

No. 16-1989

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

JOAQUÍN CARCAÑO, et al.,

Plaintiffs-Appellants,

v.

PATRICK McCRORY, in his official capacity as
Governor of North Carolina,

Defendants-Appellees,

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,

Intervenors/Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of North Carolina
No. 1:16-cv-00236-TDS-JEP

**PLAINTIFFS-APPELLANTS' MOTION
FOR EXPEDITED ORAL ARGUMENT**

Plaintiff-Appellants Joaquín Carcaño, Payton Grey McGarry, H.S., and American Civil Liberties Union of North Carolina (collectively, “Plaintiffs”) respectfully request that this interlocutory appeal from a denial of a preliminary injunction be scheduled for oral argument during this Court’s oral argument session on January 24-27, 2017.

Plaintiffs are transgender North Carolinians (and an organization representing transgender North Carolinians) who allege that they are experiencing ongoing irreparable harm as a result of Defendant McCrory’s policy, enacted in 2016, requiring that restrooms and other multiple-user, single-sex facilities be used only by individuals whose “biological sex,” as determined by the sex listed on the individual’s birth certificate, matches the sex designated for the facility. JA299, *see* JA125-130, JA 156-167, JA246-253. As the district court acknowledged, “the preliminary record contains uncontested evidence that [Defendants] allowed the individual transgender Plaintiffs to use bathrooms and other facilities consistent with their gender identity for an extended period of time without causing any known infringement on the privacy rights of others,” JA 986, “the individual transgender Plaintiffs have clearly shown that they will suffer irreparable harm in the absence of preliminary relief,” JA980-981, and a failure to enjoin the law would “cause substantial hardship to the individual transgender Plaintiffs, disrupting their lives,” JA984. By contrast, “Defendants do not claim to have had

any problems with the pre-2016 regime,” *id.* “do not contend that it caused any significant privacy or safety concerns,” JA 990, and there is “no reason” on the current record to believe that a return to the pre-2016 state of affairs would prejudice Defendants or the interests that they assert, JA 988. The district court nevertheless denied Plaintiffs’ preliminary injunction as to their equal protection claim on the basis that Plaintiffs did not have a likelihood of success, thus leaving in place Defendant’s discriminatory policy as to all state facilities not in the control of the University of North Carolina.¹

Plaintiffs originally filed the Motion for Preliminary Injunction on May 16, 2016, with the goal of obtaining a preliminary injunction as soon as possible. JA101. On August 26, 2016, the district court denied in part Plaintiffs’ Motion for Preliminary Injunction. JA911. Plaintiffs filed a Notice of Appeal the next business day, August 29, 2016. JA993.

Pursuant to this Court’s scheduling order, Plaintiffs are filing their opening brief with this Court contemporaneously herewith, and Defendant-Appellee’s brief is due on November 21, 2016. Plaintiffs’ reply brief is due within fourteen days of service, or approximately December 8, 2016.² The case will therefore be fully

¹ Neither party appeals the district court’s holding as the University of North Carolina on Title IX grounds.

² This schedule assumes that the amendment to Rule 26(c) of the Federal Rules of Appellate Procedure, scheduled to go into effect on December 1, 2016, is not

briefed more than six weeks before the January 24-27, 2017, argument session begins.

As the district court recognized, Plaintiffs have demonstrated that they—and thousands of transgender North Carolinians like them—have been experiencing irreparable harm each day that they are subject to Defendant McCrory's stigmatizing policy. Scheduling oral argument for the January 24-27, 2017 argument session will help minimize the amount of irreparable harm Plaintiffs and others like them will have experienced in the event that this Court concludes that the district court erred as to the likelihood of success on Plaintiffs' equal protection claim and the resulting scope of the preliminary injunction that should have been granted. Defendant can demonstrate no prejudice from the earlier argument date, particularly in light of the fact that the original briefing schedule remains intact.

Pursuant to Fourth Circuit Rule 27(a), Plaintiffs state that they have informed counsel for Defendants and Defendants-Intervenors of the filing of the instant motion, and that counsel has stated that they oppose this motion and intend to file an opposition.

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deemed to retroactively apply to the deadline for the reply brief in this case. If it is deemed to retroactively apply, Plaintiffs' reply will be due December 5, 2016.

Dated: October 18, 2016

/s/ Jon W. Davidson

Jon W. Davidson
Peter C. Renn
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
4221 Wilshire Blvd., Ste. 280
Los Angeles, CA 90010
Phone: (213) 382-7600
j davidson@lambdalegal.org
p renn@lambdalegal.org

Tara L. Borelli
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
730 Peachtree Street NE, Suite 640
Atlanta, GA 30308-1210
Phone: (404) 897-1880
tborelli@lambdalegal.org

Kyle A. Palazzolo
LAMBDA LEGAL DEFENSE AND
EDUCATION FUND, INC.
105 W. Adams, 26th Floor
Chicago, IL 60603-6208
Phone: (312) 663-4413
kpalazzolo@lambdalegal.org

Paul M. Smith
Scott B. Wilkens
Nicholas W. Tarasen
JENNER & BLOCK LLP
1099 New York Ave. NW, Suite 900
Washington, DC 20001-4412
Phone: (202) 639-6000
psmith@jenner.com
swilkens@jenner.com
ntarasen@jenner.com

James D. Esseks
Leslie Cooper
Chase B. Strangio
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
Phone: (212) 549-2500
jesseks@aclu.org
lcooper@aclu.org
cstrangio@aclu.org

Elizabeth O. Gill
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
39 Drumm Street
San Francisco, CA 94111
Phone: (415) 343-0770
egill@aclunc.org

Christopher A. Brook
AMERICAN CIVIL LIBERTIES UNION OF
NORTH CAROLINA LEGAL
FOUNDATION
Post Office Box 28004
Raleigh, NC 27611
Phone: (919) 834-3466
cbrook@acluofnc.org

Counsel for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2016, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

/s/ Jon W. Davidson
Jon W. Davidson