No. 16-1989

In the United States Court of Appeals for the Fourth Circuit

JOAQUÌN CARCAÑO, *et al.*

Plaintiffs – Appellants,

v.

PATRICK L. MCCRORY, in his official capacity as Governor of North Carolina,

Defendant – Appellee,

and

SENATOR PHIL BERGER, in his official capacity as President pro tempore of the North Carolina Senate; **REPRESENTATIVE TIM MOORE**, in his official capacity as Speaker of the North Carolina House of Representatives,

Intervenors/Defendants – Appellees.

On Interlocutory Appeal from the United States District Court
For the Middle District of North Carolina at Winston-Salem
No. 1:16-cv-00236-TDS-JEP

APPELLEES' RESPONSE IN OPPOSITION TO MOTION FOR EXPEDITED ORAL ARGUMENT

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Appellees Patrick McCrory, Phil Berger, and Tim Moore oppose Appellants' motion for expedited oral argument.[1]

As explained in Appellees' pending motion to dismiss, App. A, the Court lacks jurisdiction over this piecemeal interlocutory appeal because Appellants have claims still pending below—which are now being briefed—from which they could receive precisely the same preliminary injunctive relief that they seek in this appeal. Moreover, Appellants' claims of continuing harm from the challenged law distort the district court's order, which *granted* the individual Appellants substantial injunctive relief. Finally, Appellants' appeal depends heavily on this Court's *G.G.* decision—which has been stayed by the Supreme Court while it considers whether to grant certiorari. Appellants' motion for expedited oral argument should therefore be denied, and instead this appeal should either be dismissed for lack of jurisdiction or held in abeyance pending the district court's ruling on Appellants' still-pending due process claims.

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[1] This Court ordered Appellees to file a response to the motion to expedite "on or before 10/21/2016." ECF No. 49 (Oct. 19, 2016). Before Appellees could file on October 21, however, the appeal was "tentatively calendared" during the 1/24/17-1/27/17 argument session. ECF No. 52 (Oct. 21, 2016). For the reasons expressed in this opposition, however, the case should not be calendared for oral argument, whether on an expedited basis or not, but instead either dismissed for lack of jurisdiction or held in abeyance. App. A.

BACKGROUND

This interlocutory appeal arises from Appellants' challenge to North Carolina's Public Facilities Privacy and Security Act, N.C. Sess. Laws 3 (the "Act" or "HB2"), enacted on March 23, 2016. JA 911, 923. Part I of the Act requires public schools and agencies to designate multiple-occupancy restrooms, changing facilities, and showers according to "biological sex," while allowing single-occupancy facilities as an accommodation. JA 911-12, 926-27.[2] Parts II and III preempted a Charlotte City Council ordinance that would have required access to restrooms, showers, dormitories, and similar facilities based on "gender identity" and "gender expression," and would have applied to public and private entities, as well as anyone contracting with the City. JA 921-23.

On March 28, 2016, Appellants sued in the Middle District of North Carolina, challenging the Act under Title IX and the Equal Protection and Due Process Clauses. JA 929. On May 16, they moved for a preliminary injunction as to part I only. JA 931-32. On August 26, the district court granted Appellants' request in part and denied it in part. Specifically, the court (1) granted a preliminary injunction under

[2] HB2 defines "biological sex" as "[t]he physical condition of being male or female, which is stated on a person's birth certificate." HB2, §§ 1.2(A)(1); 1.3(A)(1).

Title IX as to the individual plaintiffs against the University of North Carolina (UNC), JA 955-56 & n.29, 992-92, but (2) denied a broader preliminary injunction on the equal protection claim, JA 970, 992. As to the due process claims, the district court "reserve[d] ruling … at this time" in order "to give the parties an opportunity to submit additional briefing." JA 978, 980. Appellants filed a notice of appeal from the district court's August 26 order on August 29. Since then, Appellants have agreed to an extension of the briefing schedule on their due process claims, under which they submitted their supplemental brief on September 30. Appellees' supplemental brief is due on October 28, and Appellants' reply brief is due on November 11. App. A at 3-4.

On October 18, Appellees filed a motion to dismiss this appeal for lack of jurisdiction. Later that same day, Appellants filed their opening brief as well as the present motion to expedite oral argument.

ARGUMENT

Appellants' motion for expedited oral argument should be denied.

First, this Court lacks jurisdiction over the appeal. As explained in Appellees' motion to dismiss, App. A at 4-7, this is a classic example of a "piecemeal appeal[ ]" contrary to the "established policy" of federal law.

Cassidy v. Va. Carolina Volunteer Corp., 652 F.2d 380, 383 (4th Cir. 1981) (citing *Switzerland Chees Ass'n, Inc. v. E. Horne's Mkt., Inc.*, 385 U.S. 23, 25 (1966)). While the district court denied preliminary injunctive relief as to *one* of Appellants' claims, they still have "claims demanding the same relief" that "remain[ ] pending" below. 16 Wright, Miller, Cooper, et al., Fed Prac. & Proc. § 3924.1, at n.37 (3rd ed.) (citing *Albert v. Trans Union Corp.*, 346 F.3d 734 (7th Cir. 2003)). Appellate courts lack jurisdiction to review denials of preliminary injunctive relief under 28 U.S.C. § 1292(a)(1) where an appellant "still h[as] injunctive relief available in the district court," as Appellants do with respect to their pending due process claims. *Cherry v. Berge*, 98 Fed. App'x 513, 516 (7th Cir. 2004); *see also Onyango v. Downtown Entmt., LLC*, 525 Fed. App'x 458, 460 (7th Cir. 2013) ("Only if … the plaintiff will have no further chance of obtaining the desired injunction from the district court, does this court have jurisdiction over an interlocutory appeal.").

Second, Appellants base their motion to expedite entirely on claims that they "have been experiencing irreparable harm each day" from HB2 and that expedited argument "will help minimize the amount

of irreparable harm" suffered. Mot. at 3. These claims distort the district court's preliminary injunction order. For example, Appellants quote the district court's statement that "the individual transgender Plaintiffs … will suffer irreparable harm in the absence of preliminary relief." Mot. at 1 (quoting JA 980-81). But the "individual transgender Plaintiffs" referred to have *already* been granted substantial preliminary injunctive relief under Title IX with respect to UNC, where they work or go to school. JA 981. Moreover, at the time of the preliminary injunction hearing, Appellants' complaint did not even allege a Title IX claim on behalf of any additional transgender plaintiffs, beyond the individual plaintiffs who have now received injunctive relief.[3] As Appellants concede, they have not appealed the scope of the district court's Title IX injunction. Mot. at 2 n.1.

Third, Appellants' motion is based on a distortion of Appellees' position on HB2. Appellants misquote the district court as saying that "*[Defendants]* allowed the individual transgender Plaintiffs to use bathrooms and other facilities consistent with their gender identity for

[3] *See* JA 956 n.29 (rejecting request for broader Title IX relief because "there is no class-wide claim presently pending, and ACLU-NC did not allege a Title IX claim"); JA 912 n.2 (noting that "[a]fter the preliminary injunction hearing, ACLU-NC moved to file a second amended complaint to allege a Title IX representational claim").

an extended period of time[.]" Mot. at 1 (quoting JA 986) (emphasized brackets added by Appellants). The quoted sentence does not refer to "Defendants," but to certain "practices," JA 986, and what the district court was *actually* referencing was a "practice of case-by-case accommodation" at UNC, who is not a party in this appeal. JA 985. Appellants use similar quote-splicing to suggest that the district court found that no "Defendants" had "privacy or safety concerns" with allowing general use of intimate facilities according to gender identity. Mot. at 1-2 (suggesting "Defendants … do not contend" such a practice "caused any privacy or safety concerns"). Again, however in the quoted paragraph the district court was discussing only "UNC's pre-HB2 policy," JA 990, and was not suggesting that "Defendants" had no privacy or safety concerns. To the contrary, the district court recognized that "[t]he privacy and safety concerns raised by Defendants are significant … particularly so as they pertain to the protection of minors." JA 985.

Finally, Appellants' opening brief relies heavily on this Court's decision in *Gloucester County School Board v. G.G.*, 822 F.3d 709 (4th Cir. 2016), *petition for cert. filed*, 85 U.S.L.W. 3086 (U.S. Aug. 29, 2016)

(No. 16-273). *See, e.g.,* Appellants' Br. at 21 (arguing "[t]his Court's decision in *G.G.* illustrates" how HB2 allegedly "inflicts a targeted harm solely on transgender individuals"); *id.* at 28 (relying on "*G.G.*'s holding" to argue for heightened equal protection scrutiny). But the Supreme Court has stayed the *G.G.* mandate—as well as the subsequent preliminary injunction—pending consideration of the School Board's certiorari petition. *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 136 S. Ct. 2442 (2016). The Supreme Court takes such actions when a decision presents "issues which would likely induce [the] Court to grant certiorari," *Russo v. Byrne*, 409 U.S. 1219, 1221 (1972) (Douglas, J.), and at a minimum that rare step suggests "the fate of *G.G.* is uncertain." JA 945. In light of that uncertainty, Appellants' attempt to spur this Court to speed ahead with a piecemeal interlocutory appeal based heavily on *G.G.* makes little sense.

CONCLUSION

Appellees respectfully ask the Court to deny the motion to expedite oral argument. The proper course is not to expedite argument or to calendar argument at all, but to dismiss the appeal for lack of

jurisdiction—or at a minimum to hold it in abeyance pending the district court's ruling on Appellants' pending due process claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2016, I filed the foregoing document through the Court's CM/ECF system, which will serve an electronic copy on all registered counsel of record.

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