

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

3 JOAQUIN CARCAÑO, et al.,                                    ) 1:16CV236

4                                    Plaintiffs,                                    )

5 V.                                    )

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

9                                    Defendants,                                    )

10                                    and                                    )

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

18                                    Intervenor-Defendants.                                    )

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19 UNITED STATES OF AMERICA,                                    ) 1:16CV425

20                                    Plaintiff,                                    )

21 V.                                    )

22 STATE OF NORTH CAROLINA, et al.                                    )

23                                    Defendants,                                    )

24                                    and                                    )

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

                                  Intervenor-Defendants.                                    )

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

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

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19 TRANSCRIPT OF THE **TELEPHONE STATUS CONFERENCE**  
20 BEFORE THE HONORABLE THOMAS D. SCHROEDER  
UNITED STATES DISTRICT JUDGE

21  
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23  
24  
25 Proceedings recorded by mechanical stenotype reporter.  
Transcript produced by computer-aided transcription.

1 APPEARANCES:

2 1:16CV236

3 For the Plaintiff: PAUL M SMITH, ESQ.  
JENNER & BLOCK, LLC.  
4 1099 New York Avenue, NW Suite 900  
Washington, DC 20005

5 ELIZABETH O. GILL, ESQ.  
6 AMERICAN CIVIL LIBERTIES UNION  
39 Drumm Street  
7 San Francisco, California 94111

8 CHRISTOPHER A. BROOK, ESQ.  
9 AMERICAN CIVIL LIBERTIES UNION OF NC  
P. O. Box 28004  
10 Raleigh, North Carolina 27611-8004

11 PETER C. RENN, ESQ.  
12 TARA BORELLI, ESQ.  
LAMBDA LEGAL DEFENSE AND EDUCATION FUND  
13 4221 Wilshire Boulevard, Suite 280  
Los Angeles, California 90010

14 1:16CV425

15 For the Plaintiff: COREY STOUGHTON, ESQ.  
LORI KISCH, ESQ.  
16 WHITNEY PELLEGRINO, ESQ.  
SEAN KEVENEY, ESQ.  
17 U. S. DEPARTMENT OF JUSTICE  
Civil Rights Division  
18 950 Pennsylvania Avenue, NW  
Washington, DC 20530

19 RIPLEY RAND, U.S. ATTORNEY  
20 LYNNE KLAUER, AUSA  
SANDRA HAIRSTON, AUSA  
21 101 S. Edgeworth Street, 4th Floor  
Greensboro, North Carolina 27401

22  
23  
24  
25

1 APPEARANCES (Continued):

2 1:16CV844

3 For the Plaintiff: STUART K. DUNCAN, ESQ.  
 4 GENE SCHAEER, ESQ.  
 5 ROBERT POTTER, ESQ.  
 6 SCHAEER DUNCAN, LLP  
 1717 K Street, NW, Suite 900  
 Washington, DC 20006

7 1:16CV845

8 For the Plaintiff: JAMES A. CAMPBELL, ESQ.  
 9 JOSEPH LARUE, ESQ.  
 10 J. CALEB DALTON, ESQ.  
 ALLIANCE DEFENDING FREEDOM  
 15100 N. 90th Street  
 Scottsdale, Arizona 85260  
 11  
 12 DEBORAH J. DEWART, ESQ.  
 620 E. Sabiston Drive  
 Swansboro, North Carolina 28584-9674

13  
 14 (Pro se Intervenor) STEVEN-GLENN: JOHNSON

15 For the Defendants:

16 (State of NC,  
 17 Governor McCrory,  
 DPS)

18 KARL S. BOWERS , JR., ESQ.  
 BOWERS LAW OFFICE, LLC  
 P.O. Box 50549  
 Columbia, South Carolina 29250

19  
 20 ROBERT C. STEPHENS, ESQ.  
 LINDSEY WAKELY, ESQ.  
 JONATHAN HARRIS, ESQ.  
 21 OFFICE OF THE GENERAL COUNSEL  
 OFFICE OF THE GOVERNOR  
 116 W. Jones Street  
 22 Raleigh, North Carolina 27699

23

24

25

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1 APPEARANCES (Continued):

2 (UNC)

3 NOEL J. FRANCISCO, ESQ.  
 4 JAMES BURNHAM, ESQ.  
 5 VIVEK SURI, ESQ.  
 6 JONES DAY  
 7 51 Louisiana Avenue, N.W.  
 8 Washington, DC 20001

9 CAROLYN C. PRATT, ESQ.  
 10 UNIVERSITY OF NORTH CAROLINA  
 11 P.O. Box 2688  
 12 Chapel Hill, North Carolina 27517

13 (United States )

14 BENJAMIN L. BERWICK, AUSA  
 15 U.S. DEPARTMENT OF JUSTICE  
 16 CIVIL DIVISION FEDERAL PROGRAMS BRANCH  
 17 1 Courthouse Way, Suite 9200  
 18 Boston, Massachusetts 02210

19 JAMES O. BICKFORD, AUSA  
 20 EMILY NESTER, AUSA  
 21 United States Department of Justice  
 22 Civil Division, Federal Programs Branch  
 23 20 Massachusetts Avenue, NW  
 24 Washington, DC 20530

25 (Intervenors)

STUART K. DUNCAN, ESQ.  
 GENE SCHAERR, ESQ.  
 ROBERT POTTER, ESQ.  
 SCHAERR DUNCAN, LLP  
 1717 K Street, NW, Suite 900  
 Washington, DC 20006

(68 Companies)

ASHLEY S. BOIZELLE, ESQ.  
 GIBSON DUNN & CRUTCHER, LLP.  
 1050 Connecticut Avenue, NW  
 Washinton, DC 20036-5306.

STEPHEN L. LARGESS, ESQ.  
 MARK KLEINSCHMIDT, ESQ.  
 TIN FULTON WALKER & OWEN, PLLC.  
 301 E. Park Avenue  
 Charlotte, North Carolina 28203

1 APPEARANCES (Continued):

2 (Amici School Administrators)

3 MARK R. SIGMON, ESQ.  
4 NATE SMITH, ESQ.  
5 SIGMON LAW, PLLC.  
6 5 W Hargett Street, Suite 812  
7 Raleigh, North Carolina 27601

8 Court Reporter: BRIANA NESBIT, RPR  
9 Official Court Reporter  
10 P.O. Box 20991  
11 Winston-Salem, North Carolina 27120  
12  
13  
14  
15  
16  
17  
18  
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20  
21  
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## P R O C E E D I N G S

1  
2           **THE COURT:** All right. Good afternoon, everyone.  
3 Turn the microphone down just a little bit so we don't get  
4 feedback in here. Thank you for waiting. We are here on all  
5 four of these cases. Let me go through and get a roll call.  
6 Carcano versus the Governor, et al., starting with the  
7 Plaintiffs.

8           **MR. PAUL SMITH:** This is Paul Smith, Your Honor,  
9 representing the Plaintiffs, along with some of my colleagues  
10 who are on the line.

11           **THE COURT:** All right. Thank you. And for the  
12 Governor?

13           **MR. BOWERS:** Good afternoon, Your Honor. This is  
14 Butch Bowers. I'm here for the Governor and the State, and Bob  
15 Stephens is also on the line with me.

16           **THE COURT:** And for the UNC Defendants?

17           **MR. FRANCISCO:** Good afternoon, Your Honor, Noel  
18 Franciso. Also on the line are Vivek Suri, Carolyn Pratt, and  
19 James Burnham.

20           **THE COURT:** All right. And the Legislative  
21 Intervenors?

22           **MR. DUNCAN:** Good afternoon, Your Honor. This is  
23 Kyle Duncan for the Legislative Intervenors, along with Gene  
24 Schaerr and Bob Potter.

25           **THE COURT:** And I understand the Amici School

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1 Administrators are on the phone, too.

2           **MR. SIGMON:** Yes, Your Honor, this is Mark Sigmon for  
3 Proposed Amici along with Nate Smith.

4           **THE COURT:** Anybody else in the Carcano case who has  
5 not announced their appearance who intends to indicate their  
6 appearance and to speak today?

7           **MR. PAUL SMITH:** I can give you the names of the  
8 others who are on the call. This is Paul Smith. The others  
9 are Elizabeth Gill, Peter Renn, Tara Borelli, and Christopher  
10 Brook, but I am going to be doing the speaking for us.

11           **THE COURT:** All right. Thank you. Let me switch  
12 then to the United States' case 16CV425, starting with the  
13 United States. Ms. Stoughton?

14           **MS. STOUGHTON:** Yes, this is Corey Stoughton, Your  
15 Honor, and also on the line are Whitney Pellegrino, Lori Kisch,  
16 Sean Keveney; and if there is any others, please speak up.

17           **MR. RAND:** Good afternoon, Your Honor. This is  
18 Ripley Rand from the U.S. Attorney's Office. I'm here with  
19 Lynne Klauer and Sandra Hairston from our office.

20           **THE COURT:** All right. Thank you. UNC,  
21 Mr. Francisco, is it you and your same crowd?

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

23           **THE COURT:** Thank you. And for the Governor,  
24 Mr. Bowers, the same?

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

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1           **THE COURT:** And the Legislative Intervenors,  
2 Mr. Duncan, the same?

3           **MR. DUNCAN:** That's correct, Your Honor.

4           **THE COURT:** And then I have Proposed Intervenors,  
5 North Carolinians for Privacy.

6           **MR. CAMPBELL:** Good afternoon, Your Honor, James  
7 Campbell for North Carolinians for Privacy, and I'm joined on  
8 the line with Joseph LaRue, Caleb Dalton, and Deborah Dewart.

9           **THE COURT:** All right. And then do we have another  
10 Proposed Intervenor, Steven-Glenn: Johnson?

11           **STEVEN-GLENN: JOHNSON:** Yes, Your Honor,  
12 Steven-Glenn: Johnson here for the Plaintiff Intervenor.

13           **THE COURT:** Okay. And I also have an Amici that I  
14 think I signed an order on yesterday. Are they present?

15           **MS. BOIZELLE:** Yes, good afternoon, Your Honor. This  
16 is Ashley Boizelle from Gibson Dunn. I will be speaking for  
17 the 68 Companies Amici, and with me on the call are my  
18 co-counsel Luke Largess and Mark Kleinschmidt from Tin Fulton.

19           **THE COURT:** All right. Is there anybody else on that  
20 case who has not spoken up?

21           All right. Then I also have 16CV844, which is Phil  
22 Berger, et al. versus U.S. Department of Justice. I think the  
23 parties have all made their appearances here, but for  
24 Plaintiff, Mr. Duncan, the same group?

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

1           **THE COURT:** And the United States, is it going to be  
2 you, Ms. Stoughton, or Mr. Berwick?

3           **MR. BERWICK:** Actually, Your Honor, this is Ben  
4 Berwick. I will be speaking on behalf of the Defendants in  
5 both Berger and North Carolinians for Privacy.

6           **THE COURT:** Okay. And, Mr. Bowers, are you present  
7 then for the Governor and the other Defendants?

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

9           **THE COURT:** And anybody else in that case I didn't  
10 get a roll call from?

11           **MR. BERWICK:** This is Ben Berwick again. I should  
12 mention that I'm joined on the line by my colleagues Emily  
13 Nestler and James Bickford, but I will be doing the speaking.

14           **THE COURT:** All right. Thank you.

15           Last case I think is 16CV845, North Carolinians for  
16 Privacy versus Department of Justice. Mr. Campbell, I think I  
17 have you and your same group for the Plaintiff; is that right?

18           **MR. CAMPBELL:** That's correct, Your Honor.

19           **THE COURT:** And then for the United States, Mr.  
20 Berwick?

21           **MR. BERWICK:** Yes, that's correct.

22           **THE COURT:** And, Mr. Bowers, for the interested  
23 parties, the Governor, et cetera?

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

25           **THE COURT:** Anybody else?

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1 All right. That may take up half of our hearing just  
2 having done that.

3 Thank you for taking the time. I know you're  
4 probably wondering where we're going, and I have been  
5 struggling to try to find the best way to proceed with all of  
6 these cases now that there are four of them before me. I did  
7 receive your proposal based on your discussions about trying to  
8 come to some agreed approach. I very much appreciate taking  
9 the time and making the effort to try to reach some agreement.

10 Before I go any further, I am a little bit lost on  
11 exactly how much discovery is going to be needed in these cases  
12 and how soon the parties would be ready for a trial on the  
13 merits. So I wanted to find that out first.

14 Let me start -- I'm principally interested in the  
15 Carcano and the Department of Justice cases, but how much  
16 discovery is going to be necessary, for example, in Carcano and  
17 how soon would the Plaintiffs be ready for trial?

18 **MR. PAUL SMITH:** There are some significant  
19 categories of discovery we want to take before we can get to a  
20 full-merits trial. Looking at the history of any past problems  
21 that form with a State interest testifying, the law inquiring  
22 into the evidence of legislative motive, there may be some  
23 issues there in terms of what documents we can obtain or not  
24 obtain, looking at how the State understands House Bill 2 and  
25 what it requires and what, in fact, it is doing to restrict

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1 access to the restrooms and stuff like that, and also we  
2 certainly want to do some significant discovery about what's  
3 happening in particular at the University of North Carolina  
4 based on their representations.

5           Those are the kind of issues we want to look at, in  
6 addition to, of course, the depositions of all the experts of  
7 the parties and maybe some other fact witnesses that we would  
8 have to take, which is not something we can get ready, for  
9 example, by September. I think with several more months we  
10 might be able to get it ready.

11           **THE COURT:** Could you be ready by October?

12           **MR. PAUL SMITH:** Well, we were, in our internal  
13 discussions, looking at more like November or December. If we  
14 had to, of course, we would do that, Your Honor. It brings up  
15 the question, as we get later and later, about whether or not  
16 there ought to be some kind of interim order to maintain the  
17 status quo, though, because the preliminary injunction is still  
18 hanging out there.

19           **THE COURT:** Right. Well, that's -- I appreciate  
20 that, and that's what I'm trying to balance is the request for  
21 preliminary relief and the desire to make a decision on the  
22 merits without having to visit things twice.

23           **MR. PAUL SMITH:** Right. I mean, obviously, one way  
24 to do that would be to just go ahead and make a ruling on the  
25 preliminary injunction motions on the papers and then put the

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1 trial -- set it for later in the year, but that would require  
2 you to look at it twice in one sense.

3 **THE COURT:** All right. What about from the  
4 Defendants in Carcano?

5 **MR. BOWERS:** In terms of discovery, obviously, we  
6 would want to engage in discovery of their experts and some  
7 other fact witnesses as well. In terms of getting ready for  
8 trial, you know, I think we could probably do it in October or  
9 November.

10 **THE COURT:** Okay. Any other Defendant want to be  
11 heard in that case? Mr. Francisco?

12 **MR. FRANCISCO:** Your Honor, we could handle any  
13 discovery we sought to take in whatever timeline was suitable  
14 for the other Defendants in this case.

15 **THE COURT:** All right. And how about -- I know I  
16 have some issues on counterclaims, and I have a question of  
17 whether to consolidate all these cases. I want to hear from  
18 you all on the consolidation issue, but I don't see the point  
19 in trying all these things separately. So my leaning would be  
20 that these probably ought to be consolidated when they're  
21 resolved, but could the Legislative Intervenors be ready by  
22 October or November?

23 **MR. DUNCAN:** Your Honor, this is Kyle Duncan. Yeah,  
24 I think that's possible. Something Mr. Smith alluded to, which  
25 is presumably Plaintiffs trying to get a lot of discovery from

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1 the legislators, that could lead to some discovery disputes. I  
2 know -- I kind of talked to Mr. Bowers about this, but Your  
3 Honor already dealt with those kind of disputes in other cases  
4 with respect to legislative materials. I frankly don't know,  
5 as we sit here, how extensive that litigation would have to be,  
6 but that's the only wrinkle that I perceive could be a problem.  
7 Otherwise, I don't think it would be a problem theoretically on  
8 that time frame.

9 **MR. FRANCISCO:** Your Honor, may I make one comment  
10 about formal consolidation?

11 **THE COURT:** Sure.

12 **MR. FRANCISCO:** The UNC Defendants are slightly  
13 differently positioned with respect to the private lawsuit by  
14 the ACLU and the lawsuit involving the Government in that we  
15 have a sovereign immunity -- we believe we have a sovereign  
16 immunity defense in the private lawsuit that wouldn't  
17 necessarily apply in the Government suit. Our preference,  
18 therefore, would be to not have formal consolidation of the  
19 ACLU, even if they were closely coordinated and tried together  
20 but not formally consolidated, because we think that would have  
21 implications for our ability to raise the sovereign immunity  
22 claims as against the private litigants in the ACLU suit.

23 **THE COURT:** Okay. All right. That sounds like a  
24 question that will be more complicated than we can make much  
25 progress on today, but I appreciate that.

1           Okay. Let me switch to the DOJ case then. How soon  
2 could the United States be ready for trial?

3           **MS. STOUGHTON:** Well, Your Honor, I think we could be  
4 ready if discovery -- first, let me say, I don't think the  
5 United States contemplates any categories of discovery that  
6 weren't mentioned by the Carcano Plaintiffs. I think, because  
7 of that, we could also be ready for trial in something like  
8 November, but I do have two concerns. One is the one that has  
9 been raised already by Mr. Duncan, which is that there is  
10 already an anticipated discovery dispute, and we would be  
11 concerned that litigation of that dispute, which does involve  
12 complicated issues, might derail any effort to be ready for  
13 trial on that time frame, which is a concern only because of  
14 the irreparable harm issues raised on the preliminary  
15 injunction; and the second is that I don't think you've heard  
16 from all the Defendants on what the full range of their  
17 defenses might be in this action, so I wouldn't want to  
18 completely foreclose additional avenues for discovery should  
19 they be raised by any defenses that any of the Defendants  
20 raised in our case.

21           **THE COURT:** Okay. So subject to those caveats,  
22 what's the Government's position on an October trial date?  
23 Could you be ready by October or November?

24           **MS. STOUGHTON:** Well, Your Honor, we would be if we  
25 had to be. Again, I think October -- as the Carcano Plaintiffs

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1 mentioned, I think October is extremely aggressive given that  
2 there is substantial discovery that would have to be done  
3 across the five categories of discovery that Mr. Smith  
4 mentioned. Again, I also would anticipate that we would need  
5 time to try to resolve and, if necessary, litigate the  
6 discovery matter that's been raised.

7           So with those in mind, you know, if those did not  
8 derail the schedule, I think we certainly could be ready for  
9 November, and if we have to, be ready for October.

10           **THE COURT:** Thank you. Mr. Francisco?

11           **MR. FRANCISCO:** Your Honor, in terms of the timing,  
12 our position is we could be ready in whatever time was  
13 consistent with the other Defendants.

14           **THE COURT:** All right.

15           **MS. STOUGHTON:** Your Honor, I apologize. This is  
16 Ms. Stoughton again. There is one other issue I wanted to  
17 raise which is pertinent to the readiness question, which is  
18 the pending question of the motion by the North Carolinians for  
19 Privacy for intervention in the case. I think my assessment  
20 was not premised on the involvement of the additional issues  
21 raised by that party in the litigation, both in their  
22 affirmative litigation posture with their case against the  
23 United States, but also in the counterclaims that they've  
24 proposed to raise an intervenor in the United States' case.

25           As you've mentioned, in some filings, that party has

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1 raised additional issues that were not raised in the United  
2 States' affirmative litigation, particularly issues raised  
3 relating to the Religious Freedom Restoration Act and the Free  
4 Exercise Clause. Those issues raised additional factual and  
5 legal questions, which factual questions would require yet  
6 another range of discovery to another set of parties.

7           So I think with those issues, that discovery is  
8 substantial enough that it is very difficult for me to imagine  
9 being able to be ready for a trial on all of those matters by  
10 October. It's possible, though I think worrisome, to think  
11 about even being ready for November.

12           **THE COURT:** All right. Mr. Francisco, did you have  
13 anything further that you wanted to add, or were you done?

14           **MR. FRANCISCO:** The only one thing I would like to  
15 add, Your Honor, is that we do believe that our opposition to  
16 the preliminary injunction, which is based on -- not on the  
17 merits of the law, could be resolved on the papers now, and so  
18 we would certainly have no objection to the Court doing that.

19           **THE COURT:** All right. Mr. Bowers?

20           **MR. BOWERS:** Yes, Your Honor, a couple of quick  
21 things. Number one, I do believe that we could be ready for  
22 trial on the merits in October or November. That presumes, to  
23 me, however, that Your Honor decides to treat all of the cases  
24 sort of like you did in the Voting Rights case, where even if  
25 they are not formally consolidated and they keep their own

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1 civil action numbers, but they are consolidated for purposes of  
2 discovery and for trial. In that context -- and we would be  
3 fully supportive of that, by the way, but in that context, we  
4 think we could be ready for trial in October or November.

5 And to bootstrap on what Mr. Francisco just said, we  
6 would take a different approach to the resolution of the PI  
7 motion, and we would -- if we are not going to do it all at  
8 once in October or November, we would like to have a hearing on  
9 the PI motions.

10 **MR. FRANCISCO:** Your Honor, just to clarify, my  
11 comment was specifically to the basis upon which the UNC  
12 Defendants have opposed the PI, which is different than the  
13 basis upon which the others do. I have no objection to what  
14 Mr. Bowers just said.

15 **THE COURT:** All right. I understand. Thanks.

16 All right. How about from the Legislative  
17 Intervenors?

18 **MR. DUNCAN:** I really don't have anything to add to  
19 what Mr. Bowers said. We are on the same page with respect to  
20 the scheduling.

21 **THE COURT:** Let me ask this you: What difference  
22 does it make? You've intervened in both of these cases so far,  
23 but then you have your own separate action, which is the 844  
24 case. If I permit you to intervene and pursue your  
25 counterclaims for declaratory relief, does the 844 case go

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1 away?

2           **MR. DUNCAN:** I think it might, Your Honor. We need  
3 to talk to our clients about that and think about it a little  
4 bit. Look, I do think that either the actions just need to be  
5 consolidated and treated as one case or our standalone case  
6 needs to go away. We are not prepared to say definitively on  
7 that right now, but I think it's obvious that they present the  
8 same issues, and so we just have to figure out procedurally  
9 what the most appropriate way of dealing with it is.

10           **THE COURT:** Okay. Well, you might talk to your  
11 clients about that, because as I consider whether to allow your  
12 counterclaims to be part of the intervention case, I think  
13 whether or not you keep your other separate case might be a  
14 highly relevant consideration.

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

16           **THE COURT:** And if they decide they want their  
17 separate case, then being involved as an intervenor with  
18 counterclaims makes perhaps less sense. I say that with a  
19 question mark, but at least it's a question I have to answer.

20           **MR. DUNCAN:** I understand, Your Honor. We will do  
21 that.

22           **THE COURT:** And I think the responding parties, as  
23 well, need to make a reality check, that if I were to allow the  
24 Legislative Intervenors in the cases with their  
25 counterclaims -- let me be more accurate than that. They're in

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1 the case. If I were to allow them to assert counterclaims,  
2 whether they are not going to oppose that, if I otherwise would  
3 civilly allow their action to proceed and then consolidate them  
4 for trial or at least try them all together, it seems to me  
5 that the practical reality is about the same on both; but you  
6 don't have to answer that today, but I want to know real soon  
7 what the parties' position on that is, and if you all come to  
8 some agreement on that, please let me know right away. There  
9 are a lot of moving parts in this litigation, and to the extent  
10 you all have consensus on something, that goes a long way  
11 toward helping resolve some of the questions.

12           Okay. So that leaves me with the North Carolinians  
13 for Privacy then. I don't know that there is anything  
14 different I need to ask, but is there any -- let me ask it this  
15 way: If I were to keep that as a separate lawsuit, then what's  
16 the timetable that you think you need for the Plaintiffs in  
17 that case?

18           **MR. CAMPBELL:** Well, Your Honor, I think that we  
19 could -- well, I think what would be preferable is to allow us  
20 to intervene in the United States' action and allow us to  
21 pursue our defenses and our counterclaims there; and if the  
22 Court does that, then I think -- just like Mr. Duncan said for  
23 his client and his claims, I think that the need for our case  
24 likely -- almost certainly goes away, Your Honor.

25           **THE COURT:** Is that Mr. Campbell?

1           **MR. CAMPBELL:** Yes.

2           **THE COURT:** All right. Thank you. Well, I am going  
3 to ask you to confer with Ms. Stoughton and the folks at the  
4 Department of Justice and see if you all can reach some  
5 agreement as to how to proceed so that I can streamline these  
6 cases. If you don't, then I'll make a decision either denying  
7 the intervention and handling your case separately or granting  
8 the intervention and then dismissing your case. Those would be  
9 the two options I think would be most likely.

10           **MR. CAMPBELL:** Your Honor, if you do for whatever  
11 reason decide to deny the intervention or if the United States  
12 doesn't agree to the intervention, then we would propose to  
13 expedite our case in a way that would get it ready to go on the  
14 same track that you set for the other cases. We would be  
15 prepared to do that.

16           **THE COURT:** Okay. All right. Hold on just a minute,  
17 everybody, please.

18           So let me ask. You all were kind enough to meet and  
19 confer, and you've come forward with what appears to be a  
20 compromise position that all the PI motions might be able to be  
21 heard in September. Maybe that's been resolved now; but if  
22 you're ready for trial in October or November, I guess my  
23 question is the September hearing date doesn't seem to make a  
24 lot of sense to me.

25           **MS. STOUGHTON:** Well, Your Honor, you know, the

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1 reason -- the reason why the United States took the position  
2 that it did, mainly, that the Court should consider taking the  
3 preliminary injunction motion on the papers and setting it for  
4 decision in July, is because it was clear from the negotiations  
5 that led to the compromise position that to get even the  
6 limited amount of discovery that the parties contemplated  
7 solely for purposes for preliminary injunction, which discovery  
8 was limited to simply expert depositions and a few fact  
9 depositions, would take us until mid-September; and I think the  
10 United States' concern is that adding the full range of  
11 discovery that the parties have articulated so far to that  
12 would make to trial in October difficult. Even if the parties  
13 set a goal of that, there are a range of issues that could end  
14 up resulting in requests for extension or discovery disputes  
15 delay the ability to complete discovery in that time frame, and  
16 that would result in a trial that ends up getting pushed out  
17 more until November. In that circumstance, I think the  
18 Plaintiff parties would be substantially prejudiced given the  
19 showing of irreparable harm that motivated the filing of the  
20 preliminary injunction in the first place.

21           So we would -- I would be willing to compromise on  
22 the hearing position in September. I think that was a  
23 manageable set of discovery that I think can get done without  
24 the kind of disputes that was derailing that schedule, but if  
25 the Court is contemplating advancing to trial on the merits in

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1 lieu of preliminary injunction, the United States has deep  
2 concerns about that and would ask the Court not do that, or if  
3 it is going to do that, to nonetheless take the preliminary  
4 injunction fully briefed -- once it's fully briefed, on the  
5 papers and rule on that prior to advancing to trial.

6           **MR. PAUL SMITH:** I would second the idea that merely  
7 pushing the preliminary injunction issues off until October,  
8 probably more like November, as a practical matter, it leaves  
9 an awful long period of time when you have irreparable harm  
10 that's not being remedied, and that there ought to be at least  
11 some serious consideration given to maintain the status quo in  
12 the meantime given our motion is completely briefed, and we  
13 have a pretty strong showing, I would submit.

14           **THE COURT:** Let me ask you this, Ms. Stoughton. The  
15 concern I have and I've had all along is deciding preliminary  
16 injunction motions followed by a trial within six weeks to  
17 eight weeks after that. I fully appreciate the concern for  
18 some hearing on some relief preliminarily.

19           I do note that the Carcano Plaintiffs were quick to  
20 get their motion filed. The Department of Justice took a  
21 little longer to get its motion filed. One option available to  
22 me that I am giving some serious thought to is to go ahead and  
23 have a resolution of the Carcano Plaintiffs' motion for  
24 preliminary injunction, whether on the papers or with a  
25 hearing, and advancing to trial on the merits as to every other

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1 claim in all the cases so that I am not duplicating the  
2 analysis on a lot of these claims and also providing the  
3 opportunity for relief or at least to be heard on relief on  
4 both the statutory, that is, the Title IX claim, and the  
5 constitutional claim raised by the Carcano Plaintiffs, which I  
6 think is a due process and equal protection argument.

7           So one option I thought about is that, that is,  
8 deciding the preliminary injunction ruling in Carcano and  
9 advancing to trial on the merits as to the Department of  
10 Justice's motion for preliminary injunction, which is still in  
11 the briefing stage and the parties have indicated they wish to  
12 have some discovery on, at least the Defendants did, going  
13 ahead and advancing that to trial and doing that either in  
14 October or November, which would be a delay all of four to  
15 eight weeks from the September schedule.

16           **MS. STOUGHTON:** Well, Your Honor, that is a plan with  
17 a certain amount of appeal. I would just say that the United  
18 States' motion, if it were just taken on the papers the way you  
19 were proposing to do with the Carcano case, would be fully  
20 briefed only a few weeks later, and the advantage or the  
21 particular reason I think to consider that alongside the other  
22 motion is that the United States' injunction is broader because  
23 it covers more claims and more parties. It would bring broader  
24 relief to a broader set of people who are affected by H.B. 2,  
25 and I think because the issues are similar and because the

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1 briefing would not be that far behind functionally, I think  
2 it's worth considering adding that in.

3           That's our only objection to that. Beyond that, the  
4 plan that you propose has a certain amount of merit to it, and  
5 we can understand why the Court might proceed down that path.

6           **THE COURT:** Okay. All right. Well, here's what I am  
7 going to do then. I am going set for hearing the Carcano  
8 preliminary injunction request for July 25th. I don't know  
9 exactly what time we'll start. That's a Monday. So that's a  
10 week from Monday.

11           That, I presume, will be an oral argument because I  
12 think the parties had indicated earlier they did not  
13 necessarily wish to present evidence, and then I think what I  
14 am inclined to do is I'm going to advance trial on the merits  
15 on the Department of Justice's motion for preliminary  
16 injunction. That, to me, makes the most sense. That's the  
17 most rapid way to resolve these claims and also provide the  
18 opportunity for a hearing for some relief on the Plaintiffs who  
19 have acted quickly to seek relief. I'm not being critical of  
20 the Department of Justice, but I am acknowledging that the  
21 motion came later, and we are getting closer to where I think  
22 we can get this advanced for trial and get this resolved.

23           I have no doubt that the claims raised novel issues,  
24 and I believe that all parties would be served and the  
25 appellate courts would be served to make decisions on a full

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1 record, and I think the best way to do that is to quickly get  
2 to the evidence. This does not seem to require a massive  
3 collection of evidence. In fact, it seems to be fairly narrow  
4 from what I've heard so far and can tell, and so I'm going to  
5 immediately contact the U.S. magistrate judge and have her get  
6 together with you all to set schedules that will get us geared  
7 to a trial that will either be in late October or early  
8 November, and it will be trial on the merits. Whether they are  
9 fully consolidated or simply try it at the same time, we'll  
10 resolve that later. Maybe you can work that out with the  
11 magistrate judge, but it seems to me, as a practical matter,  
12 the result will be the same, that is, they are all bench  
13 trials, and I would like very much to consider all the issues  
14 together, if I can, and do it with as much of a record as  
15 possible.

16           That also allows the parties sufficient time to  
17 gather evidence and to take depositions and to discover the  
18 opponent's claims, and then we'll have endeavor to have a trial  
19 quickly. So that's what I am inclined to do. Anybody want to  
20 react negatively to that, speak now or forever hold your peace.

21           **MR. BOWERS:** Your Honor, that whole plan sounds good  
22 to me, but in the spirit of speaking now and not holding my  
23 peace, and this is purely selfish, I have longstanding plans to  
24 be out of the country the week of July 25th. Is there any way  
25 that Your Honor's schedule will allow the PI hearing in Carcano

1 to be held either on Friday the 22nd or the following Monday,  
2 August 1st? If not, I'll certainly adjust, but I thought I'd  
3 throw that out there.

4           **THE COURT:** I will take a look and see what I can do.  
5 I appreciate your scheduling issues. I'm very constrained in  
6 what I can do here.

7           **MR. FRANCISCO:** I may just want to add to that, Your  
8 Honor. As between the 22nd and the beginning of August, the  
9 22nd, from a scheduling perspective, would be very difficult  
10 for me only because I will be just -- I can do it, but I'll be  
11 coming off a hearing in Seattle just a couple of days before  
12 and so will have very little time to prepare. So as between  
13 those two, I would prefer the August date to the September  
14 [sic] 22nd date, understanding Your Honor has a lot of  
15 different things he has to juggle.

16           **MR. BERWICK:** I just want to mention -- I want to  
17 echo what Your Honor said earlier, which is it seems to make  
18 sense to us at least that the Berger case, the Berger  
19 Plaintiffs having intervened in both Carcano and the  
20 Government's affirmative case, should probably be dismissed as  
21 a standalone case and the same with North Carolinians for  
22 Privacy, were they allowed to intervene in the Government's  
23 affirmative case.

24           That being said, if, for example, North Carolinians  
25 for Privacy were to remain as a standalone case, I just want to

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1 put on the record that were Plaintiffs to seek any discovery in  
2 that case, we would likely oppose. We don't think discovery  
3 would be appropriate in that case.

4 **THE COURT:** I appreciate that. Let me ask you to do  
5 this. I have a request for them to intervene. I think I  
6 shortened the response date for the Government until Monday, if  
7 I'm not mistaken.

8 **MR. CAMPBELL:** Yes, that's correct, Your Honor.

9 **THE COURT:** So maybe, Mr. Berwick, why don't you talk  
10 to the North Carolinians for Privacy and see if you and  
11 Mr. Campbell can work out some agreement as to how you want to  
12 proceed. In other words, if you are copacetic with them  
13 intervening, if they agree that the case will be dismissed,  
14 then notify the Court immediately, and if you disagree -- or if  
15 there are any terms and conditions, you all work it out. If  
16 you disagree with that, that's fine. You can file your  
17 response and oppose intervention, but all I'm saying is the  
18 sooner we figure out who's in what cases, if the parties kind  
19 of recognize reality and can come to some agreement as to how  
20 they are able to work with each other, that will go a long way  
21 to lessening some of the strife as we move forward.

22 **MR. BERWICK:** That makes perfect sense, Your Honor.  
23 The only thing I'll say is Ms. Stoughton and the Civil Rights  
24 Division are lead counsel in the Government's affirmative case,  
25 and my understanding, at least their position has been and I

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1 don't know that it's changed, is that they would intend to  
2 oppose intervention; in which case, if the Court agreed, it  
3 would remain as a standalone case.

4           What I want to flag is that in the eventuality that  
5 it does remain as a standalone case, we would probably take the  
6 position -- and I don't even know if they would intend to seek  
7 any discovery, but we would probably take the position that  
8 discovery is inappropriate and that it could be resolved  
9 through briefing.

10           **THE COURT:** Well, the good news is you both work in  
11 the same office, so you all can work that out.

12           **MR. BERWICK:** We certainly can, Your Honor.

13           **THE COURT:** You just let me know, and if you can come  
14 to some -- my point is we are going to move fast. We are going  
15 to get to the merits, and you all are going to have to work  
16 together, and you are all professional. So the more you can  
17 come to agreement, the easier it's going to be.

18           I can tell you, from a judge's perspective, at the  
19 end of the day, I will focus on the facts and the law, and I  
20 don't need to be worried about disputes between the lawyers on  
21 how they get from A to B. If you all can ease the path for  
22 everybody, then we can all focus on the merits, and I think  
23 that will be helpful.

24           **MR. DUNCAN:** Your Honor, if I may -- I'm sorry to  
25 interrupt -- just given the schedule that you're laying out, if

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1 I'm not mistaken, the response is due to the Department of  
2 Justice's preliminary injunction motion I believe on the 29th.  
3 The schedule you are laying out, is it assuming that that's  
4 still the response date for a merits response to the  
5 Department's PI? I am just trying to understand where that  
6 fits in to sort of the schedule that we are talking about here  
7 with respect to the PI hearing on ACLU/Carcano but an advanced  
8 trial on the merits on DOJ. I don't know if that makes sense.

9 **THE COURT:** Well, what I'm contemplating is a hearing  
10 on Carcano because it's ready and then advancing the trial on  
11 the Department of Justice's preliminary injunction request and  
12 having trial on all claims in all cases in either late October  
13 or early November. So your question is do I have to answer the  
14 motion that's out there on the preliminary injunction?

15 **MR. DUNCAN:** Right, from the DOJ, or does this  
16 shift -- affect that deadline at all? Perhaps it's something  
17 that I should talk to DOJ about, I guess.

18 **THE COURT:** I frankly don't know the answer to that  
19 right now. The only reason I hesitate is you are going to need  
20 to know each party's positions on the issues. Why don't you  
21 talk to Department of Justice and see what you all work out,  
22 and then just advise Ms. Engle if you still have a dispute.

23 **MR. DUNCAN:** Okay. Thank you, Your Honor.

24 **THE COURT:** Does that work?

25 **MR. DUNCAN:** Yes, it does.

1           **THE COURT:** All right. Anybody have anything else  
2 for the good of the order?

3           All right. I'll enter an order at some point setting  
4 a time for a hearing on the 25th. That will be here in  
5 Winston-Salem most likely, and I don't anticipate we would  
6 require all day for that. I'm hoping we don't, but hopefully  
7 in a couple of hours or so or two and a half hours, we can get  
8 through the issues we need to get through. I do have a few  
9 questions for the lawyers, so I would like to use that as an  
10 opportunity to get some answers as well.

11           **MS. STOUGHTON:** Your Honor, I wonder if you would  
12 entertain a request from the United States to participate in  
13 the July 25th hearing on the Carcano preliminary injunction  
14 perhaps as an amicus? We would be happy to file a formal  
15 motion if that would be useful, but given the related nature of  
16 the cases and the fact that the United States' preliminary  
17 injunction claim, at least on the Title IX issue, is precisely  
18 the same issue that will be considered by the Court, we would  
19 ask for the opportunity to at least participate in the Court's  
20 consideration of those issues.

21           **THE COURT:** Okay. I am interested in knowing the  
22 United States' position, particularly since it could affect  
23 some of the claims that the United States has. So I would be  
24 interested in hearing from the United States. It is an oral  
25 argument. I can handle it in a little more of a flexible way,

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1 so I would be happy to do that.

2           Why don't you work with your opposing counsel and  
3 with the Carcano Plaintiffs, but I think you can assume that I  
4 will be happy to hear from you during the hearing on that.

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

6           **THE COURT:** All right. I'll send an order out  
7 otherwise, and then you should be hearing shortly from the  
8 magistrate judge. So I think you should put your thinking caps  
9 on working backwards from a trial date in late October, early  
10 November, and trying to come up with some discovery plans.

11           I should have asked, but I don't know whether any of  
12 the parties actually thought they would be filing motions for  
13 some kind of dispositive relief like summary judgment, and I  
14 haven't really built that into the schedule at all, because I  
15 do have the authority under Rule 65 to advance trial on the  
16 merits. That's what I am inclined to do, but if you have some  
17 concern about that, then I think you need to raise that with  
18 the magistrate judge as well. Again, I am trying to avoid  
19 reaching the same decision question multiple times. I would  
20 like to resolve this once. It is a bench trial, and I'm not  
21 sure I see the wisdom of having to resolve it short of trial on  
22 the evidence when I can just hear it at trial.

23           Okay. Thank you all for your time. I will look  
24 forward to seeing you all on the 25th then, and as I said, I'll  
25 enter an order shortly. Have a good afternoon.

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1           **MS. STOUGHTON:** Your Honor, sorry, just one other  
2 question. Does Your Honor -- would Your Honor like us to have  
3 a Rule 26(f) conference in anticipation of trial?

4           **THE COURT:** You will be hearing from the magistrate  
5 judge. I am going to -- I think it's Judge Peake who is  
6 assigned to these, and so you will be hearing from Judge Peake  
7 on what you need to prepare and when.

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

9           **THE COURT:** It will be soon, I can assure you of  
10 that. It will be soon.

11           As always, if there are problems, make sure you let  
12 the Court know because I want to move forward and stay on  
13 track. I know the lawyers have other cases they have to  
14 handle. I practiced for 23 years, so I appreciate keeping all  
15 the balls in the air, but I frankly just am not persuaded that  
16 these cases need to linger very long. The issues seem to be  
17 fairly straightforward or narrow, and so I think we ought to do  
18 what we can to get them resolved on the record, and then you  
19 all can take it from there.

20           Thank you all. Have a good afternoon. I look  
21 forward to seeing everybody July 25, or if I change the date,  
22 whatever date I set it for.

23           (END OF PROCEEDINGS AT 1:55 P.M.)

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1 UNITED STATES DISTRICT COURT

2 MIDDLE DISTRICT OF NORTH CAROLINA

3 CERTIFICATE OF REPORTER

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5

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

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10 Dated this 18th day of July 2016.

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*Briana L. Nesbit*

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Briana L. Nesbit, RPR  
Official Court Reporter

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