

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

JOAQUÍN CARCAÑO et al., )  
 )  
Plaintiffs, )  
 )  
vs. ) CASE NO. 1:16-CV-00236-TDS-JEP  
 )  
PATRICK MCCRORY, in his official )  
capacity as Governor of North Carolina, et al., )  
 )  
Defendants. )

---

UNITED STATES OF AMERICA, )  
 )  
Plaintiff, )  
 )  
vs. ) CASE NO. 1:16-CV-00425-TDS-JEP  
 )  
STATE OF NORTH CAROLINA et al., )  
 )  
Defendants. )

**STATE DEFENDANTS AND INTERVENOR-DEFENDANTS’  
STATEMENT OF POSITION PURSUANT  
TO ORDER OF NOVEMBER 15, 2016**

Pursuant to this Court’s Order of November 15, 2016, defendants Governor Patrick L. McCrory, the State of North Carolina, and the North Carolina Department of Public Safety along with intervenor-defendants President *Pro Tempore* Phil Berger and Speaker Tim Moore (collectively, “defendants”) hereby provide the following statement regarding their position:

1. As previously outlined in defendants’ filing of August 12, 2016, *USA Doc.* 129, defendants believe that the proper approach in the 425 case in light of the Supreme Court granting certiorari in *Gloucester County School Board v. G.G.*, 822 F.3d 709 (4th

Cir. 2016), *stay granted*, 136 S. Ct. 2442 (2016), *cert. granted in part*, No. 16-273, 2016 WL 4565643 (Oct. 28, 2016) (“*G.G.*”), is to do two things:

- Stay these proceedings altogether, or—at a minimum—stay the trial and all discovery (both written discovery and depositions) until after the Supreme Court has decided *G.G.*; and
- Hear and deny the United States’ motion for preliminary injunction on the briefs already submitted, without prejudice to it being asserted again depending on the outcome of *G.G.*<sup>1</sup>

Defendants submit that *G.G.* lies at the core of the United States’ case, not just its Title IX claim. The United States’ Title VII claim, for example, relies extensively on *G.G.* In its motion, the United States urges that it would be “incongruous” to interpret Title VII differently from *G.G.*’s view of Title IX; that the *G.G.* concurrence should control interpretation of Title VII cases; and that *G.G.* dictates “an informed understanding of the real-life meaning of the term ‘sex.’” *USA Doc. 76* at 17-20, 24, 26. While portions of these claims might go beyond *G.G.*, this Court’s eventual disposition of those claims will look quite different depending on the Supreme Court’s opinion. At a minimum, the Supreme Court’s decision may open the possibility of resolving certain of the remaining claims through dispositive motions. Therefore, following the *G.G.* decision all parties should have a reasonable period (for instance, 30-45 days) before discovery, if any, recommences within which to file dispositive motions. When the Court resolves the parties’ dispositive motions and potentially narrows the issues for trial, the

---

<sup>1</sup> If this Court proceeds to issue a preliminary injunction at this time, defendants contend that it should be stayed pending the final decision in *G.G.*

parties would then agree to a reasonable pre-trial schedule consisting of written discovery, depositions, and pre-trial motions.

2. With regard to the 236 case, the motion for preliminary injunction by the *Carcaño* plaintiffs as to their due process claims has been briefed in this Court by all parties. Defendants take no position as to whether this Court should rule on the due process claims now or stay consideration of those claims. Nonetheless, because the *Carcaño* plaintiffs' motion for preliminary injunction on due process grounds remains pending before this Court, the Fourth Circuit lacks jurisdiction over plaintiffs' pending appeal, and the appeal should therefore be dismissed. Defendants have reiterated this position with the Fourth Circuit as recently as November 16, 2016.

*(Signatures of counsel appear on the following page.)*

Respectfully submitted, this the 21st day of November, 2016.

By: /s/ Karl S. Bowers, Jr.  
Karl S. Bowers, Jr.\*  
Federal Bar #7716  
*Counsel for the State of North Carolina,  
Governor McCrory, and the North  
Carolina Department of Public Safety*  
BOWERS LAW OFFICE LLC  
P.O. Box 50549  
Columbia, SC 29250  
Telephone: (803) 260-4124  
E-mail: butch@butchbowers.com  
\*appearing pursuant to Local Rule  
83.1(d)

By: /s/ Robert N. Driscoll  
Robert N. Driscoll\*  
*Counsel for the State of North Carolina,  
Governor McCrory, and the North  
Carolina Department of Public Safety*  
MCGLINCHEY STAFFORD  
1275 Pennsylvania Avenue NW  
Suite 420  
Washington, DC 20004  
Telephone: (202) 802-9950  
E-mail: rdriscoll@mcglinchey.com  
\*appearing pursuant to Local Rule  
83.1(d)

By: /s/ S. Kyle Duncan  
S. Kyle Duncan\* (DC Bar #1010452)  
Gene C. Schaerr\* (DC Bar #416638)  
Leah D. McDowell\* (MS Bar #9628)  
*Counsel for President Pro Tempore  
Phil Berger and Speaker Tim Moore*  
SCHAERR|DUNCAN LLP  
1717 K Street NW, Suite 900  
Washington, DC 20006  
Telephone: (202) 714-9492  
Email: kduncan@schaerr-duncan.com  
gschaerr@schaerr-duncan.com  
leahmcdowell@gmail.com  
\*appearing pursuant to Local Rule 83.1(d)

By: /s/ Robert C. Stephens  
Robert C. Stephens (State Bar #4150)  
*Counsel for the State of North Carolina  
and Governor McCrory*  
General Counsel  
Office of the Governor of North Carolina  
20301 Mail Service Center  
Raleigh, NC 27699  
Telephone: (919) 814-2027  
E-mail: bob.stephens@nc.gov  
\*appearing as Local Rule 83.1 Counsel

By: /s/ William W. Stewart, Jr.  
William W. Stewart, Jr.  
(State Bar #21059)  
Frank J. Gordon (State Bar #15871)  
B. Tyler Brooks (State Bar #37604)  
*Counsel for the State of North Carolina,  
Governor McCrory, and the North  
Carolina Department of Public Safety*  
MILLBERG GORDON STEWART PLLC  
1101 Haynes Street, Suite 104  
Raleigh, NC 27604  
Telephone: (919) 836-0090  
Email: bstewart@mgsattorneys.com  
fgordon@mgsattorneys.com  
tbrooks@mgsattorneys.com

By: /s/ Robert D. Potter, Jr.  
Robert D. Potter, Jr. (State Bar #17553)  
*Counsel for President Pro Tempore  
Phil Berger and Speaker Tim Moore*  
2820 Selwyn Avenue, #840  
Charlotte, NC 28209  
Telephone: (704) 552-7742  
Email: rdpotter@rdpotterlaw.com

**CERTIFICATE OF SERVICE**

I hereby certify that, on this date, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all CM/ECF participating attorneys.

This the 21st day of November, 2016.

By: /s/ William W. Stewart, Jr.  
William W. Stewart, Jr. (State Bar #21059)  
*Counsel for the State of North Carolina,  
Governor McCrory, and the North Carolina  
Department of Public Safety*  
MILLBERG GORDON STEWART PLLC  
1101 Haynes Street, Suite 104  
Raleigh, NC 27604  
Telephone: (919) 836-0090  
Fax: (919) 836-8027  
Email: bstewart@mgsattorneys.com