No. 16-1989

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOAQUÍN CARCAÑO, *et al.*,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees,

and

PHIL BERGER, in his official capacity as President *pro tempore* of the North Carolina Senate, and **TIM MOORE**, in his official capacity as Speaker of the North Carolina House of Representatives,

Intervenors/Defendants-Appellees.

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

PLAINTIFFS-APPELLANTS' OPPOSITION TO MOTION TO HOLD APPEAL IN ABEYANCE

In yet another attempt to forestall preliminary injunctive relief, Appellees move this Court a second time to hold this appeal in abeyance, this time relying on the Supreme Court's grant of certiorari in *Gloucester County School Board v. G.G.*, No. 16-273, 2016 WL 4565643 (U.S. Oct. 28, 2016). Strikingly, Appellees do so even while maintaining—as they did below—that the resolution of the Title IX claims before the Supreme Court in *G.G.* is entirely irrelevant to the Equal Protection claims presented by this appeal.

Even more striking, however, is Appellees' indifference to the harms that would be perpetuated by the delay in adjudication that they seek—and their failure to articulate any countervailing hardship justifying such a delay. As the Supreme Court has clearly held, "if there is even a fair possibility that [a] stay . . . will work damage to some one else," then the proponent of a stay "must make out a clear case of hardship or inequity in being required to go forward." *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936). Appellees do not and cannot contest that a delay in adjudicating Plaintiffs' appeal would be a *de facto* denial of appellate review, perpetuating the ongoing, significant, and irreparable harms suffered by thousands of transgender North Carolinians like Plaintiffs who, under Part I of North Carolina's House Bill 2 ("H.B.2") are effectively excluded from government facilities where they have no safe place to use the restroom. Yet Appellees' motion enumerates no hardship from proceeding with this interlocutory appeal,

which seeks only *preliminary* injunctive relief preventing the state from continuing to enforce H.B.2 pending trial in the case below.

Simply put, there is no basis to grant the delay that Appellants seek. This Court should instead see their motion for what it is—a request for a *de facto* denial of the ultimate relief sought in this appeal—and reject it.

ARGUMENT

1. As a threshold matter, the Supreme Court's grant of certiorari in *G.G.*—to address questions relating to Title IX—provides no basis to stay this appeal, which presents *only* questions pertaining to equal protection.

"Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another" proceeds. *Landis*, 299 U.S. at 255. This Court, internalizing the Supreme Court's guidance in *Landis*, has articulated that proceedings in one case should be stayed in favor of another only when parallel litigation "offers a definitive and comprehensive avenue to resolve the issues raised in this case." *Great Am. Ins. Co. v. Gross*, 468 F.3d 199, 207 n.6 (4th Cir. 2006).

There is simply no basis to think that the Supreme Court's resolution of the Title IX questions in *G.G.* will provide a "definitive and comprehensive" resolution of the questions presented in this appeal. As set forth in Plaintiffs' opening brief, the sole questions presented in this appeal pertain to Plaintiffs' equal protection claims; no party has appealed the district court's decisions regarding

Title IX. *See* Plaintiffs' Br. (D.E. 46) at 4. And, among other arguments, Plaintiffs assert that government classifications setting apart transgender individuals constitute discrimination based on a suspect classification and therefore demand heightened scrutiny. Plaintiffs' Br. at 37-40. Appellees offer no explanation for how the Supreme Court's decision in *G.G.* is likely to impact such a determination.

Instead, Appellees rely largely on the fact that Plaintiffs cite *G.G.* as supporting the conclusion—reached by numerous other courts—that discrimination against transgender individuals is a form of sex discrimination. But the fact that Plaintiffs cite a favorable aspect of what—even now—is the Fourth Circuit's binding precedent, *see United States v. Collins*, 415 F.3d 304, 311 (4th Cir. 2005), does not automatically provide support for a stay while *G.G.* is reviewed. This is particularly so given Appellees' own contention to this Court that "how Title IX may apply to the[] questions [at issue in *G.G.*] does not dictate how the Equal Protection Clause applies to them." Mot. at 5. This argument is wholly consistent with the representations that Appellees made below. *See* Dist. Ct. D.E. 55 at 9 (argument by Appellee McCrory that reliance on *G.G.* is "misplaced because the Court there addressed only administrative interpretation of Title IX regulations not the Fourteenth Amendment's Equal Protection Clause"); Dist. Ct. D.E. 61 at 10-11 (argument by Intervenors/Defendants-Appellees that *G.G.* does not even stand for the proposition that the policy at issue "constituted 'sex discrimination," and

"expressly declined to address the Equal Protection Clause"). In light of their own arguments, Defendants cannot possibly assert that this appeal must be frozen until *G.G.* is decided—much less that *G.G.* will provide a "definitive and comprehensive" resolution of the questions presented in this appeal.

2. Even if this Court were convinced that the Supreme Court's adjudication in *G.G.* might potentially have some effect on this interlocutory appeal, a grant of Defendants' request to hold this appeal in abeyance would preclude Plaintiffs from receiving the full preliminary injunctive relief that they have sought and the prompt adjudication of their equal protection claim they deserve from this Court. Given these consequences, the equities simply do not support a stay of the proceedings before this Court.

Appellees ignore the Supreme Court's clear admonition in *Landis* that "the suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else." *Landis*, 299 U.S. at 255. That is, for a stay to be granted, Appellees must demonstrate that the balance of harms merits one. *Id.; see Nken v. Holder*, 556 U.S. 418, 434 (2009) (courts' discretion to issue stays is governed by the factors outlined in *Winter v. NRDC*, 555 U.S. 7 (2008), which requires balancing the harms to the parties). But Appellees have not even attempted to make such a showing—nor could they, given that (1) their requested

delay in preliminary injunctive relief would perpetuate the severe and ongoing harm caused by H.B.2 on Plaintiffs and myriad other transgender North Carolinians, effectively denying them the preliminary relief Plaintiffs seek; (2) there is no cognizable hardship in requiring Appellees to continue with this appeal or even in the ultimate grant of preliminary injunctive relief; and (3) the *preliminary* relief sought in this appeal is of a limited nature.

Appellees do not and cannot contest that H.B.2's discriminatory mandate causes ongoing, significant, and irreparable harm to the individual Plaintiffs as well as the numerous transgender members of the ACLU of North Carolina whose rights are being enforced here by that associational Plaintiff. The preliminary injunction granted by the district court under Title IX was limited to the facilities of the University of North Carolina and the three individual transgender Plaintiffs. JA991-92. But, as the district court recognized, the effect of H.B.2's discriminatory mandate on transgender North Carolinians is "that they cannot use multiple occupancy facilities that match their birth certificates for fear of harassment and violence, that single occupancy facilities are not reasonably available to them, and that they are at a serious risk of suffering negative health consequences as a result." JA982.

Although Appellees fail to acknowledge it, the stay that they seek would perpetuate these harms—permitting the state to continue interfering with

transgender individuals' ability to access government facilities by denying them a safe place to use the restroom. In effect, what Appellees seek is a *de facto* denial of appellate review, effectively precluding Plaintiffs from receiving the full preliminary injunctive relief they have sought. This Court, however, should not be complicit in perpetuating what the district court recognized as "clearly" irreparable harm. JA981.

These harms to Plaintiffs and other transgender North Carolinians are particularly compelling in light of the fact that Appellees have made no countervailing demonstration of any hardship that would result from proceeding with this appeal. To the extent that Appellees complain that they would be forced to file briefs or appear before this Court at argument, that is simply not a cognizable injury in this context; as the Supreme Court has explicitly held, "the expense and annoyance of litigation" does not constitute an "irreparable injury" that should be given weight in an equitable analysis. *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980); *see also Petroleum Exploration, Inc. v. Pub. Serv. Comm'n*, 304 U.S. 209, 222 (1938); *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974).

Indeed, as the district court recognized, Appellees have made no demonstration of any hardship that may result from the *ultimate* grant of preliminary injunctive relief and a return to the status quo before H.B.2. The

district court recognized that transgender individuals had been using sex-separated facilities matching their gender identity long before H.B.2 "without complaint," that Appellees themselves "do not claim to have had any problems with the pre-2016 regime," and that "the entry of an injunction should not work any hardship on them." JA955, JA984. In sum, Appellees have not even demonstrated a reason to justify the existence or enforcement of H.B.2—much less for this Court to delay considering whether to preliminarily enjoin it.

Further, Appellees ignore that the relief sought in this appeal is merely *preliminary* injunctive relief—a *temporary* return to the status quo before the North Carolina legislature passed H.B.2, pending the final adjudication of the proceedings below. Such temporary relief is nearly always decided with some uncertainty as to the ultimate legal entitlements of the parties. *See Nken*, 556 U.S. at 435 (recognizing that injunctions must be decided "before the legality of [an] action has been conclusively determined"); *Am. Hosp. Supply Corp. v. Hosp. Prods., Inc.*, 780 F.2d 589, 593 (7th Cir. 1986) (given legal uncertainties, in deciding preliminary injunctions, courts "must choose the course of action that will minimize the costs of being mistaken"). Thus, it misses the point entirely to suggest—as Appellees do—that some future proceeding might shed further light on the legal entitlement of the parties to relief. If courts were to indefinitely delay

the adjudication of preliminary injunctions every time that were so, it would vitiate the rules that provide for preliminary injunctions.[1]

In short, every equitable consideration calls for this Court to promptly resolve this appeal and grant the requested preliminary injunctive relief. There is no basis for this Court to stay this proceeding—and thereby perpetuate the harmful and unjustified discrimination caused by H.B.2.

3. Finally, Appellees err in suggesting that there will be procedural benefits from holding this appeal in abeyance. Specifically, Appellees suggest (Mot. at 7) that proceedings might continue below and aid this Court in adjudicating this appeal.

Appellees' suggestion is belied by the fact that the district court has stayed the extensive discovery anticipated by the parties on Plaintiffs' Title IX claims—and any trial on such claims—for at least 90 days in light of the Supreme Court's grant of certiorari regarding the Title IX claims in *G.G.* (Minute Entry of Nov. 14, 2016), and has provided no definitive timetable for a resolution of Plaintiffs' entitlement to preliminary injunctive relief on their due process claims. Indeed, it is difficult to read Appellees' suggestion as anything other than disingenuous,

[1] Nor are Appellees without a remedy in the unlikely event that an eventual decision in *G.G.* impacts questions relating to Equal Protection that are not presented by that appeal; Appellees remain free to seek dissolution or modification of a preliminary injunction based on changed circumstances.

given that, on the day after they filed their motion suggesting that the district court might adjudicate Plaintiffs' due process claims, Appellees themselves sought a stay of "all proceedings" before the district court—including the adjudication of Plaintiffs' due process claims. Dist. Ct. D.E. 175 at 3.[2]

In any event, as explained in Plaintiffs' opposition to Appellees' Motion to Dismiss (D.E. 77), there is no basis to hold this appeal in abeyance pending any proceedings below—including any theoretical further adjudication of Plaintiffs' motion for preliminary injunctive relief as to Plaintiffs' due process claims. Appellees' arguments to the contrary (D.E. 44, 83) fail to overcome the enormous legal and practical obstacles to adopting the new and unprecedented jurisdictional rule that they seek—up to and including this Court's interpretation of 28 U.S.C. § 1292(a)(1) as a "statutory mandate" to hear interlocutory appeals such as this one. *NationsBank Corp. v. Herman*, 174 F.3d 424, 427 (4th Cir. 1999).

CONCLUSION

For the foregoing reasons, Plaintiffs ask that this Court deny Appellees' motion and hear this appeal without delay. At a minimum, Plaintiffs request that

[2] Plaintiffs note that—expressly because of the pendency of this appeal, which they believe should provide them protective preliminary injunctive relief regardless of a stay below—they joined the request for the stay of proceedings below, due to the discovery that is contemplated on their Title IX claims (which could well be affected by the Supreme Court's resolution of *G.G.*) and the district court's stated intention to try those claims jointly with Plaintiffs' constitutional claims. Dist. Ct. D.E. 175 at 2.

the Court proceed with the oral argument tentatively scheduled for January 24-27, 2017, after which the Court will have the ability to resolve this appeal on the timeline that it deems appropriate.

* * *

Dated: November 14, 2016

/s/ Jon W. Davidson

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

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

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

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

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

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

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

Counsel for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2016, the foregoing PLAINTIFFS-APPELLANTS' OPPOSITION TO MOTION TO HOLD APPEAL IN ABEYANCE was served on all parties or their counsel of record through the CM/ECF system.

/s/ Jon W. Davidson
Jon W. Davidson