor McCrory, and the North Carolina Department of Public Safety (“the State Defendants”); Attorney Kyle Duncan spoke on behalf of Intervenor-Defendants Phil Berger and Tim Moore (“the Legislative Intervenors”); and Attorney John Gore spoke on behalf of the University of North Carolina (the “UNC Defendants”). Prior to the Conference, the Parties filed a Joint Submission Regarding Case Calendar in Advance of Telephonic Conference [Doc. #175 in 1:16CV236 and Doc. #213 in 1:16CV425], setting out their positions with respect to modifying the trial and discovery schedule in these cases in light of the recent decision by the Supreme Court of the United States to grant certiorari in Gloucester County School Board v. G.G., 822 F.3d 709 (4th Cir. 2016), cert granted in part, 2016 WL 4565643 (U.S. Oct. 28, 2016) (No. 16-273). The Court enters this written order to memorialize the Parties’ positions and the Court’s rulings at the Scheduling Conference.

I. Schedule for Trial and Discovery

In their Joint Submission, the Parties set out their respective positions with respect to scheduling and discovery, reflecting a general agreement to continue the trial in these cases

until after the Supreme Court of the United States issues an opinion in Gloucester County School Board v. G.G. At the Scheduling Conference, the Court heard from each Party. All Parties agreed to a delay of trial until later in the summer of 2017, in anticipation of a Supreme Court ruling in G.G. In addition, all Parties except for the USDOJ Plaintiff requested that the Court stay all discovery pending the ruling in G.G. For its part, the USDOJ Plaintiff agreed to a continuance of the trial date and corresponding extension of the discovery deadlines, but expressed a preference to continue conducting depositions pending a Supreme Court ruling in G.G., rather than staying discovery completely.

The Court considered the Parties' positions and considered the issues raised by the USDOJ Plaintiff, including the need to keep discovery on track so that this case is ready for trial soon after a decision in G.G. has issued. However, the Court also considered the position of the ACLU Plaintiffs and the Defendants, who agree that discovery should be stayed because the Supreme Court's ruling in G.G. will likely affect the scope of discovery and the number of depositions necessary. In this regard, the Court notes that the Parties presently anticipate conducting up to 70 fact and expert depositions, but the ACLU Plaintiffs and the Defendants contend that the number of depositions will be much smaller and the scope of the depositions will be much narrower after a decision in G.G.

In an effort to balance the need to keep discovery on track but also avoid unnecessary discovery (and discovery disputes), the Court will not stay all discovery indefinitely, but will instead continue the trial and all discovery deadlines for 90 days, as agreed by the Parties, and then stay discovery for a 90-day period. This stay will allow the Court and the Parties to address the matter further after 90 days, will avoid the potentially unnecessary burden of

numerous depositions during that immediate time period, and will still allow enough time for the completion of discovery prior to the new trial date.

Thus, by agreement of the Parties, because the Supreme Court's decision in Gloucester County School Board v. G.G. would likely have a significant impact on the trial in these cases, the trial in these cases will be continued for 90 days, and will be rescheduled for an available date to be determined by the Clerk of Court. Additionally, all discovery deadlines will be similarly extended by 90 days. Finally, for the reasons noted above, all discovery will be stayed for 90 days. As a result of this ruling, all discovery and pretrial motions now pending are stayed (1:16CV236: Docs. #89, #153, #167, #168, and #172; 1:16CV425: Docs. #98, #183, #204, #207, and #211). On or before February 13, 2017, the Parties shall file status updates and position statements, jointly if possible, addressing scheduling and discovery issues, including whether the Court should lift or extend the stay, as well as any other matters that should be brought to the Court's attention. The Court will set a further status and scheduling conference as appropriate after the Parties file their position statements.

II. USDOJ Plaintiff's Motion for a Preliminary Injunction

Also at the Scheduling Conference, the Court heard from the Parties as to the effect of any stay of discovery or continuance of the trial date on USDOJ's Motion for a Preliminary Injunction. All of the Parties agreed that USDOJ's Motion for a Preliminary Injunction could proceed separately from the trial, that no evidentiary hearing was needed on that Motion for Preliminary Injunction, and that the stay of discovery or continuance of the trial date would not affect consideration of the Motion for Preliminary Injunction. Therefore, the USDOJ Plaintiff's Motion for a Preliminary Injunction is not included in the stay. However, with

respect to the impact of the proceedings in G.G., the Parties in 1:16CV425 have been directed to file short position statements on or before November 21, 2016, addressing whether or how the Supreme Court's granting of certiorari in G.G. should be considered with respect to USDOJ's Motion for a Preliminary Injunction, for further consideration by the District Judge.

III. ACLU Plaintiffs' Motion for a Preliminary Injunction Based on Due Process

With respect to the ACLU Plaintiffs' Motion for a Preliminary Injunction as to their due process claim, at the Scheduling Conference the ACLU Plaintiffs agreed that their Motion for a Preliminary Injunction based on due process should be stayed and considered at trial. Defendants did not disagree with that position. Thus, it appears that the Parties agree that there is nothing for this Court to address or resolve on the Motion for Preliminary Injunction as to the due process claim at this time. However, the status of that Motion in this Court may be an issue in the pending appeal in the Court of Appeals for the Fourth Circuit on the ACLU Plaintiffs' Motion for Preliminary Injunction as to their equal protection claim. As noted during the Scheduling Conference, the Court would expect that the status of the Motion for Preliminary Injunction should be clear in this Court, and that the Parties would take consistent positions in this Court and in the Court of Appeals with respect to the status of the matter. Therefore, the Parties in 1:16CV236 must file position statements on or before Monday, November 21, 2016, setting out their position with respect to the status of and anticipated proceedings on the pending Motion for Preliminary Injunction on the due process claim, including the position they are taking in this Court and in the Court of Appeals for the Fourth Circuit.

IV. ACLU Plaintiffs' Oral Motion for Leave to File Third Amended Complaint

During the Scheduling Conference, the ACLU Plaintiffs made an Oral Motion for Leave to file a Third Amended Complaint for the purpose of adding a Title VII claim against the UNC Defendants. There were no objections to this Motion. Therefore, the Court granted this Motion, and directed the ACLU Plaintiffs to file the Third Amended Complaint on or before November 21, 2016. No responsive pleadings shall be due until after the 90-day stay ordered above has lifted. The Parties may address the schedule for any responsive pleading in the position statements filed on February 13, 2017.

Finally, to the extent the ACLU Plaintiffs contemplate the need to substitute some of the named Plaintiffs, no action needs to be taken in that regard while the stay is in place, and any substitutions may be requested after the stay is lifted.

V. Conclusion

IT IS THEREFORE ORDERED that the trial in this case is continued for 90 days, by agreement of the parties so that trial may be held after the Supreme Court has issued its decision in Gloucester County School Board v. G.G., and all pending discovery deadlines are likewise extended for 90 days.

IT IS FURTHER ORDERED that in light of that extension, and having considered the positions of the Parties, discovery is stayed for 90 days, and any pending discovery and pre-trial matters are stayed (1:16CV236: Docs. #89, #153, #167, #168, and #172; 1:16CV425: Docs. #98, #183, #204, #207, and #211). On or before February 13, 2017, the Parties shall file status updates and position statements, jointly if possible, addressing scheduling and discovery issues, including whether the Court should lift or extend the stay, as well as any other

matters that should be brought to the Court's attention. The Court will set a further status and scheduling conference as appropriate after the Parties file their position statements.

IT IS FURTHER ORDERED that the Parties in 1:16CV425 shall file short position statements on or before Monday, November 21, 2016, addressing whether or how the Supreme Court's granting of certiorari in Gloucester County School Board v. G.G. should be considered with respect to USDOJ's Motion for a Preliminary Injunction.

IT IS FURTHER ORDERED that the Parties in 1:16CV236 shall file position statements on or before Monday, November 21, 2016, addressing the status of the pending Motion for Preliminary Injunction on the due process claim, and setting out the position they are taking in this Court and in the Court of Appeals for the Fourth Circuit.

FINALLY, IT IS ORDERED that the ACLU Plaintiffs' Oral Motion to file a Third Amended Complaint is GRANTED; the ACLU Plaintiffs shall file the Third Amended Complaint on or before November 21, 2016; and any responsive pleadings shall not be due until after the 90-day stay of discovery has lifted. The Parties may address the schedule for any responsive pleading in the position statements filed on February 13, 2017.

This, the 15th day of November, 2016.

/s/ Joi Elizabeth Peake
United States Magistrate Judge