

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 HOLD
APPEAL IN ABEYANCE PENDING THE SUPREME COURT'S
DECISION IN *GLOUCESTER COUNTY SCHOOL BOARD V. G.G.***

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Appellees Patrick McCrory, Tim Moore, and Philip Berger submit this reply in support of their motion to hold this appeal in abeyance pending the Supreme 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) ("*G.G.*").

1. The argument for staying this appeal can be summarized in one Latin word: *passim*. That word appears beside *G.G.* in the Table of Contents in Appellants' brief, Br. at iv, because *G.G.* is cited in that brief **twenty-three** times. And contrary to Appellants' argument opposing this motion, *G.G.* is not cited merely to reaffirm other precedent. Opp. at 3. To the contrary, as Appellees' motion explains, *G.G.* is *central* to Appellants' equal protection arguments in this appeal, just as it was to their equal protection claim below. Mot. at 3-5. That is why Appellants argue to this Court that it was "precisely *G.G.*'s holding" that discriminating against transgender individuals is sex discrimination; that, while *G.G.* was a Title IX case, it would be "anomalous" to reach a different result in the equal protection context; and that "even now" *G.G.* "is the Fourth Circuit's binding precedent." Br. at 28; Mot. at 3. Thus, Appellants cannot seriously deny that the

Supreme Court's resolution of *G.G.*—which the Court agreed to review on October 28—“may affect the ultimate resolution of [this] appeal,” which is all this Court's abeyance rule requires. 4th Cir. R. 12(d).

2. Appellants fire off a volley of arguments designed to obscure that simple fact, but none of them is valid. For instance, they argue that abeyance is appropriate only if *G.G.* “will provide a ‘definitive and comprehensive’ resolution” of the issues in this appeal, Mot. at 2, but the case they cite for that proposition, *Great American Insurance Co. v. Gross*, 489 F.3d 199, 207 n.6 (4th Cir. 2006), concerns whether concurrent federal litigation should be stayed under the *Colorado River* doctrine. That case has nothing to do with holding an appeal in abeyance under Rule 12(d), which allows abeyance if another court's decision “may affect the ultimate resolution” of the case.

3. Additionally, citing only *Landis v. North American Co.*, 299 U.S. 248 (1936), Appellants claim that holding an appeal in abeyance pending resolution of a related case requires showing that the balance of harms favors the stay proponent. Opp. at 4 (citing *Winter v. NRDC*, 555 U.S. 7 (2008)). *Landis* held nothing of the sort. That case laid down various “counsels of moderation” concerning whether numerous

lawsuits should be stayed for years while the government adjudicated a test case. *Landis*, 299 U.S. at 255, 249-53. Among those were the principles that courts have an “inherent” power to control their dockets to promote “economy of time and effort for itself, for counsel, and for litigants,” and that doing so “calls for the exercise of judgment.” *Id.* at 254. Furthermore, *Landis* expressly *rejected* the argument that “before proceedings in one suit may be stayed to abide the proceedings in another,” the stay proponent must show the issues in the two cases are “identical.” *Id.* Finally, *Landis* expressly approved of staying a case for a reasonable period where a related lawsuit “may not settle every question of fact and law ..., but in all likelihood it will settle many and simplify them all.” *Id.* at 256.

Thus *Landis* does not remotely support the high abeyance standard Appellants seek to create and, if anything, supports holding this appeal in abeyance. Furthermore, Appellants fail even to address the authorities cited in Appellees’ motion in which cases were held in abeyance pending even a potentially relevant Supreme Court decision. *See* Mot. at 6 (citing *Fehlhaber v. North Carolina*, 675 F.2d 1365 (4th Cir. 1982); *Hickey v. Baxter*, 833 F.2d 1005, 1987 WL 39020 (4th Cir.

Nov. 19, 1987)). Indeed, in one of those cases—*Hickey*—this Court cited *Landis* in finding that the district court appropriately “stay[ed] proceedings while awaiting guidance from the Supreme Court in a case that could decide relevant issues.” *Hickey*, 1987 WL 39020, at *1.

Finally, the unsupported balance-of-harms standard Appellants urge would be particularly inapposite in this case, given that the district court has already *denied* Appellants preliminary injunctive relief on their equal protection claim. Appellants cannot possibly mean to say that—in order to satisfy the Rule 12(d) standard for staying this appeal pending *G.G.*—Appellees bear the burden of establishing that they will likely prevail in an appeal in which they *won* below. That cannot be right. And even if Appellees had to show that staying the appeal would not cause irreparable harm (which, again, is not the Rule 12(d) standard), Appellants ignore the fact that they have *already* received substantial injunctive relief on their Title IX claim and that the district court’s statements quoted in their opposition concern putative harm already remedied through an injunction. *See* Mot. at 5 (quoting JA982).

3. Appellants also argue that *G.G.*’s Title IX holding has no

relevance to this appeal because it concerns equal protection, not Title IX. Opp. at 2-3. But, as already explained, that is not what Appellants told the district court in their preliminary injunction briefing, and it is not what Appellants say in the brief already filed in this Court. *See* Mot. at 3-5. It is also not what Appellants told the district court at the preliminary injunction hearing. When the district court pointed out that *G.G.* was a Title IX case, not an equal protection case, Appellants' counsel countered with the argument that, "of course, Title IX is an implementation of the Fourteenth Amendment and has much the same logic [.]” Doc. 103 at 39. Furthermore, Appellants' principal authority in opposing this motion, *Landis*, plainly rejected the exact proposition Appellants press here: “[W]e find ourselves unable to assent to the suggestion that before proceedings in one suit may be stayed to abide the proceedings in another, the parties to the two causes must be shown to be the same *and the issues identical.*” *Landis*, 299 U.S. at 255 (emphasis added).

4. Moreover, recent developments in the district court underscore why proceeding with this appeal before *G.G.* is resolved will serve no legitimate purpose. This past Monday, November 14,

Appellants *joined* with Appellees in urging a stay of all district court proceedings pending resolution of *G.G.*—including all proceedings and discovery concerning their equal protection claims—and the court accordingly stayed all proceedings for a minimum of 90 days. *See* Opp. at 8-9 & n.2.¹ In light of that comprehensive stay of lower court proceedings pending *G.G.*, what conceivable purpose would be served by continuing with this appeal in the interim? Appellants are quite candid about that: they want this Court to award them broader injunctive relief than they received below. *See* Br. at 3 (while recognizing grant of injunctive relief under Title IX, seeking reversal of district court’s “denial of broader injunctive relief under the Equal Protection Clause”). And while Appellants are certainly free to seek such broader relief at the appropriate time, their desire to do so now provides no legitimate reason to decline to hold an appeal in abeyance pending a Supreme Court decision that will plainly affect its outcome.

5. Finally, Appellants’ opposition wrongly portrays Appellees’ arguments for abeyance as “disingenuous.” Opp. at 8. They point out

¹ *See also* Ex. A (Magistrate’s 11/15/16 order noting that, “by agreement of the Parties, because the Supreme Court’s decision in [*G.G.*] would likely have a significant impact on the trial in these cases,” trial and discovery deadlines would be continued by 90 days and all discovery would be stayed for 90 days).

that Appellees argued that abeyance could also allow the district court time to rule on the still-pending due process claims; but they then suggest that, the following day, Appellees inconsistently asked the district court to stay all proceedings. Opp. at 9. Appellants present an incomplete picture of the proceedings below. First, as Appellants admit in a footnote, they “joined the request for the stay of proceedings below.” Opp. at 9 n.2. Moreover, at a telephone conference with the magistrate last Monday morning, *see* Ex. B (transcript), Appellees’ counsel made perfectly clear he was taking no position on whether the district court should rule on the due process claims or stay consideration of those claims along with the remaining proceedings. Ex. B at 26-27. Furthermore, Appellees’ counsel emphasized that Appellees’ pending motion to dismiss this appeal would potentially be affected only if Appellants *withdrew* their due process-based preliminary injunction motion. *Id.* at 28. The court asked the parties to clarify their position on how the Court should treat those due process claims by next Monday, November 21. Ex. A at 7.

Thus, there is nothing “disingenuous” about Appellees’ motion to hold this appeal in abeyance. The parties are engaged in ongoing

discussions below concerning disposition of the pending due process claims, and the outcome of those discussions may shed light on whether this appeal is properly before this Court to begin with. But quite apart from those discussions, one thing is clear: the Supreme Court's resolution of *G.G.* will obviously impact the ultimate resolution of this appeal and the Court should therefore hold this appeal in abeyance under the clear standard of Rule 12(d) until *G.G.* is resolved.

CONCLUSION

Proceeding with briefing and argument in this appeal would be a colossal waste of the parties' and the Court's resources. Appellees' brief and Appellants' reply brief—which will be filed on November 21 and December 5, respectively—will have to be rewritten to account for whatever the Supreme Court decides in *G.G.* For the same reason, oral argument in this appeal—which is tentatively scheduled at least a month before *G.G.* would even be argued—will offer this Court no insights whatsoever on what viability, if any, *G.G.* will have in this Circuit by next Spring. The Court should hold this appeal in abeyance and avoid this waste of resources. Following the Supreme Court's *G.G.* decision, the parties can go forward with briefing and argument

(assuming that this Court has jurisdiction) based on established law and not speculation.

Appellees respectfully ask the Court to hold this appeal in abeyance pending issuance of the Supreme Court's *G.G.* decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 16, 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.

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EXHIBIT A

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.

1:16CV236

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF NORTH CAROLINA, et al.,

Defendants,

and

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

Intervenor-Defendants.

1:16CV425

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

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

JOAQUIN CARCAÑO, et al.,) 1:16CV236
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 Plaintiffs,)
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 V.)
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 PATRICK McCRORY, in his)
 Capacity as Governor of North)
 Carolina, et al.,)
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 Defendants,)
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 and)
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 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,) 1:16CV425
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 Plaintiff,)
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 V.)
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 STATE OF NORTH CAROLINA, et al.)
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 Defendants,)
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 and)
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 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,) Winston-Salem, North Carolina
) November 14, 2016
 Intervenor-Defendants.) 10:05 a.m.

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

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1:16CV425

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1 P R O C E E D I N G S

2 **THE COURT:** Good morning. So this is a telephone
3 scheduling conference in 16CV236 and 16CV425.

4 What I am going to do is start by just asking
5 everyone on the call to identify themselves, let me know who
6 will be speaking. I am going to go through each of the groups,
7 and then I'll set out where we are and take up the matter
8 before the Court.

9 Just in terms of who is on the call, let me start
10 with the Carcano Plaintiffs.

11 **MR. WILKENS:** Yes, Your Honor, it's Scott Wilkens
12 on, and I believe that my colleagues Christopher Brook and Jon
13 Davidson are also on.

14 **THE COURT:** All right. Anyone else on for the
15 Carcano Plaintiffs then?

16 All right. The DOJ Plaintiffs?

17 **MS. STOUGHTON:** Your Honor, this is Corey Stoughton,
18 and I will be speaking; and I'm on the line with Ripley Rand,
19 United States Attorney, and Whitney Pellegrino and Lori Kisch.

20 **THE COURT:** Very good. Thank you. Anyone else for
21 the DOJ Plaintiffs then?

22 **MS. PFEIFFER:** Good morning, Your Honor. This is
23 Sonya Pfeiffer. I'm a non -- I represent A. N., A. T., and
24 Alaina Kupec. I will not be speaking. I'm on the call just to
25 make sure I'm up to speed with scheduling and the status of the

1 case.

2 **THE COURT:** You were interrupted with someone joining
3 the meeting, so can you repeat for me who you are?

4 **MS. PFEIFFER:** Yes, ma'am, Sonya Pfeiffer. I'm an
5 attorney for three of the declarants, A. N., A. T., and Alaina
6 Kupec.

7 **MS. NULL:** This is Taryn Wilgus Null for DOJ.

8 **THE COURT:** And you are with the U.S. Department of
9 Justice?

10 **MS. NULL:** Correct.

11 **THE COURT:** All right. Anyone else then that hasn't
12 been identified either by Ms. Stoughton or who have identified
13 themselves for the DOJ Plaintiffs?

14 **MR. SUSSMAN:** My name is Jake Sussman. I, like Ms.
15 Pfeiffer, represent a third party, Stephanie Paige Dula, who is
16 the subject of some of the litigation around the subpoenas. So
17 I was on the call -- just to the extent that there's any
18 relevance on scheduling, I was going to address it.

19 **THE COURT:** All right. Very good. For the record,
20 could you repeat again your name for me?

21 **MR. SUSSMAN:** Jake Sussman.

22 **THE COURT:** All right. Anyone else with the DOJ
23 Plaintiffs or related third parties?

24 All right. Then to the Legislative Defendants, who
25 do we have?

1 **MR. DUNCAN:** Good morning, Your Honor. This is Kyle
2 Duncan for the Legislative Intervenors, and I'm joined by Leah
3 McDowell and Robert Potter.

4 **THE COURT:** Very good. Anyone else then for the
5 Legislative Defendants or Intervenors? And for the State
6 Defendants, or what we've designated as the State Defendants,
7 who do we have?

8 **MR. BOWERS:** Good morning, Your Honor. This is Butch
9 Bowers, and on the line with me are Bill Stewart and Bob
10 Stephens.

11 **THE COURT:** All right. Very good. And anyone else
12 on the call for the State Defendants in this case?

13 All right. And then, finally, I have the UNC
14 Defendants.

15 **MR. GORE:** Good morning, Your Honor. This is John
16 Gore on behalf of the UNC Defendants, and I'm joined by Noel
17 Francisco.

18 **THE COURT:** All right. Very good. And then let me
19 just ask: Anyone else on the call that hasn't otherwise been
20 identified?

21 **MS. PRATT:** Good morning, Your Honor. This is
22 Carolyn Pratt from UNC.

23 **THE COURT:** All right. Very good. Anyone else?

24 All right. By text order last Thursday, I set this
25 for a status and scheduling conference today in light of the

1 joint request of the parties. In that same text order, I went
2 ahead and continued the hearing that was previously set for
3 this upcoming Friday just so you all would have as much notice
4 as I could give you of that in light of the issues that we
5 might take up today, and I think your joint request or your
6 joint submission was very helpful.

7 What I would like to do is start with just going
8 through to get the position of each of the parties, and I'm
9 going to ask you to address three things in particular. The
10 first is your position on proceeding with discovery or staying
11 discovery for, say, 60 or 90 days and extending the trial date
12 and all the discovery deadlines by that same period of time or,
13 otherwise, staying discovery pending a ruling in the Supreme
14 Court decision in *G.G.* So that would be the first issue I'd
15 ask you to address.

16 The second would be your position on whether the
17 Court should proceed with the Department of Justice's motion
18 for preliminary injunction and how the grant of certiorari in
19 *G.G.* affects that.

20 And then, finally, your position on whether the Court
21 should proceed with the remaining due process issue on the
22 Carcano Plaintiffs' motion for preliminary injunction and how
23 the grant of cert. affects that, and also what position you are
24 taking on that with the Fourth Circuit.

25 I will tell you that what I may end up doing is

1 asking you to file position papers on the latter two matters so
2 that the district judge will have the ability to consider those
3 and make some separate determination as to the preliminary
4 injunction motions, and the matter that I would be most
5 interested in resolving this morning would be the question
6 about discovery; but I think it would be helpful to me to go
7 ahead and let you address those things, as I go through each of
8 you, with the focus on the discovery piece for me this morning.

9 So let me just start, Mr. Wilkens, with you.

10 **MR. WILKENS:** Thank you, Your Honor. So, first, on
11 the first piece in terms of discovery, we would support a stay
12 of the proceedings without the 60- or 90-day deadline but
13 pending the outcome of the ruling in *G.G.*, and the reason being
14 that -- you know, given that Title IX is one of the important
15 claims in the action, we do think that the Supreme Court's
16 ruling in *G.G.* is likely to have an impact on that claim, the
17 shape of it, the discovery necessary to pursue that claim and
18 to present that claim at trial. We think it makes sense to
19 stay discovery pending the ruling in *G.G.* and then shape the
20 discovery around that ruling.

21 So that would be our position with respect to the
22 first issue. If you have questions on that, I would be happy
23 to address that.

24 **THE COURT:** All right. I guess the only question I
25 would have is if there is some disagreement on that, is there

1 any reason not to stay everything for 90 days and then set a
2 further status conference, like this one, at the conclusion of
3 the 90-day period just to visit where we are at that point to
4 determine what everyone's position might be then?

5 **MR. WILKENS:** Your Honor, that would be fine, I mean,
6 to reconvene in 90 days. And, again, I will say -- I think --
7 I mean, it's possible that our view could change over the
8 course of 90 days, but I think -- where we are now, I think we
9 would be in favor of a stay pending the ruling in the *G.G.*
10 case, but we are happy to reconvene in 90 days to readdress
11 that.

12 **THE COURT:** All right. That helps. If you want to
13 just briefly let me know where you are on those other two
14 issues, that would be helpful, too.

15 **MR. WILKENS:** On the second issue, I really -- I
16 guess I would want to really leave that with the United States.
17 We -- whether the Court wants to proceed with that -- I mean,
18 it's obviously a matter for the Court, and my understanding is,
19 from what the United States has said in our joint filings, they
20 want the Court to proceed with that. If the Court wants to do
21 that, that's fine. I mean, it's not our motion, but --

22 **THE COURT:** I just want to make sure -- I know, if
23 you have a position on that, understandably that might not be
24 your focus; but if there is anything you wanted to add on that,
25 and then I will hear from DOJ.

1 **MR. WILKENS:** We certainly wouldn't be -- if the
2 Court were to proceed with that and obviously issue the broader
3 relief -- grant a PI with the broader relief, I mean, that's
4 obviously a matter for the Court to decide and that -- if such
5 relief were granted, that would obviously be a benefit to
6 transgender people across the state.

7 With regard to the third issue, unless you want to --

8 **THE COURT:** I guess -- so you are certainly not
9 opposed to the Court proceeding, but you don't have a position
10 necessarily either way on that one?

11 **MR. WILKENS:** That's correct, Your Honor.

12 **THE COURT:** All right. And then the one that I would
13 assume is more your focus, tell me about the third piece.

14 **MR. WILKENS:** Yeah, on the third piece, we are -- we
15 would like -- or we believe it would be appropriate to have
16 that due process piece fall within the scope of the stay. We
17 are -- we're pursuing broader relief in the Fourth Circuit
18 through our protection appeal, and that's where our focus is in
19 terms of seeking broader relief. We had understood from the
20 Court that it would prefer not to deal with things in a
21 piecemeal manner. I envisioned that the due process issue
22 would be heard at trial or dealt with at the same time, and so
23 we didn't kind of view that as a separate process.

24 **THE COURT:** Right.

25 **MR. WILKENS:** That's why, I mean, in coming to our

1 position in terms of on the stay, we would not want a carve-out
2 of due process.

3 Now, if we are done with those three issues, I wanted
4 to add one more.

5 **THE COURT:** Okay. All right. Let me follow up with
6 that. I think that my understanding and intent would be and
7 would have been that we concluded that if the due process piece
8 required any evidentiary hearing or determination, that that
9 would be rolled into the trial, and you were in agreement with
10 that being delayed, at least previously at the time, until May
11 and now until after a ruling in *G.G.*, but my understanding was
12 before, at least, that you were still maybe requesting a ruling
13 on the due process piece to the extent it didn't require an
14 evidentiary hearing before the Court; but that's part of what I
15 want to make sure I understand.

16 **MR. WILKENS:** Yes, so, Your Honor, I mean, we are --
17 we are not requesting a separate ruling on the due process
18 claim, and we are -- we're not seeking to have that carved out
19 of a stay. That would be part of the stay that we would be
20 agreeing to --

21 **THE COURT:** Okay.

22 **MR. WILKENS:** -- before the Court.

23 **THE COURT:** All right. So you would then agree not
24 only to a stay of discovery but also to a stay of your -- any
25 further determination of your motion for preliminary injunction

1 on due process; is that right?

2 **MR. WILKENS:** That's right.

3 **THE COURT:** All right. So one piece of that I had
4 included was the position at the Fourth Circuit. I don't want
5 to be in a position where the Fourth Circuit is holding up what
6 it might do waiting for us to rule on the due process piece if
7 you are all in agreement that the due process piece can be
8 stayed until trial.

9 **MR. WILKENS:** I mean, at least -- there certainly has
10 been briefing about this before the Fourth Circuit, but I don't
11 believe that the due process claim will in any way inhibit the
12 Fourth Circuit from ruling on the appeal pending before it.

13 **THE COURT:** Right. So your position is then that can
14 proceed separately, and you are agreeing to stay any further
15 consideration of the due-process-based request for preliminary
16 injunction until the trial, whenever that might be; is that
17 right?

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

19 **THE COURT:** Okay. So then what was the other issue
20 you wanted to raise or include?

21 **MR. WILKENS:** The other issue I wanted to raise is
22 that we would like to -- well, at present, we would like to
23 amend the complaint in one respect, and, that is, one of our
24 named Plaintiffs, Mr. Carcano, has -- is just about to receive
25 a right-to-sue letter under Title VII against UNC, and so we

1 would want to amend the complaint to add that claim. And the
2 question is just given the stay -- you know, there is a 90-day
3 period in which he has to do that under the right-to-sue
4 letter. It was an EEOC complaint.

5 **THE COURT:** Right.

6 **MR. WILKENS:** So when either -- I guess we could
7 either just -- with the Court's permission -- and we've already
8 previewed this or mentioned this to UNC and to the other
9 parties.

10 **THE COURT:** Okay.

11 **MR. WILKENS:** We could amend it -- we could go ahead
12 and amend it now, or I guess there's also an option that the
13 Court and UNC could agree to a tolling period on when we would
14 need to amend by to meet the statutory --

15 **THE COURT:** I think probably the best way to do that
16 would be to have you go ahead and make your motion to amend,
17 and we'll take care of that, but then stay any further
18 proceedings on that consistent with whatever other stay might
19 be in place. I think that probably makes that simpler to take
20 care of it that way, but I will hear from UNC or anyone else
21 who wants to add on to that.

22 Any reason, though, you wouldn't just go ahead and
23 make your motion to amend if --

24 **MR. WILKENS:** Yeah, no -- sorry, Your Honor, I didn't
25 mean to interrupt. The reason why we wouldn't do that now, and

1 we could certainly make a motion for leave or if -- I mean, if
2 that was what we needed to do, we can certainly do that now.

3 I would also just mention that just given the passage
4 of time, we may -- as the case proceeds, we may want to add or
5 sub in some additional named plaintiffs as people graduate and
6 life moves on. We may want to add -- you know, there may be
7 some different named plaintiffs. In other words, you know, I
8 don't know when, but maybe, let's say, at the time *G.G.* were to
9 come down, we would want to be able to do that. I just wanted
10 to note that. The parties have also -- already are aware of
11 that issue and have at least discussed it.

12 **THE COURT:** On that, it seems to me, it probably
13 makes sense to visit that whenever we're lifting whatever stay
14 may be in place --

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

16 **THE COURT:** -- so we don't do that unnecessarily
17 while proceedings are otherwise stayed; but I will let anyone
18 address that as well, if there is anything else to add on that
19 piece.

20 All right. Anything else, Mr. Wilkens?

21 **MR. WILKENS:** Not at the moment, no, thank you.

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

23 **MS. STOUGHTON:** Thank you, Your Honor. The United
24 States' position on the first question is really related to our
25 position on the second question, which is that, you know, we

1 filed a motion for preliminary injunction. You know, the
2 motion was premised on ongoing irreparable harm to people
3 because of H.B. 2; and while that's happening in the absence of
4 preliminary relief, we object to any stay of the action,
5 recognizing that the Court has granted cert.

6 You know, we have claims that are independent of the
7 claims being considered in *G.G.*, the VAWA claim, and, you know,
8 as we all know, anything can happen with that decision. And so
9 while that certainly does obviously play into the Court's
10 understanding of how to proceed with the case, we would urge
11 the Court to proceed, and we want to vigorously pursue the
12 enforcement action until and unless we had preliminary relief;
13 in which case, I think our calculation would obviously be much
14 different because the motivating force behind our desire to
15 move forward and be ready as quickly as possible is that
16 irreparable harm.

17 So we don't object to any brief stay, recognizing the
18 reality that the Court will probably certainly at least want to
19 have trial --

20 **THE COURT:** Right.

21 **MS. STOUGHTON:** -- by the outcome of the *G.G.* case,
22 but there is a big difference between staying proceedings and
23 then having to start up all over again in June, or whenever it
24 happens, and a brief stay where we get, you know, the 60-plus
25 depositions -- you know, we get a lot of that under our belt

1 and can be ready to go very quickly after that decision
2 happens.

3 **THE COURT:** All right. What about the possibility of
4 extending all the deadlines, including the trial, for, say, 90
5 days to get to that period after we'll have a decision in *G.G.*
6 for final trial preparation and trial and then staying
7 discovery for 90 days just to let those intermediate issues
8 work themselves out, however they might, and then I can set
9 this for another scheduling conference at the conclusion of the
10 90-day period so that we can visit those things? It's not then
11 stayed indefinitely. We'll have to revisit it then, and we
12 would keep the schedule that's presently in place but extend
13 everything 90 days so that there would be a plan in place for
14 starting back up after we take a brief stay of those things.

15 Any objection to that?

16 **MS. STOUGHTON:** Well, Your Honor, I think -- yes, I
17 think so. I mean, we haven't discussed that internally, but I
18 think our overriding goal is to keep things moving, and, you
19 know, I don't know -- I guess a brief stay -- I'd have to take
20 that back, I'm sorry. It wasn't discussed thoroughly so I
21 don't think I can take a position on that right now.

22 **THE COURT:** As far as the second piece, the motion
23 for preliminary injunction, that's going to really be up to the
24 district judge. And in terms of addressing how the grant of
25 cert. affects that and what your position would be on that, is

1 that something then -- presumably, even if I stay discovery,
2 that's still pending. That would be something you could
3 address with the district judge in terms of your position as to
4 whether the grant of cert. affects that or should affect any
5 determination on that; is that right?

6 **MS. STOUGHTON:** Your Honor, I mean -- yes, Your
7 Honor. We are happy to state that position with the district
8 judge, but our position is that he should certainly rule on the
9 preliminary injunction that's pending. The grant of cert.
10 obviously may ultimately affect things, but until there's a
11 ruling, the -- you know, the law is still as it was set forth
12 in our brief.

13 **THE COURT:** Okay. What about the Carcano motion for
14 preliminary injunction on due process grounds? It sounds like
15 they are willing to let that be stayed pending trial. Do you
16 have any position on that?

17 **MS. STOUGHTON:** No, we don't have any position on
18 that.

19 **THE COURT:** All right. Anything else that you wanted
20 to raise or address, Ms. Stoughton?

21 **MS. STOUGHTON:** Your Honor, I just wanted to go back
22 to the notion of a brief stay. I do understand the logic of
23 it, but I also think there's really no harm -- there is quite a
24 lot of discovery pending in this case, and I think all the
25 parties are feeling the burden of compressing a lot of

1 depositions in a brief time frame. So I think our preference
2 would be to proceed with discovery, push the schedule out, as
3 you say, for 60 or 90 days, but then just let discovery go, and
4 we can then take it at a slower pace, as opposed to just
5 staying discovery and then kind of start the machine back up
6 again.

7 **THE COURT:** What discovery would you anticipate
8 trying to do within the next, say, 90 days?

9 **MS. STOUGHTON:** Well, I think there are a number of
10 depositions already scheduled where the schedules of lawyers
11 and witnesses have been worked out. So the most urgent thing I
12 think would be to keep that. It was a feat, a miracle, with
13 the hard work of all the parties on the phone to get that
14 schedule in place. So one thing that I think makes a lot of
15 sense is to keep that schedule, and, you know, if a few things
16 need to be -- if a few dates need to be moved around, that's
17 fine. We have suspended depositions. So there are some
18 depositions that need to be worked back in, but, again, with a
19 pushed-back schedule, we will have the space for that.

20 **THE COURT:** All right. And can you just give me an
21 idea of who we're talking about? Who will those depositions
22 be?

23 **MS. STOUGHTON:** You know, some of the other parties
24 may have it more at their fingertips. I think upcoming are
25 some of the educators, some of whom are experts and some of

1 whom are fact witnesses, to discuss how H.B. 2 or a different
2 rule affects school environments. I think that there are
3 public safety experts, the law-enforcement-type experts the
4 parties have put forward. Those are on the block, and then I
5 think there are a few individual witnesses upcoming, but there
6 may be more than that. Others may know off the top of their
7 head.

8 **MS. PFEIFFER:** Your Honor, this is Sonya Pfeiffer.
9 If I could just pipe in on that for a moment? I represent
10 three of the declarants, again, A. N., A. T., and Alaina Kupec.
11 All three of those depositions are scheduled. I have arranged
12 my schedule appropriately, including purchasing a ticket to
13 Washington, D.C., to be present for the deposition of Alaina
14 Kupec at the end of January, and I know that my clients have
15 also rearranged their schedules to be prepared for those.

16 **THE COURT:** And as I understand it, that's -- are
17 those individuals then also subject to some of the pending
18 motions on -- motions to quash that I also have pending?

19 **MS. PFEIFFER:** Yes, ma'am.

20 **THE COURT:** All right. Ms. Stoughton, anything else
21 you wanted to add on that?

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

23 **THE COURT:** Okay. All right. Let me hear from the
24 Legislative Defendants then. Mr. Duncan?

25 **MR. DUNCAN:** Sure, Your Honor, good morning.

1 **THE COURT:** Good morning.

2 **MR. DUNCAN:** Right, so the first question is the
3 discovery. We are in agreement with the Carcano Plaintiffs on
4 this issue. As we set forth in the pleading that we filed,
5 frankly, our position has always been, ever since the stay of
6 G.G. back in early August, that the whole thing should be
7 stayed. Now our position, as shouldn't surprise anybody, is
8 just stronger. The Court is going to decide the case.

9 The brief -- I mean, I represent the school board in
10 that case as well, so I can tell you that the briefing schedule
11 right now is pretty quick. I don't think the Court is -- our
12 brief is due on December 12. I don't know that -- I don't see
13 anywhere on the Court website and I haven't received any
14 communication from the Court about a definitive oral argument
15 date. My assumption is it's going to be late February, but
16 that's not official. It will only be official when the Court
17 sets the calendar, and lots of stuff can happen then that might
18 push off the argument date. So that's sort of up in the air,
19 but that case has been granted.

20 We think, as we set forth in our pleading, that that
21 means discovery ought to be stayed. We would not at all object
22 to what Your Honor suggested, which is a 90-day stay of
23 everything and then we reconvene. I think that would be
24 mid-February, if I'm not mistaken.

25 **THE COURT:** Right.

1 **MR. DUNCAN:** At that point, who knows what the world
2 is going to look like. It can change rapidly these days, and
3 we can all assess where we are at that point.

4 **THE COURT:** All right.

5 **MR. DUNCAN:** I think that makes perfect sense.

6 If I may, and, of course, interrupt me with any
7 questions --

8 **THE COURT:** Well, let me -- I do want you to tell me
9 about the other things as well and anything else you want to
10 add.

11 As to the particular depositions that the United
12 States has mentioned, it sounds like there are educators,
13 public safety experts, and individual witnesses. Tell me how
14 you anticipate the decision in *G.G.* may affect the scope of
15 those depositions or the focus of those depositions going to my
16 ultimate determination, whether it makes sense to let you go
17 ahead and proceed with those depositions that you have or
18 whether it makes more sense to delay those out until we have a
19 little more information.

20 **MR. DUNCAN:** Your Honor, let me tell you what I am
21 looking at right now. I'm looking at what I have as a master
22 deposition calendar on my calendar, and -- well, let me answer
23 your specific question first.

24 I think that the potential impact of *G.G.* means that
25 we put off all these depositions. I cannot sit here and

1 intelligently say, you know, what *G.G.* might affect or might
2 not affect with respect to any specific depositions or any
3 specific category of depositions. You know, for example,
4 depending upon what the Supreme Court does in *G.G.*, we may well
5 want to advocate for a short -- a reasonable period to file
6 dispositive motions, especially on the United States' Title IX
7 and Title VII claims; and it would certainly make sense to
8 resolve those in light of whatever two legal landscapes we have
9 instead of going forward with depositions.

10 I guess another way to look at it is to the extent
11 that these depositions concern any parts of the United States'
12 claims -- you know, and I'm looking at the calendar. I mean, I
13 think many of them do. If we are going to think about
14 dispositive motions, then it really doesn't make sense to go
15 forward with a bunch of depositions in the interim when they
16 may not be useful -- may not be necessary at all.

17 The other thing is is that, as I understand the
18 Carcano Plaintiffs, they can correct me if I'm wrong, the
19 Carcano Plaintiffs are also in favor of postponing all these
20 depositions right now. So I just don't understand -- I mean,
21 the scheduling of all the depositions -- sure, everybody has
22 expended a lot of effort. I think an economist would call that
23 a sunk cost. Simply because we've done that doesn't mean we
24 have to expend frankly geometrically more effort and money,
25 public money, to go forward with these depositions right now.

1 I just don't see the point.

2 The other thing is, and I don't mean -- I guess I
3 don't mean to be political in anything I am trying to say here,
4 but I think the Court understands that there's going to be a
5 different administration in place as of January 20. I don't
6 know what that administration's view of these matters is going
7 to be, but it certainly, it seems to me, at a minimum makes
8 sense not to make the parties go forward with massive
9 expenditures in terms of depositions when we don't even know
10 what the new administration's position on these issues is going
11 to be. It may be the same or it may be different, but it seems
12 to me the prudent thing to do is just to call a timeout on the
13 depositions until after that becomes clear, and I think it will
14 be clear and I imagine it will be clear by the end of the
15 90-day stay that the Court is proposing. So we think all these
16 depositions ought to be put off.

17 **THE COURT:** All right. Was there anything else you
18 were otherwise going to address or add? I know then I wanted
19 to hear from you as to the preliminary injunction as well, but
20 I didn't know if there was something else you wanted to
21 include.

22 **MR. DUNCAN:** Sure. I don't think I have anything
23 else to say on the discovery part --

24 **THE COURT:** Okay.

25 **MR. DUNCAN:** -- of the equation.

1 On the PI motion, our position has been -- and I
2 think we said this in writing in other pleadings. I don't
3 think our current pleading addresses this, but we've also said
4 it to the United States. We don't -- we're not going to try to
5 argue that the Court shouldn't go ahead and rule on the United
6 States' preliminary injunction motion, if that's what the Court
7 wants to do. Frankly, I don't know any basis for saying that
8 the Court shouldn't rule on it.

9 **THE COURT:** All right.

10 **MR. DUNCAN:** Our position, though, is pretty clear, I
11 think, that we think -- back when the Court stayed *G.G.*, we
12 said that that stay alone suggests that the United States'
13 motion ought to be denied, and now the Court has granted *G.G.*,
14 and, of course, we still say that the United States' motion
15 should be denied.

16 But, you know, the United States has made it clear to
17 us that it views sort of going forward with that PI motion as
18 important to its interests, and I understand that. So we think
19 the Court should go ahead and rule on it, and then the parties
20 can seek whatever appellate relief that they think is
21 appropriate in light of the Court's motion.

22 **THE COURT:** All right. What about the due process
23 piece of the Carcano motion for preliminary injunction?

24 **MR. DUNCAN:** Right. I have to say my answer to this
25 is going to be -- is going to seem a little complicated and

1 maybe counterintuitive. As I understand the Carcano
2 Plaintiffs' position on this call, they do not oppose sort of
3 folding that due process component of the PI ruling into a
4 stay. If I haven't stated that correctly, forgive me.

5 **THE COURT:** That's my understanding as well; right.

6 **MR. DUNCAN:** Okay. You know, our view is it's their
7 motion, and so we're not going to tell the Court go ahead and
8 rule on it or don't rule on it. It's a motion that's seeking
9 broader relief against my clients than the PI that's already
10 been entered, so I would be delighted if the Court never rules
11 on the thing.

12 However, Your Honor, Mr. Wilkens alluded to arguments
13 being made in the Fourth Circuit, so I want to be clear.

14 **THE COURT:** Right.

15 **MR. DUNCAN:** We are arguing in the Fourth Circuit, in
16 a motion to dismiss that we've already filed, that the fact
17 that that due process component in the PI motion is still
18 hanging out there means that the Fourth Circuit should not
19 entertain the appeal. We're saying that it doesn't have
20 jurisdiction, that, you know, you've piecemealed an appeal
21 across two different courts essentially on the same motion.

22 Now, to be fair, the Carcano Plaintiffs have filed a
23 vigorous objection to that, and they will disagree with all of
24 my arguments on that point.

25 **THE COURT:** It's probably helpful to clarify that to

1 the extent there may be some disagreement about what's
2 happening here. I want it to be at least factually clear what
3 we are doing here so then it's not one understanding here and a
4 different presentation at the Fourth Circuit.

5 If there is some basis to go ahead and agree that
6 that due process piece is stayed or separated out and rolled
7 into trial so then it doesn't affect anything as part of the
8 appeal, but the Court also is not going to reach it or proceed
9 on it, it seems like now is the time to go ahead and figure
10 that out.

11 **MR. DUNCAN:** I understand, Your Honor. As I
12 understand it -- I mean, we could all agree here that the due
13 process part of the PI motion won't be ruled on by the Court
14 and would be folded into any trial.

15 As I sit here, I don't know -- obviously don't intend
16 to give away any part of my motion to dismiss the appeal in the
17 Fourth Circuit.

18 **THE COURT:** Well, I understand that. The concern is
19 if we are agreeing here to separate it out and fold it into the
20 trial, then I don't know if it is -- if at least it would
21 accurately reflect my understanding of what we're doing then to
22 tell the Fourth Circuit that they should delay or shouldn't
23 rule because we haven't reached everything that's still pending
24 before us.

25 I guess that's the tension I want to make sure that

1 we're addressing or at least factually on the same page as to
2 what is happening here in this Court. Do you understand where
3 I'm going with that?

4 **MR. DUNCAN:** I do understand. I think I do, at
5 least. May I make a suggestion? It seems to me that that
6 would work, that sort of understanding would work -- well, let
7 me put it this way. It wouldn't work if there's still a
8 pending motion for preliminary injunction on the basis of the
9 due process claims.

10 **THE COURT:** So if the Carcano Plaintiffs withdraw the
11 motion for preliminary injunction on due process grounds
12 without prejudice and with leave to file that as part of a
13 request for permanent injunctive relief at trial, then that
14 would seem to clarify the status of things here and also make
15 it clear that that issue is not still open or pending here that
16 otherwise would delay what the Fourth Circuit -- or affect what
17 the Fourth Circuit might do? Is that fair; right?

18 **MR. DUNCAN:** Your Honor, I think depending on what
19 sort of the pleading looked like, I think that would clarify
20 that there's no longer on the table a PI motion based on the
21 due process claims. That would -- I think that would clarify
22 things, yeah.

23 **THE COURT:** All right. That raises another question,
24 and I will come back around ultimately to the Carcano
25 Plaintiffs to address that; but before I do that, let me let

1 you finish addressing anything else then as to any of the
2 matters I raised or the additional issues that Mr. Wilkens
3 raised with respect to amending the complaint or changing the
4 named plaintiffs at some point, some of those procedural
5 issues.

6 Anything as to those matters, or anything else you
7 wanted to add?

8 **MR. DUNCAN:** No, I don't think I have anything else,
9 Your Honor.

10 **THE COURT:** Okay. All right. Then let me go on to
11 Mr. Bowers. Let me let you address anything that you want to
12 add as to those things.

13 **MR. BOWERS:** Thank you, Judge. Hopefully, you'll
14 appreciate this. I'll just appropriate and adopt everything
15 that Kyle just said. We're on the same page.

16 **THE COURT:** That's sounds fine.

17 **MR. BOWERS:** We're on the same page on all of these
18 issues.

19 **THE COURT:** Then if there isn't anything else, I'm
20 going to move on to the UNC Defendants. Anything at all,
21 Mr. Bowers, you wanted to add as to any of those things?

22 **MR. BOWERS:** Not at this time, Judge. If I want to
23 do a reattack, I will let you know; but right now, I will just,
24 again, stand on the comments that Kyle made.

25 **THE COURT:** All right. Mr. Gore, anything that you

1 want to add?

2 **MR. GORE:** Good morning, Your Honor. Yes, I would
3 like to address a couple of these points very briefly on behalf
4 of the UNC Defendants.

5 I think it's clear from our portion of the joint
6 filing from last week that the UNC Defendants strongly support
7 a stay of all proceedings until a decision issues from the
8 Supreme Court in *G.G.* That would also apply to any depositions
9 or discovery that would be affected, both in their scope and in
10 their extent and even in their need, by the Supreme Court's
11 ruling, at least potentially. So we see no basis to go forward
12 now with any depositions or discovery that might be altered or
13 obviated by the Supreme Court's decision in *G.G.*

14 On the second issue that Your Honor raised, with
15 respect to the Department of Justice's motion for a preliminary
16 injunction, on the merits, I think we made clear our position
17 as to why that injunction shouldn't issue. From a procedural
18 standpoint, I don't think we have any objection to the Court
19 proceeding to rule on that, if the Court chooses to do so.

20 As to the due process issue raised by the Carcano
21 Plaintiffs, we are again in agreement with the Carcano
22 Plaintiffs and the other Defendants that that can be rolled
23 into any eventual trial in the case.

24 I will note, in terms of the Fourth Circuit piece of
25 that, Your Honor, that the UNC Defendants are -- have been

1 dismissed as parties to that appeal. So we have no position or
2 anything to add to that conversation on that issue.

3 **THE COURT:** All right.

4 **MR. GORE:** In terms of the two amendments that
5 Mr. Wilkens mentioned on the phone, let me take -- or the first
6 one is amending the complaint to add a Title VII claim for
7 Mr. Carcano.

8 **THE COURT:** Right. I'm sorry. What's that?

9 **MR. GORE:** Can you hear me, Your Honor?

10 **THE COURT:** I hear you now. You went out for a
11 minute. Go ahead and restate what your position was on that.

12 **MR. GORE:** I think our position is fairly
13 straightforward. We would not have any objection to
14 Mr. Carcano amending the complaint to add that claim at this
15 time as long as our response to that amended complaint, whether
16 it would be to adopt our prior motion to dismiss or file a
17 supplemental motion to dismiss with respect to that particular
18 claim, would be postponed until after the stay.

19 We had had some conversations about that, I think,
20 with Mr. Wilkens; and as long as we had 30 days or so after the
21 stay was lifted to file our responsive pleading, we don't
22 object to the amendment happening now so that Mr. Carcano can
23 try to do that within a timely fashion.

24 In terms of the amendment to add additional parties
25 in order to prevent the case from becoming moot, again, we

1 think that that would be best handled after any eventual stay
2 is lifted and we have a better sense of what the timing and the
3 terrain are for the remainder of the case.

4 **THE COURT:** All right. That's very helpful. So let
5 me come back around then to Mr. Wilkens and Ms. Stoughton to
6 let you address the issues raised by the Defendants, to the
7 extent there is anything you wanted to add.

8 Mr. Wilkens, let me go to you first.

9 **MR. WILKENS:** Well, Your Honor, I think with respect
10 to the due process PI issue and the suggestion that if we were
11 to withdraw it without prejudice to kind of renewing it as a --
12 to seek permanent injunctive relief at some later point, I
13 would just want to -- I don't -- on this call, I don't have a
14 formal position. It sounds like it may be a workable solution.
15 I would just want to be able to confer with the various counsel
16 for the Carcano Plaintiffs and be able to come back to the
17 Court quickly on that. That very well may be a workable
18 solution that we could implement fairly quickly.

19 **THE COURT:** Just on that, my intent is this: If the
20 parties are all in agreement here on this call that it makes
21 sense to stay that determination at this point, then I don't
22 see any reason for the Court to have to resolve an issue the
23 parties otherwise agree should be stayed and rolled over into
24 trial; but I also want to make sure that that is then sort of
25 accurately and consistently translated at the Fourth Circuit,

1 or wherever else it might be, and so while I can note the
2 parties' positions, I'm -- I think that that may be one for you
3 all to visit, as I had indicated, maybe with some filing with
4 the district judge in the next week or so as to everyone's
5 positions so that it's cleaned up as far as the DOJ motion for
6 PI motion.

7 It sounds like everyone is in agreement that that one
8 can proceed, but it might still be helpful to address what
9 effect, if any, the grant of cert. in *G.G.* might have on that;
10 and then as to the due process piece, if the parties are in
11 agreement that should be stayed or handled in trial, then
12 procedurally the best way to accomplish that so it's not
13 creating some separate issue or that it's not still showing
14 pending as here I think would be worthwhile.

15 Does that make sense, Mr. Wilkens?

16 **MR. WILKENS:** It does, Your Honor.

17 **THE COURT:** All right. Anything else you wanted to
18 respond as to any of those things?

19 **MR. WILKENS:** Just one point that John Gore had made
20 about amending the complaint to add a Title VII claim for Mr.
21 Carcano. It would be only against UNC. If UNC does not
22 object, and I would assume that the other Defendants wouldn't
23 object to that amendment, then I just wonder whether a motion
24 for leave is necessary or whether the Court would be able to
25 just grant us the right to file a third-amended complaint?

1 **THE COURT:** I think what I would intend to do is
2 handle that as part of this call, and I can ask the clerk to
3 note an oral motion to amend that I can grant without
4 objection, if that is ultimately where we are on that. That
5 would give you then a certain number of days to file that
6 motion, and it would include, as part of that, the
7 determination that any response deadline is extended.

8 So I think we can do that. It still is going to show
9 a motion that's being granted by the Court, but we can do that
10 all as part of this hearing, unless there is some objection
11 that would need to be addressed further on any written
12 presentation. So I will come back around to that, and,
13 Mr. Wilkens, if I don't, then you can remind me before we end
14 the call to make sure we've covered that as well.

15 As far as, Mr. Wilkens, before I go to Ms. Stoughton,
16 the individuals who are otherwise scheduled for deposition and
17 your position with respect to whether it makes sense to go
18 ahead and conduct any of those depositions in the next 90 days
19 or so or whether it would be better to postpone those, I will
20 hear from you further on that.

21 **MR. WILKENS:** Your Honor, I do think it makes sense
22 to postpone them. I mean, while there may be some -- it may be
23 possible to point to some depositions that theoretically may
24 not be affected by the *G.G.* ruling, it's hard to do that, and I
25 think -- I think what -- at least what we envisioned is that

1 the *G.G.* ruling may recast the case -- kind of case strategy,
2 what depositions -- what the parties want to focus on, and I
3 will note, for example, the various medically related
4 depositions coming up mostly in January, but that's a very
5 intensive period of depositions with experts, and that could
6 very well be impacted in some ways in terms of the questions
7 that are asked, the areas that are pursued, depending on what
8 the Supreme Court says about the facts of the case before it
9 and how it handles transgender issues in its ruling.

10 So I think it makes sense to stay these depositions
11 because we very well may re-prioritize who -- you know, which
12 -- what the witnesses will be at trial and, therefore, who
13 needs to be deposed and who doesn't need to be deposed. One
14 thing I think everybody on the call would admit is that it's a
15 very long list of deponents --

16 **THE COURT:** Right.

17 **MR. WILKENS:** -- a lot of depositions, and the idea
18 that we could kind of truncate that significantly potentially
19 after a *G.G.* ruling I think would be beneficial to all sides.

20 **THE COURT:** Anything else?

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

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

23 **MS. STOUGHTON:** Your Honor, I don't know that I have
24 much to add. I think our position is the same. Again, a brief
25 extension of time is appropriately consistent, but we feel the

1 need to continue to pursue this enforcement action, including
2 making progress on some of the discovery, which may be affected
3 by *G.G.*, but I think the question of that is sufficiently
4 speculative in the absence of preliminary injunctive relief we
5 feel the need to pursue.

6 **THE COURT:** All right. It is accurate to say that
7 you are in agreement at least the trial date be extended until
8 later into the summer of 2017?

9 **MS. STOUGHTON:** We have no objection to that.

10 **THE COURT:** All right. Then anything else for any of
11 the Defendants?

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

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

14 **THE COURT:** All right. What I would intend to do is
15 this: Along the lines as I had initially asked you to address,
16 I think that in light of the grant of cert. in *G.G.*, the
17 overlapping or potentially overlapping issues, and the effect
18 that it may have or appears likely to have on the scope of
19 discovery, that it makes sense to delay the trial for 90 days
20 so that we'll have a decision in *G.G.* prior to trial and,
21 hopefully, some period of time for dispositive motions as well;
22 and that with respect to the discovery, while I proceeded with
23 discovery even with the stay that was granted at the Supreme
24 Court and in light of the need to go ahead and get some written
25 discover underway, the depositions -- the volume of depositions

1 and the extent of the discovery contemplated are voluminous and
2 extensive and would potentially be impacted significantly by
3 the decision *G.G.*, but I don't want it to be unnecessarily
4 delayed and to have a longer period than necessary to get this
5 case ready for trial once we have some decision from the
6 Supreme Court.

7 So in light of all that, I think the intermediate
8 approach that I contemplated would be to stay discovery for 90
9 days, and that is in order to give the parties an opportunity
10 to further address and consider the status of the proceedings
11 at the Supreme Court in *G.G.* and determine what their positions
12 might be with respect to how we proceed and the extent of
13 discovery that we need to do, still aiming for a trial date in
14 the summer of 2017 but extended 90 days to account for the
15 90-day stay here; and then I'll address that further at a
16 status and scheduling conference in February.

17 And so what I would intend to do is extend all of the
18 discovery deadlines for 90 days and extend the trial date for
19 90 days, stay the pending discovery for that 90-day period, but
20 then ask the parties to file position statements, and that
21 would be mid-February, so let's say February 13, as to their
22 positions on scheduling and discovery, whether the stay should
23 be extended, and whether the matter is ready to go ahead and
24 proceed with any part of discovery in order to still continue
25 with the deadlines that would otherwise apply just with the

1 90-day extension.

2 And then at that point, I can consider whether there
3 is a basis to extend the deadlines further, whether it makes
4 sense to do that, or whether we should go ahead and proceed
5 with the schedule we previously set just with the 90-day
6 extensions.

7 With regard to the pending preliminary injunction
8 motions, I am not going to include either of those in the stay.
9 Obviously, the parties seem to have some agreement that the
10 Department of Justice's motion for preliminary injunction could
11 proceed and that the Carcano Plaintiff's motion for preliminary
12 injunction could be stayed or rolled into the trial on the
13 merits; but in light of the parties' positions and the need to
14 have that presented to the district judge and the need to have
15 it clarified so that our docket is clear as to the status of
16 those for purposes of anything that may be happening at the
17 Fourth Circuit, what I am going to do is ask you to each file a
18 position statement, and that's just a short sort of turnaround,
19 say in a week or so, and I will hear from you if we need to
20 adjust that, but say by next Monday, the 21st, with respect to
21 your position on the preliminary injunction motions and
22 specifically the effect of the Supreme Court's granting of
23 cert. in *G.G.* and the position that you may be taking in the
24 Fourth Circuit or how any proceedings in the Fourth Circuit
25 should or could be considered in that determination.

1 And if you all reach some agreement on the due
2 process preliminary injunction in the Carcano case, then you
3 can address that and file an appropriate motion on that, but I
4 am going to for now leave those as showing pending for you all
5 to address further with the district judge.

6 So the effect of that would be to stay the pending
7 discovery-related motions, and I am going to include the UNC
8 motion to dismiss as well. So the motions that would be stayed
9 would be in the 236 case -- I am going ask the clerk to follow
10 with me to make sure I have this. So in the 236 case, it would
11 be Number 89, which is the UNC motion to dismiss; Number 153,
12 the motion for protective order on legislative privilege; and
13 then I show 167, 168, and 172 related to the motions for
14 protective order and motions to quash. All of those would be
15 stayed.

16 And then in the 425 case, it would be Number 98,
17 which is the UNC motion to dismiss; Number 183, which is the
18 motion for protective order on legislative privilege, and then
19 what I believe would be Numbers 204, 207, and 211, which are
20 motions for protective order and as to motions to quash.

21 I will enter a written order on that, but at this
22 point, it would be a determination that everyone agrees that
23 the trial could be extended in order to have the decision in
24 *G.G.* prior to trial, and so I would extend the trial date for
25 90 days; and I'll let the clerk's office take a look at

1 specifically when that might be reset.

2 And then while we have this intermediate period, I
3 will go ahead and extend all of the discovery deadlines by 90
4 days but also include a 90-day stay so that we don't have
5 unnecessary depositions that we may need to otherwise revisit
6 or could potentially narrow, and then we'll revisit all of that
7 after mid-February, and I will go ahead and ask you by
8 February 13 to file your joint notice, and then I will
9 anticipate setting it for a telephone scheduling conference,
10 although if, based on your notice, it looks like it's going to
11 need a full hearing, then I can set it for a full scheduling
12 conference and hearing. I would anticipate doing that sometime
13 either the week of February 13 or February 20. So it would be
14 there during those middle two weeks in February.

15 As to the motion to amend the complaint to add a
16 Title VII claim against the UNC Defendants, I'll ask the clerk
17 to show an oral motion to amend by the Plaintiffs in the
18 Carcano case, in the 236 case, and no objection.

19 And let me ask just to make sure: Is there any
20 objection to allowing that motion the amend? All right. So
21 we'll show the motion to amend with no objection, and I will
22 grant that motion to amend, and so within the week --
23 Mr. Wilkens, do you need more than a week for that?

24 **MR. WILKENS:** No, Your Honor, we can do it very
25 quickly.

1 **THE COURT:** All right. So within the week that -- by
2 next Monday, the 21st, the Carcano Plaintiffs will file their
3 amended complaint adding the Title VII claim, but no response
4 is due until after the 90-day stay has been lifted, and I can
5 address any deadlines or dates for that after we have that
6 conference in mid-February.

7 And then with respect to changing the case to add or
8 substitute named plaintiffs in the Carcano case, I will just
9 note that there would not be a need to do that while the case
10 is stayed for those 90 days, but that's something that we could
11 take up to the extent we need to substitute any plaintiffs.
12 That could happen after the stay is lifted, and I will address
13 that at that point, but that would be -- any need to do that
14 would be stayed during the period that the discovery is stayed.

15 So, to be clear, I'm extending the trial deadline,
16 staying discovery, and staying those particular motions I
17 noted, but I am not staying the preliminary injunction pieces
18 that are still showing, and those would be matters that you
19 would need to address with the district judge, and file your
20 position papers on that within a week, say by the 21st, so that
21 that's clear, I would assume consistent with what you've
22 presented here to me today, but so that it is presented to the
23 district judge that way; and he can make a determination
24 whether to proceed or which matters to proceed or how *G.G.* may
25 affect that on the preliminary injunction request, and if

1 there's some resolution as to the due process piece, as a
2 procedural matter, then I will let you all work that out during
3 that time as well.

4 So that would be what I intend to do, and I'll enter
5 a written order that just summarizes that; but what I want to
6 do now is go through each of you to see if there's anything
7 that I need to clarify or any other issues that I need to
8 address to make sure I've covered everything while I've got you
9 here on the call.

10 Mr. Wilkens, any questions or anything I need to
11 address further?

12 **MR. WILKENS:** Your Honor, that was very thorough. I
13 only have one point -- one question, which is while the
14 legislative privilege issue is fully briefed before Your Honor,
15 the medical records issue, the reply brief I believe is due
16 today. I just wanted to clarify whether the stay is affecting
17 that. We obviously are prepared to file our reply and fully
18 brief it today. So I just wanted to clarify that point.

19 **THE COURT:** All right. I would say this: If you
20 have a reply brief ready to go and want to go ahead and file
21 that today, it will not be today before I enter the order
22 setting all of this out. So you could go ahead and file that
23 today, and then what I would intend to do is when the stay is
24 lifted and we revisit those issues, I'll let you supplement or
25 address further those pending matters in light of where we

1 stand. So if you want to go ahead and do that just to have the
2 briefing complete on that, then I think that might be helpful
3 and worthwhile; but I'm going to stay the Court's consideration
4 of that until we get to the point in the case where we are
5 ready to take that up and actually proceed with those
6 depositions.

7 Does that make sense?

8 **MR. WILKENS:** Understood, Your Honor, yes.

9 **THE COURT:** All right. So anything else,
10 Mr. Wilkens?

11 **MR. WILKENS:** No, Your Honor, thank you.

12 **THE COURT:** All right. Ms. Stoughton, anything for
13 DOJ?

14 **MS. STOUGHTON:** Just one thing on that last point,
15 Your Honor. If we choose not to file a reply brief today, is
16 that without prejudice to further addressing it when the stay
17 is lifted?

18 **THE COURT:** That's correct. If you want to wait and
19 not file that now, I think that would just be a matter to
20 address with me when we lift the stay. If you want to file a
21 reply brief or otherwise address further the arguments that
22 were raised as well as any new issues that may have arisen,
23 that would be something you could do. You just need to raise
24 that and address that at the time.

25 **MS. STOUGHTON:** Thank you.

1 **THE COURT:** All right. Any other questions or any
2 other issues that we need to address, Ms. Stoughton?

3 **MS. STOUGHTON:** No, Your Honor, thank you.

4 **THE COURT:** Mr. Duncan?

5 **MR. DUNCAN:** No, we don't have anything further to
6 address. Thanks very much.

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

8 **MR. BOWERS:** Nothing further, Your Honor, thank you.

9 **THE COURT:** Mr. Gore?

10 **MR. GORE:** Your Honor, just to confirm our
11 understanding, that the response to the amended complaint that
12 the Carcano Plaintiffs would be filing within the week, the due
13 date for our response will be set at a later time after the
14 stay is lifted?

15 **THE COURT:** I think that's right. What I'll tell you
16 is this: I would assume it would need to be filed 21 days
17 after the stay is lifted; but if you want to address that
18 further at the time we're lifting the stay, then that's
19 certainly something you could address. I don't want it to be
20 left completely indefinite where we don't get a response or it
21 otherwise falls through the cracks. So assume that once the
22 stay is lifted, you are going to need to go ahead and file your
23 response; but if you want the Court to visit that deadline in
24 any way, we can do that as part of setting the schedule once we
25 lift the stay, but I'll take that up further when we reconvene

1 in mid-February.

2 Does that clarify?

3 **MR. GORE:** Understood, Your Honor. Thank you, and we
4 have nothing further.

5 **THE COURT:** All right. Let me ask any of the other
6 third-party representatives on the call: Does anyone have
7 anything that you need to raise with the Court?

8 **MS. PFEIFFER:** Nothing further, Your Honor.

9 **THE COURT:** All right. Anything else from anyone
10 before we go ahead and adjourn?

11 All right. Thank you very much. I will enter the
12 written order setting all of this out. Obviously, as I've
13 already indicated and indicated in the text order, we won't be
14 having the hearing this week on Friday, but I will anticipate a
15 hearing mid-February either by telephone conference or in
16 person, and I will make that determination after I get your
17 position papers February 13.

18 Thank you very much. We'll go ahead and be
19 adjourned.

20 (END OF PROCEEDINGS AT 11:08 A.M.)

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1 UNITED STATES DISTRICT COURT
2 MIDDLE DISTRICT OF NORTH CAROLINA
3 CERTIFICATE OF REPORTER

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I, Briana L. Nesbit, Official Court Reporter,
certify that the foregoing transcript is a true and correct
transcript of the proceedings in the above-entitled matter.

Dated this 15th day of November 2016.



Briana L. Nesbit, RPR
Official Court Reporter