APPENDIX A

No. 16-1989

In the United States Court of Appeals for the Fourth Circuit

JOAQUÌN CARCAÑO; PAYTON GREY MCGARRY; H.S., by her next friend and mother, Kathryn Schaefer; AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA,

Plaintiffs – Appellants,

and

ANGELA GILMORE,

Plaintiff,

v.

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

Defendant – Appellee,

REPRESENTATIVE TIM MOORE; SENATOR PHILIP E. BERGER,

Intervenors/Defendants – Appellees,

and

UNIVERSITY OF NORTH CAROLINA,

Defendant

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' MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION

Counsel listed on following page

Robert C. Stephens
General Counsel
OFFICE OF THE GOVERNOR OF NORTH CAROLINA
20301 Mail Service Center
Raleigh, NC 27699
(919) 814-2027
bob.stephens@nc.gov

Karl S. Bowers, Jr.
BOWERS LAW OFFICE LLC
P.O. Box 50549
Columbia, SC 29250
(803) 260-4124
butch@butchbowers.com

William W. Stewart, Jr.
Frank J. Gordon
B. Tyler Brooks
MILLBERG GORDON STEWART PLLC
1101 Haynes Street, Suite 104
Raleigh, NC 27604
(919) 836-0090
bstewart@mgsattorneys.com
fgordon@mgsattorneys.com
tbrooks@mgsattorneys.com

Robert N. Driscoll
McGLINCHEY STAFFORD
1275 Pennsylvania Avenue NW
Suite 420
Washington, DC 20004
(202) 802-9950
rdriscoll@mcglinchey.com

Counsel for Appellee Governor Patrick L. McCrory

S. Kyle Duncan
Gene C. Schaerr
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 714-9492
kduncan@schaerr-duncan.com

Robert D. Potter, Jr.
2820 Selwyn Avenue, #840
Charlotte, NC 28209
(704) 552-7742
rdpotter@rdpotterlaw.com

Counsel for Appellees Senator Philip Berger and Representative Tim Moore

Pursuant to Federal Rule of Appellate Procedure 27 and Fourth Circuit Rule 27(f), Appellees Patrick McCrory, Tim Moore, and Philip Berger move to dismiss this interlocutory appeal for lack of jurisdiction or, alternatively, to hold it in abeyance pending the district court's ruling on Appellants' due process claims.

This case is a classic example of a "piecemeal appeal[ ]" that is contrary to the "established policy" of federal law. *Cassidy v. Va. Carolina Volunteer Corp.*, 652 F.2d 380, 383 (4th Cir. 1981) (citing *Switzerland Cheese Ass'n, Inc. v. E. Horne's Mkt., Inc.*, 385 U.S. 23, 25 (1966)). Although the district court granted the individual Appellants substantial injunctive relief on their Title IX claim, Appellants now appeal the district court's denial of a somewhat broader preliminary injunction based on their equal protection claim. App. A (8/26/16 preliminary injunction order). However, still pending below are Appellants' due process claims, on which they seek *identical* preliminary injunctive relief but on which the district court has not yet ruled. Consequently, this Court lacks jurisdiction over the present appeal under 28 U.S.C. § 1292(a)(1) and the appeal should be dismissed or, alternatively, held in abeyance pending the district court's ruling on

the still-pending due process claims. When the district court rules on those claims, there will be an opportunity for a proper appeal addressing all potential grounds for preliminary injunctive relief.

Pursuant to Fourth Circuit Rule 27(a), Appellants' counsel have been informed of the intended filing of this motion and intend to file a response in opposition.

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 into law on March 23, 2016. App. A at 1, 13. Part I of the Act requires public schools and agencies to designate use of multiple-occupancy restrooms, changing facilities, and showers according to a person's "biological sex," while allowing single-occupancy facilities as an accommodation. *Id.* at 1-2, 16-17.[1] Parts II

[1] 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). On April 12, 2016, Governor McCrory issued an executive order affirming HB2's application to cabinet agencies while also affirming anti-discrimination protections for state employees on the basis of "sex, sexual orientation, [and] gender identity." Executive Order No. 93, §§ 2, 3 (Apr. 12, 2016). The order also directed all agencies to provide "a reasonable accommodation" of single-occupancy facilities where practicable and "invited and encouraged" similar accommodations by "[a]ll council of state agencies, cities, counties, the University of North Carolina System and the North Carolina Community College System." *Id.* § 3.

and III of the Act preempted an ordinance passed by the Charlotte City Council that would have required access to restrooms, showers, dormitories, and similar facilities based on a person's "gender identity" and "gender expression," and would have applied to public and private entities, as well as anyone contracting with the City. *Id.* at 11-13.

On March 28, 2016, Appellants filed suit in the Middle District of North Carolina challenging the Act under Title IX of the Educational Amendments of 1972 and under the federal Equal Protection and Due Process Clauses. App. A at 19. On May 16, 2016, they moved for a preliminary injunction as to part I only, based on their Title IX, equal protection, and due process claims. *Id.* at 21-23. On August 26, 2016, the district court granted Appellants' request in part and denied it in part. Specifically, the court (1) granted a preliminary injunction on the Title IX claim limited to the individual plaintiffs and the University of North Carolina (UNC), *id.* at 45-46 & n.29, 81-82, but (2) denied a broader preliminary injunction on their equal protection claim, *id.* at 60, 82. As to the due process claims, however, the district court "reserve[d] ruling … at this time" in order "to give the parties an opportunity to submit additional briefing." *Id.* at 68, 70. Under an

agreed extension of the briefing schedule, Appellants submitted their supplemental due process brief on September 30, 2016; Appellees' supplemental brief is due on October 28, 2016; Appellants' reply brief is due on November 11, 2016. App. B at 5 (scheduling order).

ARGUMENT

Federal law has "an established policy against piecemeal appeals." *Cassidy v. Va. Carolina Volunteer Corp.*, 652 F.2d 380, 383 (4th Cir. 1981) (citing *Switzerland Cheese Ass'n, Inc. v. E. Horne's Mkt., Inc.*, 385 U.S. 23, 25 (1966)); *see also, e.g., Lewis v. Bloomsburg Mills, Inc.*, 608 F.2d 971, 973 (4th Cir. 1979) (noting "congressional policy … against piecemeal appeals"). While 28 U.S.C. § 1292(a)(1) allows review of a district court's order denying a preliminary injunction, "that statute is to be construed narrowly, … 'lest a floodgate be opened' that would deluge the appellate courts with piecemeal litigation.'" *Albert v. Trans Union Corp.*, 346 F.3d 734, 737 (7th Cir. 2003) (quoting *Gardner v. Westinghouse Broad. Co.*, 437 U.S. 478, 481-82 (1978)).

1. Pursuant to the policies of narrowly construing 28 U.S.C. § 1292 and avoiding piecemeal appeals, courts have dismissed for lack of jurisdiction interlocutory appeals from a denial of a preliminary

injunction where the Appellant still had "claims demanding the same relief" that "remained pending" below. *See generally* 16 Wright, Miller, Cooper, et al. Fed. Prac. & Proc. § 3924.1, at n.37 (3rd ed.). The Seventh Circuit in particular has a well-developed body of precedent teaching that appellate courts lack jurisdiction to review the denial of a preliminary injunction where the appellant "still had injunctive relief available in the district court." *Cherry v. Berge*, 98 Fed. App'x 513, 516 (7th Cir. 2004); *see also, e.g., 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.").

The leading case is *Albert v. Trans Union Corp., supra*, which carefully considered whether appellate courts have jurisdiction under 28 U.S.C. § 1292(a)(1) "where plaintiffs have sought multiple injunctions and the district court denied some of them while leaving others pending." 346 F.3d at 739. The court conceded that there could be cases where appellate jurisdiction was unclear—such as "where the injunctive relief denied by the district court and the injunctive relief still remaining before the district court are of an entirely different

nature—relating to distinct subject matter or seeking completely different injunctive relief." *Id.* But an appellate court would clearly lack interlocutory jurisdiction, the court explained, when "the counts that remained in the district court and the counts that were dismissed and appealed, essentially sought the same injunctive relief, only under different legal theories." *Id.* (citing *Holmes v. Fisher*, 854 F.2d 229, 231 (7th Cir. 1988)).

2. Under those principles, the Court lacks jurisdiction over this interlocutory appeal. In addition to seeking preliminary relief under Title IX—which was granted as to the individual Appellants—all Appellants sought identical preliminary injunctive relief based on their equal protection and due process claims. App. A at 22-23, 46-47, 60, 79-82.[2] However, while denying a preliminary injunction based on equal protection, the district court "reserve[d] ruling on Plaintiffs' motion for preliminary injunction on their Due Process claims," until the parties could submit additional briefing. *Id.* at 82.

[2] Their complaint also seeks the same injunctive relief on those two claims. *See* Doc. 151 (2nd Am. Compl.) at 54 (seeking judgment "[p]reliminarily and permanently enjoining enforcement by Defendants of the unlawful provisions of H.B.2," based on claims that the Act "violate[s] Plaintiffs' rights under the Equal Protection and Due Process Clauses").

In sum, those claims—the rejected equal protection claim and the still-pending due process claims—"essentially sought the same injunctive relief, only under different legal theories." *Albert*, 346 F.3d at 739. This Court does not have jurisdiction to review one-half of the district court's preliminary injunction ruling while the other half remains pending below.

The parties are even now in the process of filing supplemental briefs with regard to the Appellants' due process claims. That briefing will be completed by November 11, 2016, a schedule Appellants themselves requested. App. B at 5 (noting briefing schedule was entered "at the ACLU Plaintiffs' request"). And while Appellants are free to ask the Court to consider their due process claims in advance of trial, at the scheduling conference addressing the supplemental briefing schedule Appellants "d[id] not object to that matter being continued until the May 2017 trial." *Id.*

Because "there is little difference between the injunctive relief denied by the district court and the injunctive relief that still remains below," *Albert*, 346 F.3d at 740, the present appeal must be dismissed for lack of jurisdiction. Appellants may eventually obtain the same

preliminary injunction they unsuccessfully sought on their equal protection claim when the district court rules on their still-pending due process claims. But if they do not, they can immediately appeal *that* order, together with the equal protection ruling, and this Court will have before it a ruling on all claims supporting plaintiffs' preliminary injunction motion. To be sure, even that ruling would be interlocutory, but it would not involve the piecemeal appeal with which Appellants now seek to burden this Court's resources unnecessarily.

It bears noting that the individual plaintiffs in this case have already received substantial preliminary injunctive relief on their Title IX claim. App. A at 81 (granting "[t]he individual transgender Plaintiffs'" preliminary injunction motion against UNC). Concededly, they want broader relief, *see id.* at 46 n.29, but they may still receive that on their still-pending due process claims.

3. Finally, in the alternative the Court could hold this appeal in abeyance until the district court rules on Appellants' due process claims and that ruling is appealed. *See* 4th Cir. R. 12(d) (Court "may … place a case in abeyance pending disposition of matters before this Court or other courts which may affect the ultimate resolution of an

appeal"). That would allow the Court to remedy the jurisdictional defect in this appeal through consolidation of the two appeals.

CONCLUSION

Appellees respectfully ask the Court to dismiss this interlocutory appeal for lack of jurisdiction or, alternatively, to hold it in abeyance pending the district court's ruling on Appellants' due process claims.

Respectfully submitted,

Robert C. Stephens
General Counsel
OFFICE OF THE GOVERNOR OF NORTH CAROLINA
20301 Mail Service Center
Raleigh, NC 27699
(919) 814-2027
bob.stephens@nc.gov

/s/ Karl S. Bowers, Jr.
Karl S. Bowers, Jr.
BOWERS LAW OFFICE LLC
P.O. Box 50549
Columbia, SC 29250
(803) 260-4124
butch@butchbowers.com

William W. Stewart, Jr.
Frank J. Gordon
B. Tyler Brooks
MILLBERG GORDON STEWART PLLC
1101 Haynes Street, Suite 104
Raleigh, NC 27604

/s/ S. Kyle Duncan
S. Kyle Duncan
Gene C. Schaerr
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 714-9492
kduncan@schaerr-duncan.com

Robert D. Potter, Jr.
2820 Selwyn Avenue, #840
Charlotte, NC 28209
(704) 552-7742
rdpotter@rdpotterlaw.com

Counsel for Appellees Senator Philip Berger and Representative Tim Moore

(919) 836-0090
bstewart@mgsattorneys.com
fgordon@mgsattorneys.com
tbrooks@mgsattorneys.com

Robert N. Driscoll
McGLINCHEY STAFFORD
1275 Pennsylvania Avenue NW
Suite 420
Washington, DC 20004
(202) 802-9950
rdriscoll@mcglinchey.com

Counsel for Appellee Governor Patrick L. McCrory

CERTIFICATE OF SERVICE

I hereby certify that on October 18, 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.

/s/ S. Kyle Duncan
S. Kyle Duncan
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 714-9492
kduncan@schaerr-duncan.com

Counsel for Appellees Senator Philip Berger and Representative Tim Moore