

No. 16-1989

In the United States Court of Appeals for the Fourth Circuit

JOAQUÌN CARCAÑO; PAYTON GREY MCGARRY; H.S., by her next friend and
mother, Kathryn Schaefer; AMERICAN CIVIL LIBERTIES UNION OF NORTH
CAROLINA,

Plaintiffs – Appellants,

and

ANGELA GILMORE,

Plaintiff,

v.

PATRICK L. MCCRORY, in his official capacity, Governor of North
Carolina,

Defendant – Appellee,

REPRESENTATIVE TIM MOORE; SENATOR PHILIP E. BERGER,

Intervenors/Defendants – Appellees,

and

UNIVERSITY OF NORTH CAROLINA,

Defendant

On Interlocutory Appeal from the United States District Court
For the Middle District of North Carolina at Winston-Salem
No. 1:16-cv-00236-TDS-JEP

**REPLY IN SUPPORT OF APPELLEES’
MOTION TO DISMISS APPEAL**

Counsel listed on following page

Robert C. Stephens
General Counsel
OFFICE OF THE GOVERNOR OF
NORTH CAROLINA
20301 Mail Service Center
Raleigh, NC 27699
(919) 814-2027
bob.stephens@nc.gov

Karl S. Bowers, Jr.
BOWERS LAW OFFICE LLC
P.O. Box 50549
Columbia, SC 29250
(803) 260-4124
butch@butchbowers.com

William W. Stewart, Jr.
Frank J. Gordon
B. Tyler Brooks
MILLBERG GORDON STEWART
PLLC
1101 Haynes Street, Suite 104
Raleigh, NC 27604
(919) 836-0090
bstewart@mgsattorneys.com
fgordon@mgsattorneys.com
tbrooks@mgsattorneys.com

Robert N. Driscoll
McGLINCHEY STAFFORD
1275 Pennsylvania Avenue NW
Suite 420
Washington, DC 20004
(202) 802-9950
rdriscoll@mcglinchey.com

*Counsel for Appellee Governor
Patrick L. McCrory*

S. Kyle Duncan
Gene C. Schaerr
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 714-9492
kduncan@schaerr-duncan.com

Robert D. Potter, Jr.
2820 Selwyn Avenue, #840
Charlotte, NC 28209
(704) 552-7742
rdpotter@rdpotterlaw.com

*Counsel for Appellees Senator
Philip Berger and Representative
Tim Moore*

Appellees Patrick McCrory, Tim Moore, and Philip Berger file this reply in support of their motion to dismiss this interlocutory appeal for lack of jurisdiction or, alternatively, to hold it in abeyance.

As explained below, Appellants are mistaken that this Court has jurisdiction to hear an appeal involving only *one aspect* of the district court's still-incomplete preliminary injunction ruling, especially when Appellants have claims pending below on which they could receive from the district court the same relief that they seek here. However, events occurring since the filing of this motion to dismiss make resolving that question unnecessary. On October 28, 2016, the Supreme Court agreed to review this Court's decision 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), a decision on which many of Appellants' equal protection arguments depend. Consequently, this Court should simply hold this appeal in abeyance until the Supreme Court rules in *G.G.* See 4th Cir. R. 12(d). Appellees are filing a separate motion to that effect along with this reply.

Should the Court decide to resolve the jurisdictional question, however, it should find that it lacks jurisdiction over this appeal.

1. As already explained, 28 U.S.C. § 1292(a) does not support jurisdiction over an appeal of a ruling limited to only *one* aspect of a preliminary injunction motion while *other* aspects of the same motion remain pending below, and on which Appellants could obtain identical relief. ECF No. 44-1, at 4-8. That is the situation presented here: the district court ruled against Appellants on their equal protection claim but reserved ruling on their due process claims and asked for supplemental briefing, which is ongoing. *Id.* at 3-4. Section 1292(a)(1) does not allow a piecemeal appeal from the equal protection component of the district court’s ruling while that court is still considering the due process component of the same motion. *Id.* at 4-5 (*citing* 16 Wright, Miller, Cooper, et al. Fed. Prac. & Proc. § 3924.1, at n.37 (3rd ed.)).

Simple logic supports that result. The district court need not have ruled on *any* aspect of the preliminary injunction motion, but could have simply ordered additional briefing. However—at Appellants’ urging that the new academic year was approaching—the district court “endeavored to resolve [their] motion for preliminary relief as quickly as possible” and issued a partial injunction in *favor* of the three individual plaintiffs. Order at 3. That act of generosity towards Appellants does

not convert the rest of the district court's incomplete order into an appealable denial of injunctive relief.¹

2. As already explained, an established line of Seventh Circuit cases squarely shows the lack of jurisdiction over this appeal. ECF No. 44-1 at 5-6; *see also, e.g., Albert v. Trans Union Corp.*, 346 F.3d 734, 739 (7th Cir. 2003) (“Only if the district court’s decision is definitive, *i.e.*, the plaintiff will have no further chance of obtaining the desired injunction from the district court, does this court have jurisdiction over an interlocutory appeal.”). Appellants would restrict those decisions to appeals from motions that have “the effect of foreclosing injunctive relief,” while making them inapplicable to orders that “actually adjudicate a motion for injunctive relief.” Opp. at 10-11. But that distinction is one of Appellants’ own invention: it is not supported by Appellants’ authorities. *See, e.g., Albert*, 346 F.3d at 736 (applying jurisdictional limitation to “the district court’s determination that private plaintiffs are not entitled to injunctive relief under the FCRA”).

¹ The district court’s order was generous to Appellants in another way: the court noted significant problems with Appellants’ due process arguments, but nonetheless gave them a second chance to brief those claims. *See* Order at 68-69 (noting Appellants had “devoted relatively little attention to this [informational privacy] claim both in their briefs and at the hearing on this matter,” and that their due process claim for “unwanted medical treatment” was “even less developed”).

To the contrary, the most relevant decisions squarely prevent piecemeal consideration of different aspects of the *same* preliminary injunction motion at the *same* time by the court of appeals and the district court. See ECF No. 44-1 at 5-6 (citing cases).

3. Appellants strain to find authorities supporting appellate jurisdiction, but none does so. For instance, in *Everett v. Pitt County Board of Education*, 678 F.3d 281 (4th Cir. 2012), the district court had refused to enjoin a desegregation plan in part because the school district's progress toward unitary status was to be reviewed later that year anyway. *Id.* at 287-88. Unlike the present case, however, there was no indication that the district court's ruling *on the motion appealed from* was at all incomplete. *Id.* And the other Fourth Circuit case cited by Appellants did not even involve a challenge to appellate jurisdiction. See *Norfolk Dredging Co. v. Wiley*, 439 F.3d 205 (4th Cir. 2006).²

Appellants' authorities from other jurisdictions are also off point. Two are patent and trademark infringement actions that did not

² *Norfolk Dredging* involved an injunction preventing the filing of claims against a ship owner until it was determined whether liability under the Jones Act would exceed the value of the vessel. The district court offered to reconsider its injunction ruling in the event liability exceeded the value of the vessel. No one contested appellate jurisdiction and this Court accepted the appeal without comment. 439 F.2d at 208.

involve appeals under § 1292(a)(1) at all. *See SquirtCo v. Seven-Up Co.*, 628 F.2d 1086 (8th Cir. 1980) (district court issued permanent injunction, entered final judgment under Rule 54(b), and certified order for immediate appeal under §1292(b)); *Am. Cyanamid Co. v. Lincoln Labs., Inc.*, 403 F.2d 486 (7th Cir. 1968) (appellate court dismissed patent infringement appeal for lack of finality under §1292(a)(4)). Two others involved injunction orders that the district court segregated from compensatory damages; in neither case was potential injunctive relief still pending before the district court. *See Schulner v. Jack Eckerd Corp.*, 706 F.2d 1113, 1114 (11th Cir. 1983) (order to reinstate ADEA plaintiff to his former position was immediately appealable despite remaining issue of compensatory damages); *King Instrument Corp. v. Otari Corp.*, 814 F.2d 1560, 1562 (Fed. Cir. 1987) (order continuing injunction against patent infringement was appealable even though district court deferred determination on compensatory damages).

4. Finally, contrary to Appellants' assertion, dismissing this appeal will not have the "necessary consequence" of requiring them (or future parties) to seek certification under 28 U.S.C. § 1292(b) or a partial judgment under Federal Rule of Civil Procedure 54(b). To the

contrary, all it would require them to do is to brief their own motion to the district court's satisfaction and allow that court to complete its ruling. This is a reasonable request from any party, whereas allowing this appeal would permit Appellants (and future parties) to pursue injunctive relief simultaneously on appeal *and* in the district court, merely because the district court requested supplemental briefing on certain arguments. Nor is there any implication for Rule 54(b), because Appellants' motion does not involve "multiple claims" or "multiple parties"—it is a single motion seeking a single injunction, only on different grounds. *Cf. Onyango v. Downtown Ent'mt. LLC*, 525 F. App'x 458, 460 (7th Cir. 2013) (explaining that an injunction is a type of remedy, not a "claim")

CONCLUSION

The Court should dismiss this interlocutory appeal for lack of jurisdiction or, alternatively, hold it in abeyance.

Respectfully submitted,

Robert C. Stephens
General Counsel
Office of the Governor of North
Carolina
20301 Mail Service Center
Raleigh, NC 27699
(919) 814-2027
bob.stephens@nc.gov

/s/ Karl S. Bowers, Jr.

Karl S. Bowers, Jr.
Bowers Law Office LLC
P.O. Box 50549
Columbia, SC 29250
(803) 260-4124
butch@butchbowers.com

William W. Stewart, Jr.
Frank J. Gordon
B. Tyler Brooks
Millberg Gordon Stewart PLLC
1101 Haynes Street, Suite 104
Raleigh, NC 27604
(919) 836-0090
bstewart@mgsattorneys.com

Robert N. Driscoll
McGlinchey Stafford
1275 Penn. Ave. NW, Ste. 420
Washington, DC 20004
(202) 802-9950
rdriscoll@mcglinchey.com

*Counsel for Appellee Governor
Patrick L. McCrory*

/s/ S. Kyle Duncan
S. Kyle Duncan
Gene C. Schaerr
Schaerr | Duncan LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 714-9492
kduncan@schaerr-duncan.com

Robert D. Potter, Jr.
2820 Selwyn Avenue, #840
Charlotte, NC 28209
(704) 552-7742
rdpotter@rdpotterlaw.com

*Counsel for Appellees Senator
Philip Berger and Representative
Tim Moore*

CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2016, I filed the foregoing document through the Court's CM/ECF system, which will serve an electronic copy on all registered counsel of record.

/s/ S. Kyle Duncan
S. Kyle Duncan
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 714-9492
kduncan@schaerr-duncan.com

*Counsel for Appellees Senator Philip
Berger and Representative Tim Moore*