UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
Harrisonburg Division

JOHN DOE, Civil No. 5:15cv00035

Plaintiff,

vs. Harrisonburg, Virginia

JONATHAN R. ALGER, et al.,

Defendants. September 30, 2015

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE ELIZABETH K. DILLON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: W. DAVID PAXTON
MICHAEL E. ROSMAN
GENTRY LOCKE
P.O. Box 40013
Roanoke, VA 24022

For the Defendants: JOHN D. GILBODY
NERISSA N. ROUZER
Assistant Atty General
900 E. Main St.
Richmond VA 23219

Court Reporter: Sonia Ferris, RPR, OCR
U.S. Court Reporter
116 N. Main St. Room 314
Harrisonburg, VA 22802
540.434.3181. Ext. 7

Proceedings recorded by mechanical stenography; transcript produced by computer.

THE COURT: Good afternoon, counsel.

Ask the clerk to call the case.

THE CLERK: Yes, Your Honor.

This is Civil Action No. 5:15cv000035, John Doe versus Jonathan R. Alger, et al.

THE COURT: Ms. Rouzer, welcome to the case.

MS. ROUZER: Thank you, Your Honor.

THE COURT: I understand that was a recent event.

The rest of us have gathered here earlier for the prior motion to dismiss and this is the defendant's motion to dismiss the amended complaint.

Mr. Gilbody, you may proceed.

MR. GILBODY: Thank you, Your Honor.

Now, Your Honor, when last we came before you, you've indicated that the primary issues the Court was worried about was focusing on whether or not there's a property interest or a liberty interest.

THE COURT: Correct.

MR. GILBODY: The property interest has been well-briefed twice now for the Court. I'm not going to spend a whole lot of time on that. I just want to point out a few things that I think are worth noting.

There are no cases out there in Virginia which I'm aware where the holding was there's a property interest in a continued enrollment in a public university. The plaintiffs

haven't been able to point to any state law. The plaintiffs have alleged a contract of some sort -- not clear, not discrete, as required under Virginia law. I've cited the Randolph Macon case to Your Honor where the Supreme Court of Virginia spoke to this issue of Virginia law very clearly and said that it has to be clear and discrete for there to be a contract. And in that case, it was just like this. It was an alleged contract between a student and a university. The Supreme Court of Virginia was very clear that you have to be able to define what the terms of that agreement are. The plaintiff hasn't shown that in their complaint. They haven't properly alleged any clear, discrete contract between the parties.

They've also indicated that they think there's an implied contract. As we've indicated in our brief, you cannot have an implied contract with the Commonwealth of Virginia and that's not a viable claim against the defendants in this matter because the cases have been brought, as Your Honor is aware, in their official capacity.

Finally, and I think perhaps most interestingly, the plaintiffs are alleging that the "dear colleague" letter creates a contract between the Commonwealth and the federal government to which he is a third party beneficiary. Now, I think it's a novel claim, but I -- just looking at it very basically, going back to law school, a contract claim

requires a signing by the party to be charged. They don't have that here. What they've got is a letter from a federal bureaucrat to a university musing on, making statements about what they expect to be done, pursuant to Title IX. It doesn't have exactly the force and effect of law. However, it does, quite clearly, lay out what the federal agency believes the law to be. But it's not a contract. There's no discrete contract between OCR, the Office of Civil Rights for the Department of Education and the federal government, and JMU, to which the plaintiff in this action is a third party beneficiary. So, for all those reasons and all the reasons that have been briefed extensively, we think simply no property interest has been shown here, Your Honor.

Really, I think the liberty interest question is really the one that's going to be the focus of this afternoon's hearing, I suspect, and I'm going to move on to that, unless Your Honor has anything else.

THE COURT: You may proceed.

MR. GILBODY: Thank you, Your Honor.

I'll just start off by saying that, quite obviously, the 800-pound gorilla or the elephant in the room, so to speak, was the recent opinion handed down by Judge Ellis in Alexandria, on September 16th.

THE COURT: There is a motion to supplement with regard to that opinion. I already found that opinion. I

already read that opinion. So to the extent that motion is outstanding, it's granted. I'm assuming everybody is going to talk about that case anyway. So go ahead.

MR. GILBODY: It is, Your Honor. While I appreciate that, I would also -- I want to just be clear that going forward, if there are questions regarding that, we may be in a position -- I don't know, based on what happens today and how Your Honor rules or doesn't rule or what Your Honor says or doesn't say, I want to be sure that we would request, if the Court thinks it's helpful, that the Commonwealth be afforded an opportunity to brief the issues that have been raised as a result of Judge Ellis' opinion because, obviously, that came after all the briefing had been done.

THE COURT: At the end of this argument, I'll let counsel know if I think I need anything else in that regard.

MR. GILBODY: Thank you, Your Honor.

Now, I'm not going to stand before Your Honor today and try to distinguish this case from the case before Judge Ellis. I'm going to say, with all due respect to Judge Ellis, who is a very well-respected jurist, and I can say I've never had the privilege of appearing before, but I think he's just got it wrong. So I'm not distinguishing our case from that. I'm saying very clearly that we think, unfortunately, he made a mistake in his decision. I will tell you why.

First of all, he was making new law. He makes that quite clear in his opinion when he discusses qualified immunity. He says there's no way -- or he says it's not necessarily clear that a party would know that a Court would analogize stigma-plus analysis that had previously been used only and solely in the employment context into the educational setting and he's doing that because he's noting he's making new law. He is transferring a whole body of law, the stigma-plus analysis, that had exclusively been used in the employment context into the educational context and that's simply not been done before, at least not in the Fourth Circuit. In that respect, he was making brand new law. In doing so, it's our position that he made a number of mistakes and probably the easiest to understand is in the context of FERPA, tied with Iqbal and Twombly. What I mean by that, Your Honor, the analysis for educational records are all protected by FERPA. Universities spend millions of dollars every year making sure that they comply with this extensive set of federal regulations relating to those records. Now, they can't simply hand over their records to anybody who wants them. They would be in violation of federal law if they did. Now, there's no similar federal regulatory scheme relating to employment records. So, the analysis in terms of saying that these employment records are likely to be made public or likely to be seen by third

parties should be completely different in an educational context. And Judge Ellis doesn't do any analysis whatsoever under FERPA to understand what are the -- how are they different. And what's important about that is because on brief, or rather, on their complaint, the plaintiffs have alleged that third parties -- that JMU regularly allows third parties to just look at records. Okay, let's break that down under Iqbal and Twombly. That's a very vague, nonspecific allegation, okay? That's just a generalized allegation of fact that's not a specific fact. Let's be clear what they are really saying. They are saying that JMU, as a matter of course, violates federal law, just all the time, for no reason, whatever. That's what they are alleging. Now, that's just not plausible and it's not plausible because it's not true. I don't think plaintiff's counsel can stand before this Court and say we are aware of specific instances where, repeatedly, JMU has violated FERPA and regularly violates FERPA. They can't say that. It sounds nicer, but that is, in essence, what they're alleging.

Now, that doesn't make sense and it's not plausible. So if it's not plausible that we would regularly allow a third party to look at these records, how does the analysis that Judge Ellis uses when he looks at the -- and I'm going to butcher the name of the case -- it's Sciolino.

THE COURT: I say it "Sciolino," but I don't know if

that's correct.

MR. GILBODY: I'll take your --

THE COURT: I think you can pronounce it however you'd like. I can't correct you on that.

COURT REPORTER: Can you spell it?

MR. GILBODY: S-C-I-O-L-I-N-O; sorry.

Now the analysis in that case doesn't look at all to -- they never consider any protections for the documents in question because as I've said, there's no federal body of law protecting those documents from disclosure.

THE COURT: What about this scenario? What if John Doe goes to apply to another university and they ask him on the application form, "have you ever been disciplined" or "have you ever been suspended or expelled from a university?" And so, he either must lie or self-disclose. Suppose he self-discloses. He discloses that he has been suspended from JMU and they ask for him to grant permission -- they say "we'll consider your application, but you're going to have to give us access to your records because we can't get them under FERPA." What about that scenario?

MR. GILBODY: In that scenario and -- in that scenario, I guess to the extent the records are releasable, the school could release them at the request of John Doe. But let's be clear. That would be at his request. In the similar matter, which require the sort of self-disclosure,

would be of his own making and of his own doing. The analysis there is different necessarily than the analysis of an employer saying "here are some employment records." It's just a different set of rules that relate to that. There's simply no analysis that Judge Ellis did.

Your point is well taken in the sense that, is it possible? Yes. But that's not the standard under that case I just spelled for the Court Reporter -- Sciolino, we'll say. It was something about very likely or the standard there is it's not one of, "is it possible?" It's "is it very likely?" I can't say -- I mean -- that it is or is not. Well, I can't speak to the actions of what John Doe may or may not do, but it's not on his transcript. There's no allegation that it's in his transcript and that's been briefed for Your Honor and there's a new law. That's an area that's in flux, but for purposes of John Doe, that is not on his transcript. It is my understanding, and I think it's common knowledge, that's typically the information that flows from one university to another university when discussing a student.

THE COURT: I appreciate the difference between educational records and employment records.

MR. GILBODY: And there is -- okay. So another point here, in terms of the motion to dismiss, that when we're talking about the liberty interests that I think it's important for the Court to understand, because in terms of

the motion to dismiss, we're trying to put some level, to the extent the case moves forward, want to understand what is it that the plaintiff is asking for and is entitled to? Now, under liberty interest analysis and under stigma-plus analysis, what's very important, Your Honor, is if you read -- the stigma-plus cases all talk about how the plaintiff in those cases is entitled to a "name-clearing hearing." Now, that's very important for a couple of reasons. First of all, the first reason is that in this case, he had an opportunity for a name-clearing hearing. He's been afforded that. Now, the question for Your Honor then, and one that I haven't seen briefed is, does that name-clearing hearing, are the requirements for that hearing coterminous with due process or not? Now, I don't know the answer to that question, but I can say that it would seem an odd thing that if it were, because then, in a sense, the thing proves itself. That is a problematic analysis from my perspective. But what's more important or not more important, but more easy to get our head around as it relates to this case is that to the extent the plaintiff has asked, the relief specifically sought by the plaintiff is for this Court to order JMU to allow him back as a full-time student. Period. That's what he's asked for. That's not what one gets in a stigma-plus case. In a stigma-plus case, what the plaintiff, at best, at most, is entitled to is an opportunity for a name-clearing hearing. I

want to be clear. To the extent that Your Honor is inclined to accept Judge Ellis' liberty interest analysis, then necessarily, the relief that can be afforded to the plaintiff is circumscribed by that stigma-plus analysis and the only thing the plaintiff would be entitled to going forward would be a name-clearing hearing. And that would be, in our view, at least in part, granting the motion to dismiss because it's limiting the amount of relief and the parameters of the relief that the plaintiff can get, and the Court is recognizing what it is we're really arguing about because that's very important if we're going to move forward in this case because I'm not sure the case would move forward on that basis. So it's very important that we understand that. I think that is -- if that is the theory upon which they can move forward, that is the only relief that I think a stigma-plus analysis or a liberty interest, as described by Judge Ellis in his opinion, would afford.

But taking a step back for just a moment, because Judge Ellis, he analogized this whole area and created what was new law and the one thing that I didn't see in that opinion was why. I don't understand, why are we taking all of this employment analysis and just plopping it down into the educational arena? I'm still at a loss. Having read the opinion, it's not clear to me what the motivation for that was. As Your Honor is well aware, Judge Ellis' decision,

while certainly having persuasive authority, is not binding upon this Court. Having failed to provide any reason why this one method of analysis should be superimposed on a whole different body and a whole different set of law, having failed to make that argument, I'm at a loss to understand why the Court would want to do that, and it's our position that it doesn't make any sense. They're very different things. Employment has to do with how one feeds oneself and one's family in the very immediate sense of the word. Education temporally is connected very differently and you get an education so down the road, years later, you can get a job. They're very different things. The problem that I have with Judge Ellis' opinion is that all of the things in between are necessarily going to be dragged along with his analysis, which is to say, if someone is receiving any type of benefit from the federal government, is it the case that if you receive any type of benefit from the federal government that you rely upon, which is really a much better analogy to an employment situation than an educational situation, in every single one of those cases, if they make a statement, if there's a document put in a file that says something that suggests you're not a good person and then you lose a benefit, do you have a liberty interest? Because that is the clear import of Judge Ellis' opinion. The scope, the potential scope of what we're -- the body of benefits and

different types of payments that the government might make to an individual that are included within that are really unspecified and unclear to me. But I believe it's pretty straightforward and I think we all know that there are a lot of payments that the federal government makes to people and they're quite often administrated through the state. In every single one of those, it would necessarily be a liberty interest if there's any finding that the person did anything wrong that was in any way stigmatizing; in any way. That, to me, you're opening up a Pandora's Box of problems, whereas before you had the stigma-plus analysis, was boxed in and related only to employment law.

THE COURT: Would you concede, Mr. Gilbody, that sexual misconduct is different than "did anything wrong"?

MR. GILBODY: I would.

What is stigmatizing and what is not would be for a Court to decide ultimately. I'm not sure -- look. I'm not going to argue that certainly an allegation of sexual misconduct is stigmatizing. We wouldn't argue otherwise.

THE COURT: So we're really talking about the plus part, for the stigma-plus analysis? Aren't we talking about the plus part? Does the plus part have to be termination from a job or, as you're saying, denial of some benefit you receive from the government? Is that enough? Where do we come down as to what is the plus?

MR. GILBODY: That's a problem that Judge Ellis in his opinion faced and he said, well, it can't be a property interest because then liberty interest doesn't mean anything. I can understand what he's saying.

THE COURT: If we analogize to employment, clearly you can have a liberty interest with regard to -- and get a name-clearing hearing in employment, even if you didn't have a property right.

MR. GILBODY: Correct, because that is this change in legal status sufficient to trigger the liberty interest because it's something -- the plus is amorphous. It's not quite a property interest. We don't know what to call it, so we're calling it plus. But that plus could be a denial of Section 8 waiver, Section 8 benefits. I've done work with people. I know the rules on that are very strict and if someone is found to be in any way involved in drugs, for instance, that would certainly potentially be stigmatizing. Moreover, they could lose their benefits. That could potentially involve and raise the specter of whether or not that person has a right to a due process hearing before they're denied that benefit, which kind of leads to, what's really going on here, in my view, is that we are turning the -- we're doing exactly that which the high Court has said should not be done; namely, the due process clause was not supposed to be a font of tort law. What this, in many ways,

bears a great similarity to is a defamation action. The only difference between the allegation the plaintiffs have made and the analysis under a liberty interest would be -- the only difference between a defamation case and the case they propose going forward is the relief sought, because they're going to have to prove -- as I understand it, they're going to have to prove in this case that JMU does regularly allow third parties to look at records, as they've alleged in their complaint. They're going to have to prove that the statements made regarding the plaintiff were false. That's one of the elements of the stigma-plus case. And they're going to have to show injury. That's the stigma.

In every way, this is a defamation case. The only difference is instead of seeking monetary damages as they would in a state court proceeding, they're seeking equitable relief from a federal court. But what they're in effect of doing is making a federal tort out of defamation. That's from our perspective.

The state court remedy has defamation. Tort law is designed to modify behavior. You're supposed to have -- defamation lawsuits are designed to not only rectify the defamation that occurred in the case before it, but also to keep defamation from occurring in the future. Now, what this is doing is just allowing them a different avenue to pursue that exact same relief. It's becoming a font of tort law, as

the Court has repeatedly said the due process clause should not be.

So, with that, I'm not sure there's anything else on the liberty interest front that I need to go into and I certainly am doing so with no disrespect to Judge Ellis in his opinion.

THE COURT: I understand.

MR. GILBODY: Another issue that's before the Court in terms of the motion to dismiss is the question of whether or not President Alger will remain a defendant. We briefed that extensively for Your Honor. There's nothing in the complaint about President Alger that relates to due process other than a single allegation that he did not -- that he was somehow vaguely involved, was the language used, in a decision not to reconsider the decision that was made pursuant to the procedure set up at JMU. That's the only factual allegation that in any way touches upon President Alger. As we've indicated in our brief, we think the sole reason for his inclusion going forward, and the pretty, I would say, manifest desire of the plaintiff to move forward against President Alger is solely to try to keep the profile of this case higher than it necessarily -- I mean, it doesn't affect the proof. It doesn't affect the remedy. It affects nothing. So, why he should be included in this case escapes me. The primary case upon which they've relied where the

Ninth Circuit said the buck stops with the president, I've indicated that case has never been cited with approval anywhere. The Ninth Circuit didn't provide any citation for their statement. They just made that up. I don't think a random statement by the Ninth Circuit that no other circuit has ever attributed any precedential value has any precedential value in this court. It's just simply a statement they made, as far as I can tell, for convenience, because they needed to find a defendant.

But in this case, that's not the case. They have a clear defendant in Mr. Warner, who is plainly, and according to the allegations in the plaintiff's own complaint, the party who was responsible for the process at issue. There's just no reason to continue with the case against President, and Doctor, Alger.

With that, I think those are all the issues for now. I'll ask for a chance to rebut. Thank you.

THE COURT: Thank you.

Mr. Paxton?

MR. PAXTON: Yes. Good afternoon, Your Honor.

There's much I can say, but the Court is obviously focused on this issue and is well aware of the cases that have been cited. I'm happy to address -- I want to do whatever is most beneficial to the Court and I don't want to waste a lot of time. I think the analysis that Judge Ellis

gave both to the property interests, as well as the liberty interests in his decision, was very thoughtful, and I think he got it right on both counts.

THE COURT: With regard to property interest, he allowed an amendment. He granted leave to amend.

MR. PAXTON: The one thing that was really interesting in his opinion, Your Honor, was he noted the plaintiff had not alleged a contract by the payment of tuition for the right to go -- I think it's 3 or 4. I don't have the case right in front of me. But he specifically seemed to be suggesting that if the plaintiff had actually alleged the existence of a contract where they had paid tuition -- one moment. I'll get the case and I'll point you to it.

THE COURT: Footnote six.

MR. PAXTON: As I read that, Your Honor, basically, what he is recognizing is that the lower courts that have wrestled with this have struggled with the recognition of a property interest. But he clearly says that isn't controlling and that there really is not as much law as any of us would like on this issue.

We clearly have alleged in our complaint the payment of tuition, the response to an offer, the successful completion of the first semester of academic course work, the pre-registration for five classes that would have started in January, all of which are consistent with the contract that

we allege was entered into where they agreed that if you made satisfactory academic performance, he could continue to be enrolled and would not be dismissed without good cause. That's very clearly alleged.

THE COURT: Let me ask you this, Mr. Paxton. Should we encourage universities not to have fair and impartial processes with regard to discipline so they don't create property rights?

MR. PAXTON: No, I don't think that's the issue, Your Honor. The struggle I think the Courts face, and it was clear from the arguments that the defendants made in this case in opening, is everybody is very afraid we're somehow opening the doors to the courthouse to a whole avalanche of cases. I don't think that's the case at all. But I think that what we are saying, Your Honor, is that procedures have to comply with constitutional notions of due process. That's all this case is about. While a state court --

THE COURT: I don't think anyone disputes that, if there's a property right and liberty interest.

MR. PAXTON: Right.

I think, Your Honor, when you look at the importance of education today, not one of us that have children would encourage them not to go to college or not to get a degree.

THE COURT: Isn't it different, Mr. Paxton, than the Goss case where you don't have post secondary education? It

is a right that Virginia has created with regard to everyone, regardless of financial ability.

MR. PAXTON: Correct, and they have created an incentive by giving discounted tuition.

THE COURT: But they have not created that same right in post secondary education.

MR. PAXTON: They have not formally said every person in Virginia has the right to attend college, in part because college requires an admissions standard, whereas public education through 12th grade in the secondary education is something that everybody needs. Now, will that change over time --

THE COURT: And it's free.

MR. PAXTON: That's right, and it's free.

So here, we enter into a contract to buy your services from different educational institutions.

THE COURT: Is it an explicit contract or an implicit contract?

MR. PAXTON: I think it is an explicit contract, Your Honor, but it is implied in fact by the terms.

The Flores case that Mr. Gilbody cited involves a quantum meruit implied at law concept, which is a very different concept than implied. In fact, in June of this year, the Supreme Court of Virginia in a case, Spectra-4, LLP vs. Uniwest Commercial Reality, Inc., clearly recognized the

difference between implied at law, which is a quantum meruit, sort of an unjust enrichment kind of claim, which is not permitted against a sovereign and implied in fact.

This case does not involve a government agency. Let me be real clear about that. But it is talking about how the law is analyzed. Implied in fact is the recognition that if you enter into services -- like in the Flores case. What happened there, Your Honor, was the third party was trying -- had provided services to the government, didn't comply with the Procurement Act, refused to sign a signed agreement and then tried to say, well, it's unfair that we gave all these services and can't get paid for them. That's not what we're dealing with here. We actually gave them money to get a service. They were to provide us something. We weren't providing something to them. It's a very different set of circumstances where we're not looking, asking for equitable relief. We're asking to get the benefit of the bargain, which is to attend school and not have us thrown out of school unless we engage in misconduct that is established through proper procedures. So, from our perspective, Your Honor, the Flores case does not stand for the bald proposition that you can never have an implied contract against a sovereign.

I would argue, too, here, this is not a contract case. We're not trying to enforce a contract. We're looking

for the source of a property interest, which is a different issue. The Supreme Court in lots of cases, Perry vs. Sinderman, all of those cases recognize that implied contracts can give rise to a property interest. In other words, if you have to have a breach of contract claim in order to bring a property interest case, then we would be getting the same argument where you're trying to turn every breach of contract into a constitutional tort. That's not the standard. The question is, is there a property interest and what's the source of it? Virginia hasn't adopted a statute that says John Doe or any other of our children have the absolute right to go to JMU or UVA or any of those schools. That's not -- there's no statute to that effect. But that's not the end of the inquiry and we recognize that there is a lot of resistance from the Court and elsewhere, but we believe it cannot be the case that there is no contractual right here. Certainly if our client had not paid the tuition, they wouldn't have let him come to school.

THE COURT: Can't JMU change its procedures and policies at will?

MR. PAXTON: They can change them to a degree, Your Honor, not in the way that you're talking. And that's where this third party beneficiary argument comes in.

THE COURT: Let's set that aside for now.

With regard to your client's direct alleged contract

with JMU, can't JMU change its policies, procedures, its student --

MR. PAXTON: They can change details of it. In fact, the Dodge case, the Randolph Macon Williams College case, that's a narrow decision and when you look at it, the Court makes it very clear. They can change the fact they're an all women's college, but you still have to provide an education. So, yeah, there are changes that can be made, but it can't be changed in the context of changing the very nature of the relationship. That's a totally different thing and I think that's where -- while they can certainly change their policies -- they did change their policies, as we've alleged in the complaint. So I think what we have alleged is that they have never discharged a student without having established good cause for doing so, for a misconduct claim. While it may not be exactly a third party beneficiary, they have contractually obligated themselves not to change it in this area with the federal government and we're the beneficiary of that. You can't have it both ways.

We know that there is another case pending before this Court, filed by Sarah Butters, alleging a Title IX case. Part of our case at the beginning of this was the very fact of how the Department of Education and the investigation of how JMU handles these cases, because they weren't sure they were handling them properly and consistent with the Title IX

regulations and guidance that had been issued. From our perspective, Your Honor, the facts that we have alleged in this case satisfy the existence of a property interest. That's why we broke it into two claims because we want to get that ruling very clear because we do believe that it is possible for a state institution through its course of conduct, through its dealings, through its affirmative representations, to enter into a contract with students, the essential terms of which are if you do the academic work satisfactorily and pay our tuition, we will not kick you out of school for misconduct unless we're able to prove you actually did it. Has to be a good reason to do it. That's the contract we've alleged. They've never done anything different.

In theory, is there some -- they could wake up tomorrow and do that? They would never do that, Your Honor. It's kind of one of those hypothetical things. Why would they ever agree to do something like that? They wouldn't do that because no other college does that.

To your point, I don't think if this Court rules there's a property interest in this case that every state university in Virginia is going to change its rules and stop providing process to people when they're accused of sexual misconduct, because they can't. The federal government won't allow them to do that. So, it is -- this is one of those

areas where the defendants seem to want to have it both ways. We're required to do this, but then don't hold us accountable to it.

So from our perspective, Your Honor, we believe we have alleged a property interest and have done so in ways that the other plaintiffs in the other cases in the eastern district didn't, including John Doe in the George Mason case. So we believe that that -- that there is a property interest.

We think the liberty interest is a pretty easy call. I think defendant's counsel argued, well, why did Judge Ellis do this? What was his motivation? He was trying to comply with the Constitution. The notion that somehow it's different to lose your job as opposed to being kicked out of college and branded as someone who has sexually assaulted another student and you're not allowed to come back on campus for five-and-a-half years, how that's not worse than just losing your job is a little hard to understand, when what was at issue in the Goss case was a ten-day suspension from middle school. I mean, to me, that's not even a real argument that the Court should be giving consideration to.

The liberty interest, the impact on this young man is significant. We have, as has been pointed out, we have alleged that JMU prior to the adoption of the new Virginia statute that took effect in July, and this is in paragraph 135 of the amended complaint, that JMU has an established

pattern of disclosing final disciplinary actions to other universities when students seek to transfer. That's specifically permitted by FERPA. Specifically. They don't require consent of the student. Nothing.

THE COURT: Do you have the FERPA cite on that?

MR. PAXTON: Yes, ma'am, I do. It is FERPA cite 20 U.S.C. Section 1232G(b)(6)(B).

THE COURT: Can you say that one more time?

MR. PAXTON: 1232G(b)(6)(B).

THE COURT: Thank you.

MR. PAXTON: Yes, ma'am.

It specifically says that they are permitted to disclose the final results of any disciplinary proceeding against a student alleged to have committed a crime of violence or forcible sexual offense if there's a finding the student violated the institution's rules.

We have been told directly that when students transfer from one university in Virginia to another university in Virginia, if the new university wants to get that information, they're provided it. I don't think -- and certainly in light of the new statute that requires --

THE COURT: Just so everyone knows, I'm looking at what you've alleged, not what you're telling me you've been told here.

MR. PAXTON: That's correct. But I was dealing with

the Iqbal issue that we would have to somehow prove this. But I think you're right. We have alleged sufficiently that they do that and it's not prohibited by FERPA.

We think, and as the Court through its questions recognizes, that any application for transfer asks the question: "Have you left your former institution in good standing"? Or "have you been subject to disciplinary action?" And they have to answer that. If you want to transfer someplace, you've got to disclose the information.

I think the stigma-plus in this case is pretty clear and that's why Judge Ellis didn't have much problem with it. While it is true that FERPA imposes an extra layer of protection on student records, as the Court well knows, personnel records of state employees are not a matter of public disclosure either. They're exempt from FOIA. There are all kinds of issues that protect personnel issues.

THE COURT: FERPA is a little different than the Data Collection and Dissemination Act.

MR. PAXTON: It is, but to suggest personnel records are not protected is not, I'm sure, accurate. It's not like if I went to ask for Mr. Gilbody's records from the Attorney General, he would turn it over to me. Yet Sciolino and the other courts have said employers will eventually get that information and that's what's involved here. We think we have met the pleading standard established in Sciolino very

easily and the liberty interest is one that really shouldn't cause the Court -- we believed at the beginning, when we were here the last time, that we had pled the liberty interest properly and I think Judge Ellis' decision as well. And he's not the only one. There was a case that we cited in our brief out of the Western District of North Carolina that involved the Tonza case, I think it is. I thought I brought it with me, but I apparently left it on my desk. There, too, the Court found there was a liberty interest in very similar circumstances.

We're dealing with probably the worst allegation that could be brought against a student and that is one that, in effect, they're a rapist. They don't use those words anymore. They say "sexual misconduct" because it's more politically correct. But if you read the blogs, they accuse him of being a rapist. If you read what Jane Roe and her friends said, they certainly call him a rapist. We alleged they disclosed the information to Jane Roe.

We think that from a motion to dismiss standpoint, and we are prepared to prove our case, that we have pled a proper case under Section 1983. The question of relief is a totally different issue. I'm not sure where that was really coming from. I'm not sure the government is actually suggesting due process has different variations to it. Obviously, the context of due process has to be determined,

but what's happened here is the name-clearing hearing he got, cleared his name. We don't have a problem --

THE COURT: What they're alleging is if he has a property right, the process that he was given was not due process.

MR. PAXTON: Correct.

THE COURT: So, do you agree that his remedy would be to have a name-clearing hearing with due process?

MR. PAXTON: The remedy would be to strike the decision that was made, have it completely removed from his record, have the original decision reinstated unless there is to be an appeal at this point. In other words, I don't think it's a forgone conclusion that Jane Roe would want to go through this again. I don't think there is any reason to think that -- we're in a little different situation here because the only hearing that occurred where live testimony was taken, he was found not responsible. We are asking -- and the appeal process was the flawed part of this. There was a lot about what happened before that's at issue, but not in this case.

THE COURT: So is it your position that he received due process until sometime after the original decision was made?

MR. PAXTON: We did not file a lawsuit challenging the proceeding and the decision made on December 5th. There were

things that occurred prior to December 5th that I'm not sure comport with what should have happened. We don't necessarily agree that the standard that was used was appropriate, but it didn't hurt him. So it's a little hard for us to argue that he was denied due process at that hearing.

THE COURT: I'm just curious because your allegations seem to indicate you challenge some of the process that occurred before that.

MR. PAXTON: Yes, and we do because there was really no investigation. There were a lot of things that happened, but none of that worked to our client's ultimate disadvantage, which is what happens with the outcome. So, even though we're not thrilled with some of the things that happened and had issues with those, those are not part of this case because he was exonerated. So, it's like taking an appeal or a challenge to something that -- where you win. So I don't know that he could bring a constitutional 1983 case based on what happened.

THE COURT: I'm just asking because the review then is sometimes cumulative. We're looking back at what someone else did and what was developed earlier also.

MR. PAXTON: Right, that's correct.

So, I think a lot of what we don't know is we don't know. Until we get into discovery, we won't know. I just didn't want to foreclose us from raising issues from below.

So, Your Honor, I don't know that it is accurate -- our position would be that the decision that was handed down on January 9th, 2014, needs to be completely set aside and what's left is a finding of no responsibility and he's allowed to continue school unless and until there's an appeal filed and adequate process that's consistent with motions of due process, the right to be present if you're going to have evidence entered, all those issues that we've raised, occurs. That's really not up to us. The university, the defendants may decide not to do that. Jane Roe may not even be a student there. She may not care. We don't know. We're not in control of any of those things.

THE COURT: Let me ask you this, Mr. Paxton. Could you address what you believe -- there was some question as to what are the parameters of a name-clearing hearing. Are you prepared to address that or not?

MR. PAXTON: Well --

THE COURT: Are the requirements coterminous with due process?

MR. PAXTON: Yes, ma'am.

The whole notion of the name-clearing hearing, obviously, and due process in the context in which it occurs, is somewhat flexible. But I think for all the reasons we've alleged and briefed and argued and the Court seemed to agree with us, those provisions, due process, there wouldn't be a

different standard for that. It's not like there's a mini different standard for a name-clearing hearing.

THE COURT: I just wanted to know the party's positions.

MR. PAXTON: Yes, ma'am.

It is very odd to us that the president of a university who has been involved and as visible as he has been in trying to address the sexual misconduct issue as alleged in our complaint wants to run and hide behind his vice president.

THE COURT: That's really irrelevant to my analysis, isn't it?

MR. PAXTON: Well, I mean, it is in the sense we think we've alleged his involvement and the president of the university has the responsibility for the policies that are issued. He was involved in this. The complaint alleges that he was directly involved, leading up to. The complaint talks about the task force he appointed to look into the policy because of the OCR thing. All this stuff was going on parallel with this. Our client and his parents made an appeal to the university to undo the wrong that had been done on January 9th and he was the one that made the decision we're not going to do it. That's why we're here. If he reached a different conclusion, we wouldn't be in this court.

THE COURT: Would you agree, Mr. Paxton, that the

relief you seek is the same whether you have one defendant in his official capacity or two defendants in their official capacity?

MR. PAXTON: The relief is the same.

What we're not sure about is the extent of a vice president's authority in their system. The statute appoints the Board of Visitors and then they delegate administrative authority though the president.

THE COURT: But who have you sued when you sue in the official capacity?

MR. PAXTON: You're suing the office, the office of the president, and we're suing the office of the vice president for the administration and handling of the appeals process. So I think those two -- we don't know. The worst thing that can happen to us is have the president's office dismissed from this and somehow, the university is not -- the person that's left if not in a position left to provide the relief that we deserve. So if they want to dismiss Vice President Warner, that's okay with us. That would be more logical than dismissing the top person, quite frankly, because then there's no question about this authority. But they've not asked for that.

The argument that somehow the Court's decision on this issue should be influenced on whether or not the case proceeds under a pseudonym, I'm not sure what the logic of

that is. There's really no -- there's not been much publicity about this case, frankly. They talk about it a lot --

THE COURT: I'm not considering that in my decision, so I don't think we need to address that.

MR. PAXTON: Your Honor, we believe that as we left here on June 26th, the question was could we amend the complaint to allege a property interest and a liberty interest. We have done that. We think we've done it conclusively. We're not asking -- we don't believe that Judge Ellis created new law and the notion that somehow the president of George Mason, the fact that he was granted qualified immunity somehow suggests that that's new law, the standard for qualified immunity is it has to be well established. Everybody here recognizes that this issue of sexual misconduct and the government's response to it and the college's efforts to comply with that has taken on a new turn, from our perspective, a kind of sinister dark turn that sort of ignores due process concepts, in the last five to six years. So the fact that Judge Ellis looked to employment law as an analogous type of body of law, there's been lots of cases, Your Honor, that we've cited that students have had protected rights for a long time. As Judge Ellis noted, a lot of those cases didn't get into the fine details of is there a property interest or liberty interest, but found

there had been violations. When you look at Jones vs. The University of North Carolina and the cases cited and discussed with Judge Ellis, but now there's kind of this, frankly, fear from the university's perspective they're going to get hauled into court a lot, these threshold issues are becoming a lot more important issues. So we think we pled what we needed to and we would like to move on with the discovery in the case and set this case for trial.

Thank you.

THE COURT: Mr. Paxton, do you agree there's no cases out there that I can -- to guide me with regard to this third party beneficiary of a federal government contractual relationship?

MR. PAXTON: Well, our brief cites certain situations where -- not in this exact context.

THE COURT: Not like this case.

MR. PAXTON: But the reality is, Sarah Butters' case is a Title IX case where she is claiming to be the beneficiary of a regulatory system that the federal government imposed on JMU. That seems to me to be a third party beneficiary argument. It's not couched in those terms, but it's the same concept. That's, frankly, how that idea came to us. If a female student can bring an action against a university and state a claim because the university didn't comply with those regulations, then a male student who is

guaranteed a certain due process before they're kicked out should also be allowed that same thing. It's not a Title IX issue because it may not be gender-based unless that's the way the Courts have analogized it, but in terms of trying to understand if there's a property interest involved, that's a pretty significant interest of not being discharged from school without receiving what most people would consider due process where evidence is introduced, you have a right to confront it and you know what the charges are going in. So, those are all things that I think that are important, Your Honor.

So I don't have a specific case, to answer your question.

THE COURT: Thank you. Thank you, Mr. Paxton.

Mr. Gilbody?

MR. GILBODY: Thank you, Your Honor.

I'm just going to address some of the points that Mr. Paxton just raised.

Just to go over the implied in fact and the distinction that he was making there, I think what is important to understand is one has to understand the nature of contracts that one can have with the Commonwealth. It's very important to understand that when you're contracting with the sovereign, apparent authority does not matter. The only thing that matters is actual authority. As the Virginia

state court cases, of which I'm very familiar, say, are that you contract with the Commonwealth at your peril and -- because the person who provides it right -- if someone who works for the Commonwealth enters into a contract with you, they have to have the actual authority or it is ultra vires -- and I think I'm saying that right, hopefully -- and it's not enforceable. In point of fact --

THE COURT: There's cases that say no estoppel against the Commonwealth.

MR. GILBODY: Correct.

The point though is if you're going to make an argument that the course of dealing creates some sort of contract with the Commonwealth, then you're throwing all that analysis out the door because what you're then doing is you're giving to whatever state official with which they were dealing the authority to contract with someone. You would have to show that that individual employee of the Commonwealth had the actual authority to do that. If you can't show that, there is no enforceable contract. And if there is no enforceable contract, there is no property interest.

Mr. Paxton sort of said, well, there might not be a contract, but there's still a property interest. Well, if there's not a contract, there's not a contract. There is or there's not. And if there's not, there can't be a property

interest in something that isn't anything. That is the nature of property, as I understand. And I think that's very important to understand. I don't think that analysis is appropriate. That's one of the reasons why we think the property interest fails.

Another point that I want to make is that as counsel just agreed, JMU has a right to change the contract, and I think his exact words and what I have in my notes are, "to a degree." They can change it to a degree? What degree? If they can change it to a degree, there's no limiting measure. That is not a contract. That is a set of general guidelines and that's exactly what the student handbook purports to be. That's what it says it is, that they're general guidelines. That is not a contract.

Another thing that's important to understand as it relates to this third party beneficiary/Title IX/dear colleague letter, 2011, issue, and I think it's very important, and as Mr. Paxton was talking, I was thinking about it. Here's the issue, isn't it? In the Butters case, she's bringing an action under Title IX. Let's just back up and think for a second. What do the courts always say about a property interest? It must be something created by state law. Or something that the state did. Well, Title IX is not something the state did. That's something the federal government did. And what he's trying to argue now is that a

federally imposed right creates a state imposed right, which is not the method of analysis. What point of fact he's really saying, as I understand it -- and this is tricky, I admit -- it would seem to me what he's really -- their third party beneficiary claim is, in fact, really a misplaced way of saying a Title IX claim or something like that. Because they're saying we want the benefit of Title IX and we think we have a property interest in Title IX. Well, no, if you do, that's not something the state or in this case the Commonwealth of Virginia created. Therefore, it can't create a property interest. What you're really doing is seeking -- it's a Title IX claim in Section 1983 clothing, to borrow a metaphor. The tortured analysis there just doesn't get you there. It's not a property interest. It arises from a federal statute and a federal agency's interpretation of that statute. It's not something that was a benefit that was afforded to someone by the Commonwealth of Virginia. That's the alpha and the omega of the analysis, as far as I can tell, Your Honor.

Now, as it relates to the liberty interest, we talked about that. I guess the only thing I can say is Mr. Paxton indicated, well, why did he do that? Well, because he was following the Constitution. That sounds great. That's a good sound bite. But what does it mean? We all know what it says: Life, liberty and property. I don't know if you're

talking about the Constitution or getting into a Lockheed analysis or what have you, but the point is, liberty in this context, the case law has developed in a very specific manner and no federal court in the Fourth Circuit prior to Judge Ellis found that liberty interest. As I indicated, when he goes through this qualified immunity analysis, he says, oh, no, there's no way anybody could necessarily have known this is the way the Court was going to go.

THE COURT: It wasn't clearly established, at least with regard to the Fourth Circuit and Supreme Court.

MR. GILBODY: Right.

And he says that because what he's doing is brand new, and I think he's admitting as much, and that's what he plainly was doing. So again, I think that doesn't answer the question of why. Mr. Paxton indicated that perhaps that is due to -- I think he indicated there was a sinister turn as it relates to Title IX or sexual assaults or sexual misconduct or these regulations that look at the behavior of students in colleges are being adjudicated. Well, let's be clear. The case law may have presumed. In all the cases where they said we presume without deciding, and the courts did that for many years, but in all those cases where they presumed without deciding, they found no due process violation because what due process ultimately means is a chance to be heard. There's no question about whether or not

the plaintiff got that hearing.

Now, they've argued about some of the more technical aspects of it, but they've never argued --

THE COURT: The question is not whether a right decision was made or not, either. It's whether the process was fair under the due process clause, if there's a property right or liberty interest.

MR. GILBODY: Well, but isn't that -- under the stigma-plus liberty interest analysis though, the question becomes not solely whether or not due process was allowed because the question is, you have to show that it was wrong. That is an element of that claim. So --

THE COURT: I stand corrected with regard to the liberty interest.

MR. GILBODY: I'm sorry.

THE COURT: No, I appreciate that.

MR. GILBODY: The point then becomes -- and that's why I talked about it becoming a font of tort law. Your Honor is going to be hearing what in effect will be a defamation lawsuit. That's problematic because that's not the role of the federal judiciary, in my view at least. The state remedy in a case like this would be a defamation lawsuit. Now, granted, he can't get the precise -- exactly what he wants in terms of the equitable relief he's seeking in a case brought at law, but he can certainly get, for

instance -- I mean, this young man has gone to school, as I understand it, and he's at a different school out of state. There would be a proper remedy that related to perhaps the differences between, in a state law proceeding, the difference between the price of an out-of-state tuition at one university and the university where he had attended previously, because there would be a measure of damages that would be able to recompense a plaintiff in some fashion. It's not clear to me there's an irreparable harm associated with this because, frankly, if you've gone to a different school and there's a piece of paper -- you're in the new school. There's a piece of paper somewhere in a college that you're no longer attending that says something that's not flattering about you, but if you're going to attend another school, that's over. Is anyone ever going to look at that piece of paper? That's doubtful. We just don't know. As I talked about earlier, it's not likely, as required by the Fourth Circuit. That's wholly speculative and, frankly, it's a little far afield.

So as it relates to the liberty interest, I'm concerned that the federal courts are going to become -- anytime a school takes an action, then we're going to have to parse through exactly to make sure there wasn't any violation of due process in which case you have to have courts almost in every school that run very efficiently and are run very

strictly to provide due process to students. I can tell you --

THE COURT: We don't do that in the employment context, really.

MR. GILBODY: You're talking about in terms of the obligations of how they go about doing it?

THE COURT: There's not a court with the employer.

MR. GILBODY: Right.

In fact, you raise a good point, Your Honor. What you're really speaking to there, there's a heightened burden upon JMU in this case and other public universities because they typically do have some sort of quasi-judicial process that's followed and it's going to be incredibly difficult to not -- lawyers, got excellent lawyers over here and they are very good at picking out what was done wrong in the process. That's their job. The people who are setting up these processes are non-lawyers, lay people, and they're trying, and I think doing an excellent job, but they're not to be held to the same standards of federal or state courts in terms of how they make decisions. That's what the end result of what they want to do in this case does. It would require every university to have essentially a -- they're going to have to spend a lot of money and time that could otherwise be directed at things like education, which is what we would all prefer them to be doing, presumably, to satisfy these very

strict guidelines about not only picking through everything that's occurred and making sure there can't be any complaint that there was any due process violation, and that's going to be problematic. Your Honor has two cases like this that are relating to this issue already. I suspect they won't be the last.

THE COURT: But, Mr. Gilbody, it is your position that your client gave due process in this case, isn't it?

MR. GILBODY: That they did it? Oh, absolutely, and I think the evidence is going to show -- we've laid out, I think in response to the original complaint that, really, the evidence is going to show there was one single document -- there were no new allegations. I'm not trying to argue the case, but I think the evidence is going to show quite clearly there was no new evidence of which the plaintiff was not aware when the -- when there was this second hearing where there was no live testimony taken, but rather, the appeal panel listened to the testimony that was given at the hearing. They listened to that and then made their new decision, which is a good segue, by the way, into the next point, Your Honor, which is getting into the question of what relief is available to the plaintiff in this case and whether or not they're entitled to just what I heard Mr. Paxton saying is, he believes the Court should come in and say, okay, there was this due process. Now, the plaintiff wants

it stopped right here where he won. Stop right there and we're happy with that. That's what they want. Of course, they do. They want to stop at the point in which they prevailed. But that's not what ultimately happened. So the question is, there was a process in place at JMU that plaintiff in this action, to be clear, is asking a federal court to say the process you followed, not only was it not -- and they also admitted they have problems with the due process even up to that point, but because our client won, we want you to stop right there. He got off. He won. Let's just forget everything and stop right there. Let him back in school. The case is over. No, that's not the way that works. That does not comport with Title IX or the requirements of JMU.

In point of fact, if this Court is going to grant relief, we believe the only proper relief would be the name-clearing hearing the party is entitled to under the liberty interest analysis and that's assuming -- and I'm assuming without conceding that we prevail on the property interest question and don't prevail on the liberty interest question. That is -- under the liberty interest analysis, only if the Court finds that that is the only relief that's proper is that name-clearing hearing and we would ask that the Court grant the motion to dismiss to the extent that they seek a remedy beyond that narrow focus because at least then,

the parties would know what it is we're actually fighting over. Why are we here and what is in play? I think that would be very important for an ultimate disposition in this matter.

Now, finally, just to address the question of President Alger, counsel for JMU, Susan Wheeler, is here. I am, at least for the next three days, an employee of the Office of the Commonwealth of Virginia and I'm representing to this Court that explains why she's coming in, although I'd be happy to have her in any case, Your Honor, as a colleague, but we are representing to the Court, and Ms. Wheeler will correct me if I'm wrong, that going forward in this suit solely against Vice President Warner will not change the panoply of remedies that could be afforded the plaintiff. We're making that representation on the record to this Court and I'm happy to do so.

I'll tell you, I looked back at Ms. Wheeler at one point and thought to myself, when Mr. Paxton said, well, we'd be happy to dismiss Warner, but not Alger, I thought to myself, well, I should accept that deal because lawyers, we all have a penchant for wanting to be cute at times, because quite frankly, Alger's involvement in this, the facts are going to show, was nothing. Nothing. That's what the facts are going to end up showing. When that's the case, then we can say, well, he had no involvement in any of this, so it

doesn't matter if you're right or wrong. Because he wasn't involved, you have to show some involvement and because there was no involvement, you lose. That's not showing the proper respect to this proceeding I think that it deserves.

There's a question before this Court that should be answered. The proper party is Mr., not Dr., Warner, as he likes to point out.

Thank you.

THE COURT: Thank you.

Counsel, would you like to speak to whether or not you want the opportunity to provide me any other information with regard to the Doe vs. George Mason case?

MR. GILBODY: Is that directed to me?

THE COURT: Either side, both sides?

MR. GILBODY: As Your Honor can well imagine, my question would be --

THE COURT: In your three days. Would you like to spend your three days working on that?

MR. GILBODY: Unfortunately, looks like my dance card is booked. Getting my files transferred is going to take those three days.

THE COURT: I understand. I'm sure there will be a smooth transition.

MR. GILBODY: Your Honor, I think that given the gravity of Judge Ellis' decision that I think this has, it's

an issue that deserves a great deal of consideration because it's going to likely have effects throughout the Commonwealth for the years going forward, that in the interest of getting it right the first time, it would be appropriate. Mr. Paxton raised a section of FERPA that I wasn't aware of and I think that it would be appropriate, and frankly, if it says what he says -- if it says what he says it says, and I have no reason to believe that it doesn't, that could be problematic for us, perhaps. But I think the Court wants to get this issue quite right and I think it would be proper and appropriate to allow the Commonwealth to more fully brief this issue because it is a rather 11th-hour change in the field of what's going on in this area of juris prudence, which is, quite frankly, an area that is rather active.

THE COURT: Thank you.

Mr. Paxton?

MR. PAXTON: If they're going to file something, we'd like the opportunity to respond to it. I don't want to prolong this. Judge Ellis' view on this was known.

THE COURT: But they didn't have the benefit of the written opinion.

MR. PAXTON: That's true.

I brought an extra copy of the Spectra 4 case that I mentioned. I gave a copy earlier to Mr. Gilbody.

If it's the Court's pleasure, we'll be glad to submit

whatever additional analysis --

THE COURT: I'm certainly going to allow it. This is an important issue. I think it's a legally fascinating issue also. For many years, Courts have assumed, without deciding. I will tell you that I don't plan to assume without deciding. But I would welcome any additional information you would like to provide.

Is it pronounced Rouzer?

MS. ROUZER: Yes, Your Honor.

THE COURT: Ms. Rouzer, I'll let you speak to this since Mr. Gilbody will not be there to do the work, so we'll look at your schedule. When would you be able to get something filed?

MS. ROUZER: Your Honor, after next Thursday, I'll be out of the country for two weeks, so either one week or four weeks would be my preference.

THE COURT: Mr. Paxton, in the interest of being kind to another professional, would you allow four weeks so that she can perhaps enjoy her vacation a little more?

MR. PAXTON: Your Honor, we certainly would be more than accommodating.

One of the concerns that we have is kind of the delay factor here. Given the unusual sort of flow of this case, no trial date has been set. We haven't started discovery. I'd like to at least get the opportunity to serve some discovery.

Typically when a motion to dismiss is pending, discovery is not stayed. I don't want to find ourselves -- four weeks from now is the end of October, and we respond a couple weeks after that and we're into December probably before the Court has a chance --

THE COURT: I can tell you that this Court has a tremendous desire to bring this portion of it to a decision quickly. The Court has not been idle awaiting your arguments and not looking at this case in doing so.

MR. PAXTON: I was not trying to imply any of this was on the Court.

THE COURT: I didn't think you were. But I wanted you to know that I've been working on this case and I plan to continue working on this while I await your further briefing. So it is not going to be set aside with nothing happening until that point in time.

To the extent the parties desire to go ahead with some discovery, it's at your client's risk that that might be a wasted effort on your part. But do you have an objection to that?

MS. ROUZER: No, Your Honor, we don't. If the Court prefers that we go ahead and set a trial date just to have it on the calendar, we don't object to that.

THE COURT: If you would like, you may contact chambers and look at your calendars with regard to a trial

date.

You may proceed with discovery, understanding that's at your risk.

Then what date can you have the brief to the Court?

MS. ROUZER: I need to look at the calendar, but by October 28th.

MR. PAXTON: If it's okay, I'll refer to my device here.

MS. ROUZER: I believe the 28th is four weeks.

MR. PAXTON: The 28th is a Wednesday. If we could have two weeks from that, the 11th.

THE CLERK: That's a holiday.

MR. PAXTON: We can do the 10th. That's fine.

THE COURT: Do you need a reply?

MS. ROUZER: No, Your Honor.

THE COURT: You'll just rest.

MS. ROUZER: Yes.

THE COURT: Then the briefing will be completed November 10th and I'm not going to give you a date because I have learned that court time is sometimes longer than regular time. But I do tell you that I have a great interest in making a thoughtful considered decision as quickly as possible.

MR. PAXTON: Yes.

THE COURT: Anything else we need to address today,

counsel?

MR. GILBODY: Other than, Your Honor, because I'm going to be leaving, I'd like to thank you for your kind consideration and wish you well. I'll be going to the Henrico County's attorney's office so I probably won't be finding my way back out to western Virginia anymore.

THE COURT: I wish you the best of luck in your next endeavor and I'm sure it will be a very interesting position also. Good luck to you.

I thank all of the parties for your briefing, for your argument of these issues. I think these are fascinating legal issues, but they are not, as we well know in this case, not arguments in the abstract. There are people on each side of this case that have an interest in having this decided with due speed and that will be done. Thank you, counsel.

With that, we will adjourn court for the day, please.

"I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Sonia Ferris October 20, 2015"