

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.)

19 _____) 1:16CV425

20 UNITED STATES OF AMERICA,)

21 Plaintiff,)

22 v.)

23 STATE OF NORTH CAROLINA, et al.)

24 Defendants,)

25 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,)

Winston-Salem, North Carolina

September 2, 2016

Intervenor-Defendants.) 10:07 a.m.

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

4 APPEARANCES:

5 1:16CV236

6 For the Plaintiff: SCOTT B. WILKENS, ESQ.
7 JENNER & BLOCK, LLC.
8 1099 New York Avenue, NW Suite 900
9 Washington, DC 20005

10 JENIFER R. WOLFE, ESQ.
11 BROWN & BUNCH, PLLC.
12 101 North Columbia Street
13 Chapel Hill, North Carolina 27514

14 1:16CV425

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

20 For the Defendants:

21 (State of NC,
22 Governor McCrory,
23 DPS)

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

WILLIAM W. STEWART, JR.
MILLBERG GORDON & STEWART, P.L.L.C.
1101 Haynes Street, Suite 104
Raleigh, North Carolina 27604

1 APPEARANCES (Continued):

2 (UNC)

3 JOHN M. GORE, ESQ.
4 JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001

5 CAROLYN C. PRATT, ESQ.
6 UNIVERSITY OF NORTH CAROLINA
P.O. Box 2688
7 Chapel Hill, North Carolina 27517

8 (Intervenors)

9 STUART K. DUNCAN, ESQ.
10 ROBERT POTTER, ESQ.
11 SCHAERR DUNCAN, LLP
12 1717 K Street, NW, Suite 900
13 Washington, DC 20006

14 Court Reporter:

15 BRIANA NESBIT, RPR
16 Official Court Reporter
17 P.O. Box 20991
18 Winston-Salem, North Carolina 27120
19
20
21
22
23
24
25

P R O C E E D I N G S

1
2 **THE COURT:** All right. Good morning. I'll ask the
3 clerk to call the cases on the calendar this morning first.

4 **THE CLERK:** The Court calls Carcano, et al. v.
5 McCrory, et al., 16CV236, and United States of America v. State
6 of North Carolina, et al., 16CV425.

7 **THE COURT:** All right. What I am going to do is just
8 for the record ask you all just to announce your
9 representations for me, and then we'll proceed this morning.
10 Yes, sir.

11 **MR. WILKENS:** Your Honor, for the Carcano Plaintiffs,
12 I'm Scott Wilkens from Jenner & Block, and with me as well is
13 Jenifer Wolfe from the ACLU of North Carolina.

14 **THE COURT:** All right. And will you be presenting
15 then for both in this case this morning ?

16 **MR. WILKENS:** Yes, I'll be presenting for the Carcano
17 Plaintiffs.

18 **THE COURT:** For all of the Carcano Plaintiffs?

19 **MR. WILKENS:** Yes.

20 **THE COURT:** Okay. Yes, ma'am.

21 **MS. STOUGHTON:** Good morning, Your Honor, Corey
22 Stoughton from the Department of Justice Civil Rights Division
23 for the United States.

24 **THE COURT:** Good morning.

25 **MR. BOWERS:** Good morning, Your Honor, Butch Bowers.

USA, et al. v. NC, et al. Status Conference 9/2/16

1 Good to see you again. Here for Governor McCrory, the
2 Department of Public Safety, and the State of North Carolina,
3 and with me is my cocounsel, Bill Stewart.

4 **THE COURT:** All right. Very good. And if I could
5 refer to you as the State Defendants, is that generally
6 accurate at this point?

7 **MR. BOWERS:** Yes, ma'am.

8 **THE COURT:** All right. Yes, sir.

9 **MR. DUNCAN:** Good morning, Your Honor, Kyle Duncan
10 for the Intervenor Defendants, Senator Phil Berger and
11 Representative Tim Moore. I'm joined by my cocounsel, Robert
12 Potter.

13 **THE COURT:** All right. Very good. Thank you. Yes,
14 sir.

15 **MR. GORE:** Good morning, John Gore of Jones Day for
16 the UNC Defendants, the University of North Carolina, Board of
17 Governors of the University of North Carolina, and Chairman
18 Bissette, and I'm joined in the courtroom today by Carolyn
19 Pratt from UNC.

20 **THE COURT:** All right. Very good.

21 All right. And, obviously, we only called these two
22 cases based on the dismissal of what we had otherwise been
23 referring to as the 845 case, the North Carolinians for
24 Privacy.

25 Is that your understanding, Mr. Wilkens,

USA, et al. v. NC, et al. Status Conference 9/2/16

1 Ms. Stoughton, for the Plaintiffs in this case?

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

3 **MS. STOUGHTON:** Yes, Your Honor.

4 **THE COURT:** And then for all the Defendants as well,
5 the North Carolinians for Privacy have voluntarily dismissed
6 their case. Is that y'all's understanding as well?

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

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

9 **MR. GORE:** Yes, Your Honor.

10 **THE COURT:** I have your joint notice of the issues.
11 We are on for a status conference. Obviously, I think the
12 first thing to take up is what you all identified as the
13 schedule with respect to whether there is some sort of stay
14 requested or continuance of the trial date or what the schedule
15 is that we are going to look at because I think that obviously
16 will affect how we deal with the remaining discovery issues
17 that we need to take care of.

18 I will tell you at the outset I am generally inclined
19 to leave this on in November and just push forward; but if
20 there's some other option that you all can agree to and want to
21 present to me, then we can take that up. I think what might be
22 helpful is if I just hear from everybody so I understand what
23 the positions of the parties are. I can let you know generally
24 what options you might have, and then if we need to take a
25 break so that you all can discuss that, then we can do that and

USA, et al. v. NC, et al. Status Conference 9/2/16

1 then reconvene and see where we stand at that point.

2 I am going to start with the Carcano Plaintiffs
3 first. I understand the motion to stay comes from --
4 originally from the Defendants, but just to make sure I cover
5 everybody, let me just see where everybody is on the motion to
6 stay and the schedule that we might have.

7 **MR. WILKENS:** Thank you, Your Honor. Yes, so for the
8 Carcano Plaintiffs, we think a stay is appropriate at this
9 point given that we have filed a notice of appeal with regard
10 to Judge Schroeder's preliminary injunction ruling on the equal
11 protection claim, and we feel strongly that the guidance
12 provided by the Fourth Circuit could have very important
13 implications for the scope of the case, including elements of
14 discovery, but, of course, also how the trial would proceed.
15 And so we think in terms of the resources of the Court and also
16 of the parties -- and I will get to the in-place schedule we
17 have in a moment -- we think it makes sense to have a stay of
18 discovery, not written discovery, but certainly of depositions.

19 **THE COURT:** Right. That was going to be my next
20 question. So your position is maybe continue with written
21 discovery on some more extended schedule and just continue the
22 trial out and stay depositions until some later period of time?

23 **MR. WILKENS:** Yes, Your Honor. Although I don't
24 think we have the Fourth Circuit's schedule clear yet, it looks
25 like the briefing there would not be complete until about the

USA, et al. v. NC, et al. Status Conference 9/2/16

1 end of the year, sometime in December the reply brief would be
2 in, and I don't know how quickly they would have oral argument
3 and issue a ruling. So we think it makes sense to proceed with
4 written discovery in part because -- and I'm sure we'll get to
5 this a little bit later today -- we are already seeing some
6 areas of dispute come up that could probably use briefing
7 before the Court, and they may take some time to resolve.

8 It's also become clear that in the parties'
9 discussions, written discovery is just taking longer than we
10 had thought. So, you know, having the time to make that happen
11 still efficiently but to get those documents before depositions
12 begin I think is also very -- much more efficient for the
13 parties.

14 So we would recommend that there be a stay pending
15 the Fourth Circuit appeal, it's not clear to us how long that
16 will take, and push the trial out past that, the trial date out
17 past that; and then in the interim, for the efficiency of the
18 Court and all the parties and to keep this case moving along,
19 engage in written discovery, which I think will involve some
20 disputes, and we can get to those, that may need to be resolved
21 through motions practice.

22 **THE COURT:** All right. The piece for preliminary
23 injunction that you still have outstanding currently would be
24 the due process piece. Judge Schroeder has indicated he would
25 roll that in with the trial. So if you're asking for that, to

1 me that would include moving that due process piece out to
2 whenever the trial is because I am not going to set up
3 something where we are going back to Judge Schroeder multiple
4 times. We've got it now set for the trial in November all
5 rolled together. If you want to continue that out, that would
6 continue out anything that's been rolled into the trial,
7 including the due process piece.

8 **MR. WILKENS:** Well, Your Honor, on that specific
9 issue, I think our position would be that the briefing schedule
10 that Judge Schroeder set forth on the last page of the
11 preliminary injunction ruling, we think that's -- that can
12 certainly stay in place. Whether there is oral argument I
13 think is a matter for the Court's convenience. If the Court
14 wants that, wants to have oral argument on the due process
15 briefing, we can certainly provide that, but we would leave
16 that up to the Court.

17 **THE COURT:** If I told you that if you want the due
18 process to happen on that schedule, it's got to be in
19 conjunction with the trial because it's all rolled together in
20 November, then what would you elect to do?

21 **MR. WILKENS:** I'm sorry, Your Honor? I mean, the
22 briefing --

23 **THE COURT:** So the due process -- the trial's been an
24 accelerated trial or an advanced trial so that all the
25 preliminary injunction issues that are remaining can be

1 addressed all together at once so that the Court doesn't have
2 it sort of coming through multiple times and so that it all
3 gets presented together in an efficient and consolidated way.

4 I understand the concern about getting all of the
5 discovery in, but given the point of putting all of that
6 together in November, if I told you that if you want due
7 process -- or the preliminary injunction piece that's left on
8 due process to be considered in November, then that has to be
9 as part of all of the trial in November, and if we are moving
10 the trial, then we are moving the due process piece, too, what
11 would your request be?

12 **MR. WILKENS:** If we are moving the trial, then we
13 would be willing to move the due process request piece. We
14 would like -- we would -- our ideal position here would be to
15 have the briefing continue as it's set forth in the judge's
16 order and then have the Court decide whether it wants oral
17 argument and rule on it as the Court wishes when the Court
18 desires.

19 If a ruling on due process has to be tied to the
20 November trial date, then we would -- I think we would, on
21 balance and given the other issues that we'll talk about, we
22 would still be in favor of a stay.

23 **THE COURT:** That's what I wanted to know. If that
24 were the choice that you had, if you want that due process
25 preliminary injunction piece heard sooner, it's set up to be

1 heard sooner in November. If we're staying it, then if the
2 choice is stay it and stay all of it, then your election would
3 be to stay it and stay all of it?

4 **MR. WILKENS:** Yes, Your Honor, and I would also
5 suggest what perhaps might be a workable solution here, and,
6 that is, as we've suggested in the joint notice, that the
7 United States' preliminary injunction motion -- that that
8 briefing schedule is set. I think it's going to be finished,
9 the briefing, by the middle of September or around thereabouts.
10 If there were oral argument on that PI motion, for example, I
11 think there also could be oral argument, maybe a bit later, but
12 on the due process piece, and that would be separated from the
13 November trial date, but I understand Your Honor's question.

14 **THE COURT:** Right. Well, and the concern of the
15 Court being the need for sort of multiple interventions in this
16 along the way when we have it set for November to get all of it
17 presented and decided together. So if you're asking
18 collectively or in some groups to move that, then I would be
19 inclined to consider that if we are moving everything, but not
20 if we are setting up serial requests along the way for the
21 Court. Do you understand?

22 **MR. WILKENS:** Yes, Your Honor. I guess my only
23 caveat there would be -- at least from my perspective, would be
24 that a hearing on the -- my understanding, at least in terms of
25 the request, is the hearing on the Government's preliminary

1 injunction motion and a hearing on due process would be a
2 nonevidentiary hearing; it would be oral argument only, and so
3 that would really distinguish it from what would be happening
4 at the trial in November. Obviously, we would be putting on --
5 both sides -- or all sides, we would be putting on a
6 substantial evidentiary case. So it would be, I think, quite
7 efficient if the Court wanted oral argument on either the U.S.
8 Government's PI motion or on the due process piece. That could
9 be done very discretely and efficiently even if it's taken away
10 from or separate from the trial on the merits in this case.

11 **THE COURT:** All right. I am going to come to
12 Ms. Stoughton, but I'm going to push you on one other piece
13 here. If the Government is requesting to go ahead and go
14 forward so that they can have their preliminary injunction and
15 everything heard together, or if the Court is not inclined to
16 separate the Government's preliminary injunction request either
17 so that it all goes together, if their position is, well, then
18 we want to go ahead and go together as soon as we can in
19 November, or whenever we can sort of do it most quickly, then
20 if we're having that trial, your clients would still be
21 requesting to be part of that trial?

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

23 **THE COURT:** All right. So if it's going forward,
24 then you would still be part of the discovery going forward?

25 **MR. WILKENS:** Yes, we would. Thank you, Your Honor.

1 **THE COURT:** All right. One other piece I wanted to
2 ask you about. There's the motion to amend to add the
3 representational Title IX claim, which could potentially affect
4 the scope of the preliminary injunction if we are just looking
5 at the Title IX piece. Is that something that you would be
6 intending to ask this Court to take up even while everything
7 else is either stayed on discovery or proceeding in the Fourth
8 Circuit?

9 **MR. WILKENS:** Yes, Your Honor, that's one of the
10 pending issues, that we would want to proceed even while a stay
11 is pending. I think we tried to list several things in the
12 joint notice.

13 **THE COURT:** Right. And so if that -- if the Court
14 were willing to entertain that, even while everything else is
15 stayed, because it's related to what the Court has already
16 issued in terms of the Title IX and the effect of *G.G.* in this
17 case, then that would be something that we could still consider
18 or present, but everything else, including the due process, you
19 would be content to stay until the ultimate trial, if that were
20 the choice that you had to make?

21 **MR. WILKENS:** If that were the choice we had to make,
22 yes. I think I already stated our ideal position.

23 **THE COURT:** Right. Right. Right. Well, I ask
24 because, as I said when I started, I think my starting point
25 here is we are on in November. Everything gets heard in

1 November. It's consolidated for the Court, and all the
2 preliminary injunction pieces can all be considered together
3 with the trial on the merits. So to the extent there are novel
4 legal issues and factual issues that are intertwined, all of
5 that can happen in November. If your request is to change
6 that, then I want to make sure that you're willing to change
7 all of that as part of your request. Does that make sense?

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

9 **THE COURT:** And that is what your position would be
10 unless the United States is going forward in November; in which
11 case, you want to stay on November. Is that right?

12 **MR. WILKENS:** Correct, Your Honor.

13 **THE COURT:** Anything else as far as your position on
14 that piece?

15 **MR. WILKENS:** Not that I can think of right now, Your
16 Honor.

17 **THE COURT:** All right. I'll give you a chance if you
18 need to add anything else.

19 **MR. WILKENS:** Thank you.

20 **THE COURT:** All right. Ms. Stoughton.

21 **MS. STOUGHTON:** Thank you, Your Honor. Your Honor,
22 the United States' position is that the grounds on which the
23 parties have asked for a stay are not persuasive grounds for a
24 stay. We stated our reasons in our written opposition for why,
25 the *Gloucester* decision. I won't belabor those.

1 **THE COURT:** Right.

2 **MS. STOUGHTON:** We don't think the Carcano
3 Plaintiffs' appeal changes things. We don't think the appeal
4 from those equal protection claims really will have much affect
5 on the resolution of the statutory claims that the United
6 States has brought.

7 **THE COURT:** Okay.

8 **MS. STOUGHTON:** So for that reason, we have not
9 joined or even consented to those motions for stay.

10 Having said that, the United States is not wedded to
11 the trial date in November. If the Court was willing to hear
12 the United States' pending motion for preliminary injunction
13 on, you know, the schedule on which it's briefed, we would not
14 object to that, but we have not made that request because we
15 have understood the Court's position to date to be that the
16 Court is not interested in that.

17 Having said that, the problem today is that the
18 discovery has not proceeded at the pace at which it should
19 have, and that's for a lot of reasons. One of the reasons is
20 that I think when the parties, including the United States,
21 told the Court some months ago that we could be trial ready in
22 November, that was not accounting for the counterclaims and
23 claims by the NCFP Plaintiffs against the United States and the
24 discovery demands that would then be propounded on the United
25 States as a result of those, and now having had those and

USA, et al. v. NC, et al. Status Conference 9/2/16

1 seeing those, it's very clear to us that it is not possible for
2 the United States to respond even with the limitations imposed
3 by our legitimate objections to those demands on this trial
4 schedule.

5 So without limits on that discovery, we can't meet
6 our discovery obligations because they have asked for documents
7 across a range of federal agencies and e-discovery searches
8 that will produce hundreds of thousands of documents, many of
9 which will be deliberative process privilege, which requires
10 review and redaction and the invocation of a process. So just
11 to accomplish that is not feasible.

12 So I think what we are here today is to say two
13 things. So first is a question, which we had posed in an email
14 the other day following the dismissal of the NCFP claim, which
15 is whether the dismissal or withdrawal of that claim -- that
16 action changes the discovery demands that have been propounded
17 on the United States such that perhaps our calculation would be
18 different and we actually could meet the demands that have been
19 placed on the United States on the current schedule, which is
20 wrapped into the first question, which is can we in general
21 pose more limits on discovery that make it feasible; and we've
22 proposed several things that have been so far rejected by the
23 Defendants. We have proposed stipulations, which have not been
24 rejected but have not been responded to, fact stipulations that
25 would limit the scope of necessary discovery on both sides. We

USA, et al. v. NC, et al. Status Conference 9/2/16

1 have proposed limits on the total number of witnesses and
2 limits on the times of depositions, which the Defendants have
3 now rejected, and we have tried to -- we have been engaging in
4 other discussions about e-discovery and other limits, which are
5 kind of ongoing, and I won't say have been rejected but just
6 have not been accomplished yet. So that's the first problem
7 and question.

8 The second question is whether the Court would
9 reconsider the position the Court has articulated, and, again,
10 we don't stand here to be obstructionists about a proposal that
11 would push out the trial date as long as the preliminary
12 injunction that's pending was heard. Again, we are not -- we
13 would prefer -- we understand the Court to prefer that we come
14 up with a plan that accomplishes the discovery on the current
15 time frame and rolls the trial and the preliminary injunction
16 together. It's just that, as things stand, we don't have a
17 path for that.

18 **THE COURT:** All right. I understand that. I think
19 I've said and it's been articulated previously that the Court's
20 intent is to do this all together at once so we don't have sort
21 of multiple or serial inquiries on different issues coming up,
22 and all of it can get resolved altogether.

23 Let me ask you one piece about your preliminary
24 injunction request because it appeared that a significant
25 portion of that relates to the Title IX issue that overlaps, if

1 not completely, almost completely with the Title IX request
2 that the Carcano Plaintiffs would make, at least if they were
3 also allowed to make a representational claim.

4 Is that right, understanding that right now it is
5 just as to the three individual plaintiffs that the preliminary
6 injunction applies, but if there is a representational claim
7 that the Court is also considering, that that would be similar
8 or analogous to your claim, all of it based on the same issues
9 the Court has already addressed?

10 **MS. STOUGHTON:** Well, certainly, the legal issues are
11 identical.

12 **THE COURT:** Okay.

13 **MS. STOUGHTON:** The only distinction is in the scope
14 of the relief that would be justified, and I'm not familiar
15 enough with what scope of relief the Carcano Plaintiffs would
16 be entitled to under the representational claim, if it were
17 added, to be able to say whether it would be concomitant with
18 what the United States would be entitled to. So I don't know
19 the answer to that question.

20 **THE COURT:** But it would be the same legal issues
21 that have already been addressed by the district judge in the
22 preliminary injunction?

23 **MS. STOUGHTON:** Absolutely.

24 **THE COURT:** So if that piece could proceed just as to
25 the Title IX with the Title VII that has some potential factual

1 issues intertwined and the Violence Against Women Act that's at
2 least more sort of novel in how it all is interpreted or
3 relates -- we don't have the guidance like we do from *G.G.* --
4 those things get addressed as part of the trial on the merits,
5 but the Title IX piece gets presented earlier, what would your
6 client's position is?

7 **MS. STOUGHTON:** So I can't say standing here that we
8 could agree to that because there is relief in the Title VII
9 and VAWA claims that go quite far beyond what the Title IX
10 claim could afford on the preliminary injunction. So, because
11 of that, I would not be authorized to agree that we would
12 assent to not considering those claims on a preliminary basis
13 and rolling them over into a trial that was beyond even the
14 November 14 date. I can certainly take that back and discuss
15 it, but I think we would be inclined against it because we
16 think that those claims are strong as well, and our objective
17 is to get the broadest relief possible against H.B. 2's
18 discrimination as quickly as possible. So I can't agree to
19 that standing here, but I can certainly take -- we have not
20 considered that fully, and I can certainly take that back and
21 discuss that.

22 **THE COURT:** Well, I raise that as a possibility
23 because that issue has already been presented, addressed by the
24 Court, and could potentially be addressed on a preliminary
25 basis without going further and beyond into the other issues

1 that I think the Court contemplated dealing with all together
2 as part of the trial in the case.

3 If all of it needs to be considered together or there
4 isn't a way to split it apart, then I think what the Court has
5 always anticipated is this advanced trial that we are going to
6 set for November. If that's the case, though, I'm hearing
7 tension between the ability to do that and the request for
8 relief, and I am not sure what the proposal is other than maybe
9 a request just to reconsider the preliminary injunction being
10 heard first.

11 **MS. STOUGHTON:** Well, we have two requests. One
12 is -- again, I'm hesitant to call it a request to do that, but
13 the other parties have requested pushing this out, and I think
14 it would solve some of the pressures on discovery for the Court
15 to reconsider that position. That's as kind as far as we are
16 really willing to go on this.

17 The second request is that the Court intervene
18 aggressively to help impose greater limits on discovery in this
19 case and discovery limits that the United States is willing to
20 impose bilaterally on its own discovery as well, including
21 limiting the number of witnesses we would call, both expert and
22 fact witnesses, and restricting time frames, for example, for
23 ESI searches, which we have proposed as well as of yesterday,
24 so they haven't had a chance to respond to that, to be sure.
25 So that's -- I think that's the only other path we see out of

USA, et al. v. NC, et al. Status Conference 9/2/16

1 this.

2 And then one last thing I want to say with respect to
3 the Court's suggestion about separating out the Title IX claim
4 from the Title VII and VAWA claim for preliminary relief. It
5 does occur to me that the VAWA claim, I think, belongs in a
6 bucket with the Title IX claims because, although the Court has
7 not itself considered those claims that -- as I understand it,
8 the distinction between Title IX and Title VII is the absence
9 of the *Gloucester* decision giving controlling weight to guide
10 its interpreting the meaning of sex in that statute and its
11 implementing regulations.

12 In VAWA, that issue is also not present because VAWA
13 explicitly covers gender identity, which I think makes it
14 similarly situated to Title IX. There are not, as far as I can
15 understand it, factual questions that would be pertinent to the
16 Court's resolution of the VAWA claim that are different from
17 the Title IX claim. So if we are going to go down that road,
18 and I understand it is a possibility, I would at the very least
19 urge the Court to roll the VAWA claim into the initial
20 resolution --

21 **THE COURT:** On the Title IX?

22 **MS. STOUGHTON:** -- with the Title IX.

23 **THE COURT:** But to the extent that there are factual
24 issues tied up with the Title VII, understanding that if we are
25 moving out the trial, then we would at least be moving out the

1 Title VII?

2 **MS. STOUGHTON:** I understand it to be a possibility.
3 Again, I don't have authority to represent the position that
4 the United States would agree to that, but just in terms of
5 framing up a discussion, I wanted to make that distinction.

6 **THE COURT:** All right. So assuming that you're not
7 agreeing to break it out that way, then your request -- if the
8 Court is otherwise not reconsidering the determination that all
9 of this should be decided together, your request is then to
10 just start going through and putting some discovery limits and
11 get us back on track for November?

12 **MS. STOUGHTON:** Yes, Your Honor.

13 **THE COURT:** All right. And I think that's
14 potentially what I would do to the extent I can today, and
15 we'll set this on for another hearing next Friday where you can
16 give me some specific proposals for what we need to do. I
17 understand they may have just been circulated. So that would
18 be -- if that's the path we need to go down, then we can do
19 that.

20 If either you determine that you can agree to
21 splitting the preliminary injunction and would be sort of
22 willing to do it that way or the Court otherwise reconsider
23 hearing the preliminary injunction in full, then what would
24 your request -- and hearing the preliminary injunction in full
25 on the briefing without any evidentiary hearing and if all of

USA, et al. v. NC, et al. Status Conference 9/2/16

1 the parties are in agreement that that's all that's needed as
2 to the preliminary injunction request that remains, as I said,
3 or if you agree to splitting it and the Title VII at least
4 being pushed out, what would your request be for how we proceed
5 then in the interim? Are we just continuing the trial out and
6 to when and continuing with written discovery in the meantime?

7 **MS. STOUGHTON:** Your Honor, I think it seems to me
8 that what we would do in that instance is put this case back on
9 what the local rules set up as kind of the track. I think
10 looking back at those rules and given the number of expert
11 witnesses, it might be that it's not quite the standard track
12 but maybe a little bit more that second tier up --

13 **THE COURT:** Complex.

14 **MS. STOUGHTON:** -- complex, and just put it onto the
15 tracks that the Court -- that this Court has generally
16 established for cases, taking it off this extra expedited track
17 that it's been on, and then allow discovery to proceed
18 normally, written discovery, depositions, as they are
19 negotiated amongst the parties and scheduled, as the documents
20 make us ready for them in the normal course.

21 **THE COURT:** All right. If we set, say, a six-month
22 discovery period or even between a four- and six-month
23 discovery period, you are looking for trial, say, in the
24 spring, maybe June, that sort of time frame?

25 **MS. STOUGHTON:** I would say earlier than June. I

1 would say, first of all, the discovery period should start from
2 when the Court initially entered the scheduling order. So we
3 certainly think six months from today is excessive to
4 accomplish this discovery.

5 **THE COURT:** All right.

6 **MS. STOUGHTON:** Six months from that date is probably
7 about right, and that would bring the close of discovery to
8 January, and then we could take up, I think, roughly the
9 schedule that we have from there and move as quickly as
10 possible to trial, which I would hope would bring us before
11 June, although, of course, I'm sure it depends on the Court's
12 schedule.

13 **THE COURT:** Right. More in the sort of the March or
14 April time frame would be the -- if there is a time period for
15 briefing post-close of discovery in January -- I think you had
16 right now closed discovery in October, October 7th, trial
17 November 14th. So if you're closing discovery, say, end of
18 January, we would be into mid-March or maybe even April, if
19 there was a little more time prior to trial for reviewing the
20 motions, the pretrial motions?

21 **MS. STOUGHTON:** Yes, Your Honor.

22 **THE COURT:** All right. Anything else you wanted to
23 add on any of those issues?

24 **MS. STOUGHTON:** No, Your Honor, except to add that
25 with respect to the Court's suggestion about bifurcating or --

1 that's not exactly the right word, but taking the Title VII
2 claim --

3 **THE COURT:** Right.

4 **MS. STOUGHTON:** -- you know, it's possible that I
5 could even initiate a discussion about that today. I'm not
6 sure I could get an answer today, but I just wanted to add
7 that.

8 **THE COURT:** Well, as I said, I wanted to get
9 everyone's position, and then I think I might take a brief
10 recess and let you make that call, let you all discuss sort of
11 what we've talked about, what you've heard, and I will look at
12 the Court's calendar and see sort of what the options might be,
13 and then we'll come back in before we start into the sort of
14 harder parts of the details of getting the discovery done. And
15 so that's certainly something that I would anticipate you could
16 at least try to see what you could do in a short recess, if we
17 had the chance to do that.

18 **MS. STOUGHTON:** Yes, Your Honor.

19 **THE COURT:** All right. And then before I go over to
20 the Defendants, I am going to ask you, Mr. Wilkens -- I went
21 through some more details in terms of the trial date
22 suggestions and what the request would be. I want to get your
23 thoughts on that and the various scenarios that we are looking
24 at.

25 **MR. WILKENS:** Thank you, Your Honor. Maybe first I

1 will just -- I would like to say, on your questions on the due
2 process piece, I would also -- in a recess, I would also just
3 confer with my team on the questions you asked so I can confirm
4 the position that I've already represented.

5 **THE COURT:** All right. Okay.

6 **MR. WILKENS:** I just want to note that. With respect
7 to the trial, I mean, I think we would -- we don't know yet
8 what the Fourth Circuit schedule will be. It appears briefing
9 will be complete by December. When the argument would happen,
10 I don't know, and how that would line up with the trial dates,
11 you just discussed with Ms. Stoughton.

12 So I think it would probably make sense, just given
13 the Fourth Circuit timing and the notion that guidance from the
14 Fourth Circuit would be very helpful to the Court for trial and
15 to the parties, that the trial should happen probably later
16 than March or April because I don't know that the Fourth
17 Circuit would issue a decision by then. So, I mean, Your Honor
18 had mentioned June, but something more along those lines would
19 probably be appropriate.

20 I haven't looked to see how long it normally takes
21 the Fourth Circuit to issue a ruling after oral argument or how
22 quickly they have oral argument. I can certainly do that, but
23 I guess our position would be we would recommend that trial be
24 stayed until after the Fourth Circuit has ruled, and I think
25 that, for example, the dispositive motions before the Court --

1 I don't know, but I expect the parties will want to file
2 motions for summary judgment -- that those motions would
3 benefit from insight from the Fourth Circuit on, for example,
4 the equal protection claim and the legal standards that should
5 be followed there.

6 So that would mean that if those dispositive motions
7 should await a Fourth Circuit ruling and the trial would
8 happen, I don't know, a month after that, or I don't know how
9 soon, it's just hard right now for me to guesstimate when the
10 trial should be. I guess we would suggest that there be a stay
11 in place and that a new trial not be set yet, a date not be set
12 yet, but rather be set at some later point. Perhaps once the
13 Fourth Circuit briefing is complete and we have a better sense
14 of the timing there, we could speak with the Court about
15 setting a trial date, but for now just hold it in abeyance for
16 later scheduling.

17 **THE COURT:** I have a couple of concerns about that.
18 The first is that I don't want to stay things -- have something
19 happen in the Fourth Circuit and then have the same problem
20 where we don't have time to get discovery done in order to have
21 a timely trial.

22 The second thing is I don't think the United States
23 is in agreement with that position, and so I have some concern
24 about setting their trial out indefinitely, and my
25 understanding from you is you want to go when they go, and I

USA, et al. v. NC, et al. Status Conference 9/2/16

1 think that was the Court's anticipation, too, that this would
2 be handled together. So I have some concern about setting it
3 out indefinitely when the United States isn't asking for that.

4 **MR. WILKENS:** Your Honor, that's fine. We would not
5 object to setting a trial date. Certainly, I mean, we can set
6 one, and, obviously, as happens all the time, if that becomes
7 difficult for some reason or it should be adjusted for some
8 reason, we can come back to the Court on that.

9 **THE COURT:** I think that's true. I will tell you
10 that ordinarily in this district trial dates don't get moved
11 easily. So once it's set, I would anticipate that, you know,
12 we're moving forward. Even with the November date, I'm not
13 sure it works to move it unless there is enough of a way to
14 make that happen.

15 **MR. WILKENS:** I appreciate that, Your Honor. I don't
16 practice here very often, so to understand that trial dates
17 stick is important for me. Thank you.

18 **THE COURT:** All right. Yes, sir, what's the State
19 Defendants' position?

20 **MR. BOWERS:** Your Honor, I'm happy to answer any
21 questions or go into sort of the reasons why we believe a stay
22 is warranted, but I think it's probably more efficient to just
23 start and say we do believe -- I agree largely with -- on
24 behalf of the State Defendants, I agree largely with what Mr.
25 Wilkens said in his opening remarks that a stay is warranted

1 and for the reasons we've set forth in our briefing, but also
2 the discovery has been -- has become more burdensome than I
3 think any of us anticipated for a variety of reasons.

4 Again, we can go into that. If the Court pleases, I
5 am happy to do that, but I think we all agree that there are
6 plenty of disagreements among the parties. I will say I have
7 been very pleased with the professionalism that all the lawyers
8 have engaged in, but there's some legitimate disagreements. I
9 think Mr. Wilkens is right that there are -- there's likely
10 some issues that are becoming ripe that will be subject to
11 motions practice, and so to us it makes sense to stay
12 depositions, stay the trial, and move forward with written
13 discovery and try to resolve some of those discovery issues in
14 the meantime.

15 You know, we appreciate -- of course, when we filed
16 our motion to stay, the Carcano Plaintiffs had not yet filed
17 their appeal. So that was not a basis for our motion, but we
18 agree that the Fourth Circuit's decision there would provide
19 guidance.

20 Also -- and Mr. Duncan will have more to say about
21 this probably, but I think whether or not the Supreme Court
22 takes up the *G.G.* case, which, if I'm not mistaken, Judge
23 Schroeder mentioned seems likely, then that also has a bearing
24 on the proceedings.

25 So in terms of a schedule, you know, we are not

1 really wed to any particular date, but we do believe that it
2 should be pushed off and the dates that you were discussing
3 with the Plaintiffs, whether it's March or April or whether
4 it's June or July, we don't take a strong position on either
5 one. So that's basically where we are.

6 **THE COURT:** So I have a few different sort of
7 variations on the proposal to stay indefinitely versus just to
8 continue the trial and keep things on what would ordinarily be
9 sort of the Court's local rules for a discovery schedule.
10 Whether the stay is linked to something happening in the Fourth
11 Circuit or it's just based on the need for additional time for
12 discovery, I think there's some slight variations that I have
13 over here that I would want to make sure I understood the State
14 Defendants' position on. I understand maybe you are not wedded
15 to any particular one of those, but just generally what your
16 thoughts would be about that.

17 **MR. BOWERS:** Sure.

18 **THE COURT:** Then, in addition, I want to know what
19 you would propose to do with the preliminary injunction
20 requests that are still outstanding. I had some conversations
21 obviously with respect to pieces that may be tied together with
22 the evidentiary presentation, that the Court then advanced the
23 trial so all of that would happen together at the trial on the
24 merits, which pieces of that, if any, could go ahead and
25 proceed, particularly as to any of the Title IX pieces, and

USA, et al. v. NC, et al. Status Conference 9/2/16

1 what the State Defendants' position would be on that.

2 I think that the State Defendants initially took the
3 position that there was discovery needed or additional time
4 before the preliminary injunction requests could be considered.
5 That was part of what prompted this advance the trial and set
6 it in November. So addressing all of that as well.

7 **MR. BOWERS:** On that piece, Your Honor, I would
8 appreciate an opportunity to confer with my co-defendants
9 because that's not something, frankly, that we've discretely
10 talked about. For obvious reasons, I think we'd all like to be
11 on the same page, if we can.

12 **THE COURT:** Right.

13 **MR. BOWERS:** So if Your Honor does decide to take a
14 break, we would like to confer about that issue --

15 **THE COURT:** All right.

16 **MR. BOWERS:** -- on the first question.

17 One of the -- and I don't want to get too far into
18 the weeds, but one of the threshold issues for us is the
19 imposition of a protective order, and we've discussed that back
20 and forth, and we've had some fruitful, productive discussions
21 but nothing that has led to an actual protective order being
22 put in place. So that to us is an important threshold matter
23 to get resolved because I think it all flows from that.

24 Frankly, we have several hundred, if not thousands,
25 of pages of documents ready to produce; but as we told the

1 Plaintiffs, we don't feel comfortable doing that without a PO
2 in place. So I do believe -- and this may not be the time or
3 the forum for it, but we need to get that issue resolved
4 because then the discovery I think will naturally flow from
5 there.

6 **THE COURT:** Well, and I think that's why we're here
7 today. So we'll take that up as we go through the particulars,
8 but if we go ahead and get a protective order in place, or
9 whatever other piece you might need, then my assumption is,
10 regardless of what's happening at the Fourth Circuit, at least
11 as we understand right now, or at the Supreme Court, we would
12 still at least be proceeding with written discovery so that we
13 don't get backed up on that.

14 **MR. BOWERS:** Yes, ma'am.

15 **THE COURT:** And then there would be some period of
16 time we go ahead and schedule depositions and then a trial,
17 understanding that once the trial date is set, that's what the
18 Court anticipates doing unless there's some sort of sufficient
19 showing that would overcome that based on something that we
20 don't know right now.

21 **MR. BOWERS:** And we are in agreement with all of
22 that.

23 **THE COURT:** Even if that means depositions might need
24 to be set for the January sort of time frame, you would be in
25 agreement with that?

1 **MR. BOWERS:** Sure, yes, ma'am. And, again, I
2 think -- yes, the answer is yes, but I think like in terms of
3 depositions -- we can get into this now or later -- you know,
4 there are going to be some significant disputes I anticipate on
5 certain depositions and whether or not they should be taken,
6 whether or not certain privileges apply, and that sort of thing
7 that I think will require some motions practice.

8 **THE COURT:** And what I would intend to do is go ahead
9 and set some schedules for briefing if you've got legislative
10 immunity issues, and if that's what you're referring to --

11 **MR. BOWERS:** Yes, ma'am.

12 **THE COURT:** -- then we can go ahead and put a
13 briefing schedule in place so that we have that resolved prior
14 to the time frame that you are anticipating doing depositions.

15 Now, if we are staying on a November schedule, then I
16 might set this for a hearing next week on the legislative
17 immunity issue so that we go ahead and take care of it, if you
18 understand where I am going on that.

19 **MR. BOWERS:** I think I do, and I would tell you that
20 if the Court decides that, you know what, we are just going to
21 stick with what we've got and you guys got to buckle up and do
22 it, then I would like to talk with Mr. Wilkens about it, but I
23 think he would probably be in agreement that we probably need
24 to get that teed up sooner rather than later.

25 **THE COURT:** All right. I think that that is

1 certainly still on the table as part of what I would
2 anticipate. My default is we are on November, and we are going
3 to do what we have to do to get it done for November. If you
4 all need me involved in that, then I'm here. We'll set you on,
5 and we can go through as much of the details as we need to do
6 to make that happen, but I want to explore what the
7 possibilities are before we all sort of settle in to getting it
8 done for November.

9 **MR. BOWERS:** Understood, Your Honor, and just to
10 confirm that we would be happy to start depositions, as you
11 said, like in the January time frame so that we don't get
12 backed up, but continue with written discovery, get some of
13 those issues resolved, if there are any, and move forward at
14 that pace, that at least -- and, again, I would like to confirm
15 that we all take that position globally on this side, but,
16 generally speaking, that sounds about right to me.

17 **THE COURT:** So then the primary issue is leaving time
18 to get discovery done as opposed to stopping everything while
19 we wait for something to happen at the Fourth Circuit or the
20 Supreme Court. Is that fair?

21 **MR. BOWERS:** I think it's some of both from my
22 perspective.

23 **THE COURT:** All right. So it's getting it done, but
24 then also as sort of a benefit of that there is the possibility
25 that we'll have more guidance from the Fourth Circuit and the

1 Supreme Court?

2 **MR. BOWERS:** I think that accurately captures our
3 position, yes, ma'am.

4 **THE COURT:** All right. I am going to let the other
5 folks here speak.

6 **MR. BOWERS:** Good.

7 **THE COURT:** And then -- if there is anything they
8 want to add and then see if there is anything else, and then I
9 am going to take a break to let you all discuss -- to discuss
10 with each other to sort of confirm your answers to some of the
11 questions that I have posed here and to take a look at the
12 Court's calendar and what my options might be for whether
13 that's something we are going to entertain or whether we are
14 going to stick with November.

15 **MR. BOWERS:** Thank you, Your Honor.

16 **THE COURT:** All right. Yes, sir.

17 **MR. DUNCAN:** Thank you, Your Honor. I just want to
18 add to -- just add some context to what Mr. Bowers was saying,
19 I guess a few things, some legal and some sort of factual
20 issues.

21 The legal issues that have arisen since we came up
22 with the original schedule are both the *G.G.* stay order and
23 cert. petition and now the Carcano appeal. They sort of
24 intertwine with each other because they both could potentially
25 resolve, in some way or the other, legal issues that would bear

USA, et al. v. NC, et al. Status Conference 9/2/16

1 on the trial. The *G.G.* case, for example, which we represent
2 the school board in that case as well, so I can speak with some
3 detail about that --

4 **THE COURT:** Okay.

5 **MR. DUNCAN:** -- we filed the cert. petition on
6 August 29th. If the parties adhere to the schedule set by the
7 Supreme Court, and I have a feeling they will since the Supreme
8 Court denied my motion to extend time to file the
9 cert. petition, but we got it in anyway, then the case will
10 be -- there will be an opposition on October 3. They could
11 file it earlier, I guess. I don't know what they are going to
12 do. There would be an opposition on October 3. By my
13 calculations, the Court would then conference the case by
14 November 4, or early Novemberish.

15 So that would mean that if we are going to a November
16 trial, we would have the possibility of the Supreme Court
17 granting cert. in that case right around the time that we're
18 going to trial, which I think presents all sorts of legal
19 difficulties. It's just not something you'd want to do when
20 you're going to trial in a case where the issues could well
21 overlap. As we know, the Court has already ruled that the *G.G.*
22 Fourth Circuit ruling is controlling on the Title IX claim.

23 So the Carcano appeal just adds another layer to
24 that. We're evidently going to be in the Fourth Circuit
25 briefing. I assume the equal protection issue, maybe other

1 issues -- I don't know what they are going to raise. We'll be
2 briefing those and seeking guidance from the Fourth Circuit.
3 Like Mr. Wilkens, I don't know what the Fourth Circuit schedule
4 is going to be. I don't know how quickly it's going to resolve
5 those issues, and then, quite frankly, Your Honor, if, let's
6 say, the Court grants in *G.G.* and the Fourth Circuit decides
7 something on the equal protection claim, those issues are
8 intertwined, and I think there would be the real possibility of
9 seeking Supreme Court review from the Fourth Circuit's opinion
10 if it went against -- if it went one way or the other since the
11 issues are very obviously closely intertwined on equal
12 protection and Title IX. So there is all sorts of legal
13 difficulties that have arisen since we came up with this
14 schedule.

15 With respect to the sort of difficulties in
16 discovery -- I mean, we'll talk about that in a more granular
17 level when we come back after our halftime break.

18 **THE COURT:** Right.

19 **MR. DUNCAN:** One issue I would like to emphasize is
20 the privilege issue, the legislative privilege issue. Although
21 Mr. Wilkens and I have had some productive conversations about
22 it, we have a real difference of opinion on the issue,
23 particularly as it relates to waiver of legislative privilege,
24 and that's going to need to be briefed. It's a very important
25 issue to our clients obviously.

1 **THE COURT:** Now, as I understand, it relates only
2 just to your specific legislator clients. It's not -- I mean,
3 that's -- it wouldn't preclude discovery under the standards
4 that this Court has previously had to examine legislative
5 immunity and the categories that might be at issue. It's just
6 as to waiver -- whether there's been a waiver by your clients
7 by intervening; is that correct?

8 **MR. DUNCAN:** I can't answer that because I don't know
9 the answer to that. I don't know what position precisely the
10 Carcano Plaintiffs are taking. Mr. Wilkens can correct me if
11 I'm mistaking something.

12 All I understand is there's the suggestion of a
13 waiver because of the intervention of our clients in the case
14 as agents of the State to defend H.B. 2. I don't know what
15 their argument is as to the extent of that waiver. I don't
16 know how it relates to the rest of the legislature. I just
17 don't know that yet.

18 My point is is that it's a very important issue. It
19 impacts -- it potentially impacts in a dramatic way how quickly
20 discovery can proceed because, for example, if we followed the
21 example that Your Honor and Judge Schroeder did in the voter ID
22 case where there are certain categories that are privileged and
23 other categories that are not and there's certain categories
24 where one doesn't even have to produce a privilege log, we've
25 suggested to the Plaintiffs that that could be sort of a

USA, et al. v. NC, et al. Status Conference 9/2/16

1 compromise position. We don't know if what you did in those
2 cases is necessarily applicable outside voting and
3 redistricting.

4 **THE COURT:** Right.

5 **MR. DUNCAN:** Who knows.

6 **THE COURT:** Right.

7 **MR. DUNCAN:** That's an issue in and of itself, but we
8 would entertain a compromise where we follow that as sort of a
9 lodestar, and that might allow -- that could allow discovery to
10 proceed in a more reasonable way, but if not and if we have to
11 deal with legislative privilege, waiver issues as in privilege
12 logs, that's going to really complicate things in a dramatic
13 way.

14 So what I would say about that is what we've proposed
15 and what the Carcano Plaintiffs now agree with is not stopping
16 everything and waiting to see what happens in D.C. in *G.G.* and
17 what happens in Richmond in the Fourth Circuit, but instead to
18 have a written discovery schedule that is less compressed so
19 that at the front end, we can deal with these kinds of
20 privilege and other issues so that we at least know what the
21 rules of the ballgame are, and then we can look ahead and do
22 written discovery in a more sort of efficient way.

23 And we'll talk about this later, but that would also
24 include sort of trying to agree with the United States on the
25 scope of certain, you know, search terms so that we could try

1 to pare down our documents. That would seem to be very
2 important, and we are certainly willing to do that. We just
3 haven't had the opportunity to do it yet.

4 **THE COURT:** So for all of the Defendants, I think the
5 preliminary injunction piece sort of sits out there in light of
6 the fact that Judge Schroeder has granted the preliminary
7 injunction, at least as to the Title IX, and I think based on
8 the same reasoning, at least the possibility, that if it's
9 presented from the United States or as a representational claim
10 from the ACLU, that that might be broader in application than
11 just the individual plaintiffs.

12 Is there some basis that you all can reach either an
13 agreement for how that gets presented or, even better, an
14 agreement as to how that preliminary injunction could apply in
15 light of the broader requests that might be coming while the
16 law is as it currently is so that we can set the trial out
17 further but with some benefit to the Plaintiffs in the
18 knowledge that they at least have the preliminary injunction in
19 place as to the Title IX funding recipients while the law is as
20 it currently exists with the possibility that that could be
21 revisited if something changes with respect to the authority
22 that *G.G.* is currently in the circuit? Do you understand what
23 I'm asking?

24 **MR. DUNCAN:** I think so. Let me try to break it down
25 a little bit. As I heard you say to the other side, you want

1 to entertain the possibility of breaking out Title IX in terms
2 of the preliminary injunction -- including the United States'
3 preliminary injunction?

4 **THE COURT:** Right.

5 **MR. DUNCAN:** And there's the suggestion from I think
6 both Plaintiffs on the other side that they think they would be
7 entitled to broader relief on a representational claim or the
8 United States' claim?

9 **THE COURT:** Right.

10 **MR. DUNCAN:** Now, just to be clear, we're not saying
11 or admitting in any way, shape, or form that they ought to get
12 broader relief even under *G.G.* So as long as that's clear --

13 **THE COURT:** Right.

14 **MR. DUNCAN:** -- we'll go back and talk among
15 ourselves whether we think it makes sense to break out the
16 Title IX portions with the PI for both the United States and
17 the Carcano Plaintiffs.

18 One thing I would add to that, though, briefing is
19 not completed on the Carcano Plaintiffs' motion to amend their
20 complaint for the second time, and I believe we have an
21 opposition due on Friday to that.

22 **THE COURT:** Well, I think that's one of the motions I
23 have in my stack to look through today to see where we are on
24 all of that. I will tell you that if the opposition is we
25 don't think they state a claim, this is futile and would be

1 subject to a motion to dismiss, then I would rather that be
2 presented as a motion to dismiss. Do you understand or follow?

3 **MR. DUNCAN:** Well, I do. I don't know that we are
4 going to raise that particular claim.

5 **THE COURT:** Okay.

6 **MR. DUNCAN:** My concern was the idea that I thought
7 was suggested in your colloquy with the Plaintiffs, which was
8 the idea that because they're trying to add a representational
9 claim to the Title IX point, then there would be some basis for
10 broadening the preliminary injunction that's already in place.
11 I thought that was part of the colloquy.

12 **THE COURT:** That was part of the questioning; right.

13 **MR. DUNCAN:** My only point as to that is -- and, of
14 course, they can make whatever motion they want with respect to
15 that, but my only point is that the Defendants be allowed to
16 address that, that potential broadening of the preliminary
17 injunction, if, indeed, they are allowed to amend the complaint
18 to put forth a representational claim. In other words, we want
19 to be able to weigh in on that.

20 **THE COURT:** Right. So here's how I would anticipate
21 that gets presented. If they want to ask for the preliminary
22 injunction to be broadened in accordance with a
23 representational claim, they would need to file a motion to
24 request that that you would have an opportunity to respond to.

25 **MR. DUNCAN:** We would agree with that, Your Honor.

1 **THE COURT:** What my sort of prior point to you was if
2 you intend to file a response in opposition to the motion to
3 amend because you don't want them to be able to make a
4 representational claim, my procedural preference is that that
5 get addressed in a motion to dismiss that they have an
6 opportunity to respond to and a reply by you rather than
7 briefing it just in the context of whether they should amend or
8 not, because, for my purposes, the amendment has to do with
9 whether it's timely, whether it's undue prejudice, procedurally
10 when it happens in the case as opposed to whether they can
11 state a claim for what they've tried to add in the motion to
12 amend. Do you understand?

13 **MR. DUNCAN:** I do understand that. I had not --
14 frankly, I had not even thought about adding the second parts
15 that you just said to the September 9 opposition. I thought
16 that it was supposed to be addressed to the propriety of
17 amending the complaint under the federal rules for the second
18 time.

19 **THE COURT:** Right.

20 **MR. DUNCAN:** That's all I thought we were supposed to
21 address.

22 **THE COURT:** I think that's true. I just want to make
23 sure that if you have some opposition to the motion to amend
24 just on those procedural grounds, then you can raise that and
25 then I can take that up. What I don't want the motion to amend

1 briefing to become is the equivalent of what really should be
2 addressed in a motion to dismiss, whether they can or can't
3 raise a representational claim. Do you understand?

4 **MR. DUNCAN:** I understand what you're saying, Your
5 Honor, and we have no intention of raising that in that
6 context. That wouldn't seem proper to us. Our only concern is
7 what I just said, which was if there's going to be a motion to
8 broaden the existing preliminary injunction, we want the
9 ability to respond to it.

10 **THE COURT:** So I think that we have determined they
11 would need to file a motion. You would have the opportunity to
12 respond to that. I understand your response is not due until
13 next week; but while we're here, is there some basis that you
14 would be otherwise opposing the motion to amend?

15 **MR. DUNCAN:** I'm sorry, Your Honor. I am just not
16 prepared -- there are other people working on that right now.
17 I don't want to have to call them back right now and say I just
18 told the judge --

19 **THE COURT:** Represented that it was fine.

20 **MR. DUNCAN:** -- that you are not --

21 **THE COURT:** Right. Okay. Well, so I will let you
22 look at that. Like I said, I understand your response is not
23 due until next week. My point while you are here is to try and
24 resolve as much as we can --

25 **MR. DUNCAN:** Understood.

1 **THE COURT:** -- so if there are issues that we can
2 determine, this is what needs to be briefed, then we can go
3 ahead and put that on a schedule to address.

4 **MR. DUNCAN:** That's fine.

5 **THE COURT:** All right.

6 **MR. DUNCAN:** That's fine. With respect to these
7 broader issues, we continue to believe that the general road
8 map we've laid out in our stay motion still makes sense, that
9 if there is a lengthier or at least less compressed written
10 discovery period, that makes sense so that we can resolve all
11 that before depositions begin. We do depositions along the
12 lines that we've been discussing here.

13 With the trial date -- we can all discuss this, but a
14 trial -- I think in our motion for stay, we proposed a March or
15 April trial date, you know. I don't -- we'll confer amongst
16 ourselves to see if our position has changed at all in light of
17 the Carcano appeal, but that's what we've already proposed.

18 **THE COURT:** So I am going to come back around to this
19 preliminary injunction issue this way. I understand that you
20 would prefer to move this off of November and set it in the
21 March, April kind of time frame. I understand why there are
22 reasons why that might make sense.

23 On the other hand, it was set in November as an
24 expedited trial because of the preliminary injunction request
25 and putting all of that together in an accelerated trial so

USA, et al. v. NC, et al. Status Conference 9/2/16

1 that all of that could be addressed at once in November. If
2 we're moving it, I think that your clients need to figure out
3 how to address the preliminary injunction piece so that the
4 Plaintiffs are satisfied that they are not giving up too much
5 by moving the trial.

6 **MR. DUNCAN:** Well, I understand the concern. I
7 thought we tried to address the concern by agreeing that their
8 preliminary injunction motion could be heard on the briefing.

9 **THE COURT:** Just on the briefing? Well, I don't know
10 if they --

11 **MR. DUNCAN:** With the exhibits -- I'm sorry, Your
12 Honor. I didn't mean to interrupt.

13 **THE COURT:** No, I think that -- two concerns with
14 that. The first is whether then the Court wants to do this in
15 three or four different phases of addressing it rather than
16 hearing it all together at once and whether there's a way to
17 break those pieces out in a way that lets the Court take care
18 of the things that were already addressed in part of the
19 preliminary injunction determination that's already been made
20 and reserving the things that might otherwise overlap with an
21 evidentiary hearing and a trial on the merits.

22 I think what I will do at this point is just leave
23 that as one of the things that you all can address and discuss
24 when we take a break here. That is certainly something that I
25 want to make sure is addressed. I am concerned about how we

1 address it, and that ultimately the default has to be if we
2 can't work out something else that makes sense, we're on for
3 trial in November, and that's what we got to try to make work.

4 I understand, though, that there are lots of reasons
5 why you might be able to come up with other possibilities that
6 everyone can agree to and that would be sort of consistent with
7 where the Court wants to go, that we could try and make
8 something else work, but I want to give you all a chance to see
9 if you can come up with something as well.

10 Anything else?

11 **MR. DUNCAN:** I don't think so.

12 **THE COURT:** All right. Yes, sir.

13 **MR. GORE:** Your Honor, just briefly. There is one
14 caveat with respect to the UNC Defendants. As we've laid out
15 in our papers, we still have motions to dismiss pending. So it
16 remains our position that no discovery should proceed against
17 us unless and until those motions are denied.

18 **THE COURT:** I understand that point. That came up at
19 the last hearing because I wanted to make sure that wasn't
20 going to be an issue, and the notion was UNC understood they
21 were in it and had to be part of this going forward.

22 **MR. GORE:** That remains our understanding. I just
23 wanted to state that for the record.

24 **THE COURT:** All right.

25 **MR. GORE:** Subject to that caveat, that we're in

1 agreement largely with all the other Defendants and certainly
2 also with Mr. Wilkens in terms of the pressures of the current
3 schedule and the need for postponing the trial. We think that
4 all roads lead to a postponement whether it's a postponement
5 based on *G.G.*, whether it's a postponement based now on the
6 interlocutory appeal that the Carcano Plaintiffs are pursuing,
7 or simply the enormous scope and unanticipated burdens of
8 discovery in this case. I think that's been mentioned a few
9 times.

10 Certainly, from the perspective of the UNC
11 Defendants, the discovery has gotten much broader, far more
12 burdensome, far more involved than anything that we
13 contemplated and I think that any of the parties contemplated
14 at the time we negotiated the initial schedule.

15 I think we have an opportunity here to open up the
16 discovery period in a way that allows for a much more rational
17 approach, a much more reasonable approach, and an approach that
18 is in line with how the Court ordinarily manages litigation.

19 **THE COURT:** Well, it is in the sense that there are
20 reasons why it might make sense to do that, but those are
21 counterbalanced with the need to address all of it together and
22 the whole point of putting it on for an expedited trial based
23 on the overlapping preliminary injunction issues. So there has
24 to be some way of addressing that.

25 Now, I understand UNC's position has been, at least

1 to some level, that there wasn't going to be enforcement. If
2 there is some way that you all can reach an agreement that
3 becomes a part of a court order that says while we are awaiting
4 trial, this is what the status will be, then everyone can have
5 some level of acceptance of that as the compromise in place
6 until we get to the trial, in light of what Judge Schroeder has
7 done now on the preliminary injunction determination. I think
8 that opens up the possibility of being able to move the trial,
9 but that's the sort of thing I want you all to see if you can
10 come up with a proposal.

11 **MR. GORE:** We think that's definitely a possibility.
12 I think that's among the other issues that we would talk about
13 here at this halftime break.

14 **THE COURT:** All right. All right. Certainly that
15 would be one of the things that seems to make sense to me so
16 that we can address the Plaintiffs' legitimate concerns with
17 respect to having the preliminary injunction request dealt
18 with, but also then taking into account the request to continue
19 the trial.

20 **MR. GORE:** Let me say, Your Honor, subject to the
21 caveat I laid out before, we have been in agreement that if the
22 Court were inclined to, it could decide the U.S.'s preliminary
23 injunction motion on the papers; but understanding the Court's
24 position on that, we'll take that back and see if we can come
25 up with something that also accommodates the Court's interests

1 and preferences on that front.

2 **THE COURT:** All right. All right. I am going to
3 come back just to see if there is anything else before we take
4 a break that either of the Plaintiffs want to add in response
5 to what occurred here.

6 Mr. Wilkens, anything for you?

7 **MR. WILKENS:** Your Honor, just two very quick points.
8 One is that we -- I just want to make clear, although we had
9 talked about allowing document discovery to proceed, we are not
10 at all opposed to also having depositions proceed, and I think
11 you were talking a moment ago about those beginning in January;
12 and Ms. Stoughton had kind of proposed what we should do is
13 just put this case on some kind of a typical schedule that this
14 Court uses. We don't oppose that at all, and I think we are
15 going to be talking about that at halftime.

16 And the second quick point I wanted to make was
17 just -- that Mr. Duncan talked about, the legislative privilege
18 issue. We believe that that also is a very important issue.
19 We will need to resolve it through briefing. From our
20 perspective, the waiver does apply to the specific legislative
21 intervenors, and we will certainly explain why we believe
22 that's correct, but that is certainly an issue that will need
23 to get worked out, and we'll have to work out a briefing
24 schedule for that.

25 **THE COURT:** All right. And on that, as sort of -- I

1 would structure that then -- if we are operating under the
2 assumption that the framework that we used in the Voting Rights
3 case would apply in this case without necessarily making a
4 separate determination on that, but if there is a framework
5 that we adopt that follows something along those lines, then
6 there are lots of categories of documents or things that could
7 be addressed before you even get to whether there has to be a
8 waiver, and then the waiver, as I understand what you're
9 saying, would just be as to the particular legislators who
10 chose to intervene. Is that right?

11 **MR. WILKENS:** Yeah, correct, Your Honor. For example
12 -- and I'm now very familiar with all those rulings in the
13 Voting Rights cases on the privilege. Communications with
14 third parties, that's one category.

15 **THE COURT:** You don't have to get to waiver to take
16 care of that category.

17 **MR. WILKENS:** Right. And I think waiver -- I don't
18 want to limit us right now, but I think the waiver point we're
19 particularly aimed at is the legislative intervenors and their
20 communications with other legislators, their staff, each other
21 about H.B. 2 and the reasons for enacting H.B 2, and that's a
22 category under the Voting Rights kind of framework that I think
23 the -- if you applied that framework here, and there's, as
24 Mr. Duncan mentioned, a question whether that's appropriate,
25 but that would normally be privileged, and we have -- I think

1 we have strong arguments as to why that's been waived here.

2 **THE COURT:** Okay. All right. Ms. Stoughton,
3 anything else before we take a break?

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

5 **THE COURT:** All right. Well, what I am going to do
6 then -- I think that in my comments and my exchanges you have
7 some sense of what my concerns are and sort of what I hope
8 maybe you all can work out and resolve possible ways that you
9 might be able to propose something that would be workable in
10 the interim if the Court then would continue the trial until
11 sometime in the spring so that there was a more typical
12 discovery schedule, but also understanding that if we can't
13 come up with something that works, then we're going to come
14 back in here and figure out how to make this happen in
15 November.

16 That's where I am right now, but I want to give you
17 as much time as you need, frankly, to work out what you can,
18 and so I am going to say let's take a 30-minute recess; but if
19 you need more time, then you can let the case manager know, and
20 I don't have any problem extending that out, and we can come
21 back either sort of some later period after that, or we can
22 even reset this for after lunch and come back in and give you
23 enough time to take care of what you need.

24 Yes, ma'am, Ms. Stoughton.

25 **MS. STOUGHTON:** Your Honor, can I just -- there is

1 one proposal I think the parties are all in agreement about
2 already, which -- but it might be that it's the lack of clarity
3 in our position that's holding that up, so I just want to
4 address that briefly.

5 **THE COURT:** Okay. All right. That will be helpful.

6 **MS. STOUGHTON:** Which is the proposal embedded in all
7 of the parties' stay motions or applications that the case be
8 stayed, and we work out the details of what that means, if the
9 Court is willing to hear the United States' preliminary
10 injunction in full on the papers without an evidentiary
11 hearing.

12 I understood the Court to be saying that the Court
13 had hesitations about that because that was a bit of the
14 piecemeal resolution that the Court found unattractive to begin
15 with; but to the extent that the Court feels that there are
16 factual issues that would need to be resolved to reach a
17 preliminary injunction resolution of those three claims, the
18 United States is perfectly comfortable having the Court resolve
19 those to the extent that he can on the papers. We'd like there
20 to be an oral argument, but we don't see a need for an
21 evidentiary hearing.

22 So if -- and I understood all the parties to be in
23 agreement, that they acceded to the notion that the preliminary
24 injunction could be heard on the papers without an evidentiary
25 hearing. So if that's -- so I just wanted to make that very

1 clear, and, of course, anyone can stand up and disagree with
2 that understanding; but I think if the Court were willing to do
3 that at this time, we would be where the Court wants to get to
4 and have an agreement that that motion would just be heard as
5 it is. The reply brief is coming in a couple of weeks. The
6 Court would hear that motion, issue the ruling that it would
7 like to issue on the papers, and then we would negotiate a more
8 reasonable schedule towards trial.

9 **THE COURT:** I think that -- I understand that might
10 be sort of a possibility. I think that it is a more likely
11 option if that is limited to just the Title IX -- or possibly
12 just the Title IX and the Violence Against Women Act so that
13 the Title VII piece and the remaining due process piece that
14 Judge Schroeder's reserved would then stay with the trial
15 whenever the trial is. I think that you all would have to
16 agree to that, if that's something that you're willing to do,
17 because the Court has otherwise said we are going to advance
18 the trial on the merits and consider all of this together.

19 So the option if you want it heard sooner is
20 November. If you're willing to agree to that being later, then
21 it can be heard with the trial whenever the trial is reset. I
22 can consider that. I will try to take a look and see what
23 Judge Schroeder would be sort of open to on that, but my sense
24 is if all of those things need to be considered together, they
25 are on for November to be considered together; but if there is

1 some way to address the Title IX piece consistent with what
2 Judge Schroeder has already done and what he's already said,
3 that there may be a way to take care of that if that's
4 something that Plaintiffs can agree to that would then
5 facilitate an agreement to move the trial. I think that is
6 something that is I think even more of a possibility.

7 My concern is if we keep the Title VII, the due
8 process, and the Violence Against Women, especially to the
9 extent there were overlapping pieces that might involve
10 evidentiary or factual issues, that all of that get resolved on
11 a sort of full briefing at trial and not twice or more given
12 that we've already done the Carcano preliminary injunction, but
13 I don't want to interrupt or preclude your right to move for
14 preliminary relief, which is why the November option sits
15 there.

16 So I think that might be part of what I need to know
17 in terms of what the Plaintiffs might be willing to do and
18 whether the Defendants can sort of make some arrangement or
19 accommodation for that request to the extent there would be
20 some potential agreement that Judge Schroeder's opinion is
21 controlling for sort of the larger claims, subject to whatever
22 the Fourth Circuit might ultimately decide on that preliminary
23 injunction appeal; but I don't know if there is a way for you
24 all to work that out, and I will take into account the
25 possibility of separating out the preliminary injunction in

USA, et al. v. NC, et al. Status Conference 9/2/16

1 full and the trial. I'm just afraid that gets us into three or
2 more rounds of this for the Court.

3 So I think that's helpful, but I'll ask you to sort
4 of explore those possibilities still during the break.

5 **MS. STOUGHTON:** Thank you.

6 **THE COURT:** Let's take a 30-minute recess, and then
7 we'll extend that if we need to.

8 (The court recessed at 11:17 a.m.)

9 (The court was called back to order at 11:55 a.m.)

10 **THE COURT:** All right. I think what I will do is
11 just start off by going through each of the folks here again
12 and letting you tell me where we are or what the options might
13 be. Mr. Wilkens, I'll start with you.

14 **MR. WILKENS:** Your Honor, thank you. I think it may
15 make the most sense to have the United States speak.

16 **THE COURT:** Okay. All right. Ms. Stoughton.

17 **MS. STOUGHTON:** Your Honor, the United States would
18 prefer -- as between -- let me start over.

19 As I said before we broke, the United States is
20 perfectly willing to agree to the proposal that the parties
21 have to hear the United States' preliminary injunction in full
22 without an evidentiary hearing on the papers and then engage in
23 a discussion about moving the trial out.

24 **THE COURT:** Okay.

25 **MS. STOUGHTON:** At this stage, the United States

USA, et al. v. NC, et al. Status Conference 9/2/16

1 would prefer a November trial date to the separation out of the
2 United States' preliminary injunction claims with some of those
3 claims, whether Title IX and VAWA or just Title IX, being heard
4 as a preliminary injunction and the Title VII claim being
5 rolled over into a later trial.

6 **THE COURT:** All right.

7 **MS. STOUGHTON:** I do want to say that that's our
8 position now because we do prefer to work through the discovery
9 issues. We do recognize that there are substantial issues to
10 work through, but we would remain committed to doing that and
11 to finding a solution that gets us to a November trial date,
12 and we strongly would prefer that option at this stage to --
13 and so we can't --

14 **THE COURT:** To splitting it up?

15 **MS. STOUGHTON:** -- at this stage agree to split up
16 our claims, recognizing that there are these very looming
17 discovery battles that we are going to ask the magistrate
18 obviously to help us sort out.

19 **THE COURT:** All right. Before we sort of settle in
20 on a November date then, let me ask if there are other ways to
21 sort of narrow or clarify even to the extent that there may be
22 in the future the possibility that the Carcano Plaintiffs are
23 going to move for a representational -- an extension of the
24 preliminary injunction based on a representational claim. It
25 sounds like that overlaps with your Title IX claim. If the

1 Court were considering your preliminary injunction, does the
2 Court also then need to consider Carcano Plaintiffs'
3 representational claim on the Title IX issue?

4 **MS. STOUGHTON:** If the Court were to hear our
5 preliminary injunction in full you mean, Your Honor?

6 **THE COURT:** Right.

7 **MS. STOUGHTON:** You know, I would certainly defer to
8 what the Carcano Plaintiffs say about that, but my sense is
9 that the relief that the Court would issue, if it were to grant
10 a preliminary injunction to the United States, would subsume
11 any relief -- additional relief the Carcano Plaintiffs could
12 get under Title IX.

13 **THE COURT:** Would that be true -- and I'll ask -- let
14 Mr. Wilkens speak to this. Would that be true as to the due
15 process issue remaining as well? Mr. Wilkens, you can jump in
16 on this.

17 **MR. WILKENS:** Yes. Well, Your Honor, one thing I
18 should have said when I stood is that on the due process issue,
19 I want to confirm that we are willing to have that pushed off
20 to a later trial as part of a stay.

21 **THE COURT:** Okay.

22 **MR. WILKENS:** We don't insist on having that decided
23 before that.

24 **THE COURT:** All right. If the -- again, my intent is
25 to try to narrow these things. If the Court is willing to

USA, et al. v. NC, et al. Status Conference 9/2/16

1 consider the Government's preliminary injunction request, which
2 includes the broader Title IX, it's the same Title IX claim or
3 similar Title IX claim but with broader relief, then does that
4 avoid the need to consider some later motion to expand the
5 relief that you are seeking based on a representational claim?

6 **MR. WILKENS:** Well, Your Honor, as I stand here, I
7 don't know that we would be making such a motion. It's
8 possible that we might perhaps, and I would go back and talk
9 with my folks. We could try to get it done -- if we were
10 inclined to do it and we didn't believe that the United States
11 would be able to get the broader relief that would obviate any
12 relief that we would get, we could try to brief it quickly so
13 that it could be before the Court at the same time as the
14 preliminary injunction that the United States is seeking so
15 there wouldn't be serial --

16 **THE COURT:** Obviously, that's right. That's what we
17 are trying to avoid, or it may be that if -- that there's not
18 anything else you would need to raise on that, and so it's just
19 a matter of addressing the Government's motion for preliminary
20 injunction.

21 **MR. WILKENS:** I think that's right, Your Honor. We
22 may very well be able to do it in the context of filing
23 something in relation to the Government's motion.

24 The parties have already submitted briefing on the
25 breadth of the relief they were entitled to, at least under the

1 PI briefing on the Carcano Plaintiffs' motion. So there is
2 some briefing that we could draw on, and I think that we could
3 find a way to -- if we were going to file a such motion or we
4 wanted to have the Court consider broader relief, we could find
5 a way to accelerate that kind of briefing so that it could be
6 considered in conjunction with. It wouldn't be a serial issue
7 that the Court would have to address more than once.

8 **THE COURT:** Okay. I think my hope would be it may be
9 able to be presented more in line of a brief in support that
10 includes your sort of position on some of those things as
11 opposed to a full briefing on another motion that then had to
12 get also addressed by the Court, but in some way -- if there
13 was some piece you needed to add or just support you wanted to
14 raise on that, if there is some piece you needed to include,
15 but, again, trying to streamline what it is that actually gets
16 presented to the district judge.

17 **MR. WILKENS:** Your Honor, I think we could do that,
18 and I think we would make every effort to work with the United
19 States to kind of make that happen in the context of the
20 briefing on the PI motion.

21 **THE COURT:** All right. So let me come back to you.
22 On the motion for preliminary injunction that would be there,
23 there's -- and this is just for my understanding and benefit as
24 I am trying to think through this as a practical matter.

25 There's the Title IX piece. If there were relief

1 granted on the Title IX piece, then what is left on the VAWA on
2 the Title VII? What does that as a practical matter do? Who
3 does that extend to?

4 **MS. STOUGHTON:** Well, the Title IX injunction would
5 run to UNC, to enforcement on UNC's campus, it would cover
6 employees of UNC, but what it doesn't cover are state employees
7 all across the state, which is what the Title VII injunction,
8 if granted, would cover.

9 **THE COURT:** What about the VAWA?

10 **MS. STOUGHTON:** VAWA would cover both employees of
11 and people who use facilities run by the North Carolina
12 Department of Public Safety in addition to what the other
13 injunctions cover.

14 **THE COURT:** So how -- even on the VAWA claim, how
15 broad is that compared to -- how big is that compared to what
16 the Title IX piece would cover?

17 **MS. STOUGHTON:** You know, it's an augmentation. I
18 don't know that I can compare the size, but I don't think
19 that's what you're really asking. It would augment the scope
20 of relief beyond the UNC's campus to facilities that are
21 covered by the North Carolina Department of Public Safety, so
22 just the Department of Public Safety.

23 The Title VII injunction is really of the three
24 claims I think the broadest injunction because it does reach
25 state employees of every public agency in the state of North

1 Carolina.

2 **THE COURT:** Okay. So then if the Court were willing
3 to entertain your request for preliminary injunction with the
4 agreement of you and all of the other parties that there
5 wouldn't be a need for an evidentiary hearing, the Court can
6 make a decision whether it wanted oral argument at all or
7 whether just decide on the briefing, and that you and Mr.
8 Wilkens could try to streamline any further requests by the
9 Carcano Plaintiffs so they're not adding sort of an additional
10 further request that would come before the Court, other than
11 maybe adding their support or their supplement to the extent
12 they had something in addition they wanted to raise in the same
13 way you may have done on their motion for preliminary
14 injunction, is that sufficient for you to then otherwise be
15 content with a trial that's moved out into the spring?

16 **MS. STOUGHTON:** Yes, Your Honor.

17 **THE COURT:** All right.

18 **MS. STOUGHTON:** And let me just add with regard to
19 the Title IX issue, the Title IX injunction we would seek would
20 extend to every person using campus facilities at UNC. So I
21 think it's the case, and I think Mr. Wilkens agrees, that the
22 scope of the injunction couldn't be made any broader by a
23 motion --

24 **THE COURT:** And you think that they did --

25 **MS. STOUGHTON:** -- by the Carcano Plaintiffs. So I

1 think that the path you outlined is very viable.

2 **THE COURT:** For it just to be presented as your
3 motion for preliminary injunction as currently and already
4 briefed, and I guess the reply brief is still remaining, but
5 absent the reply brief, that there wouldn't be anything else
6 further other than possibly a supplemental sort of support
7 brief from the Carcano Plaintiffs; is that right, Mr. Wilkens?

8 **MR. WILKENS:** Yes, Your Honor, because in our amended
9 complaint, all we sought to do in this respect is to add the
10 ACLU of North Carolina as a plaintiff for the Title IX claim
11 and to substitute the defendant in terms of UNC, but it would
12 not be any broader than UNC's campuses. So if the injunction
13 the U.S. would receive would cover all of UNC campuses, it
14 would actually be broader than what we would seek on behalf of
15 ACLU of North Carolina.

16 **THE COURT:** So then addressing that should take care
17 of --

18 **MR. WILKENS:** Yes.

19 **THE COURT:** -- anything that you would otherwise seek
20 to raise, so there wouldn't be any reason for you need to raise
21 anything separately or in addition?

22 **MR. WILKENS:** Yes, Your Honor, that's correct.

23 **THE COURT:** All right. All right. Well, with the
24 intent to try and narrow it as much possible but understanding
25 where we are on the schedule, it is feasible for the Court to

USA, et al. v. NC, et al. Status Conference 9/2/16

1 entertain that possibility, which would be to still hear the
2 Government's motion for preliminary injunction without an
3 evidentiary hearing with the Court's discretion whether to even
4 set it for an oral argument on a schedule, understanding that
5 it's going to be fully briefed once the reply brief is filed,
6 and it can be referred to the Court for a decision, and then
7 with the trial and anything that needs an evidentiary
8 determination set out for the ultimate hearing in the case.

9 I can't promise that the District Court wouldn't look
10 at it and decide that there are factual issues on the
11 preliminary injunction piece as to Title VII that need to be
12 held and resolved at the trial, but at least it would be
13 addressed, and then you can take that determination or whatever
14 you wanted to do with that. Does that make sense?

15 **MS. STOUGHTON:** Yes, Your Honor, thank you. I would
16 just say the United States strongly believes that there are not
17 factual questions that should stand in the way, and so for that
18 reason, we do throw ourselves on the mercy and ask for an oral
19 argument to allow us an opportunity to explain that, to the
20 extent that that might be on the Court's mind. So I just
21 wanted to put that out there.

22 **THE COURT:** All right. So if the Court is concerned
23 about that, you've at least made that sort of position of the
24 United States known, that you don't believe there are factual
25 issues that need to be resolved?

1 **MS. STOUGHTON:** Yes, Your Honor.

2 **THE COURT:** All right. If -- and before I start, let
3 me see what the Defendants have to say in terms of where we are
4 now or what the Court might be willing to do if it's
5 essentially adopting what you all had otherwise agreed to,
6 attempting to limit it to the extent we can, but the
7 Government's motion for preliminary injunction could be heard
8 without an evidentiary hearing on the papers and potentially
9 with oral argument, if the Court decided it wanted oral
10 argument, but then moving the trial out to sometime in the
11 spring.

12 Is that something that all of the Defendants are in
13 agreement with? Mr. Bowers?

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

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

16 **MR. GORE:** Yes.

17 **THE COURT:** All right. So -- and I'm going to sort
18 of confirm again because, as I recall and understood it, it was
19 the Defendants who were initially asking for evidence or for a
20 chance to present evidence on the request for preliminary
21 injunction. You are all agreeing that there is not any need
22 for an evidentiary hearing; is that correct?

23 **MR. BOWERS:** I would state, in the spirit of trying
24 to reach an agreement, that we would forego discovery --

25 **THE COURT:** Discovery on the preliminary injunction?

1 **MR. BOWERS:** Correct.

2 **THE COURT:** All right. Is that correct?

3 **MR. DUNCAN:** That's correct, Your Honor. And, of
4 course -- and we've had the opportunity to put in exhibits and
5 affidavits with respect to the United States' preliminary
6 injunction motion. So as Mr. Bowers said, it's not everything
7 that we wanted, but it gave us the opportunity to do that.

8 **THE COURT:** All right. Is that correct?

9 **MR. GORE:** Your Honor, for the UNC Defendants, we
10 never sought discovery with respect to the preliminary
11 injunction motion, so it's consistent with our position.

12 **THE COURT:** All right. All right. So I can tell you
13 that if we were going to go down that route, based on the trial
14 court's schedule, it looked like we would be set for a trial in
15 May sometime, which is some compromise, I guess, between what
16 you had all each suggested and that is when there's
17 availability for it to be set.

18 So if we are looking at a May trial date, then what I
19 would need you all to do is a new Rule 26(f) report that
20 proposes a discovery schedule consistent with a May trial date,
21 working back from that; and if you want the Court to entertain
22 dispositive motions prior to trial, you are going to need to
23 leave enough time in advance of trial for that to be
24 considered. If you want to roll the dispositive motions or at
25 least the ruling on the dispositive motions into the bench

USA, et al. v. NC, et al. Status Conference 9/2/16

1 trial, I think there are reasons why that would make sense. I
2 don't know that the Court is going to do a round of ruling on
3 dispositive motions and then a bench trial, and so you can
4 brief dispositive motions, but then with the anticipation that
5 it's all going to be resolved as part of the bench trial, that
6 can give you more time on the discovery piece if you are not
7 trying to build in 60 days for the Court to resolve dispositive
8 motions prior to trial.

9 Everybody follow where I am going with that?

10 Mr. Wilkens?

11 **MR. WILKENS:** Your Honor, as a practical matter then,
12 would that sort of mean that the dispositive motions would be
13 in lieu of pretrial briefing?

14 **THE COURT:** Well, I think that's worth you all
15 discussing how you want to present those things to the Court.
16 You could just forego dispositive motion briefing and present
17 it as trial briefing to the Court. It seems to me that would
18 make sense in this case so that you leave yourself more time
19 for discovery since I don't think there's probably a reason to
20 have dispositive motions and 60 days and then trial briefs and
21 a bench trial. We're not talking about needing to tee things
22 up for a jury trial there, but I can consider that here with
23 you, or I can give you a chance to talk about it.

24 **MR. WILKENS:** I think we should talk about that as
25 part of our negotiations on a new Rule 26(f) report to submit

1 to you because we would also want to talk about, for example,
2 how *Daubert* motions would fit into that because we want those
3 to be resolved before trial.

4 **THE COURT:** Right. And I think as you sort of think
5 about what you want to present and also think about what you
6 want the Court to focus on, it might make sense to give
7 yourself time for briefing *Daubert* motions and time for the
8 Court to resolve the *Daubert* motions prior to trial without
9 also adding for you and for the Court dispositive motions that
10 are just going to get rolled over into the bench trial anyway.

11 I'm not going to tell you you can't file dispositive
12 motions, but in your discussions, as a practical matter, how
13 this should be presented to the Court, it would seem to make
14 sense to potentially roll the dispositive motion briefing into
15 trial briefing, but give yourself plenty of time for *Daubert*
16 motion briefing that then could go to the Court, and you could
17 have some resolution of that sufficiently in advance of trial
18 so that you can narrow things that way to the extent that would
19 be helpful prior to trial. Does that make sense?

20 **MR. WILKENS:** Yes.

21 **THE COURT:** All right. What I would first want to do
22 is see if there is any objection to May or anything else I need
23 to take up with that, and then I'm going to go through the
24 pending motions and the other issues that you had set out in
25 the status report just to address everything we can today or

1 anything that needs to be addressed while you are here.

2 Mr. Wilkens, any objection to May? Any reason why
3 that is not going to work for your client?

4 **MR. WILKENS:** None, Your Honor.

5 **THE COURT:** All right. Ms. Stoughton, any objection?

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

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

8 **MR. BOWERS:** No objection.

9 **MR. DUNCAN:** No objection, Your Honor.

10 **MR. GORE:** No objection, Your Honor.

11 **THE COURT:** All right. All right. My intent is then
12 not to set all the particulars of the schedule today because I
13 think it would be helpful for you all to meet and discuss and
14 do a supplemental Rule 26(f) report, but let's look at what I
15 do have here so that we can clean up the pending motions that
16 are outstanding, and then I can look at the issues so you can
17 have those things in mind as you're doing the Rule 26(f)
18 report.

19 All right. I have -- just by way of cleaning up
20 motions -- and these are, I think, just in the order they are
21 on the docket, and so I am going to let you tell me if there is
22 anything else we need to do with these. There was the notice
23 of the briefing schedule for the United States' motion for
24 preliminary injunction. I think you all are following that
25 briefing schedule. I don't think there is any reason to change

USA, et al. v. NC, et al. Status Conference 9/2/16

1 that. I had -- it's Document 112, Joint Notice Regarding
2 Preliminary Injunction Briefing Schedule. There is nothing
3 changed and nothing you need from the Court on that, is there,
4 Ms. Stoughton? It looks like this is --

5 **MS. STOUGHTON:** Your Honor, is this what we filed
6 before the Carcano Plaintiffs --

7 **THE COURT:** I think this is July 29, August 17, and
8 September 16 as the briefing dates. Obviously, the August 17
9 date has passed. The response has been filed. So this would
10 be just your reply by September 16.

11 **MS. STOUGHTON:** That's our understanding.

12 **THE COURT:** That's the schedule everyone is following
13 at this point; is that right?

14 **MS. STOUGHTON:** Yes, Your Honor.

15 **THE COURT:** All right. So to the extent that was
16 referred to me, I am approving that schedule. And, again, this
17 is just cleaning up things on the docket that I need to make
18 sure aren't showing as still outstanding.

19 There is a United States' motion for extension of
20 time to respond to the counterclaims, which was by consent. It
21 looks like that would just be for the United States to file the
22 answer to the counterclaims, and I should add it's Document
23 Number 127 in the 425 case. So I would intend to grant that.

24 How long does the United States need to file that
25 answer as a separate document? Has that already been taken

1 care of?

2 **MS. STOUGHTON:** Your Honor, it's my understanding
3 that motion was already granted.

4 **THE COURT:** All right. It's still showing, I think,
5 with a gavel on it for me, so I am trying to clean up what I
6 have. If it has not been granted, it's granted now.

7 **MS. STOUGHTON:** Thank you.

8 **THE COURT:** Has the answer been filed?

9 **MS. STOUGHTON:** Yes, it has been filed.

10 **THE COURT:** I show it right now as 127-2 as an
11 attachment. Is it also filed as a separate --

12 **MS. STOUGHTON:** I believe it has separately been
13 filed now.

14 **THE COURT:** Do you have a document number for me for
15 that?

16 **MS. STOUGHTON:** We'll find that for you.

17 **THE COURT:** All right. I am going to give you a
18 minute so we don't get confused moving on.

19 **MS. STOUGHTON:** Your Honor, do you know the date in
20 that document on which it was due to be filed?

21 **THE COURT:** Let's see. The document file is 127 on
22 August 9.

23 **MS. STOUGHTON:** The date by which the answer --

24 **THE COURT:** That was the date that the motion for
25 extension was filed. It was for a nunc pro tunc extension.

USA, et al. v. NC, et al. Status Conference 9/2/16

1 **THE CLERK:** Your Honor, it looks like the
2 counterclaim answer to complaint was filed on August 23,
3 Document Number 154, and the motion for extension was granted
4 on August 19, Document Number 150.

5 **THE COURT:** So it was just -- for some reason, it
6 just hadn't been terminated?

7 **THE CLERK:** Right.

8 **THE COURT:** All right. So then that's just the
9 clerk's office needs to take care of terminating that as an
10 open motion. All right. Thank you.

11 All right. There is a motion to withdraw as counsel
12 by one of the attorneys for the United States. So I would
13 grant that in Document Number 165 in the 425 case.

14 There was a motion for extension of time to designate
15 rebuttal experts. That is likely moot, but what I would intend
16 to do -- it is Document Number 121 in the 236 case -- I'm going
17 to grant that to the extent that the deadline's extended so it
18 has not past yet, and then, in addition, any of those deadlines
19 going forward would all be subject to whatever additional
20 negotiation and proposal you have in the Rule 26(f) report.

21 The motion to stay, which is Number 113 in the 236
22 case, I will grant in part based on the determination that the
23 Court will continue the trial to a date to be set in May, and
24 I'll ask you all as part of your Rule 26(f) report to propose
25 potential trial dates in May as well and then to include the

USA, et al. v. NC, et al. Status Conference 9/2/16

1 pretrial schedule, and that would be not linked to a particular
2 ruling by the Supreme Court or the Fourth Circuit but -- and to
3 the extent the UNC Defendants have requested a stay pending
4 ruling on the motion to dismiss, that piece would be denied
5 because we're all going forward at this point but on the new
6 schedule that you might come up with; and then the only other
7 piece would be that the motion for preliminary injunction filed
8 by the United States will be referred to the Court after
9 briefing is complete without an evidentiary hearing and, at the
10 discretion of the Court, whether to set for oral argument for
11 determination separate from the trial.

12 Is that everyone's understanding of where we are on
13 the motion to stay? Does that cover everything?

14 Actually, I do have one other piece with that, and
15 that is the case that's still pending in the Eastern District,
16 because I am concerned about staying this case if there is
17 still other proceedings happening in the Eastern District.
18 What's the intent of the Legislative Defendants as to that
19 case?

20 **MR. DUNCAN:** We are not in that case, Your Honor, if
21 I'm not mistaken. We were transferred here.

22 **THE COURT:** Your case was transferred here?

23 **MR. DUNCAN:** Yes, Your Honor. Our case was
24 transferred here, and then we voluntarily dismissed it.

25 **THE COURT:** The 844 case?

1 **MR. DUNCAN:** That's right.

2 **THE COURT:** What case is still left in the Eastern
3 District?

4 **MR. BOWERS:** That's my case.

5 **THE COURT:** That's your case. All right. I have the
6 wrong docket from the Eastern District then.

7 **MR. BOWERS:** That's my case. Corey, correct me if
8 I'm wrong, but I think the United States still has pending a
9 motion to dismiss?

10 **THE COURT:** Right.

11 **MR. BOWERS:** And the Court -- the Eastern District
12 has yet to rule on it.

13 **THE COURT:** Well, my concern is if your clients are
14 asking me to continue this trial here while you're still
15 proceeding in the Eastern District. Do you understand the
16 concern?

17 **MR. BOWERS:** I understand your concern, Your Honor.

18 **THE COURT:** So are your clients intending to
19 voluntarily dismiss this case, the Eastern District case?

20 **MR. BOWERS:** Not at this time, no.

21 **THE COURT:** I have some concern about continuing the
22 trial while there's a separate proceeding in another district,
23 given sort of the procedural issues and the back and forth as
24 to which district you are going to proceed in or how that might
25 play out. I don't want to continue it here and then have a

USA, et al. v. NC, et al. Status Conference 9/2/16

1 rush happen in the Eastern District that undermines what we are
2 trying to do here.

3 **MR. BOWERS:** I share that concern, and I don't want
4 that to happen either.

5 **THE COURT:** Well, what are you going to do about it?

6 **MR. BOWERS:** I am going to confer with my client, and
7 we are going to figure out a plan. Ms. Stoughton and I have
8 talked about it in terms of trying to get a resolution, and we
9 just haven't been able to come up with one jointly yet.

10 **THE COURT:** Again, my concern is granting the request
11 to stay, even to continue the trial out, without knowing what
12 is happening in that case.

13 **MR. BOWERS:** I can tell you, Your Honor, that since
14 the United States' motion to dismiss was filed, there's been no
15 activity, nothing. They will correct me if I misstate
16 anything, but nothing has happened; and I can't speak for the
17 Court obviously in the Eastern District, but there's been
18 literally zero activity, and so I think it would be very
19 unlikely for anything in the Eastern District to proceed that
20 would -- where a trial would occur before May of 2017.

21 **THE COURT:** And just to make sure I'm clear again,
22 those claims are the same as the counterclaims that you now
23 have in the 425 case; is that right?

24 **MR. BOWERS:** That's correct.

25 **THE COURT:** All right. What's the -- let's see.

1 This is the -- so in the Eastern District, it's the 238 case.
2 Anything, Ms. Stoughton?

3 **MS. STOUGHTON:** I apologize, Your Honor, but I am not
4 counsel in that case so I can't represent the United States'
5 position in that case. I can confirm that the motion to
6 dismiss was filed and is pending, and I can confirm that, as
7 far as I am aware, there has not been any action such as a
8 scheduling order. Beyond that, there is not much I can say.

9 **THE COURT:** All right. My concern is I don't want to
10 interfere with what's happening in the Eastern District.
11 Obviously, that's not before me. My concern is if we're
12 setting this out further by agreement without my having some
13 assurance that then there is not going to be a push to move it
14 forward faster in some other district, or that that's going to
15 interfere with what we are trying to do here in this sort of
16 consolidated proceeding.

17 **MS. STOUGHTON:** Your Honor, I can say we share that
18 concern. The United States' position has always been that that
19 case should be voluntarily dismissed or dismissed on the motion
20 that's been filed and that these issues should be resolved in
21 this forum, and we've urged for those results.

22 **MR. BOWERS:** Your Honor, I apologize for misstating
23 it. It's not Ms. Stoughton that I have been talking with. It
24 was other counsel of the United States. That was a mistake on
25 my part.

1 We don't intend -- I can represent to the Court that
2 we don't intend to try to fast-track the case in the Eastern
3 District in any way. We have -- with other counsel for the
4 United States, we have proposed what we thought was a
5 reasonable alternative to us voluntarily dismissing the case to
6 get it so that we could all be focused here in the Middle
7 District, and the United States rejected that offer, and so
8 here we are.

9 **THE COURT:** I'm sorry. I didn't follow. What was
10 the --

11 **MR. BOWERS:** Your Honor, I don't want to misstate it,
12 but we -- you weren't part of that, were you?

13 **MS. STOUGHTON:** I was not, Your Honor.

14 **THE COURT:** All right.

15 **MR. BOWERS:** But it was a procedural device that we
16 found more palatable, and the United States -- it was -- I just
17 don't remember off the top of my head, Your Honor.

18 **THE COURT:** Well, again, I don't want to interfere in
19 the Eastern District case because what's happening there is
20 whatever it is that's happening there. My concern is what we
21 are doing here and that we don't end up continuing this out as
22 part of some larger plan that then is undermined by something
23 else that your clients are pursuing in another district.

24 **MR. BOWERS:** I understand, Your Honor. I can tell
25 you that we are -- ultimately, we do not intend on trying two

USA, et al. v. NC, et al. Status Conference 9/2/16

1 different cases in two different courts.

2 **THE COURT:** Right.

3 **MR. BOWERS:** Okay. And we are proceeding in good
4 faith here, and nothing has happened in the Eastern District, I
5 mean, literally nothing. We haven't spoken with the United
6 States since their motion to dismiss was filed, but there are
7 other factors that we are taking into consideration in terms of
8 how -- the best way to wrap that case up in a manner that is
9 consistent with us moving forward here in the Middle District.

10 **THE COURT:** All right. So at least your
11 representations to the Court is that your intent is still to
12 move forward with the trial here in this district, and you are
13 not intending to move forward to try it in the Eastern
14 District?

15 **MR. BOWERS:** Absolutely, that is our intent, as I
16 stand here today, yes. If at any point I get an inkling that
17 that changes, we'll notify the Court, but at this point, we are
18 100 percent committed to trying the case here.

19 **THE COURT:** All right. I will just note my concern
20 that if you switch gears to the Eastern District after we've
21 set all of this up based on the assumption that we are moving
22 forward here together on a consolidated proceeding, that would
23 raise concerns for me as to what we are doing here and what the
24 intent of your clients might be.

25 **MR. BOWERS:** Understood and duly noted.

1 **THE COURT:** All right. So then we will leave that
2 one alone otherwise, just noting that, and then I will plan to
3 enter a summary order setting all of this out, including with
4 respect to the motion to stay, but it would be granted in part
5 consistent with what I have gone over here today.

6 I will ask you if anybody needs me to clarify
7 anything or if you think I misstated anything as far as where
8 we've ended up on the motion to stay. Anything else, Mr.
9 Wilkens?

10 **MR. WILKENS:** Just one question, Your Honor.

11 **THE COURT:** Yes, sir.

12 **MR. WILKENS:** Just in articulating the stay in part
13 that you intend to enter, I just wanted to get clarity on
14 the -- is the due process piece then going to go with the May
15 trial date?

16 **THE COURT:** I think that my assumption is Judge
17 Schroeder had ordered that if there needed to be any hearing or
18 anything further on the due process piece, that that would be
19 part of the trial, and I've noted your agreement to that even
20 if we continued the trial date.

21 My assumption is that it would be unless Judge
22 Schroeder looks at it and feels like he wants to resolve it
23 earlier without anything else; but as I understood Judge
24 Schroeder's order, he had pulled those together for any further
25 proceedings, and I think that would then include even it's

1 continued out until May. Any objection on that?

2 **MR. WILKENS:** No objection, Your Honor. All that I
3 would note for the record, which I think I already noted, it
4 would be our preference, if Judge Schroeder were amenable to
5 it, to have the due process issue dealt with on briefing and if
6 the Court wants an oral argument, but we also are fine with it
7 going along with the May trial. It's what the Court prefers.

8 **THE COURT:** Okay. And I think then that's what I
9 would note in my order, that it will be at the discretion of
10 the district judge, but that the Carcano Plaintiffs have
11 specifically sort of consented to it being heard as part of the
12 May trial as part of the agreement to continue the trial date.
13 Is that fair?

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

15 **THE COURT:** Ms. Stoughton, anything else as far as
16 the motion to stay that you would need me to clarify or note?

17 **MS. STOUGHTON:** Well, one thing, Your Honor, not so
18 much on the motion itself, but on the general issues. The
19 Court -- the last time we were here, I understood the Court to
20 be suggesting that motions to dismiss and other dispositive
21 motions would generally be rolled over by the Court to be
22 considered as part of the trial package, and I think one thing
23 that has become clear to us is that the scope of the
24 counterclaims, which the United States has always believed
25 should be dismissed, is expanding the scope of discovery in a

USA, et al. v. NC, et al. Status Conference 9/2/16

1 way that is unnecessary.

2 So the United States would like permission, if it's
3 necessary, to file a motion to dismiss the counterclaims, and
4 particularly now that the NCFP case has been dismissed -- or
5 withdrawn, rather, because that could have significant effects
6 of narrowing the burden and scope of discovery, which is now
7 extended over a longer period of time.

8 **THE COURT:** Well, I am not going to preclude you from
9 filing a motion to dismiss. I will tell you that by extending
10 the date out, part of the benefit of that is there is time to
11 do the discovery that we need to do. So I will put it this
12 way. I am not going to preclude you from filing a motion, and
13 it would be briefed in accordance with the ordinary briefing
14 time periods per the local rules. We are not now backed up
15 against a November trial date, but it may still be that the
16 Court elects to defer that determination until the trial; in
17 which case, if there's not some other contrary resolution, you
18 would just be proceeding with all of them through the discovery
19 period, but if there is some basis that it makes sense to take
20 it up earlier, then the -- that's something that -- the Court
21 can look at whether it comes to me for recommendation or
22 whether it goes to the district judge, but, again, in the
23 interest of avoiding sort of serial determinations in this
24 case, it may be that the Court looks at that and determines
25 that it would be better resolved as part of the ultimate trial

USA, et al. v. NC, et al. Status Conference 9/2/16

1 in the case.

2 **MS. STOUGHTON:** I understand, Your Honor. I think
3 there is another procedural obstacle to that, which is that we
4 have now answered the counterclaims, which we did again on the
5 assumption that it would be futile. I do think there is a case
6 to be made that it is no longer futile. So I think we would
7 need -- I think our time to have moved for a 12(b)(6) in that
8 sense on the counterclaims has passed because of the answer. I
9 am wondering if the Court would entertain at least waiving that
10 procedurally?

11 **THE COURT:** So what I don't want it to be sort of
12 construed as is a permission to go ahead and file it now with
13 the anticipation that the Court's agreeing to hear that now.

14 **MS. STOUGHTON:** Understood.

15 **THE COURT:** So I don't have a problem letting you
16 file that. I think -- my intent before was always to say if
17 you want -- have dispositive motions that you want to file, you
18 can file them. It's just the likelihood will be that it will
19 be resolved ultimately as part of a bench trial in this case.
20 So I think that still holds true, but I can give you a time
21 period. How long are you asking for?

22 **MS. STOUGHTON:** That's an excellent question. Three
23 weeks, Your Honor.

24 **THE COURT:** So 21 days from today to file a motion to
25 dismiss. Again, it's not my intent to otherwise give any

1 permission or determination that the Court is going to consider
2 that; but if that's a way to frame up those issues and then if
3 the Court looks at it and wants to have that determined, then
4 we can do that.

5 Anything you want -- yes, sir.

6 **MR. BOWERS:** Your Honor, I confess, I'm easily
7 confused. I want to make sure that we're talking about -- are
8 we talking about my counterclaims?

9 **THE COURT:** I think it would be both; right?

10 **MS. STOUGHTON:** Both.

11 **THE COURT:** It would be the State counterclaims and
12 the Intervenor counterclaims. I don't know what the basis for
13 that is going to be. All I would note is there's time now. If
14 they want to file those and they didn't because of the prior
15 schedule, I'll let them file them. You all can respond. If
16 you need more time to respond than the local rules otherwise
17 provide for, then you can ask for an extension of time. We
18 have a little more time now to play with, but it may just be a
19 way of setting up those issues that ultimately are going to
20 have to be resolved at the trial anyway.

21 I am not going to make a determination now as to when
22 the Court is going to address that other than to say my general
23 sense is still going to be an intent to resolve all of this
24 together at the trial, if it's not in November, then in May,
25 but I am also not precluding anyone from filing whatever motion

1 that you want to file, and that wouldn't fall in that same
2 category for me.

3 **MS. STOUGHTON:** I appreciate that. We'll consider
4 that when we weigh whether we'll actually file. We appreciate
5 the ability to do so.

6 **THE COURT:** All right. Anything else then as far as
7 the United States for clarifying where we are on the motion to
8 stay?

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

10 **THE COURT:** For the Defendants, anything else that
11 you would want to clarify or note with respect to the Court's
12 ruling on the motion to stay? Anything on that?

13 **MR. BOWERS:** Nothing from me, Your Honor.

14 **MR. DUNCAN:** Your Honor, we're still on the briefing
15 schedule for the due process claim that Judge Schroeder laid
16 out in his PI motion order?

17 **THE COURT:** Right. I think that you should follow
18 that briefing schedule and --

19 **MR. DUNCAN:** It's on page 82.

20 **THE COURT:** So it would be September 9 for additional
21 briefing, responses by September 23, and replies by October 7;
22 but then if the parties desire additional oral argument, any
23 hearing will be combined with the consolidated preliminary
24 injunction hearing and trial on the merits.

25 I think that my understanding is the Carcano

1 Plaintiffs have agreed that they understand that any due
2 process determination may be deferred until May, and that's
3 part of their agreement in requesting a spring -- or a
4 continuance of the trial date. So I would anticipate that it
5 may still be that if the district judge wants any hearing, any
6 evidentiary hearing, any oral argument, that that could still
7 all be combined together with the May trial, but the briefing
8 schedule will be as otherwise set out. Does that make sense?

9 **MR. DUNCAN:** Yes.

10 **THE COURT:** All right. Anything else?

11 **MR. GORE:** Just one small point of clarification.

12 **THE COURT:** Yes, sir.

13 **MR. GORE:** Since our motions to dismiss on behalf of
14 the UNC Defendants are fully briefed and pending, would those
15 be decided in the ordinary course and not rolled over to the
16 trial, which is how I understood Your Honor --

17 **THE COURT:** Right. No, so I think that those were
18 already briefed and can be referred and decided by the Court in
19 the ordinary course. If the Court reviews those and makes the
20 determination that they are better to be resolved at the bench
21 trial, then it may be that they are ultimately deferred. So
22 until there is ruling on those, your client should continue to
23 participate in discovery and plan for the trial; but then if
24 there is a determination prior to that, then it would be
25 whatever the Court determined on that.

1 **MR. GORE:** Understood, Your Honor.

2 **THE COURT:** All right. So I think that takes care of
3 that motion to stay. I will, as I said, just do a general
4 summary order so it's set out where we are here.

5 The motion for leave to file a second amended
6 complaint is filed but hasn't been briefed yet. Mr. Duncan, I
7 think you had addressed that to some extent; is that right?
8 Were you addressing that?

9 **MR. DUNCAN:** We discussed it, Your Honor. We'll be
10 filing something on Friday. As I understand what Your Honor
11 says, we should direct that to only procedural objections, if
12 we have any, and not to anything that looks like a motion to
13 dismiss the underlying claim.

14 **THE COURT:** If the Court allows them to file their
15 second amended complaint and you want to file a motion to
16 dismiss as to any of the newly added claims, then you would be
17 entitled to do it so that it gets presented to the Court on a
18 motion to dismiss rather than in briefing on the motion to
19 amend. That's my intent.

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

21 **THE COURT:** All right. But, otherwise, you are not
22 ready for me to go ahead and address the motion for leave to
23 file a second amended complaint?

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

25 **THE COURT:** All right. All right. I think that

1 takes care of everything that's been referred to me.

2 Can you tell me, Ms. Engle, if there's anything else
3 that is showing as pending that would be for me?

4 **MR. WILKENS:** Your Honor, I just wanted to ask --
5 make one request. With respect -- not to come back to due
6 process again, but to the extent the Court wants to push off
7 the decision on due process to the trial in May, we would
8 request a more extended briefing schedule on that issue, for
9 example, I mean, even having something like three weeks to a
10 month to submit our opening brief.

11 **THE COURT:** I don't have any problem with extending
12 the time now for that since we are not on a November trial. We
13 are not trying to get it briefed, and I anticipate that they
14 wouldn't have any objection to that either. Do you have a
15 proposal you want to give me?

16 **MR. WILKENS:** Right now, I think the opening brief is
17 due on the 9th.

18 **THE COURT:** Right.

19 **MR. WILKENS:** I mean, if we could push that date back
20 two weeks and maybe all the other dates similarly.

21 **THE COURT:** So it would be September 23, and I think
22 that's fine. Is that enough time, or do you want to ask for
23 more while you're here?

24 **MR. WILKENS:** Well, actually, while we're at it,
25 let's push it back one more week. With the Court's invitation,

USA, et al. v. NC, et al. Status Conference 9/2/16

1 I can't resist. One more week to the twenty --

2 **THE COURT:** It would be the 30th.

3 **MR. WILKENS:** Yes.

4 **THE COURT:** All right. So three weeks to
5 September 30th. It was only a two-week turnaround time for
6 responses. Presumably, you wouldn't have any objection to them
7 having additional time for responses?

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

9 **THE COURT:** All right. So that would be -- until
10 October 28 would be four weeks, and then a reply after that,
11 even -- say two weeks would take you to November 11th.

12 **MR. WILKENS:** Very close to our -- what would have
13 been our trial date.

14 **THE COURT:** That's right. That would have been the
15 trial date, exactly. Is that what you are requesting then?

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

17 **THE COURT:** All right. Let me ask for either or any
18 of the Defendants, any objection to that?

19 **MR. BOWERS:** I think that's fine with us, Your Honor.

20 **MR. DUNCAN:** No objection.

21 **MR. GORE:** No objection.

22 **THE COURT:** All right. So the briefing on the due
23 process claims will be extended so that any additional briefing
24 is due September 30, response briefs October 28, and reply
25 briefs November 11, with the understanding that the Court may

1 consolidate all of that still with the trial in May, and that's
2 with the agreement of the plaintiff -- the Carcano Plaintiffs
3 as part of the request to continue the trial in this case.

4 Is that fair enough, Mr. Wilkens?

5 **MR. WILKENS:** Yes, Your Honor, thank you.

6 **THE COURT:** I would still intend to go through the
7 joint notice of issues so that we can address what we need to
8 or what we can in anticipation of you all doing a new Rule
9 26(f) report.

10 Ms. Stoughton, yes?

11 **MS. STOUGHTON:** Your Honor, one last thing. With the
12 understanding everyone works better under a deadline, when the
13 Court issues its order, will the Court set a deadline for a new
14 pretrial order?

15 **THE COURT:** That's actually one of the things I
16 needed to take up, I think. What I would want to do is set
17 this for a supplemental pretrial conference, and then I will
18 give you a Rule 26(f) deadline in advance of that so that if
19 there are any other disagreements on the Rule 26(f) report or
20 anything else, frankly just a status conference even if you
21 otherwise agree, you're on the calendar, and we can go ahead
22 and have that.

23 I think we had set these for some Fridays in
24 September. What are the dates that we're otherwise set for?

25 **THE CLERK:** The 16th and 30th.

1 **THE COURT:** All right. So I will leave you on for
2 either the 16th or the 30th for our supplemental pretrial
3 conference. We could stay on the 16th if you want to go ahead
4 and get your Rule 26(f) reports in say by the 12th, or we can
5 put it out until the 30th with the understanding that all of
6 the dates we've otherwise set will be continued, and I would
7 anticipate all of those are going to be addressed so that you
8 are not missing any deadlines in the interim obviously. We can
9 do September 30, and you could get me your Rule 26(f) reports
10 say the week prior.

11 Mr. Wilkens, Ms. Stoughton, what's your preference?

12 **MS. STOUGHTON:** Your Honor, we would prefer the
13 earlier date. I think it --

14 **THE COURT:** Keeps things moving?

15 **MS. STOUGHTON:** Yeah, keep it going.

16 **THE COURT:** All right. Mr. Wilkens?

17 **MR. WILKENS:** We would agree with that, Your Honor.

18 **MR. BOWERS:** I would agree with that as well.

19 **THE COURT:** All right. So let's -- we're going to
20 set it for September 16. It will be at 10:00. I'm going to
21 set it now for a live, an in-person hearing. If you all have
22 reached an agreement and just need a telephone hearing, then
23 you can ask for that; but if there is any disagreement on the
24 Rule 26(f) report or it would still be helpful to be here, or
25 if I think it would be helpful to be here, I want everybody to

1 be prepared for it to be a live hearing on the 16th. I am
2 going to set that for here in Winston-Salem at 10:00 on
3 September 16.

4 And then if you all can get me your joint -- or your
5 separate Rule 26(f) reports by Monday the 12th, and then I will
6 take a look at those, and if it looks like we really don't need
7 that hearing, then I will try and let you know by that Tuesday
8 or Wednesday at the latest, but I am anticipating just going
9 ahead and bringing you back here so that we can make sure
10 everything is staying on track.

11 What I don't want to have happen, obviously, is that
12 we move this out until May and then nothing happens for the
13 next two or three months and then we are back crunched again,
14 trying to get it ready for trial in May. So I would rather see
15 you every month, if we need to, to make sure we keep moving
16 along.

17 So the hearing is set for September 16, and the joint
18 Rule 26(f) reports or individual reports, if you don't agree,
19 would be due on September 12.

20 I'm going to briefly go through the joint notice, but
21 is there anything else anybody else has or wants to suggest or
22 raise? All right.

23 The legislative privilege issue, we've discussed
24 that. I think my intent would be -- or my assumption would be
25 that we can come up with a framework that is modeled after the

USA, et al. v. NC, et al. Status Conference 9/2/16

1 orders that were set out in the NAACP case in this district,
2 the 13CV658. What I would ask you to do as part of the 26(f)
3 report is discuss that and identify the issues that you have
4 and propose a briefing schedule for going ahead and getting the
5 legislative immunity issue before the Court.

6 Now, if there is going to be an issue whether that
7 framework should even apply here, then that's going to be the
8 first question I want you to address. Then if that framework
9 does apply here, what I would like you to do is, to the extent
10 you can tell at this point what the potential categories might
11 be, I would like you to start the process of identifying
12 categories and set out a schedule for when you might present
13 your categories and your disagreements about those categories
14 to the Court.

15 And then as part of the categories, my assumption
16 would be, if you have documents that are otherwise privileged
17 within the categories, then you get to waiver, and so as part
18 of that briefing, you would also address any claims of waiver
19 of the privilege. I think that can be presented to the Court
20 in the context of a motion to compel or a motion for protective
21 order, but what I would like for you all to do is discuss that
22 so that there is a clear sort of plan for who is going to file
23 the motion, and I don't think it's going to change my
24 determination as to how it's viewed. I just want something
25 procedurally in terms of who is going to file the motion, the

USA, et al. v. NC, et al. Status Conference 9/2/16

1 response, and the reply, whether it's going to be filed as a
2 motion to compel or motion for protective order, if you all can
3 reach some agreement on that.

4 If you can reach an agreement to use the structure
5 from the NAACP case without having to otherwise brief that
6 issue, then that's certainly something I would ask you to
7 consider and look at, and then I can resolve the issues that
8 you actually have disagreements about using that.

9 Does that make sense on the legislative immunity
10 question?

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

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

13 **THE COURT:** Or legislative privilege, I should say,
14 more precisely.

15 The deposition scheduling, obviously, we're in a
16 different sort of time frame now. What I would ask you to do
17 as part of the Rule 26(f) report, now that you have an
18 understanding of the potential number of fact witnesses and
19 expert witnesses, that you go ahead and address that in your
20 Rule 26(f) report in terms of the number and agreement as to
21 the scope of the fact witness depositions and expert witness
22 depositions so that there's an agreement as to the number and
23 the schedule for when you are going to fit all of those in. So
24 if you have 32 fact witnesses and 18 expert witnesses, then I
25 need your schedule for depositions to plot out how you're going

USA, et al. v. NC, et al. Status Conference 9/2/16

1 to fit all of those depositions in the schedule that you
2 anticipate so that we don't end up backed up on that either.

3 The joint protective order regarding confidential
4 information, as to that issue -- and I sort of sped through
5 those legislative privilege and deposition scheduling. So
6 before we get to the confidential information, anything else as
7 to the deposition scheduling or the legislative privilege for
8 any of the Plaintiffs? Anything else we need to cover as to
9 those things? Anything else from the Defendants? Mr. Bowers?

10 **MR. BOWERS:** Your Honor, I think I said this earlier
11 this morning, but if not, I'll just make it clear for the
12 record that we take the position that the legislative privilege
13 also applies to the Governor, and to the extent that any
14 discovery or deposition is sought from him regarding his intent
15 in passing the legislation or his ministerial duties in signing
16 the bill, we think they are covered by the legislative
17 privilege. I just want to make the Court aware that we're --
18 this is not solely a legislative issue.

19 **THE COURT:** All right. Well, I think it's helpful.
20 What I would intend to do then is just ask you to make sure you
21 include yourself in the briefing on that.

22 **MR. BOWERS:** Absolutely.

23 **THE COURT:** What I think -- as I said, however you
24 all choose to structure it is fine. Because the legislative
25 privilege has to be claimed, my expectation is that it would be

1 likely that it would be a motion for protective order that
2 would be filed so that I know who it is that's claiming the
3 legislative privilege and then the opportunity for the
4 Plaintiffs to file a response and your clients to file a reply,
5 and then that way it's clear when you are going to file it and
6 who it is that's filing it so it's clear who is making the
7 claim of legislative privilege.

8 I think then if we get later into the process and
9 there's an issue of particular documents in particular
10 categories, there may be still room for Plaintiffs to file a
11 motion to compel as to a particular document or a particular
12 issue that comes up later; but I would anticipate that because
13 legislative privilege is going to have to be claimed, that you
14 all would be doing that in the form of some type of motion for
15 protective order, and you just set out a schedule for how you
16 want that presented. That way, Mr. Bowers, it's clear your
17 client is making that motion that way as well.

18 **MR. BOWERS:** Thank you, Your Honor.

19 **MS. STOUGHTON:** Your Honor, I just want to add, the
20 University of North Carolina has also claimed legislative
21 privilege as to certain demands. There's not been a great deal
22 of meet and confer on that, but the United States has taken the
23 position in response that that's not a legitimate invocation
24 either institutionally or as to the particular demands.

25 I think in light of that, I would just ask, given the

1 framework, that we roll that also into that and just confirm
2 that there's an understanding that to the extent that
3 legislative privilege is being asserted by any of the
4 Defendants, that that be part of the motion so that we can
5 drill down on what's actually being claimed as privileged.

6 **THE COURT:** And I think that would be my intent.

7 **MR. GORE:** No objection. That makes sense to us,
8 Your Honor.

9 **THE COURT:** So whoever intends to claim the
10 legislative privilege would need to file a motion for
11 protective order to make that claim, and they need to do it on
12 a schedule that you all adopt in the Rule 26(f) report.

13 And then anything else as to legislative privilege?

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

15 **THE COURT:** As to the deposition scheduling, anything
16 else that we would need to address either as to the number of
17 depositions or the claims that we need to take up today in
18 anticipation of anything?

19 All right. As to the joint protective order
20 regarding confidential information, I would just note that it
21 looks like there are separate issues on this. First, I would
22 say, as a global issue, it makes sense to me for you all to
23 come up with some type of protective order here that would be a
24 way for you all to designate confidential documents during the
25 discovery period. It calls out for that in this case. So I'm

1 sure you can come up with some agreed confidentiality order.

2 If there are particular types of documents that you
3 have some disagreement or some particular issues that you need
4 resolved, what I would ask you to do is have those ready to
5 present when we come back on the 16th, but my expectation is
6 that the general framework for a protective order is something
7 that is pretty standard, and you all ought to be able to come
8 up with it, unless I'm missing something about that.

9 **MS. STOUGHTON:** Well, Your Honor, we are ready to
10 present on the specific issue with regard to the protective
11 order.

12 **THE COURT:** Today?

13 **MS. STOUGHTON:** Today.

14 **THE COURT:** Okay.

15 **MS. STOUGHTON:** Your Honor, the parties negotiated a
16 protective order and it had agreement, as I understand it, on
17 all of the language, but the objection boils down to really
18 just one issue, which pertains to the access that -- the
19 discovery of medical records, which is an issue that goes
20 beyond the protective order because there is also a dispute
21 about whether those records are discoverable in the first
22 place, which is a separate issue; but to the extent that any
23 medical or any information falling under the protective order
24 is produced and designated as confidential, the only dispute
25 with regard to the terms of the protective order, and that's

USA, et al. v. NC, et al. Status Conference 9/2/16

1 the only thing that's standing between us now and agreement to
2 hand you a protective order to sign, is whether expert
3 witnesses should be able to have access to confidential
4 information.

5 And the United States' position and, as I understand,
6 the Carcano Plaintiffs' position, but they can speak, is that
7 experts -- there is no call for experts to have access to
8 confidential information, particularly as that information I
9 think will largely encompass information about parties and
10 witnesses.

11 We have not understood what the Defendants' interests
12 in sharing that information with their experts is, but I
13 understand the Defendants' position is they would like to share
14 that information.

15 So our request today is for the Court to agree that
16 there is not any -- we cannot see any legitimate role for
17 disclosure of that information to expert witnesses to play in
18 the claims or defenses in this action and to, you know, resolve
19 that dispute between the parties, and we would then I think at
20 that point be prepared to jointly enter a protective order.

21 **THE COURT:** All right. I am hesitant to issue what
22 comes close to an advisory ruling without knowing what the
23 records are, who the experts are. What I would prefer to do is
24 have you all agree to what it is that you are actually in
25 agreement on and then reserve particular disputes. If there

1 are specific experts that and specific medical records that the
2 Defendants want to share, then the protective order certainly
3 wouldn't preclude me from taking up that determination.

4 **MS. STOUGHTON:** Yes. What we have proposed actually
5 is that we enter the protective order as mostly recently
6 drafted, which does not contain an expressed exemption to
7 provide information to experts, but if along the way the
8 Defendants say I would like to share this information, which is
9 otherwise confidential, with an expert, we could negotiate
10 that. That's what we proposed in order to allow depositions
11 that were previously scheduled for next week to occur. We
12 could not reach agreement on that until those depositions have
13 been taken off the calendar, but that is where the dispute
14 stands.

15 It is the United States' strong hope that today we
16 could agree on the terms of the protective order which have
17 been negotiated but for this dispute over whether the
18 protective order should expressly allow sharing information
19 with experts and agree that it should not contain that without
20 prejudice to any time that the Defendants would like to say we
21 actually think we have a legitimate reason to share this
22 information with an expert.

23 **THE COURT:** I will add that, as a general matter,
24 information in this case that I otherwise understand would be
25 personal and private and confidential even from an expert

1 appears to have potentially been put at issue sufficiently
2 where I would say it makes sense for the expert to be able to
3 look at this. That is not unlikely that that's where we might
4 end up; but as far as where we are today, without having it
5 presented to me, it may be that it makes sense to enter the
6 order to the extent that you agreed on it and then to come back
7 and consider the expert issues in particular.

8 Do you understand where I am going with that?

9 **MS. STOUGHTON:** Yeah, and we would be fine with that.
10 In other words, we can punt the specific dispute over whether a
11 party should get experts -- whether experts should get access
12 to the confidential information, but otherwise enter the
13 protective order so that all the other issues that are
14 implicated by the protective order are not blocked by the
15 parties' disagreement --

16 **THE COURT:** Disagreement over that issue.

17 **MS. STOUGHTON:** We are fine with proceeding that way
18 without prejudice to the fact that we would like to eventually
19 resolve --

20 **THE COURT:** Right. And I understand there might be
21 other issues I need to take into account, but I don't want to
22 give you the impression either that I am inclined to preclude
23 their experts from ultimately being able to see that material.

24 **MS. STOUGHTON:** Understood.

25 **THE COURT:** All right. Let me see where the

USA, et al. v. NC, et al. Status Conference 9/2/16

1 Defendants are on that.

2 **MR. DUNCAN:** Your Honor, I think what you just said
3 with respect sort of the general idea of Plaintiffs putting
4 their medical condition at issue is exactly our position, which
5 will be happy to present in the future.

6 **THE COURT:** Right.

7 **MR. DUNCAN:** I don't think we have any problem with
8 dealing with the protective order right now as long as this
9 issue is simply not part of it.

10 **THE COURT:** Right.

11 **MR. DUNCAN:** In other words, we don't want the
12 protective order to be framed in such a way that later on we
13 have to sort of climb up a steep hill to get our experts access
14 to information that we think in any normal case involving
15 medical issues, of course, our experts could see it.

16 **THE COURT:** Right.

17 **MR. DUNCAN:** And, of course, our experts would agree
18 not to divulge it to anyone.

19 **THE COURT:** Right.

20 **MR. DUNCAN:** So if the protective order genuinely
21 punts on this issue --

22 **THE COURT:** Right.

23 **MR. DUNCAN:** -- then I don't think we have any
24 problem with that --

25 **THE COURT:** All right.

1 **MR. DUNCAN:** -- and I will let Mr. Bowers or Mr. Gore
2 contradict me if --

3 **THE COURT:** Well, it sounds like the goal would be
4 today to get the order in place so that, to the extent you have
5 agreed, discovery can come in as far as written discovery. It
6 does look like there are otherwise personal and private issues
7 that have been put at issue in this case. I understand your
8 point in terms of not wanting to have to overcome some
9 presumption that you've agreed to a protective order that
10 doesn't allow your experts to have access.

11 **MR. DUNCAN:** Exactly. We would not want to put the
12 burden on ourselves to have to show on a case-by-case basis
13 that an expert needs to see that information.

14 Now, if -- we just want to punt on the issue with
15 respect to the protective order right now, in light of the fact
16 that there are not looming depositions right now.

17 **THE COURT:** Understanding that ordinarily the party
18 seeking to resist discovery has the burden, we're letting the
19 discovery proceed with the limitations they've requested
20 without changing that burden on them to the extent that they
21 would seek to restrict the -- whether it's the discovery or the
22 dissemination further of the medical information, the burden is
23 still on them as the party seeking to resist discovery.

24 **MR. DUNCAN:** That is our position.

25 **THE COURT:** And we're not changing that by adopting

USA, et al. v. NC, et al. Status Conference 9/2/16

1 the protective order without addressing that issue?

2 **MR. DUNCAN:** We're certainly not agreeing to change
3 that.

4 **THE COURT:** Right. I think I'm stating it so that
5 everybody is clear that that's the position, and I will make
6 sure that the Plaintiffs agree that that's where we are.

7 **MR. DUNCAN:** It's clear to us, Your Honor.

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

9 **MR. BOWERS:** I agree completely with what Mr. Duncan
10 just said. I just want to make sure it's clear, and please
11 correct me if I'm wrong, anyone here. We've been talking a lot
12 about medical records and information, sharing them with
13 experts. If I'm not mistaken, the Defendants have also
14 objected to us asking questions of fact witnesses regarding
15 their medical conditions or medical records, and we've not been
16 able to reach resolution on that.

17 Again, I'm not trying to resolve that today, but I
18 just want to make it clear that what we're punting on and
19 reserving a determination on is anything and everything to do
20 with medical records, whether it's sharing them with expert
21 witnesses or asking questions of fact witnesses or even of
22 Plaintiffs.

23 **THE COURT:** All right. So this is how I would
24 anticipate procedurally then it might make sense. If we adopt
25 the protective order as you all have been able to reach an

USA, et al. v. NC, et al. Status Conference 9/2/16

1 agreement, which would include not turning the medical records
2 or whatever those records might be over to experts, unless you
3 all can reach agreement -- if you cannot reach an agreement,
4 then the Defendants can file a motion to ask for those records
5 to be able to be turned over to an expert, but the burden is
6 still going to stay on the Plaintiffs as the party resisting
7 discovery with respect to those records.

8 Does that sound right as to that first piece? I will
9 give you a minute.

10 (Off-the-record discussion.)

11 **MR. BOWERS:** Thank you, Your Honor, for that brief
12 time to confer, and Mr. Duncan will supplement as needed. We
13 just want to make sure that if we enter into a protective order
14 that doesn't include medical records or medical information,
15 that Plaintiffs don't get veto power over -- or veto authority
16 over whether on a case-by-case basis, well, wait a minute, we
17 don't think you're entitled to that.

18 Secondly --

19 **THE COURT:** Well, let me make sure I'm following. As
20 to the "we don't think you're entitled to that," as I
21 understand what we're looking at here, it would just be the
22 confidentiality and protective order so that documents that
23 they were providing that they designated as confidential, or
24 create yourself a separate category of highly confidential,
25 that those documents wouldn't be shared with an expert unless

1 you all reach an agreement or there is a Court order, but
2 the -- that would give you the option to be able to reach an
3 agreement. If you can't reach an agreement as to those going
4 to the expert, then, in that scenario, you're filing the motion
5 to be able to turn them over to the expert, but they still have
6 the burden because they are the party resisting discovery.
7 That's only just as a procedural mechanism to get it before the
8 Court.

9 Now, as to the questioning, I think that's a separate
10 question. If they want to file a request for a protective
11 order to limit the questioning of their witnesses at a
12 deposition, that would be their burden to do. What I am trying
13 to do is figure out how to make sure the flow of discovery is
14 as efficient as it can be, and then you just have a procedure
15 for presenting this dispute to the Court when it's actually
16 ripe.

17 **MR. BOWERS:** We'll do it however Your Honor wants us
18 to do it.

19 **THE COURT:** Right.

20 **MR. BOWERS:** But it seems to us that because the
21 burden is on them to -- because they are the ones resisting the
22 discovery, that maybe they should file first, and maybe
23 Mr. Gore has more to add to that.

24 **THE COURT:** All right.

25 **MR. GORE:** Your Honor, I just have a suggestion that

1 might clarify. For the UNC Defendants, this medical record
2 issue and the medical issue has not been implicated by any
3 discovery that we've sought.

4 **THE COURT:** Okay.

5 **MR. GORE:** We don't anticipate that it will be
6 necessarily, but in the spirit of trying to facilitate getting
7 going with the schedule, one thought that I had was that the
8 current protective order could be entered, and we could maybe
9 add some language in there to make clear that it doesn't
10 address the medical issues.

11 If the Plaintiffs, because they're the parties
12 resisting discovery, wanted to move for a separate protective
13 order on medical issues that could cover medical records, it
14 could cover questions at depositions, that would frame up the
15 issue, since they're the party with the burden. The Defendants
16 who are interested in responding to that could respond to that
17 in the ordinary course, and they get their reply, or however
18 that briefing is ordinarily done, and then we have a protective
19 order in place for all the nonmedical documents and issues that
20 are being implicated in discovery now.

21 I can say for UNC, we are not able to produce any
22 documents until there is that first protective order in place.
23 So we are trying to facilitate getting that going, and then if
24 there is a separate kind of mechanism that's treated almost as
25 a separate protective order where all the medical issues can be

USA, et al. v. NC, et al. Status Conference 9/2/16

1 addressed and briefed at one time, both for the records and for
2 the deposition questioning, and I think if we did it that way
3 with the Plaintiffs going first, since they're the parties
4 resisting discovery and have the burden, that that might be
5 another procedural way to do it.

6 **THE COURT:** Right. And I understand sort of where
7 you're going with that, and I understand why the Defendants
8 want to proceed that way. Here is where it is slightly
9 different for me. Because this is not the Plaintiffs' request
10 not to turn over the medical records at all, and they are
11 agreeing to turn over medical records that they otherwise are
12 claiming are confidential or personal or private, then it
13 shifts not the burden but the procedure to some extent because
14 now you've got those records. There is still some limit that
15 they've put on them in terms of what you can do with them, but
16 you've got those records, and I think you might know then who
17 you want to share them with or what the concern is.

18 All right. I've got lots of folks. Mr. Wilkens and
19 then Mr. Bowers. Yes, sir.

20 **MR. WILKENS:** Your Honor, I think we do have -- maybe
21 along the lines of legislative privilege, we do have a
22 fundamental dispute that is brewing over the scope of medical
23 records that the Defendants are entitled to, and so it may make
24 sense as part of our Rule 26(f) report to set forth a briefing
25 schedule on that. For example, you know, this is not a case

USA, et al. v. NC, et al. Status Conference 9/2/16

1 about damages. This is not a medical malpractice case, and
2 they're seeking every record under the sun regarding
3 psychiatric care and medical care of our transgender
4 plaintiffs. We think that's completely overbroad.

5 **THE COURT:** I'll let you brief that. I understand,
6 though, that even if the damages aren't at issue, some of those
7 underlying issues have been raised as part of the claims in the
8 case.

9 **MR. WILKENS:** That's correct, Your Honor. Our
10 declarations do from our individual plaintiffs raise some
11 medical issues, but we -- and we would like to just be able to
12 brief to the Court why that doesn't open the door to every
13 psychiatric record being turned over and all their medical
14 records being turned over and a big fishing expedition here.

15 So I think we should have briefing on that, and we
16 should really try to find a way to get a protective order in
17 place that just leaves what experts -- what the experts get to
18 see sort of as a separate issue.

19 **THE COURT:** Okay. So here's then what it sounds like
20 you're asking for. Instead of trying to address all of that
21 about your motion for protective order, your motion for
22 protective order -- the consent order can just have the
23 standard designation these are confidential, these are highly
24 confidential, this is what you can do with confidential
25 documents, this is what you can do with highly confidential

1 documents without addressing what medical records you have to
2 turn over; and then along the lines of the legislative
3 immunity, it's going to be on you to go ahead and file your
4 motion for protective order as to the medical records so that
5 they're not then turned over as part of the consent order, and
6 then we can have briefing on that.

7 What I want to sort of keep clear is if you turn over
8 documents and just designate them as confidential or highly
9 confidential, then they're subject to whatever the agreement is
10 for those documents in the protective order. If the Defendants
11 want to share them further, then there's ways for them to
12 challenge the confidentiality designation or to challenge
13 whether they should be as limited as you're asking for them to
14 be. I think once they've got the documents and they want to
15 turn them over further, that's on them to bring to the Court.

16 But you would agree that doesn't necessarily change
17 the burden of who has to show whether the documents are subject
18 to being produced in discovery; right?

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

20 **THE COURT:** It doesn't change the burden.

21 So, on the other hand, if there are documents that
22 you know are going to be an issue that you don't want to turn
23 over at all or that you want to turn over with greater
24 restrictions than the confidentiality calls for, then it might
25 make sense to treat those separately just as part of a

USA, et al. v. NC, et al. Status Conference 9/2/16

1 protective order that you file and that you set a briefing
2 schedule for as opposed to dealing with it in the consent
3 order.

4 **MR. WILKENS:** Correct, Your Honor.

5 **THE COURT:** All right. I think it's evolving here,
6 isn't it? I think that would also be true of the depositions.
7 To the extent that you want some kind of protection prior to a
8 deposition as to what questions are fair game here, that would
9 be up to you to file a motion for protective order ahead of
10 time, too.

11 **MR. WILKENS:** Yes, Your Honor, I think that's right.
12 It also may be that in resolving disputes that we have over the
13 scope of medical records that are going to be produced, that
14 may also provide some clarity on what is or isn't going to be
15 covered in depositions because the documents won't be there.

16 **THE COURT:** Certainly, as with any discovery dispute,
17 the more you all can discuss and try and resolve and narrow
18 down the issue for the Court, obviously, that's helpful to me,
19 but I think it's also better for you at getting narrowed down
20 to what it is that really is the concern that you have as
21 opposed to just generalizations.

22 What it sounds like makes sense is to go ahead and
23 present the consent protective order to the extent there are
24 lots of documents that aren't going to be at issue as part of
25 this, but then you set out a schedule for briefing the issue

1 with respect to the medical records separately. I'm assuming
2 in the meantime you are just not turning over those medical
3 records?

4 **MR. WILKENS:** That's correct, Your Honor. The
5 parties have just exchanged their responses and objections, and
6 we haven't even had a chance to really meet and confer on those
7 yet, and we certainly have objected to the very broad medical
8 record request.

9 **THE COURT:** To the extent in any particular case
10 there are not objections that you want to raise, I think you
11 can go ahead and turn over those records or documents so you,
12 as a factual matter, narrow down where the dispute is as well.

13 **MR. WILKENS:** Yes, Your Honor. I will note that even
14 in the absence of a PO, we have begun producing documents that
15 we wouldn't mark confidential. We started producing those now,
16 of course, under the previous schedule, which was a bit more
17 rushed.

18 **THE COURT:** All right. I think that it seems like
19 that that's covering generally. I will tell you that I'll hear
20 whatever briefing you have on that as an overarching thing. As
21 I said, while I understand that there are pieces and parts here
22 that would ordinarily be very sort of personal or private and
23 subject to protection, once it's put at issue, then it becomes
24 part of the substance of the case; and so I'm not going to
25 predetermine that, but just so you know, I have some concern or

1 hesitation of protecting or limiting medical records when they
2 are part of the issues or the substantive issues of the case.

3 As far as whatever you might present in your
4 protective order, I guess the notion is narrowing it as much as
5 you can, understanding that, and then whatever you want to
6 present so that I will have a chance to review the briefing and
7 make some determination on that.

8 Does that make sense?

9 **MR. WILKENS:** Thank you. Yes, Your Honor.

10 **THE COURT:** All right. So it sounds close actually
11 to what you had suggested there, Mr. Gore.

12 **MR. GORE:** Absolutely, Your Honor.

13 **THE COURT:** As far as what the determination would
14 be, it sounds like you all can reach an agreement on the
15 protective order using sort of standard provisions and then
16 taking this issue of the medical records out and putting that
17 with the Plaintiffs to file a separate motion for protective
18 order, understanding that they are not going to turn those over
19 at all until they have some ruling on that where there are
20 documents that they otherwise are not willing to have proceed
21 under the consent order that otherwise might be in place.

22 Does that make sense? Everybody consistent on that?

23 **MR. BOWERS:** I think that sounds reasonable, Your
24 Honor, at least from my client's perspective.

25 I would just like to add, I think that the analogy

1 that Mr. Wilkens draws with the legislative privilege
2 dispute -- I really do think that there's some good-faith
3 fundamental disputes about this issue as well, and I do think
4 that what we're talking about here will help resolve those in a
5 way that's most efficient for the Court.

6 And I would like to add that this is not a damages
7 case, but they have absolutely alleged harm; and as the Court
8 notes, the Plaintiffs have put their medical issues squarely at
9 issue in the heart -- as part of the heart of the case, and so,
10 again, these are fundamental disputes that we think this is a
11 good way to resolve them.

12 **THE COURT:** Right. I will just ask you both, in both
13 of those contexts, the legislative immunity and the medical
14 records issue -- I understand sort of the overarching
15 disagreement. It is much easier for me to resolve the
16 particular disputes and I think it's more appropriate for me to
17 resolve particular disputes rather than trying to make sort of
18 overarching generalizations. So the goal would be to set up a
19 schedule that presents it to me, not in theoretical framework,
20 but in whatever steps you need to take so that it's actually
21 presented on the specific scenario, the specific documents or
22 categories of documents that might apply.

23 **MR. BOWERS:** Sure.

24 **MR. WILKENS:** Your Honor, just on that front, I would
25 note that we have made a request a couple of times of the

USA, et al. v. NC, et al. Status Conference 9/2/16

1 Defendants to let us know just by broad categories the types of
2 medical information and psychiatric information they want in
3 terms of documents but also in terms of, as the depositions are
4 looming, just categories of what kinds of areas they wanted to
5 go into in terms of questioning so that we could determine what
6 we could agree to, what we would have issues with; and we
7 weren't able to reach agreement on exchanging that kind of
8 information on categories, but I think that would be a very
9 useful way to get out what you're raising, which is where are
10 the real disputes, how can we -- are there areas that can we
11 just agree to and are there specific areas that we would want
12 the Court to rule on.

13 **THE COURT:** Well, and I understand why that would be
14 helpful. Here is the concern. If their request is for all of
15 the records, you have the records. You know what they are. It
16 becomes the role of your clients as the one claiming the
17 protection to tell us what it is that you don't want to turn
18 over of all it is that they are requesting.

19 What I would -- and I'll come back to Mr. Bowers.
20 What I would say is this. I would certainly encourage you all
21 to try and have those conversations, not to pin them down on
22 particular things, but to try to have informal conversations in
23 terms of generally what they're looking for. On the other
24 hand, if they are requesting all of the records and you have
25 all of the records, it might advance the ball and be sort of

1 more appropriate for you to say what it is that you don't want
2 to turn over. Does that make sense?

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

4 **THE COURT:** All right. Mr. Bowers, anything?

5 **MR. BOWERS:** You actually -- that was my primary
6 point. I do think the burden is on them, and, secondly, it is
7 true that we have resisted turning over our deposition
8 outlines. We don't foresee -- because that's the way it
9 appeared to us is that they are looking for deposition
10 outlines. Here, tell us the categories of questions that you
11 want to ask, and then we'll let you know if we'll allow you to
12 ask them, and we don't think that's appropriate.

13 **THE COURT:** All right. And I went through that with
14 Mr. Wilkens in terms of his request for the protective order,
15 if you are requesting the documents generally.

16 I would say in the hope that you can informally
17 resolve some of these things without understandably providing
18 your deposition outline, but with the intent to try to give
19 them some information to the extent you can as to what it is
20 that you're looking for so they know what it is that they want
21 to object to -- obviously, the request for the documents
22 initially comes from you for them to then make an objection or
23 a motion for protective order. So specific as the request can
24 be I think helps to narrow what their objection might be in
25 response.

1 **MR. BOWERS:** Certainly, Your Honor.

2 **THE COURT:** All right. Yes, ma'am.

3 **MS. STOUGHTON:** I just want to add a whole other
4 wrinkle to this, which is the United States doesn't have
5 individual clients.

6 **THE COURT:** Right.

7 **MS. STOUGHTON:** So the point at which we intersect
8 these issues is very different, and we have an interest in
9 protecting the privacy of the witnesses that have come forward
10 as part of the United States' law enforcement action against
11 these Defendants, but those witnesses have their own
12 independent interests.

13 We also don't actually possess the medical records.
14 So far there has not been any demand for the medical records of
15 those third-party witnesses, but because that, I think,
16 presents a very different challenge, I just wanted to flag that
17 issue; and I think that makes it a little bit more imperative
18 for the Defendants to describe what they are looking for
19 because we obviously are not going to be in a position to
20 assert the individual rights of those individual witnesses.
21 They are going to have to do that on their own, but that's
22 going to multiply the motions practice and the lawyers
23 involved.

24 So one thing -- and this is the first time I am
25 approaching this, so I want to acknowledge that. It might make

USA, et al. v. NC, et al. Status Conference 9/2/16

1 sense for us to put the third-party individual witnesses after
2 we have worked out a framework with the Carcano Plaintiffs,
3 negotiating that, because I think that would really help
4 eliminate the possibility that we have represented witnesses
5 coming in and filing other motions to quash.

6 **THE COURT:** Well, I think procedurally it is
7 important to work out what documents you have or what
8 responsibility you have for documents as opposed to if these
9 are truly third parties that the Defendants would need to
10 subpoena their medical records and then have those motions to
11 quash the subpoenas before the Court, if that's where it goes.

12 We can go down that road, but if these are your
13 witnesses and you want to take some level of responsibility for
14 what it is that you want to present and whether you're offering
15 them to the Court with then the ability to do discovery on
16 those witnesses, it sounds to me like there are a couple of
17 layers of issues that you will need to resolve on that.

18 **MS. STOUGHTON:** I agree. And all I'm suggesting is
19 that it may make sense -- those witnesses have choices to make,
20 too, about whether they want to put things at issue, and it may
21 make sense for those witnesses -- in the interest of those
22 witnesses, to be better informed by what the approach to those
23 issues in this case is going to be, which is going to be
24 litigated inevitably by the individual plaintiffs in the
25 Carcano matter and the Defendants.

1 So all I am suggesting is that rather than
2 multiplying the motions that are pending on this, it may make
3 sense to just postpone those and see if that frameworks works.

4 **THE COURT:** All right. I think that it's worth you
5 all including some discussion on that in your sort of Rule
6 26(f) discussions. I think that at least involves two layers.
7 The first fundamentally is what the role of those witnesses
8 would be in the United States' case and the responsibility that
9 you would have for providing the discovery for those witnesses
10 as opposed to treating them as third parties and having
11 third-party discovery from those witnesses and how you all
12 decide you are going to approach that and what the framework is
13 for that.

14 And then the second layer of that is if this is going
15 to be third-party discovery from those folks, then how you
16 structure that in the schedule that you have. I think that as
17 far as the schedule for that and the framework for that, those
18 are things that you could address in the 26(f) report, but I'm
19 not going to decide now for Defendants whether they are willing
20 to wait on that or whether they want to include that earlier.

21 **MS. STOUGHTON:** I just wanted to flag that as a
22 wrinkle.

23 **THE COURT:** I think that's helpful. Anything else
24 from the Defendants that you want to add as to that issue?

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

1 **THE COURT:** All right. So as to the protective order
2 regarding confidential information, when I sort of looked at
3 that, I had notes that it looked like there were three issues:
4 The records themselves, the scope of questions in the
5 depositions, and the sharing of records with the experts. It
6 sounds like we've backed it up to the records themselves, and
7 that will be addressed in a motion for protective order as to
8 the records themselves before we get to which expert it can be
9 shared with; and then as to the scope of the questions, that
10 would also be a motion for protective order prior to the
11 deposition.

12 Does that sound right, Mr. Wilkens?

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

14 **THE COURT:** Anything else as to the protective order
15 regarding confidential information?

16 So I'll let you all submit that. I will tell you
17 that I ordinarily have a supplemental protective order that I
18 include on the back of any consent protective order that
19 essentially just goes through the local rules for sealing
20 documents, the notion being that even if you have a consent
21 protective order, that doesn't mean documents are automatically
22 sealed, and so you still have to file them according to the
23 local rules with a motion to seal so that I can follow all the
24 steps the Fourth Circuit requires before any records are
25 sealed.

USA, et al. v. NC, et al. Status Conference 9/2/16

1 The hope is that you all can narrow down what it is
2 that confidentiality is claimed on and what documents have to
3 be filed with the Court. So if they don't have to be filed,
4 you don't file them. If they do have to be filed, that you
5 only claim confidentiality if you have to; and then if there is
6 some confidentiality request to seal, that you provide the
7 sufficient basis and the findings that I would have to make in
8 order to support that.

9 That's just some other general provisions primarily
10 related to the motion to seal. So I will intend to include
11 that on the back of your consent protective order, but it
12 doesn't change anything -- or it's not intended to change
13 anything other than primarily focusing on how documents stay
14 public once they're part of the court record or sealed only if
15 there is a motion to seal in compliance with the local rules.

16 Any questions about any of that?

17 **MS. STOUGHTON:** No, Your Honor, but it may be useful
18 to the parties to set an expected date for getting the
19 protective order to you.

20 **THE COURT:** I would hope that that is no later than
21 when you are getting your joint Rule 26(f) report to me,
22 hopefully prior to that, if you all can reach an agreement
23 before then so I can go ahead and enter it; but at the latest,
24 it would be at the same time as the joint report so that if
25 there are any issues left, we can take them at up the status

USA, et al. v. NC, et al. Status Conference 9/2/16

1 conference.

2 Anything else as to the consent protective order or
3 the issues that were set out in that part of the joint notice?

4 All right. The last piece was the status of
5 retrieval review and production of ESI. Some of these issues I
6 think will now be able to be addressed given the additional
7 time that you have. It looks like the first note I have is
8 related to UNC Defendants needing a protective order. We've
9 covered that.

10 The UNC Defendants' issues with the multiple campus
11 systems, is there anything else that you need to be heard on
12 that, Mr. Gore?

13 **MR. GORE:** I don't think we need to be heard on that
14 issue at this time, Your Honor. I believe that's subject to
15 further meet-and-confer discussions that we are going to have
16 with the Plaintiffs in this matter. We just flagged that for
17 Your Honor's awareness.

18 **THE COURT:** So I would say my intent in moving the
19 trial to May is to give you time to resolve those things with
20 the expectation that you're taking care of that now rather than
21 later. If there are issues, you all can discuss that as part
22 of the Rule 26(f) report. We can take it up again when we come
23 back on the 16th; but if there are concerns with respect to
24 your ability to gather the ESI, if it's just a matter of the
25 timing, I think we can address that. If it's a matter of

USA, et al. v. NC, et al. Status Conference 9/2/16

1 whether you are able to get all the documents, we should go
2 ahead and take that up.

3 Does that make sense?

4 **MR. GORE:** Yes, Your Honor.

5 **THE COURT:** All right. For Plaintiffs, anything else
6 that we need to address as to that issue with respect to the
7 UNC Defendants?

8 **MR. WILKENS:** No.

9 **THE COURT:** All right. It looked like Defendant
10 McCrory had some issue with respect to formats other than PDF;
11 is that correct.

12 **MR. BOWERS:** Yes, Your Honor. Briefly, the
13 Plaintiffs had objected and wanted documents produced in a more
14 efficient manner, and one of the questions that the United
15 States raised was, hey, in the Voting Rights case, we know the
16 Governor was able to produce documents in a system known as
17 Relativity. The simple -- and why can't we do it that way now.

18 Quite simply, the legislature was represented by a
19 law firm in that case that had the Relativity program, and I
20 don't have it in my law firm, Mr. Stewart doesn't have it, and
21 the Governor's Office doesn't have it. I will tell you,
22 however, we just learned this week that our cocounsel in
23 Washington, the McGlinchey Stafford Firm, does have it. So I
24 can report to you that I think this is going to get worked out.
25 We have the McGlinchey IT people and the Governor's Office IT

USA, et al. v. NC, et al. Status Conference 9/2/16

1 people talking, literally as we speak, to see if there are ways
2 to get that. Mr. Duncan shared with me just this morning, and
3 I was unaware of this and the Governor's Office was unaware of
4 this, that the legislature has a similar system known as
5 Summation, and that there may be ways for us to access that as
6 well.

7 **THE COURT:** Okay. So it sounds like there is room
8 for further development on that before you need the Court to
9 intervene?

10 **MR. BOWERS:** I think so, Your Honor, especially given
11 the extra time we have. I foresee us being able to work that
12 out.

13 **THE COURT:** Anything else for the Plaintiffs on that
14 issue then?

15 All right. It looks like the Intervenor Defendants
16 just noted that there needed to be further work on the search
17 terms in the custodian list; is that correct?

18 **MR. DUNCAN:** That's correct. I think that's
19 something that we can talk to the other side about.

20 **THE COURT:** It makes sense, now that you've got time,
21 you can further work through that.

22 And the United States had a significant volume of
23 documents, but that's part of the factor the Court took into
24 account in agreeing to extend the deadline in this case.

25 Anything else?

1 UNITED STATES DISTRICT COURT

2 MIDDLE DISTRICT OF NORTH CAROLINA

3 CERTIFICATE OF REPORTER

4

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.

9

10 Dated this 9th day of September 2016.

11

12

Briana L. Nesbit

13

Briana L. Nesbit, RPR
Official Court Reporter

14

15

16

17

18

19

20

21

22

23

24

25

USA, et al. v. NC, et al. Status Conference 9/2/16