

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                   Winston-Salem, North Carolina  
19                   July 17, 2019  
20                   4:05 p.m.  
21                   Intervenor-Defendants. )

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22                   EXPEDITED TRANSCRIPT OF THE **TELEPHONE CONFERENCE**  
23                   BEFORE THE HONORABLE THOMAS D. SCHROEDER  
24                   UNITED STATES DISTRICT JUDGE

25 APPEARANCES:

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1 APPEARANCES (Continued)

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Proceedings recorded by mechanical stenotype reporter.  
Transcript produced by computer-aided transcription.

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

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2           **THE COURT:** Okay. I think we're on the record here  
3 and have everybody. This is 16CV236, Carcano, et al. versus  
4 Governor Cooper, et al.

5           I have a list of folks who I think are going to be  
6 speaking and are present. Let me go down the list and take  
7 roll just so I have it for the record, if I can. Let me start  
8 with the Plaintiffs. If you want to introduce whoever is on  
9 the phone and indicate who intends to be taking the lead, that  
10 would be helpful.

11           **MR. NOLL:** Sure, Your Honor. So this is Andrew Noll  
12 from Jenner & Block on behalf of the Plaintiffs. I have also  
13 on the line with us James Esseks from the ACLU, Irena Como from  
14 the ACLU of North Carolina, Devi Rao from Jenner & Block, and  
15 Scott Wilkens from Wiley Rein; and depending on the topic, I  
16 will be doing primarily the speaking from the Plaintiffs' side.

17           **THE COURT:** Good afternoon and thank you.  
18           How about for the State of North Carolina and  
19 Governor Cooper's office?

20           **MS. VYSOTSKAYA:** Your Honor, this is Olga Vysotskaya  
21 for the Executive Branch Defendants, and Mr. Majmundar is with  
22 me in the room. So to the extent his participation would be  
23 required, he might speak as well.

24           **THE COURT:** All right. And Legislative Intervenors?

25           **MR. SCHAERR:** Yes, good afternoon, Your Honor. This

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1 is Gene Schaerr, and I'm joined by Bob Potter. Depending on  
2 the topic, I will be doing most of the speaking.

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

4 And the UNC Defendants, are they here as well?

5 **MS. LEJNIEKS:** Good afternoon, Your Honor. This is  
6 Kristen Lejnieks of Jones Day for the UNC Defendants, and I  
7 have with me on the line Conor Maloney, also of Jones Day, and  
8 Thomas Shanahan and Carolyn Pratt of the University.

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

10 Well, good afternoon to all of you. Thank you for  
11 taking the time to be available, and I thought maybe I could  
12 cover just a few things briefly with you on the phone rather  
13 than calling you all in yet for another hearing.

14 I have the most recent proposed consent judgment and  
15 decree, and I've spent some time reviewing it. And I had just  
16 a few questions, and I thought maybe this would be the best way  
17 to address them. I think they are mostly going to be directed  
18 to the Plaintiffs.

19 Let me say that I'm entertaining considering  
20 generally entering the consent decree to the extent it  
21 memorializes the statement I had in my prior opinion, which I  
22 regard to be a somewhat narrow statement of the law. It's  
23 indicating the scope of Section 2, that is, that it's not an  
24 independent, alternate basis for regulation.

25 And I have some questions, though, about the consent

1 decree because in some portions it seems to exceed that, and I  
2 don't know if that's intentional. If not, then I think it  
3 could probably be easily fixed.

4           Let me say, first of all, it would appear that  
5 there's agreement around the table that nothing in the consent  
6 decree is intended to prohibit the Executive Branch Defendants  
7 or their successors from the application of any act of the  
8 General Assembly as it might apply or not apply to any person  
9 who's transgender.

10           Is that your understanding of your position now in  
11 the case as to the Plaintiffs?

12           **MR. NOLL:** Your Honor, to clarify that, any act of  
13 the General Assembly other than to the extent Section 2 of H.B.  
14 142 could be interpreted inconsistent with Your Honor's opinion  
15 in the motion to dismiss, but I -- it is the case that the  
16 consent decree is not meant or intended to affect in any way  
17 the application of any other criminal law or civil law to  
18 individuals who are transgender.

19           **THE COURT:** Okay. So, for example, trespass law,  
20 that would be an act of the General Assembly that, in your  
21 view, is not intended to be covered within the scope of the  
22 consent decree?

23           **MR. NOLL:** That's right, Your Honor. The intention  
24 of the terms "otherwise lawful" in paragraph 2 of the consent  
25 decree, it intended to indicate that the consent decree only

1 reaches the application of Section 2 to bar, prohibit, block,  
2 deter, or impede individuals from using public facilities.

3           **THE COURT:** All right. So whether or not a trespass  
4 law could or would apply to any person would be subject to  
5 other litigation down the road. Is that your view?

6           **MR. NOLL:** Yes, Your Honor, again to the extent it  
7 was -- you know, to the extent Section 2 was not -- of H.B. 142  
8 was not being used as, you know, the reason to bar individuals.  
9 To the extent the trespass law otherwise applies, that would be  
10 the subject of litigation outside the scope of this litigation.

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

12           Does anybody on the phone have a different view of  
13 that?

14           All right. Hearing none, I'm going to then take it  
15 that all parties are in agreement that the limited scope of the  
16 consent decree is Section 2 of H.B. 142, and it leaves -- would  
17 leave the State and the Executive Branch Defendants and others  
18 free to litigate for another day whether or not some other act  
19 of the General Assembly, for example, trespass law, could or  
20 could not be used against any person based on their use of any  
21 facility.

22           So that I think then takes me to paragraph 10 of the  
23 proposed consent decree. It is a whereas paragraph, but it  
24 strikes me that it seeks to be broader than the terms of the  
25 decretal paragraphs. I don't know if that was intentional by

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1 the Plaintiffs or whether it was not; but in its current form,  
2 I have difficulty signing a decree with paragraph 10 written  
3 the way it is.

4           It speaks to the issue of whether any executive  
5 agency or the officer, employee, or agent can promulgate any  
6 regulation under Section 2 of H.B. 2. The issue of whether  
7 there is any other act of the General Assembly that authorizes  
8 rule-making was never addressed, to my recollection, in the  
9 litigation.

10           So I'm not sure what paragraph 10 is seeking to  
11 accomplish. I don't know how necessary it is for the draft  
12 because it's a whereas paragraph and not a portion of the  
13 decree.

14           So let me ask the Plaintiffs, Mr. Noll, what is the  
15 purpose of paragraph 10? How necessary is it in this decree?

16           **MR. NOLL:** Certainly, Your Honor. The intent of  
17 paragraph 10 is meant to refer back to Section 2, which  
18 prohibits state agencies, among other entities, including  
19 boards, offices, and departments, from regulation of access to  
20 multi-occupancy restrooms, showers, and changing facilities.

21           So in our view, the whereas clause is just meant to  
22 say that consistent with Section 2 there's currently a  
23 prohibition on these entities that are listed in paragraph 10  
24 from promulgating regulations which would prevent transgender  
25 people from using facilities in accordance with their gender

1 identity, because that would be a regulation of access.

2           **THE COURT:** The legislation -- the statute, though,  
3 has the proviso unless in accordance with an act of the General  
4 Assembly, I believe. So that's missing from paragraph 10, and  
5 I don't know what the authority of the General Assembly -- what  
6 the authority, rather, of rule-making is that's been granted by  
7 the General Assembly, and paragraph 10 seems to have written  
8 that out, which to me would not be respecting the statute. And  
9 that's my concern with it.

10           **MR. NOLL:** I see. So Your Honor's concern is with  
11 the absence of the final clause: "Except in accordance with an  
12 act of the General Assembly"?

13           **THE COURT:** Well, substantively that's my concern.  
14 When you add that, it seems to me to say no more than parrot  
15 the language of the statute; in which case, I don't understand  
16 the purpose of paragraph 10 because that's what the statute  
17 says.

18           **MR. NOLL:** Well, Your Honor, I can certainly say that  
19 the intent was not to reach farther than the statute. I can  
20 confirm that's the case.

21           To the extent it is only a whereas paragraph  
22 discussing sort of the general reasoning behind the consent  
23 decree, I don't think it's necessarily essential to the actual  
24 decretal paragraphs that follow.

25           **THE COURT:** All right. Are you saying you're willing

1 to eliminate that paragraph?

2           **MR. NOLL:** I, of course, would like to discuss it  
3 with both cocounsel and the Executive Branch Defendants, seeing  
4 this as an agreed-to consent decree, but I think -- I can  
5 confirm the intent was not to reach any farther than Section 2  
6 as written and enacted by the legislature.

7           **THE COURT:** Okay. Well, I would have concerns if it  
8 remained, significant concerns, particularly if there's an  
9 effort to have this decree applied down the road to other  
10 persons as indicated in paragraph 17 through issue preclusion  
11 and collateral estoppel. That needs to be addressed. I think  
12 your options are you can eliminate it. If you decide to parrot  
13 the statute, then, as I said, I wonder what value it is,  
14 because all it does is repeat what's in the statute, but I  
15 leave that to you all.

16           **MR. NOLL:** Okay. I think from Plaintiffs'  
17 perspective, Your Honor, we would be fine eliminating paragraph  
18 10, subject to the Executive Branch Defendants' agreement as  
19 well, of course.

20           **THE COURT:** Okay.

21           **MS. VYSOTSKAYA:** Your Honor, this is Olga Vysotskaya.  
22 I think from the Executive Branch perspective, we would also be  
23 willing to eliminate that paragraph. We would like to have  
24 just maybe a very short, serious -- or confirmation of that  
25 provision, but I think we will get there.

1           **THE COURT:** All right. Paragraph 16 is just a typo.  
2 The last line -- I think technically the title is district  
3 judge, not district court judge. So you can strike court. If  
4 it shows up anywhere else, you can do that as well.

5           Paragraph 17, there is language in this, and I guess  
6 it was in a prior version that didn't come up, that indicates  
7 an intent for some aspect of this to be binding for purposes of  
8 issue preclusion, claim preclusion in all future actions,  
9 including through nonmutual offensive collateral estoppel.

10           I was curious as to that and the legal effect of that  
11 in a whereas clause versus what's in the two paragraphs of the  
12 decree. I'm sensitive to a couple of issues. One is the  
13 concern that the Legislative Defendants have raised about  
14 constant federal oversight through a consent decree down the  
15 road, if I were to apply this to future administrations.

16           Two, I don't have any current indication that anybody  
17 would ever take a position contrary to Section 2 of H.B. 142,  
18 and to my knowledge, in this case nobody has, with the possible  
19 exception of the school administrator on the coast of North  
20 Carolina that was the subject of an affidavit earlier in this  
21 case.

22           With those concerns in mind, Mr. Noll, maybe you can  
23 address the intent of paragraph 17 and, two, what legal effect,  
24 if any, you think it has since it's in the whereas clause and  
25 not elsewhere.

1           **MR. NOLL:** Certainly, Your Honor. So I think the  
2 intent was to be -- to make clear that the consent decree runs  
3 against the Executive Branch for, you know, any person that  
4 attempts to use a restroom consistent with their gender  
5 identity.

6           Now, the question of nonmutual offensive collateral  
7 estoppel, we understand that it's typically one that's raised  
8 in whatever proceeding in which an individual attempts to use  
9 this agreement as -- in an offensive manner, and the important  
10 inquiry under the Supreme Court's case law in that respect is  
11 the intent of the party against whom the provision is trying to  
12 be enforced with respect to that provision.

13           And so we think that question, the intent of the  
14 party, in this case the Executive Branch Defendants, to agree  
15 to some limitations, would be something that would be litigated  
16 in the proceeding in which the consent decree is attempted to  
17 be used in an offensive manner, which may very well be in a  
18 state court action to the extent that, you know, Section 2 of  
19 H.B. 142 was attempted to be invoked in a trespassing action,  
20 for example.

21           **THE COURT:** So by the language of paragraph 17 and  
22 the definitions that you've given to the parties, the consent  
23 parties, as I read the document, are defined as the Plaintiffs  
24 and the current Executive Branch Defendants; is that right?

25           **MR. NOLL:** The Executive Branch Defendants includes

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1 all of their successors as well.

2           **THE COURT:** Well, I don't read the decree to say  
3 that. I'm looking at paragraph 8, and it defines Plaintiffs  
4 and Executive Branch Defendants as the consent parties, and in  
5 paragraph 1 of the decree, it specifically adds successors in  
6 addition to the consent parties. That suggests to me that the  
7 consent parties are the current administration, Executive  
8 Branch Defendants, and the Plaintiffs.

9           So I guess what I'm saying is I'm not clear on what  
10 the legal binding effect, if any, is of a whereas clause, but  
11 under the current agreement, it appears to be between the  
12 current Executive Branch Defendants and the Plaintiffs.

13           Does any other party want to address that? Let me go  
14 down the list here. Let me start with the State.

15           **MS. VYSOTSKAYA:** Yes, Your Honor, this is  
16 Olga Vysotskaya. We would tend to agree with the Court's  
17 interpretation that whereas clause is not binding and that the  
18 intent of the parties would be left subject to interpretation  
19 by the court in which this clause is going to be asserted by  
20 certain individuals. So we agree with your thinking there on  
21 that issue, and we agree with what Mr. Noll has said, that the  
22 intent would be interpreted in other proceedings if that clause  
23 is ever invoked as a court of action in some type of  
24 proceedings.

25           **THE COURT:** What about the UNC Defendants,

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1 Ms. Lejnieks?

2 **MS. LEJNIEKS:** We have taken no position on this  
3 consent decree, Your Honor.

4 **THE COURT:** All right. Mr. Schaerr, do you want to  
5 be heard at all as to that?

6 **MR. SCHAERR:** Yes, Your Honor. There seems to be a  
7 disconnect between what the Executive Branch Defendants just  
8 said and what the Plaintiffs just said. I gathered the  
9 Plaintiff said they view this as extending to the successors of  
10 the current executive branch, which, of course, would be a  
11 problem from the standpoint of the Legislative Intervenors.

12 The Executive Branch, though, seems to be taking the  
13 position that we should leave that issue up for interpretation  
14 by any courts that interpret this decree in the future, but we  
15 don't think that makes sense either. It ought to be clear one  
16 way or another, and, you know, we think it should be -- if the  
17 Court is going to enter a decree, we think it ought to be  
18 limited to the current Executive Branch Defendants and not  
19 their successors.

20 **THE COURT:** All right. Well, as I read it currently,  
21 given the definitions that are made, the consent parties are  
22 the current parties to the litigation, not necessarily their  
23 successors, and I would read paragraph 17 to seek to reflect an  
24 agreement between those parties for purposes of issue  
25 preclusion, et cetera, but not to anybody beyond those parties.

1           It's also not clear to me, Mr. Noll, in paragraph 17  
2 whether -- when you say to be binding, whether that means the  
3 consent decree or whether that means the construction of H.B.  
4 142 contained in the consent decree, which is the language of  
5 the first three lines of paragraph 17.

6           **MR. NOLL:** Your Honor, I think it's meant to be the  
7 terms of the consent decree, so which would include the  
8 construction that is -- so it's intended for the consent decree  
9 to clarify, and then it provides the clarification "and to be  
10 binding." So "and to be binding," in our view, is meant to  
11 modify the consent decree.

12           **THE COURT:** All right. The next question I had then  
13 was in the decree portion, paragraph 1, given what we've talked  
14 about as to how Section 2 of H.B. 142 has the proviso that any  
15 other act of the General Assembly is not within the realm of  
16 Section 2, if you will, I was curious as to what the meaning of  
17 the last sentence of Section -- or paragraph 1 is. It doesn't  
18 talk about other acts of the General Assembly. It talks about  
19 future legislation.

20           Is there any intent in paragraph 1 to expand the  
21 scope of the agreement about the scope of Section 2 to all acts  
22 other than future legislation? That is --

23           **MR. NOLL:** No, Your Honor. In fact, I think the  
24 opposite. The final sentence was meant to provide that both  
25 Plaintiffs and the Executive Branch are not precluded from

1 either challenging, potentially in the case of Plaintiffs, or  
2 acting in accordance with, in the instance of the Executive  
3 Branch Defendants, any future legislation that amends, changes,  
4 or otherwise alters either H.B. 142 or the issues otherwise at  
5 issue in this case. I think it was meant to be clear that the  
6 section refers only to and only discusses the construal of  
7 Section 2 of H.B. 142 as it currently exists.

8           **THE COURT:** Do you have, Mr. Noll, any other issues  
9 you want to raise in light of our discussion today? I am just  
10 going to go down the list with the lawyers and make sure  
11 everybody has had an opportunity to comment.

12           **MR. NOLL:** I think that's all from the Plaintiffs at  
13 this time, Your Honor.

14           **THE COURT:** All right. And how about from the State?

15           **MS. VYSOTSKAYA:** No, Your Honor, we don't have any  
16 other issues to discuss.

17           **THE COURT:** All right. Ms. Lejnieks, does UNC wish  
18 to be heard on any issue?

19           **MS. LEJNIEKS:** No, Your Honor, thank you.

20           **THE COURT:** And, Mr. Schaerr, any comment on any of  
21 the discussion today you want to be heard on?

22           **MR. SCHAERR:** No, Your Honor, nothing beyond the  
23 points that we've already made on all of this.

24           **THE COURT:** All right. So my understanding is that  
25 the Plaintiff is -- you want to check with your folks to

1 determine whether you're in agreement -- or, rather, they are  
2 in agreement with what I understood would be your inclination,  
3 and that is to strike paragraph 10. Is that right, Mr. Noll?

4 **MR. NOLL:** Your Honor, I think the Plaintiffs can  
5 represent that we would be willing to strike paragraph 10 upon  
6 agreement, of course, with the Executive Branch, which I  
7 understood Ms. Vysotskaya agreed to.

8 **MS. VYSOTSKAYA:** Yes, Your Honor, we would be willing  
9 to strike that paragraph as well.

10 **THE COURT:** Okay. All right. Give me just a moment.  
11 I think if you would -- if the Plaintiffs would strike  
12 paragraph 10 and -- give me just a moment here.

13 I think if you would strike 10 and then make the one  
14 typo correction in paragraph -- what is now paragraph 16,  
15 strike the word "court" and then resubmit it, then I will  
16 consider that draft in light of our discussion today and  
17 keeping in mind everybody's prior comments and objections as  
18 well.

19 Does anybody have any questions -- well, let me say  
20 before I leave that. Today is Wednesday. I'm presuming you  
21 could probably get that figured out by at the latest the end of  
22 the week and submit a revised version before the end of the day  
23 Friday. Is that a possibility, Mr. Noll?

24 **MR. NOLL:** From the Plaintiffs' perspective, yes,  
25 that's a possibility, Your Honor.

1           **THE COURT:** And, Ms. Vysotskaya, is that yours as  
2 well?

3           **MS. VYSOTSKAYA:** That's right, Your Honor.

4           **THE COURT:** Okay. All right. So the sooner you  
5 submit it, the sooner I will consider it, but if you would  
6 resubmit it. Since it's eliminating information and not  
7 adding, then I think no party has any burden to file anything  
8 further, but the parties are free to do that, if they wish.

9           Mr. Schaerr, do you have any interest in filing  
10 anything further?

11           **MR. SCHAERR:** Well, I think the main issue that seems  
12 to still be hanging is whether this decree would bind the  
13 successors of the current executive branch officials, and I  
14 just -- I wonder whether the Court wants to leave that hanging  
15 or perhaps ask for a clarifying statement that it does not bind  
16 the successors of the current executive branch officials.

17           **THE COURT:** Hold on just a minute. Well, I know  
18 we've addressed this before, so I don't want to address it at  
19 length.

20           Mr. Noll, what is the benefit of the decree from your  
21 point of view?

22           **MR. NOLL:** Your Honor, I think the benefit is a  
23 couple of things. Most importantly, in our view, it would put  
24 in place a judicially enforceable order codifying the  
25 interpretation of the law that Your Honor gave in the motion --

1 order involving the motion to dismiss. In our view, that's  
2 important because although we'll get less relief than  
3 Plaintiffs could otherwise get from trial or after appeal on  
4 Section 2, it at least provides some -- you know, an order that  
5 can be enforced regarding the -- Your Honor's statement of the  
6 law. And in our view, that would remedy, although not to its  
7 full extent, the equal protection violation that we believe we  
8 have plausibly alleged about the barrier of individuals to seek  
9 accommodations under the preemption provision of Section 2. So  
10 it provides a level of both the ability to enforce an  
11 interpretation and in a colloquial sense an understanding and  
12 clarity of what the law itself means.

13 **THE COURT:** Okay. Was there ever -- I mean,  
14 honestly, was there ever any reasonable debate about what  
15 Section 2 meant? I mean, I thought my statement about it was  
16 simply a statement of the express terms of the law, that is,  
17 that a law that prohibits things cannot be the grant of an  
18 affirmative, independent basis for regulation.

19 **MR. NOLL:** So I think given Your Honor's  
20 construction, if that is the construction of the law, there is  
21 no debate. However, we have concerns both based on the  
22 contemporaneous statements about the law as well as, frankly,  
23 Your Honor, the briefing that Intervenors have submitted since  
24 we've proposed the consent decree. In their most recent  
25 submission, they argue that the consent decree would limit how

1 state officers can apply trespass and other laws, including how  
2 the attorney general cooperates with local law enforcement.

3 In our view that at least suggests some implicit  
4 concern or a contention that H.B. 142 itself can be used --  
5 could possibly be used in an effort to bar individuals from  
6 using the restrooms consistent with their gender identity, and  
7 so that seems to be consistent with the argument that some have  
8 made at the motion to dismiss stage that H.B. 142 simply  
9 returns the state to the status quo before H.B. 2. And we  
10 think if that is what the law says, as Your Honor interpreted  
11 in the motion to dismiss, then we're comfortable with entering  
12 a consent decree that codifies and confirms that  
13 interpretation.

14 But I do think there is some potential debate, albeit  
15 Your Honor may not believe it reasonable given your  
16 construction, that from Plaintiffs' perspective, we were  
17 unwilling to sort of end this litigation without some certainty  
18 about what the law means and the ability to enforce that  
19 interpretation, if necessary.

20 **THE COURT:** All right. Mr. Schaerr, do you want to  
21 be heard any further?

22 **MR. SCHAERR:** No, Your Honor.

23 **THE COURT:** Let me ask: What's the practical burden  
24 on future administrations given the interpretation of Section 2  
25 and the plain language of Section 2 in a practical real sense?

1           **MR. SCHAERR:** If the Court were to enter the proposed  
2 consent decree?

3           **THE COURT:** Yes.

4           **MR. SCHAERR:** Well, I think one -- certainly one  
5 concern that we have is just a general concern about any  
6 federal court order that's going to subject the organs of the  
7 North Carolina state government to any kind of ongoing federal  
8 court supervision. And, you know, if there's a -- if there's a  
9 disagreement about how to interpret H.B. 142, that -- you know,  
10 that ought to be worked out in the ordinary way without anybody  
11 running to federal district court to accuse the other side of  
12 violating a court order.

13           **THE COURT:** All right. Okay. Does anybody have  
14 any -- go ahead.

15           **MR. SCHAERR:** It seems to me that's the flip side of  
16 Your Honor's point about the clarity of H.B. 142. If it's  
17 clear, then why is there a need for a consent decree at all?  
18 If it's unclear and it's going to be -- and the Court's order  
19 is going to be binding on the successors of the current  
20 Executive Branch Defendants, then that's exactly the problem  
21 that the Legislative Intervenors are concerned about just  
22 institutionally.

23           **THE COURT:** I understand the institutional and  
24 federalism concern. As a practical matter, the interpretation  
25 that I put in my opinion, which is memorialized in the consent

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1 judgment and decree, I understood to be one that everybody  
2 involved in this lawsuit, including the Legislative  
3 Intervenors, accept as a plain reading and proper reading of  
4 the statute.

5 Am I right about that, Mr. Schaerr?

6 **MR. SCHAERR:** I think that's true, Your Honor.

7 **THE COURT:** So in light of that, I guess the question  
8 is, on the one hand, from a federalism point of view -- I  
9 appreciate the argument that federal courts should not be in  
10 the business of directing states not to do things unless  
11 there's some indication that there's a need for that.

12 On the other hand, everybody has agreed here to what  
13 it is they're agreeing not to do. So I'm having a -- well, let  
14 me put it this way. I think there's an argument on the  
15 Plaintiffs' side that there's no real burden here because  
16 everybody seems to be in agreement that the statute is pretty  
17 clear on its face.

18 **MR. SCHAERR:** Well, again, institutionally, Your  
19 Honor, the concern that we would have is that if there is a  
20 dispute down the road about the proper application of H.B. 142,  
21 the existence of the consent decree would provide an immediate  
22 avenue for federal court jurisdiction over the dispute which  
23 might not otherwise exist. The dispute might come up in a  
24 context where but for the Court's decree, the dispute needed to  
25 be resolved in state court.

1           **THE COURT:** In light of the plain reading, though, of  
2 Section 2, would it not be highly unlikely that there would  
3 ever be a dispute, because any -- if there is an effort down  
4 the road, and I don't know what it would be -- but if there is  
5 an issue involving the application of trespass or some other  
6 law, the decree and the statute itself specifically exempt that  
7 from Section 2 of the H.B. 142. So there would be no federal  
8 issue, at least --

9           **MR. SCHAERR:** I'm not saying I think there is likely  
10 to be that kind of dispute. I think our concerns are more  
11 institutional than they are, you know, concerns about what's  
12 likely to happen on this particular issue.

13           **THE COURT:** All right. I understand.

14           Mr. Noll, are your clients willing to enter into a  
15 decree with the current administration and having it be a  
16 consent judgment and decree that binds this administration?

17           **MR. NOLL:** No, Your Honor, I think we're not willing  
18 to enter a decree that doesn't bind the Executive Branch  
19 Defendants and their successors. I think in our view the  
20 Executive Branch Defendants are in charge with enforcing what  
21 we -- what we think, consistent with Your Honor's holding, is  
22 the law by its plain language, and that law says what it says.  
23 The legislature remains free under this consent decree to pass  
24 a new or different law that a future executive can act in  
25 accordance with, but in our view we're not willing to limit the

1 terms of the decree to just the current occupants of the office  
2 but with the *Ex Parte Young* Defendants, which is the executive  
3 branch more generally, against whom we've brought our claims.

4           **THE COURT:** Well, maybe I wasn't clear. All current  
5 Executive Branch Defendants. The argument that the Intervenors  
6 make is essentially in a case where there's been no real  
7 dispute over the law, and this administration and its  
8 defendant -- the Executive Branch Defendants are willing to  
9 enter into a decree along the lines of what's been offered  
10 here, that that decree could be entered as between them; but  
11 that to continue it beyond them, given the clear language of  
12 the statute, there's really no basis to subject further  
13 administrations down the road from any potential oversight.  
14 There will always be the interpretation of the decree that can  
15 be cited in any court of law.

16           So my question maybe was narrower than I meant it to  
17 be, and that was: Are Plaintiffs willing to sign a decree for  
18 the current Executive Branch Defendants that addresses these  
19 issues as between the current Executive Branch Defendants and  
20 the Plaintiffs?

21           **MR. NOLL:** We're not, Your Honor, again for the  
22 reasons I just articulated. I think, you know, to the extent  
23 there's a concern about future executive branch occupants, you  
24 know, I encourage this Court to look at the decision in *Frew Ex*  
25 *Rel. Frew v. Hawkins*, which talks about modification of a

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1 consent decree to the extent that there is any need to do so as  
2 a sort of reason to -- or ability for courts to reconsider the  
3 scope and extent of consent decrees.

4           Now, I think we would be hard-pressed to say that the  
5 plain language of a statute -- that there would be any changed  
6 circumstances that would lead to a valid reason to modify the  
7 consent decree, but we're not willing, given the scope of our  
8 complaint and the allegation we made in our complaint, to only  
9 enter a decree that would extend just through the termination  
10 of the current occupants' term in office.

11           **THE COURT:** All right. The court reporter did not  
12 get the citation to the case you indicated.

13           **MR. NOLL:** Sorry, Your Honor. I can reread that.  
14 It's *Frew Ex Rel. Frew v. Hawkins*, and the citation is 540 U.S.  
15 437, and I encourage the Court to look at pages 441 to 42.

16           **THE COURT:** Okay. Does anybody have anything else  
17 they want to be heard on today?

18           **MR. NOLL:** Your Honor, just from Plaintiffs'  
19 perspective, in line with your statement about the need or not  
20 need to file anything in addition to the revised consent  
21 decree, Plaintiffs would just like to reserve the right to file  
22 anything, if necessary, concerning the collateral estoppel  
23 effect that we discussed. I don't necessarily anticipate we  
24 will, but we would like to reserve that right.

25           **THE COURT:** Okay. I remain concerned about the

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1 language only because I would imagine there's already case law  
2 that addresses what collateral estoppel effect there could be.  
3 I am currently reading the current draft, as I said, to define  
4 the consent parties as the current occupants and Plaintiffs,  
5 and that the language about issue preclusion is an agreement  
6 about an intention -- it's part of the whereas provisions --  
7 about the intention of the current parties to this document.

8           As it's currently worded, I would not regard that to  
9 be binding on successors because it's in a whereas clause and  
10 not in a decree, and, certainly, if it were to -- if there were  
11 an attempt to bind any of this legally, then that would be more  
12 problematic. I remain concerned because, frankly, I have not  
13 seen, in my experience, a consent decree with that kind of  
14 language, but I would assume there's case law that already  
15 applies to that situation. I simply have not investigated it  
16 fully.

17           If you wish to file something at all with respect to  
18 the consent decree, if you would file that by Friday as well.  
19 If you do file something, then I'll allow all the other  
20 parties -- I'm going to say seven days. I'm hoping that's  
21 enough to respond, and I'll say right now if for some reason  
22 you think you need more time than that to respond, simply  
23 request it, and I'll be inclined to entertain it.

24           I would like to wrap this up. I wish I had wrapped  
25 it up before now, but I'm not going to let the urgency to get

1 something resolved interfere with getting it done right.

2 Any questions?

3 All right. Thank you all very much. I appreciate  
4 you making the time for today. We'll stand adjourned.

5 (END OF PROCEEDINGS AT 4:51 P.M.)

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1 UNITED STATES DISTRICT COURT

2 MIDDLE DISTRICT OF NORTH CAROLINA

3 CERTIFICATE OF REPORTER

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

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10 Dated this 26th day of July 2019.

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Briana L. Bell, RPR  
Official Court Reporter

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