UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

PATRICK L. MCCRORY, in his official capacity as Governor of the State of North Carolina, and FRANK PERRY, in his official capacity as Secretary, North Carolina Department of Public Safety,	)	
Plaintiffs,	)	CASE NO. 5:16-cv-238-BO
vs.	)	
UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF JUSTICE, LORETTA E. LYNCH, in her official capacity as United States Attorney General, and VANITA GUPTA, in her official capacity as Principal Deputy Assistant Attorney General,	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR UNOPPOSED MOTION TO TRANSFER VENUE PURSUANT TO 28 U.S.C. § 1404(a)

Plaintiffs Patrick L. McCrory, in his official capacity as Governor of the State of North Carolina ("Governor McCrory"), and Frank Perry, in his official capacity as Secretary, North Carolina Department of Public Safety ("Secretary Perry"), (collectively "plaintiffs") hereby file this memorandum of law in support of their contemporaneously filed motion to transfer venue to the United States District Court for the Middle District of North Carolina pursuant to 28 U.S.C. § 1404(a).

NATURE OF THE CASE

Plaintiffs brought this declaratory judgment action pursuant to 28 U.S.C. § 2201 et seq., the Federal Declaratory Judgment Act, and Rule 57 of the Federal Rules of Civil Procedure. The

parties' dispute arises from the implementation of North Carolina's Public Facilities Privacy and Security Act, N.C. Session Law 2016-3. This law concerns use of bathroom and changing facilities based on biological sex. Plaintiffs also seek injunctive relief.

STATEMENT OF RELEVANT FACTS

The North Carolina General Assembly enacted the Public Facilities Privacy and Security Act ("the Act") on March 23, 2016. (D.E. #1: Pls.' Compl. ¶ 10.) The Act created common sense bodily privacy protections for, among others, state employees, by requiring public agencies to require multiple occupancy bathroom or changing facilities to be designated for and only used by persons based on their biological sex. (Id.) Biological sex is the physical condition of being male or female, and the Act notes that such condition is "stated on a person's birth certificate." (Id.) The Act also allows accommodations based on special circumstances. (Id.)

On April 12, 2016, Governor McCrory issued "Executive Order 93 to Protect Privacy and Equality" ("EO 93"), which expanded discrimination protections to state employees on the basis of sexual orientation and gender identity, among others. (Id. ¶ 11.) EO 93 also affirmed North Carolina law that cabinet agencies should require multiple occupancy bathroom or changing facilities to be designated for and only used by persons based on their biological sex. (Id.) Governor McCrory's executive order likewise reaffirmed North Carolina law that agencies may make a reasonable accommodation upon request due to special circumstances and directed all agencies to make a reasonable accommodation of a single occupancy restroom, locker room, or shower facility when readily available and when practicable. (Id.)

Accordingly, under North Carolina law, state employees are required to use the bathroom and changing facilities assigned to persons of their same biological sex, regardless of gender

identity or transgender status. (Id. ¶ 17.) As such, North Carolina does not treat transgender employees differently from non-transgender employees. (Id.)

Nevertheless, on May 4, 2016, defendant Gupta wrote letters to Governor McCrory and Secretary Perry asserting that state law as outlined above constitutes a "pattern or practice" of discrimination against transgender state employees by denying such employees access to the bathroom or other changing facility of their chosen gender identity and thus constitutes a violation of Title VII of the Civil Rights Act of 1964 ("Title VII"). (Id. ¶ 14.) It was asserted as well that the North Carolina Department of Public Safety has violated the non-discrimination provision of the Violence Against Women Reauthorization Act of 2013 ("VAWA"). (Id. ¶ 15.) Defendant Gupta's letter further threatened to "apply to [an] appropriate court for an order that will ensure compliance with" these interpretations of Title VII and VAWA. (Id. ¶ 16.)

In light of defendants' threats, plaintiffs filed suit in this Court on May 9, 2016, seeking injunctive and declaratory relief concerning plaintiffs' compliance with Title VII and VAWA. On the very same day, the United States filed an action in the United States District Court for the Middle District of North Carolina against the State of North Carolina, Governor McCrory in his official capacity as Governor of the State of North Carolina, the North Carolina Department of Public Safety, the University of North Carolina, and the Board of Governors of the University of North Carolina (hereinafter "DOJ litigation"). In its complaint, the United States requests declaratory and injunctive relief concerning compliance with Title VII, VAWA, and Title IX of the Education Act Amendments of 1972 ("Title IX") by the defendants named therein. (See Ex. A: Complaint, D.E. #1, in United States of America v. State of North Carolina et al., Case No. 1:16-cv-00425-TDS-JEP (M.D.N.C.).)

ARGUMENT

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented." 28 U.S.C. § 1404(a). Thus, unless the parties agree to transfer the case to a particular district, in deciding the forum to which a case should be transferred, a district court first determines whether the potential transferee forum is one in which the action could have been brought originally. The court then proceeds to consider the particular factors relevant to the specific case, including the convenience of the parties and witnesses and the interests of justice generally. See Landers v. Dawson Constr. Plant, Ltd., 201 F.3d 436 (Table), 1999 WL 991419, at *2 (4th Cir. 1999) (unpublished) (citations omitted).

In this case, plaintiffs seek transfer of the action to the United States District Court for the Middle District of North Carolina. Defendants do not oppose a transfer to that district, and thus, on that basis alone, the requested transfer is proper under 28 U.S.C. § 1404(a).

Furthermore, there can be no disputing that this action could have been originally brought in the Middle District of North Carolina by virtue of 28 U.S.C. § 1391(e). Section 1391(e) makes venue proper in any judicial district in which a substantial part of the events and omissions giving rise to a plaintiff's claims occurred when the plaintiff, as in this case, sues the federal government, a federal agency, or a federal officer or employee in her official capacity. Here, the issue is whether North Carolina may enforce a statute that affects state employees and property throughout the state, and thus events and omissions giving rise to plaintiffs' claims have occurred in the Middle District of North Carolina.

Moreover, consideration of the convenience of the witnesses and the interests of justice supports transfer of this action to the Middle District of North Carolina. Both this case and the DOJ litigation present substantially similar and overlapping issues of both law and fact, and both the instant lawsuit and the DOJ litigation seek declaratory and injunctive relief relative to the same legislation enacted by the North Carolina General Assembly. Thus, much of the proof as well as many of the witnesses will no doubt be the same in both actions.

Transferring this case to the Middle District of North Carolina would enable it to be consolidated with or otherwise managed in conjunction with the DOJ litigation, thereby advancing the interests of judicial economy and reducing the inconvenience to the witnesses. Otherwise, the federal judicial system would be tasked with separately handling actions in two different districts between largely the same parties raising effectively the same issues and seeking the same forms of relief. "The feasibility of consolidation is a significant factor in a transfer decision, although even the pendency of an action in another district is important because of the positive effects it might have in possible consolidation of discovery and convenience to witnesses and parties." A.J. Indus., Inc. v. U.S. Dist. Court for Cent. Dist. of Cal., 503 F.2d 384, 386-87 (9th Cir. 1974). Here, the possibility of consolidation with other litigation weighs strongly in favor of transferring venue. E.g., Hawkins v. Gerber Prods. Co., 924 F. Supp. 2d 1208, 1214 (S.D. Cal. 2013) (quoting Callaway Golf Co. v. Corp. Trade, Inc., No. 09-cv-384, 2010 WL 743829, at *7 (S.D. Cal. Mar. 1, 2010)); see United States v. Gonzales & Gonzales Bonds & Ins. Agency, Inc., 677 F. Supp. 2d 987, 994 (W.D. Tenn. 2010) (transferring venue to "allow the transferee forum to consolidate this case with the one currently pending before it, should the transferee court deem it appropriate to do so" and noting that "consolidation would reduce the number of individual pleadings and other papers the parties

must file and enable a single court to address any common issues of law—of which there appear to be several—across the cases"); see also Schmidt v. Leader Dogs for the Blind, Inc., 544 F. Supp. 42, 47-48 (E.D. Pa. 1982).

A transfer of venue to the Middle District of North Carolina would also serve the interests of justice because Joaquin Carcano et al. v. Patrick McCrory et al., Case No. 1:16-cv-00236-TDS-JEP (M.D.N.C.), the first litigation related to the validity of the Public Facilities Privacy and Security Act, N.C. Session Law 2016-3, was filed in that district. The United States District and Magistrate Judges assigned to that case are the same as those assigned to the DOJ litigation. (See Exs. B & C: Complaint, D.E. #1, and Amended Complaint, D.E. #9, in Joaquin Carcano et al. v. Patrick McCrory et al., Case No. 1:16-cv-00236-TDS-JEP (M.D.N.C.).) Therefore, placing all of these actions in the same judicial district, and potentially under the same judicial officers, would greatly enhance efficiency for the parties and the public while avoiding piecemeal litigation and reducing inconvenience to the witnesses.

CONCLUSION

WHEREFORE, plaintiffs respectfully ask that this case be transferred to the United States District Court for the Middle District of North Carolina pursuant to 28 U.S.C. § 1404(a) for all further proceedings, including trial, and for such other and further relief as this Court may deem appropriate.

Respectfully submitted, this the 17th day of May, 2016.

BOWERS LAW OFFICE LLC

By: /s/ Karl S. Bowers, Jr.
Karl S. Bowers, Jr.*
Federal Bar #7716
P.O. Box 50549
Columbia, SC 29250
Telephone: (803) 260-4124

E-mail: butch@butchbowers.com
*appearing pursuant to Local Rule 83.1(e)
Counsel for Governor Patrick L. McCrory and Secretary Frank Perry

By: /s/ Robert C. Stephens
Robert C. Stephens (State Bar #4150)
General Counsel
Office of the Governor of North Carolina
20301 Mail Service Center
Raleigh, North Carolina 27699
Telephone: (919) 814-2027
Facsimile: (919) 733-2120
E-mail: bob.stephens@nc.gov
*appearing as Local Rule 83.1 Counsel
Counsel for Governor Patrick L. McCrory

MILLBERG GORDON STEWART PLLC

By: /s/ William W. Stewart, Jr.
William W. Stewart, Jr. (State Bar #21059)
Frank J. Gordon (State Bar #15871)
B. Tyler Brooks (State Bar #37604)
1101 Haynes Street, Suite 104
Raleigh, NC 27604
Telephone: (919) 836-0090
Fax: (919) 836-8027
Email: bstewart@mgsattorneys.com
fgordon@mgsattorneys.com
tbrooks@mgsattorneys.com
Counsel for Governor Patrick L. McCrory

CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all CM/ECF participating attorneys, and I hereby certify that I have also mailed the document to the parties listed below.

This the 17th day of May, 2016.

By: /s/ William W. Stewart, Jr.
William W. Stewart, Jr. (State Bar #21059)
Frank J. Gordon (State Bar #15871)
B. Tyler Brooks (State Bar #37604)
1101 Haynes Street, Suite 104
Raleigh, NC 27604
Telephone: (919) 836-0090
Fax: (919) 836-8027
Email: bstewart@mgsattorneys.com
fgordon@mgsattorneys.com
tbrooks@mgsattorneys.com
Counsel for Governor Patrick L. McCrory

SERVED:

United States of America
c/o Civil Process Clerk
Office of the United States Attorney
Eastern District of North Carolina
310 New Bern Avenue
Federal Building, Suite 800
Raleigh, North Carolina 27601-1461

United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Loretta E. Lynch, in her official capacity as
United States Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Vanita Gupta in her official capacity as
Principal Deputy Assistant Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA, Plaintiff, v. STATE OF NORTH CAROLINA; PATRICK MCCRORY, in his official capacity as Governor of North Carolina; NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY; UNIVERSITY OF NORTH CAROLINA; and BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA, Defendants.	)	Case No. _____

COMPLAINT

PRELIMINARY STATEMENT

1. The United States files this complaint challenging a provision of North Carolina law requiring public agencies to deny transgender persons access to multiple-occupancy bathrooms and changing facilities consistent with their gender identity.

2. As set forth below, Defendants' compliance with and implementation of Part I of North Carolina Session Law 2016-3, House Bill 2 ("H.B. 2"), which was enacted and became effective on March 23, 2016, constitutes a pattern or practice of employment discrimination on the basis of sex in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* ("Title VII"); discrimination on the basis of sex in an education program receiving federal funds in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.* ("Title IX"), and its implementing regulations, 28 C.F.R. Part 54 (2000), 34 C.F.R. Part 106 (2010); and discrimination on the basis of sex and gender identity in programs

receiving federal funds in violation of the Violence Against Women Reauthorization Act of 2013 ("VAWA"), 42 U.S.C. § 13925(b)(13).

JURISDICTION AND VENUE

3. This Court has jurisdiction over this action pursuant to 42 U.S.C. § 2000e-6 and 28 U.S.C. §§ 1331, 1343(a), and 1345.

4. Venue is proper pursuant to 28 U.S.C. § 1391(b) because Defendants are located within the Middle District of North Carolina and because a substantial part of the acts or omissions giving rise to this complaint arose from events occurring within this judicial district.

5. This Court has the authority to enter a declaratory judgment and to provide preliminary and permanent injunctive relief pursuant to Rules 57 and 65 of the Federal Rules of Civil Procedure; 28 U.S.C. §§ 2201 and 2202; 42 U.S.C. §§ 2000e-6(a) and (b); 20 U.S.C. § 1682; and 42 U.S.C. §§ 13925(b)(13)(C) and 3789d(c)(3).

DEFENDANTS

6. Defendant State of North Carolina is a person within the meaning of 42 U.S.C. § 2000e(a) and an employer within the meaning of 42 U.S.C. § 2000e(b).

7. Defendant Patrick McCrory is the Governor of North Carolina. Pursuant to Article III, Section 1 of the North Carolina Constitution, "the executive power of the State" is vested in Defendant McCrory in his capacity as Governor. Article III, Section 5(4) also provides that it is the duty of Defendant McCrory in his capacity as Governor to "take care that the laws be faithfully executed." Defendant McCrory is a person within the meaning of 42 U.S.C. § 2000e(a).

8. Defendant North Carolina Department of Public Safety is an agency of the State of North Carolina responsible for public safety, corrections and emergency management. It is a

person within the meaning of 42 U.S.C. § 2000e(a) and an employer within the meaning of 42 U.S.C. § 2000e(b). It is currently and, at all times relevant to the Complaint, has been a recipient of federal funds from the Department of Justice's Office on Violence Against Women, with open grants dated after the reauthorization of VAWA on March 19, 2013. As a condition of receiving federal funds, Defendant North Carolina Department of Public Safety signed contract assurances agreeing that it will not discriminate in violation of federal law.

9. Defendant University of North Carolina is a public, multi-campus university that is organized under, and exists pursuant to, the laws of the State of North Carolina. It is a person within the meaning of 42 U.S.C. § 2000e(a) and an employer within the meaning of 42 U.S.C. § 2000e(b). It is currently and, at all times relevant to the Complaint, has been a recipient of federal funds from the United States Department of Justice, including the Office on Violence Against Women, with open grants dated after the reauthorization of VAWA on March 19, 2013. As a condition of receiving federal funds, Defendant University of North Carolina signed contract assurances agreeing that it will not discriminate in violation of federal law.

10. Defendant Board of Governors of the University of North Carolina is the corporate body charged with the general control, supervision, and governance of the University of North Carolina and is capable under North Carolina law of suing and being sued in any court.

FACTUAL ALLEGATIONS

Enactment of H.B. 2

11. On March 23, 2016, the North Carolina legislature convened a special session for the purpose of passing H.B. 2.

12. H.B. 2 mandates, *inter alia*, that all "[p]ublic agencies . . . require multiple occupancy bathrooms or changing facilities . . . be designated for and only used by individuals based on their biological sex." H.B. 2 defines "biological sex" as "[t]he physical condition of being male or female, which is stated on a person's birth certificate." H.B. 2 further defines "public agencies" to include, among other entities, the state executive, judicial and legislative branches, including the University of North Carolina system.

13. H.B. 2 was enacted in direct response to Ordinance 7056 passed by the City Council in Charlotte, North Carolina (the "Charlotte Ordinance"), which permitted transgender individuals to use facilities corresponding to their gender identity by prohibiting discrimination based on "gender identity" in places of public accommodation.

14. Governor McCrory and North Carolina legislators made explicit public statements indicating that they proposed, passed, and signed H.B. 2 to overturn the Charlotte Ordinance and to ensure transgender individuals would not be permitted to access bathrooms and other facilities consistent with their gender identity in schools and other public agencies.

15. Prior to the passage of the Charlotte Ordinance in February 2016, Governor McCrory told members of the Charlotte City Council that the Ordinance could "create major public safety issues by putting citizens in possible danger from deviant actions by individuals taking improper advantage of a bad policy." Governor McCrory went on to explain that the "action of allowing a person with male anatomy, for example, to use a female restroom or locker room will most likely cause immediate State legislative intervention which I would support as governor."

16. When State Representative Dan Bishop introduced H.B. 2, he stated that "[a] small group of far-out progressives should not presume to decide for us all that a cross-dresser's

liberty to express his gender nonconformity trumps the right of women and girls to peace of mind."

17. The bill passed both houses on March 23, 2016—the same day it was introduced. Governor McCrory signed the bill that night. H.B. 2 took effect immediately.

18. Following the conclusion of the special session, Senate President Phil Berger stated on his website, "[t]he North Carolina Senate voted unanimously Wednesday [March 23, 2016] to stop a radical and illegal Charlotte City Council ordinance allowing men into public bathrooms and locker rooms with young girls and women." Senator Berger characterized the Charlotte Ordinance as "dangerous" and claimed that it "created a loophole that any man with nefarious motives could use to prey on women and young children."

19. Lieutenant Governor Dan Forest stated that the Charlotte Ordinance "would have given pedophiles, sex offenders, and perverts free rein to watch women, boys, and girls undress and use the bathroom."

Defendants' Compliance with and Implementation of H.B. 2 and the United States' Response

20. On April 5, 2016, following the enactment of H.B. 2, Defendant University of North Carolina's President, Margaret Spellings, issued a Memorandum to all Chancellors in the University of North Carolina system, titled "Guidance – Compliance with the Public Facilities Privacy & Security Act." The Memorandum directed Chancellors that "University institutions must require every multiple-occupancy bathroom and changing facility to be designated for and used only by persons based on their biological sex."

21. As a federal funding agency, when the Department of Justice has reason to question a funding recipient's compliance with Title IX, it gives notice of non-compliance and attempts to secure the recipient's compliance through voluntary means.

22. On April 8, 2016, the United States sent a letter to President Spellings seeking information to determine whether the University was complying with federal law.

23. In a response dated April 13, 2016, President Spellings affirmed that "the University is specifically covered by H.B. 2 and is required as a public agency to comply with its applicable portions, including the provisions related to multiple-occupancy bathrooms and changing facilities."

24. On April 12, 2016, Governor McCrory issued Executive Order 93, implementing H.B. 2 and affirming that "every multiple occupancy restroom, locker room or shower facility located in a cabinet agency must be designated for and only used by persons based on their biological sex."

25. Access to bathrooms and changing facilities on the University of North Carolina campus are covered by the non-discrimination mandates of Title IX and VAWA.

26. Access to bathrooms and changing facilities operated by Defendant North Carolina Department of Public Safety and its sub-recipients are covered by the non-discrimination mandate of VAWA.

27. Access to bathrooms and changing facilities in the workplace at public agencies in the State of North Carolina is a term, condition and privilege of employment and, therefore, is covered by the non-discrimination mandate of Title VII.

28. In letters dated May 4, 2016, the United States notified all Defendants, including the University of North Carolina, that the United States had determined they were not in compliance with Title VII, Title IX, and/or VAWA, based on their compliance with and implementation of provisions of H.B. 2 that are irreconcilable with federal law. The United States requested that Defendants immediately agree not to comply with those provisions of H.B.

2, ensure that transgender persons were entitled to use multiple-occupancy bathrooms and changing facilities consistent with their gender identity as required by federal law, and retract any statements to the contrary. The United States advised Defendants that it would take enforcement action under the above statutes if such compliance with federal law was not demonstrated.

29. As of the filing of this Complaint, no Defendant has taken steps to achieve that compliance.

Gender Identity and Its Relationship to Sex

30. Individuals are typically assigned a sex on their birth certificate solely on the basis of the appearance of the external genitalia at birth. Additional aspects of sex (for example, chromosomal makeup) typically are not assessed and considered at the time of birth, except in cases of infants born with ambiguous genitalia.

31. An individual's "sex" consists of multiple factors, which may not always be in alignment. Among those factors are hormones, external genitalia, internal reproductive organs, chromosomes, and gender identity, which is an individual's internal sense of being male or female.

32. For individuals who have aspects of their sex that are not in alignment, the person's gender identity is the primary factor in terms of establishing that person's sex. External genitalia are, therefore, but one component of sex and not always determinative of a person's sex.

33. Although there is not yet one definitive explanation for what determines gender identity, biological factors, most notably sexual differentiation in the brain, have a role in gender identity development.

34. Transgender individuals are individuals who have a gender identity that does not match the sex they were assigned at birth. A transgender man's sex is male and a transgender woman's sex is female.

35. A transgender individual may begin to assert a gender identity inconsistent with their sex assigned at birth at any time from early childhood through adulthood. The decision by transgender individuals to assert their gender identity publicly is a deeply personal one that is made by the individual, often in consultation with family, medical and health care providers, and others.

36. Gender identity is innate and external efforts to change a person's gender identity can be harmful to a person's health and well-being.

37. Gender identity and transgender status are inextricably linked to one's sex and are sex-related characteristics.

38. Most states authorize changing the sex marker on one's birth certificate, but the requirements for doing so vary and are often onerous. Specifically, many states require surgical procedures. At least one state does not allow persons to change the sex marker on their birth certificates.

39. Individuals born in North Carolina must have proof of certain surgeries, such as "sex reassignment surgery," in order to change the sex marker on their birth certificates. N.C. Gen. Stat. § 130A-118(b)(4).

40. Surgery related to gender transitioning is generally unavailable to children under age 18.

41. In addition, the great majority of transgender individuals do not have surgery as part of their gender transition. Determinations about such surgery are decisions about medical

care made by physicians and patients on an individual basis. For some, health-related conditions or other medical criteria counsel against invasive surgery. For others, the high cost of surgical procedures, which are often excluded from health insurance coverage, present an insurmountable barrier.

42. Standards of medical care for surgery related to gender transitioning generally advise that transgender individuals present consistent with their gender identity on a day-to-day basis across all settings of life, including in bathrooms and changing facilities at school and at work, for a significant time period prior to undergoing surgery.

Impact of H.B. 2 on Transgender Individuals in North Carolina

43. H.B. 2 requires public agencies to follow a facially discriminatory policy of treating transgender individuals, whose gender identity may not match their birth certificates, differently from similarly situated non-transgender individuals.

44. Because of Defendants' compliance with and implementation of H.B. 2, non-transgender employees of Defendants and of other public agencies in North Carolina may access bathrooms and changing facilities that are consistent with their gender identity in their places of work, while transgender employees may not access bathrooms and changing facilities that are consistent with their gender identity.

45. Defendants' compliance with and implementation of H.B. 2 stigmatizes and singles out transgender employees, results in their isolation and exclusion, and perpetuates a sense that they are not worthy of equal treatment and respect.

46. Upon information and belief, transgender employees of Defendants and other public agencies in North Carolina have suffered and continue to suffer injury, including, without

limitation, emotional harm, mental anguish, distress, humiliation, and indignity as a direct and proximate result of Defendants' compliance with and implementation of H.B. 2.

47. Because of the compliance with and implementation of H.B. 2 by Defendants University of North Carolina and Board of Governors of the University of North Carolina, individuals who are not transgender may access campus bathrooms and changing facilities that are consistent with their gender identity, while individuals who are transgender may not access campus bathrooms and changing facilities that are consistent with their gender identity.

48. The compliance with and implementation of H.B. 2 by Defendants University of North Carolina and Board of Governors of the University of North Carolina stigmatizes and singles out transgender individuals, results in their isolation and exclusion, and perpetuates a sense that they are not worthy of equal treatment and respect.

49. Upon information and belief, transgender individuals seeking access to the University of North Carolina campus have suffered and continue to suffer injury, including, without limitation, emotional harm, mental anguish, distress, humiliation, and indignity as a direct and proximate result of compliance with and implementation of H.B. 2.

50. Because of the compliance with and implementation of H.B. 2 by Defendants North Carolina Department of Public Safety, University of North Carolina, and Board of Governors of the University of North Carolina, individuals who are not transgender may access bathrooms and changing facilities that are consistent with their gender identity in covered facilities, while individuals who are transgender may not access bathrooms and changing facilities that are consistent with their gender identity.

51. The compliance with and implementation of H.B. 2 by Defendants North Carolina Department of Public Safety, University of North Carolina, and Board of Governors of the

University of North Carolina stigmatizes and singles out transgender individuals seeking access to covered facilities, results in their isolation and exclusion, and perpetuates a sense that they are not worthy of equal treatment and respect.

52. Upon information and belief, transgender individuals seeking access to covered facilities have suffered and continue to suffer injury, including, without limitation, emotional harm, mental anguish, distress, humiliation, and indignity as a direct and proximate result of compliance with and implementation of H.B. 2.

CLAIMS FOR RELIEF

COUNT I

Violation of Title VII of the Civil Rights Act of 1964 ("Title VII")
42 U.S.C. § 2000e, *et seq.*
(Against All Defendants)

53. As alleged in this Complaint, Defendants State of North Carolina, North Carolina Department of Public Safety, University of North Carolina, and Board of Governors of the University of North Carolina are engaged in, and continue to engage in, a pattern or practice of sex discrimination in the terms, conditions, and privileges of employment against their transgender employees in violation Title VII.

54. As alleged in this Complaint, Defendants State of North Carolina and Governor McCrory have engaged in a pattern or practice of resistance to the full enjoyment of employment rights under Title VII by implementing and requiring compliance with policies and practices that require public agencies to discriminate against their transgender employees based on sex in the terms, conditions, and privileges of employment in violation of Title VII.

COUNT II

Violation of Title IX of the Education Act Amendments of 1972 ("Title IX")
20 U.S.C. § 1681, *et seq.*
(Against Defendants University of North Carolina and Board of Governors of the University of North Carolina)

55. As alleged in this Complaint, Defendants University of North Carolina and Board of Governors of the University of North Carolina are discriminating on the basis of sex in violation of Title IX.

COUNT III

Violation of the Violence Against Women Reauthorization Act of 2013 ("VAWA")
42 U.S.C. § 13925(b)(13)
(Against Defendants North Carolina Department of Public Safety, University of North Carolina, and Board of Governors of the University of North Carolina)

56. As alleged in this Complaint, Defendants North Carolina Department of Public Safety, University of North Carolina, and Board of Governors of the University of North Carolina are discriminating on the basis of sex and gender identity, in violation of VAWA.

PRAYER FOR RELIEF

WHEREFORE, the United States respectfully requests that this Court:

A. Declare that, by complying with and implementing H.B. 2's provisions that apply to multiple-occupancy bathrooms or changing facilities, Defendants discriminate on the basis of sex in violation of Title VII;

B. Declare that, by complying with and implementing H.B. 2's provisions that apply to multiple-occupancy bathrooms or changing facilities, Defendants University of North Carolina and Board of Governors of the University of North Carolina discriminate on the basis of sex in violation of Title IX;

C. Declare that, by complying with and implementing H.B. 2's provisions that apply to multiple-occupancy bathrooms or changing facilities, Defendants North Carolina Department of Public Safety, University of North Carolina, and Board of Governors of the University of North Carolina discriminate on the basis of sex and gender identity in violation of VAWA;

D. Issue a preliminary and permanent injunction to prevent further violations of federal law; and

E. Grant such additional relief as the needs of justice may require.

Dated: May 9, 2016

Respectfully submitted,

Vanita Gupta
Principal Deputy Assistant Attorney General
Civil Rights Division
United States Department of Justice

BY:

Delora L. Kennebrew
Chief
Employment Litigation Section
Civil Rights Division
United States Department of Justice

/s Corey Stoughton
Corey Stoughton NY Bar Number: 4152633
Attorney for Plaintiff
Senior Counsel
Civil Rights Division
United States Department of Justice
950 Pennsylvania Avenue, NW
MJB, Room 5642
Washington, DC 20530
Telephone: (202) 616-2124
E-mail: corey.stoughton@usdoj.gov

Shaheena A. Simons
Chief
Educational Opportunities Section
Civil Rights Division
United States Department of Justice

/s Ripley Rand
Ripley Rand NC Bar Number: 22275
Attorney for Plaintiff
United States Attorney
Middle District of North Carolina
United States Department of Justice
101 South Edgeworth Street, 4th Floor
Greensboro, NC 27401
Telephone: (336) 333-5351
E-mail: ripley.rand@usdoj.gov

Lori B. Kisch DC Bar Number: 491282
Attorney for Plaintiff
Special Litigation Counsel

Whitney M. Pellegrino DC Bar Number: 490972
Attorney for Plaintiff
Special Legal Counsel

Employment Litigation Section
Civil Rights Division
United States Department of Justice
950 Pennsylvania Avenue, NW
PHB Room 4605
Washington, DC 20530
Telephone: (202) 305-4422
E-mail: lori.kisch@usdoj.gov

Educational Opportunities Section
Civil Rights Division
United States Department of Justice
950 Pennsylvania Avenue, NW
PHB Room 4004
Washington, DC 20530
Telephone: (202) 514-4092
E-mail: whitney.pellegrino@usdoj.gov

Candyce Phoenix VA Bar Number: 80800
Attorney for Plaintiff
Senior Trial Attorney
Employment Litigation Section
Civil Rights Division
United States Department of Justice
950 Pennsylvania Avenue, NW
PHB, Room 4031
Washington, DC 20530
Telephone: (202) 616-3871
E-mail: candyce.phoenix@usdoj.gov

Torey B. Cummings MA Bar Number: 664549
Attorney for Plaintiff
Senior Trial Attorney
Educational Opportunities Section
Civil Rights Division
United States Department of Justice
950 Pennsylvania Avenue, NW
PHB, Room 4112
Washington, DC 20530
Telephone: (202) 514-4092
E-mail: torey.cummings@usdoj.gov

Sean Keveney TX Bar Number: 24033863
Attorney for Plaintiff
Trial Attorney
Housing and Civil Enforcement
Civil Rights Division
United States Department of Justice
950 Pennsylvania Avenue, NW
NWB, Room 7010
Washington, DC 20530
Telephone: (202) 514-4838
E-mail: sean.keveney@usdoj.gov

Dwayne J. Bensing DC Bar Number: 1012138
Attorney for Plaintiff
Trial Attorney
Educational Opportunities Section
Civil Rights Division
United States Department of Justice
950 Pennsylvania Avenue, NW
PHB, Room 4015
Washington, DC 20530
Telephone: (202) 616-2679
E-mail: dwayne.bensing@usdoj.gov

ATTORNEYS FOR THE UNITED STATES OF AMERICA

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

JOAQUÍN CARCAÑO; PAYTON GREY MCGARRY; ANGELA GILMORE; AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA; and EQUALITY NORTH CAROLINA, *Plaintiffs*, v. PATRICK MCCRORY, in his official capacity as Governor of North Carolina; ROY COOPER III, in his official capacity as Attorney General of North Carolina; UNIVERSITY OF NORTH CAROLINA; BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA; and W. LOUIS BISSETTE, JR., in his official capacity as Chairman of the Board of Governors of the University of North Carolina, *Defendants*.	No. 1:16-cv-236

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This lawsuit challenges a sweeping North Carolina law, House Bill 2 ("H.B. 2"), which bans transgender people from accessing restrooms and other facilities consistent with their gender identity and blocks local governments from protecting lesbian, gay, bisexual, and transgender ("LGBT") people against discrimination in a wide variety of settings. By singling out LGBT people for disfavored treatment and explicitly

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writing discrimination against transgender people into state law, H.B. 2 violates the most basic guarantees of equal treatment and the U.S. Constitution.

2. In February 2016, the City of Charlotte enacted an ordinance (the "Ordinance") that extended existing municipal anti-discrimination protections to LGBT people. In light of the pervasive discrimination faced by LGBT people—and particularly transgender people—advocates had long pressed the Charlotte City Council for these protections. Because North Carolina state law does not expressly prohibit discrimination based on sexual orientation or gender identity, many LGBT residents of Charlotte—as well as LGBT residents throughout the state—are exposed to invidious discrimination in their day-to-day lives simply for being themselves. After two hours-long hearings, in which there was extensive public comment on both sides of the issue, the Charlotte City Council voted to adopt the Ordinance.

3. Before the Ordinance could take effect, the North Carolina General Assembly rushed to convene a special session with the express purpose of passing a statewide law that would preempt Charlotte's "radical" move to protect its residents from discrimination. In a process rife with procedural irregularities, the legislature introduced and passed H.B. 2 in a matter of hours, and the governor signed the bill into law that same day. Lawmakers made no attempt to cloak their actions in a veneer of neutrality, instead openly and virulently attacking transgender people, who were falsely portrayed as predatory and dangerous to others. While the discriminatory, stated focus of the legislature in passing H.B. 2—the use of restrooms by transgender people—is on its own

illegal and unconstitutional, H.B. 2 in facts wreaks far greater damage by also prohibiting local governments in North Carolina from enacting express anti-discrimination protections based on sexual orientation and gender identity.

4. Plaintiffs are individuals and nonprofit organizations whose members and constituents will be directly impacted by H.B. 2. Like the two transgender plaintiffs in the case, transgender people around the state of North Carolina immediately suffered harm under H.B. 2 in that they are not able to access public restrooms and other single-sex facilities that accord with their gender identity. LGBT people are also harmed by H.B. 2 in that it strips them of or bars them from anti-discrimination protections under local law. Plaintiffs seek a declaratory judgment that H.B. 2 violates their or their members' constitutional and statutory rights to equal protection, liberty, dignity, autonomy and privacy, as well an injunction preliminarily and permanently enjoining enforcement by of H.B. 2 by Defendants.

PARTIES

A. Plaintiffs.

5. Plaintiff Joaquín Carcaño ("Mr. Carcaño") is a 27-year-old man who resides in Carrboro, North Carolina. Mr. Carcaño is employed by the University of North Carolina at Chapel Hill ("UNC-Chapel Hill"). He is transgender.

6. Plaintiff Payton Grey McGarry ("Mr. McGarry") is a 20-year-old man who resides in Greensboro, North Carolina. Mr. McGarry is a full-time student at the University of North Carolina at Greensboro ("UNC-Greensboro"). He is transgender.

7. Plaintiff Angela Gilmore ("Ms. Gilmore") is a 52-year-old woman who resides in Durham, North Carolina and is an Associate Dean and Professor at North Carolina Central University School of Law. Ms. Gilmore is a lesbian.

8. Plaintiff American Civil Liberties Union of North Carolina ("ACLU of NC") is a private, non-profit membership organization with its principal office in Raleigh, North Carolina. It has approximately 8,500 members in the State of North Carolina, including LGBT members. The mission of the ACLU of NC is to defend and advance the individual freedoms embodied in the United States Constitution, including the rights of LGBT people, to be free from invidious discrimination and infringements on their liberty interests. The ACLU of NC sues on behalf of its members, some of whom are transgender individuals who are barred by H.B. 2 from using restrooms and other facilities in accordance with their gender identity in schools and government buildings, and some of whom are lesbian, gay, bisexual, or transgender individuals who have been stripped of or barred from local non-discrimination protections based on their sexual orientation and sex, including gender identity.

9. Plaintiff Equality NC ("Equality NC") is North Carolina's largest non-profit organization advocating for the rights of lesbian, gay, bisexual, and transgender individuals, with over 100,000 constituents and supporters. Originally founded in 1979 as the North Carolina Human Rights Fund, Equality NC is dedicated to securing equal rights and justice for lesbian, gay, bisexual, and transgender North Carolinians. Equality NC conducts comprehensive campaigns to build public support for equal rights,

advocates with policy-making bodies for the enactment of anti-discrimination protections for LGBT people, and provides educational programming on LGBT issues. Equality NC represents the interests of constituents who would otherwise have standing to participate in this case and have indicia of membership. Because Equality NC's primary function is to protect the rights of LGBT people, its challenge to H.B. 2 is germane to the organization's purpose.

B. Defendants.

10. Defendant Patrick McCrory ("Defendant McCrory" or "Governor McCrory" or "the Governor") is sued in his official capacity as the Governor of North Carolina. Pursuant to Article III, Section 1 of the State Constitution, "the executive power of the State" is vested in Defendant McCrory in his capacity as Governor. Article III, Section 5(4) also provides that it is the duty of Defendant McCrory in his capacity as Governor to "take care that the laws be faithfully executed." Governor McCrory is a person within the meaning of 42 U.S.C. § 1983 and was acting under color of state law at all times relevant to this complaint.

11. Defendant Roy Cooper III ("Defendant Cooper" or "Mr. Cooper") is sued in his official capacity as the Attorney General of North Carolina. Pursuant to N.C. Gen. Stat. § 114-2, it is Defendant Cooper's duty in his capacity as Attorney General of North Carolina to appear on behalf of the state in any court or tribunal in any cause or matter, civil or criminal, in which the state may be a party or interested. It is also the duty of Defendant Cooper to defend and enforce the laws of North Carolina. Mr. Cooper is a

person within the meaning of 42 U.S.C. § 1983 and was acting under color of state law at all times relevant to this complaint.

12. Defendant University of North Carolina is an education program or activity receiving federal financial assistance. Defendant University of North Carolina includes its constituent institutions, the University of North Carolina at Chapel Hill, and the University of North Carolina at Greensboro.

13. Defendant Board of Governors of the University of North Carolina ("the Board") is a corporate body charged with the general control, supervision, and governance of the University of North Carolina's constituent institutions. The Board is capable of being sued in "all courts whatsoever" pursuant to N.C. Gen. Stat. § 116-3.

14. Defendant W. Louis Bissette, Jr. ("Defendant Bissette" or "Mr. Bissette") is sued in his official capacity as the Chairman of the Board of Governors of the University of North Carolina and has the power to ensure the Board's compliance with any injunctive relief.

15. Defendants, through their respective duties and obligations, are responsible for enforcing H.B. 2. Each Defendant, and those subject to their direction, supervision, and control, has or intentionally will perform, participate in, aide and/or abet in some manner the acts alleged in this complaint, has or will proximately cause the harm alleged herein, and has or will continue to injure Plaintiffs irreparably if not enjoined. Accordingly, the relief requested herein is sought against each Defendant, as well as all

persons under their supervision, direction, or control, including but not limited to their officers, employees, and agents.

JURISDICTION AND VENUE

16. This action arises under 42 U.S.C. § 1983 to redress the deprivation under color of state law of rights secured by the United States Constitution and under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.* ("Title IX").

17. This Court has original jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1343 because the matters in controversy arise under laws of the United States and the United States Constitution.

18. Venue is proper in this Court under 28 U.S.C. § 1391(b)(1) and (2) because Defendant University of North Carolina resides within the District, and all Defendants reside within the State of North Carolina; and because a substantial part of the events that gave rise to the Plaintiffs' claims took place within the District.

19. This Court has the authority to enter a declaratory judgment and to provide preliminary and permanent injunctive relief pursuant to Rules 57 and 65 of the Federal Rules of Civil Procedure, and 28 U.S.C. §§ 2201 and 2202.

20. This Court has personal jurisdiction over Defendants because they are domiciled in North Carolina.

FACTUAL ALLEGATIONS

A. Plaintiffs.

21. **Plaintiff Joaquín Carcaño** works for UNC-Chapel Hill's Institute for

Global Health and Infectious Disease as a Project Coordinator. The project that he coordinates provides medical education and services such as HIV testing to the Latino/a population.

22. Mr. Carcaño is a man.

23. Until the passage of H.B. 2, Mr. Carcaño was recognized and treated like all other men at his work at UNC-Chapel Hill.

24. Mr. Carcaño is transgender. What that means is that his sex assigned at birth was female, as his birth certificate reflects, but that designation does not accurately reflect his gender identity, which is male.

25. A person's gender identity refers to the person's internal sense of belonging to a particular gender. There is a medical consensus that gender identity is innate and that efforts to change a person's gender identity are unethical and harmful to a person's health and well-being.

26. The gender marker on a birth certificate is designated at the time of birth generally based upon the appearance of external genitalia. However, determinations of sex can involve multiple factors, such as chromosomes, hormone levels, internal and external reproductive organs, and gender identity.

27. Gender identity is the primary determinant of sex.

28. Mr. Carcaño was diagnosed with gender dysphoria, the medical diagnosis for the clinically significant distress that individuals whose gender identity differs from the sex they were assigned at birth can experience.

29. Gender dysphoria is a serious medical condition that if left untreated can lead to clinical distress, debilitating depression, and even suicidal thoughts and acts.

30. Gender dysphoria is a condition recognized in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fifth ed. (2013) (DSM-V), and by the other leading medical and mental health professional groups, including the American Medical Association and the American Psychological Association.

31. Medical treatment for gender dysphoria must be individualized for the medical needs of each patient.

32. Treatment for gender dysphoria includes living one's life consistent with one's gender identity, including when accessing single-sex spaces like restrooms and locker rooms.

33. Forcing a transgender person to use single-sex spaces that do not match the person's gender identity is inconsistent with medical protocols and can cause anxiety and distress to the transgender person and result in harassment of and violence against them.

34. Mr. Carcaño was born and raised in South Texas. Since a very young age, around 7 or 8 years old, Mr. Carcaño was aware that he did not feel like a girl, but he did not know how to express how he felt.

35. Mr. Carcaño ultimately acknowledged his male gender identity to himself later in his adult life.

36. Mr. Carcaño has been in the continuous care of a licensed mental health clinician since 2013, who diagnosed Mr. Carcaño with gender dysphoria. Mr. Carcaño initially sought treatment for depression, which was caused in part by his gender dysphoria.

37. Mental health and medical professionals worldwide recognize and follow the evidence-based standards of care for the treatment of gender dysphoria developed by the World Professional Association for Transgender Health ("WPATH"). After diagnosing Mr. Carcaño with gender dysphoria, his therapist developed a course of treatment consistent with those standards. The goal of such treatment is to alleviate distress by helping a person live congruently with the person's gender identity, the primary determinant of sex. Consistent with that treatment and his identity, in January 2015, Mr. Carcaño explained to his family and friends that he was a man.

38. A critical component of the WPATH Standards of Care is a social transition to living full-time consistently with the individual's gender identity. For Mr. Carcaño, that includes living in accordance with his gender identity in all respects, including the use of a male name and pronouns and use of the men's restrooms.

39. For transgender adults, it is critical that social transition include transition in the workplace, including with respect to restrooms. Excluding a transgender man from the restroom that corresponds to his gender identity, or forcing him to use a separate facility from other men, communicates to the entire workplace that he should not be recognized as a man and undermines the social transition process.

40. Mr. Carcaño also began using Joaquín as his first name in January 2015. His friends, family, and coworkers now recognize him as a man, and they refer to him using his male name and male pronouns.

41. Also consistent with the WPATH Standards of Care, Mr. Carcaño's physician recommended and prescribed hormone treatment, which Mr. Carcaño has received since May 2015. For both hormone therapy and surgical treatment, the WPATH Standards of Care require persistent, well-documented gender dysphoria, which is a criterion that Mr. Carcaño satisfied. Among other therapeutic benefits, the hormone treatment has deepened Mr. Carcaño's voice, increased his growth of facial hair, and given him a more masculine appearance. This treatment helped alleviate the distress Mr. Carcaño experienced due to the discordance between his birth-assigned sex and his identity and helped him to feel more comfortable with who he is.

42. As part of the treatment for his gender dysphoria, Mr. Carcaño also obtained a bilateral mastectomy in January 2016. Consistent with WPATH Standards of Care, Mr. Carcaño satisfied the requirement of having a referral from a qualified mental health professional in order to obtain the surgical treatment.

43. As part of his social transition, Mr. Carcaño began using the men's restroom at work and elsewhere in late 2015, which occurred without incident for the five months or so before H.B. 2's enactment. Mr. Carcaño's therapist had also specifically recommended that he use only the men's restroom. She was concerned that using the women's restroom could compromise his mental health, well-being, and safety. By late

2015, Mr. Carcaño had facial hair facilitated by hormone treatment, and his therapist indicated that others would recognize Mr. Carcaño as male based on his physical appearance.

44. Mr. Carcaño is now comfortable with the status of his treatment and, with the exception of the distress now caused by the passage of H.B. 2, his distress has been managed through the clinically recommended treatment he has received. He plans to continue treatment under the supervision of medical professionals and based on his medical needs.

45. Apart from the building where he works, Mr. Carcaño also used other men's restrooms on the UNC-Chapel Hill campus without incident for approximately five months prior to H.B. 2's passage. In addition, when out in public, such as at restaurants and stores, Mr. Carcaño uses the men's restroom.

46. The only restrooms on the floor where Mr. Carcaño works at UNC-Chapel Hill are designated either for men or for women. There are no restrooms in the building where Mr. Carcaño works that are not designated either for men or women. All the restrooms in the building are multiple occupancy.

47. If Mr. Carcaño could not use the men's restroom at UNC-Chapel Hill, he would have to leave campus and find a local business in order to use the men's restroom; or he would have to locate a restroom not designated for either men or women elsewhere on campus. Either way, preventing him from using the multiple occupancy restrooms that other men are able to use is stigmatizing and marks him as different and lesser than

other men. It also interferes with his ability to perform his job duties by requiring him to leave his building each time he needs to use the restroom throughout the workday.

48. Using the women's restroom is not a viable option for Mr. Carcaño, just as it would not be a viable option for non-transgender men to be forced to use the women's restroom. Forcing Mr. Carcaño to use the women's restroom would also cause substantial harm to his mental health and well-being. It would also force him to disclose to others the fact that he is transgender, which itself could lead to violence and harassment.

49. The idea of being forced into the women's restroom causes Mr. Carcaño to experience significant anxiety as he knows that it would be distressing for him and uncomfortable for others. He fears for his safety because of the passage of H.B. 2.

50. Mr. Carcaño also visits public agencies as defined by N.C. Gen. Stat. § 143-760(4), and intends to and will do so in the future. For example, as part of his job at UNC-Chapel Hill, Mr. Carcaño has had to visit the offices North Carolina Department of Health and Human Services many times in the past, and he will continue to need to do so in the future. Prior to passage of H.B. 2, he used the men's restroom while at their office, but he will be banned from doing so in the future under H.B. 2.

51. Similarly, Mr. Carcaño has visited state courthouses in Chapel Hill as part of a process to obtain a name change from his current legal name, which includes a traditionally female first name, to the name he currently uses. Because that name change

process is ongoing, Mr. Carcaño will continue to visit state courthouses in the future, but he will be banned from using the men's restroom there under H.B. 2.

52. Mr. Carcaño has also visited the Division of Motor Vehicles under the North Carolina Department of Transportation on prior occasions (e.g., to obtain a driver's license) and anticipates doing so again in the future, where he will be banned from using the men's restroom under H.B. 2.

53. Mr. Carcaño also regularly uses the North Carolina Rest Area System, which maintains public restrooms along highways and is operated by the North Carolina Department of Transportation. For example, he uses the restrooms provided by that system when he travels approximately once a month to visit his brother in Atlanta, and when he visits Washington, D.C. periodically. He will need to continue to use those restrooms in the future, but he will be banned from using the men's restroom under H.B.2.

54. There have been no incidents or, to the best of Mr. Carcaño's knowledge, complaints related to his use of the restrooms designated for men.

55. Mr. Carcaño is a member of the ACLU of NC.

56. **Plaintiff Payton Grey McGarry** is a full-time student at the University of North Carolina at Greensboro ("UNC-Greensboro") where he is double majoring in Business Administration and Accounting. He is also a skilled musician and has played trumpet in many ensembles at UNC-Greensboro. He plays the guitar, baritone, clarinet, and saxophone.

57. Mr. McGarry is close to his family and has a younger brother who is also a member of the LGBT community. Mr. McGarry hopes to use his education to eventually go to law school and work to defend people's civil rights.

58. Mr. McGarry is a man.

59. Mr. McGarry is transgender. As is true for Mr. Carcaño, Mr. McGarry's sex assigned at birth was female, as his birth certificate reflects, but that designation does not conform to his gender identity, which is male.

60. Mr. McGarry was diagnosed with gender dysphoria.

61. Mr. McGarry was born and raised in Wilson, North Carolina. Throughout his childhood, Mr. McGarry felt like a boy and never really thought of himself as a girl. It was not until he started to go through puberty that he began to wrestle with the disconnect between his identity as a boy and his assigned birth sex.

62. Mr. McGarry realized while he was in high school that he is transgender.

63. In October of 2013, during his senior year in high school, Mr. McGarry began mental health treatment with a licensed clinical social worker who diagnosed him with gender dysphoria.

64. After diagnosing Mr. McGarry with gender dysphoria, his therapist developed a course of treatment in accordance with medical standards for treating the condition.

65. Consistent with that treatment and his identity, in the fall and winter of 2013, Mr. McGarry explained to his friends and family that he is male and began to use male pronouns.

66. In April of 2014, under the care of an endocrinologist, Mr. McGarry began hormone therapy. This treatment helped alleviate the distress Mr. McGarry experienced due to the discordance between his birth-assigned sex and his identity and helped him to feel more comfortable with who he is.

67. By the time he graduated high school in June of 2014, Mr. McGarry used the name Payton and male pronouns in all aspects of his life. He is known as Payton McGarry to his family, friends, and peers, although he has not yet changed his legal first name to Payton.

68. In the fall of 2014, Mr. McGarry enrolled as a freshman at UNC-Greensboro as Payton McGarry and as male.

69. Since arriving at UNC-Greensboro, Mr. McGarry has identified and has been known to others as male for all purposes.

70. Mr. McGarry is a member of Phi Mu Alpha Sinfonia, a music fraternity, and is the Vice President of the Iota Epsilon Chapter of that fraternity. His fraternity brothers are aware that he is transgender and have no concerns with his use of men's restrooms and locker rooms.

71. Though Mr. McGarry currently lives off campus, he is on campus six or seven days per week and always uses the restroom designed for men in on-campus buildings.

72. Mr. McGarry regularly uses the locker room facilities at UNC-Greensboro and always uses the facilities designed for men.

73. For the past year and a half since he enrolled at UNC-Greensboro, Mr. McGarry has used the men's restrooms and locker rooms on-campus without incident. Mr. McGarry is unaware of any instance in which any person has complained about his use of the men's restroom or locker room.

74. Mr. McGarry works part-time as a visual technician for marching bands at different high schools around the state and regularly uses the bathroom for men when working as a visual technician. There have been no incidents or, to the best of Mr. McGarry's knowledge, complaints related to his use of the restrooms designated for men.

75. In addition, when out in public, such as at restaurants and stores, Mr. McGarry always uses the men's restroom.

76. To Mr. McGarry's knowledge, there are very few single-user restrooms on the UNC-Greensboro campus and in many buildings where he has classes there are no single user bathrooms.

77. If Mr. McGarry could not use the men's restroom at UNC-Greensboro, he would have to search for single-user restrooms outside of the buildings where his classes are held every time he had to use the restroom. This would disrupt his ability to attend

class and would interfere with his educational opportunities. Expelling him from the multiple occupancy restrooms and locker rooms available to all other male students is stigmatizing and marks him as different and lesser than other men.

78. Since he started testosterone two years ago, Mr. McGarry's voice has deepened and his face and body have become more traditionally masculine in appearance.

79. Using the women's restroom is not a viable option for Mr. McGarry, just as it would not be a viable option for non-transgender men to be forced to use the women's restroom. Forcing Mr. McGarry to use the women's restroom would also cause substantial harm to his mental health and well-being. It would also force him to disclose to others the fact that he is transgender, which itself could lead to violence and harassment.

80. The idea of being forced into the women's restroom causes Mr. McGarry to experience significant anxiety as he knows that it would be distressing for him and uncomfortable for others. He fears for his safety because of the passage of H.B. 2.

81. Mr. McGarry has also visited public agencies as defined by N.C. Gen. Stat. § 143-760(4), and intends to and will do so in the future. For example, Mr. McGarry has visited the Division of Motor Vehicles under the North Carolina Department of Transportation on prior occasions (e.g., to obtain a driver's license) and anticipates doing so again in the future, where he will be banned from using the men's restroom under H.B. 2.

82. Mr. McGarry also has used and will continue to use the North Carolina Rest Area System, which maintains public restrooms along highways and is operated by the North Carolina Department of Transportation. He will need to continue to use those restrooms in the future, but he will be banned from using the men's restroom under H.B. 2.

83. **Plaintiff Angela Gilmore** is a resident of Durham, North Carolina. Ms. Gilmore has lived in North Carolina since 2011, when she moved from Florida to take a job at North Carolina Central University. She is currently the Associate Dean for Academic Affairs and Professor of Law at North Carolina Central University.

84. Ms. Gilmore is a lesbian, and has been in a relationship with her wife, Angela Wallace, for almost twenty years. Ms. Gilmore and Ms. Wallace were married in Washington, D.C. in 2014.

85. Ms. Gilmore looked for and accepted a job in North Carolina, after she and her wife fell in love with the state during a visiting teaching job Ms. Gilmore had at Elon University School of Law in Greensboro, North Carolina, in 2010.

86. Both Ms. Gilmore and her wife, African American lesbians, felt that North Carolina, and Durham in particular, was a place where they could be fully themselves, comfortable in terms of both their race and sexual orientation.

87. Ms. Gilmore and her wife love living in Durham—they feel very much part of the community—and prior to the passage of H.B. 2, they had been looking at small towns in North Carolina where they might want to retire.

88. Since moving to North Carolina, Ms. Gilmore has worked towards increasing non-discrimination protections for LGBT people. Ms. Gilmore is a member of ACLU of NC, and she was on the ACLU of NC board between 2014 and 2015. During that time, the ACLU of NC actively worked to defeat anti-LGBT bills proposed in the state legislature and to pass local ordinances, like the Ordinance, and to protect LGBT people from discrimination at the local level. Ms. Gilmore also has spoken on panels at her law school and other law schools regarding non-discrimination protections for LGBT people.

89. The passage of H.B. 2 has caused Ms. Gilmore and her wife distress, in that it has significantly undone their sense of belonging and value in the state, which is why they moved to North Carolina. Ms. Gilmore and her wife experience H.B. 2 as sending a clear message to them as lesbians that they are not welcome in North Carolina.

90. Ms. Gilmore and her wife have visited the city of Charlotte and they plan to do so in the future. As two women traveling together with the same first name, they are often asked about the nature of their relationship, and they therefore regularly reveal themselves to be a lesbian couple. Under the Ordinance, Ms. Gilmore and her wife would have been protected from sexual orientation discrimination in public accommodations in the city of Charlotte. With the passage of H.B. 2, Ms. Gilmore worries that she and her wife will now be exposed to discrimination based on their sexual orientation.

91. With the passage of H.B. 2, Ms. Gilmore also is limited in her ability to increase and benefit from non-discrimination protections for LGBT people in North Carolina. Were she able to, Ms. Gilmore would continue to advocate for local ordinances that prohibit discrimination based on sexual orientation and gender identity.

92. As a non-transgender woman who always uses the facilities designated for women in both public and private spaces, the passage of H.B. 2 does not make Ms. Gilmore feel safer in these facilities.

B. The City of Charlotte's Enactment of a Non-Discrimination Ordinance.

93. Advocates have long worked for the passage of an ordinance that would ensure that LGBT people were expressly protected from discrimination within the City of Charlotte. Prior to the vote on the Ordinance, there had been an earlier round of intensive public engagement in late 2014 to early 2015, when the Charlotte City Council previously considered expanding non-discrimination protections to include sexual orientation and gender identity and expression.

94. There was again extensive discussion and deliberation leading up to the February 2016 vote on the Ordinance. The Charlotte City Council heard hours of robust public comment in a forum that included hundreds of people—both those who were in support of the Ordinance and those who were in opposition to the Ordinance. The Charlotte City Council also received significant legal analysis from the Office of the City Attorney regarding its authority to enact the Ordinance and the effect of the Ordinance.

95. The impetus for the Ordinance is the reality that LGBT people often face pervasive discrimination. Although same-sex couples may now marry throughout the United States as a result of the U.S. Supreme Court's 2015 ruling in *Obergefell*, lesbian, gay, and bisexual people remain vulnerable to discrimination in states like North Carolina, where there is no express protection for sexual orientation in state law, making local anti-discrimination protections even more vital. Discrimination is especially pervasive for transgender people, as evidenced by a 2011 national study of transgender Americans, *Injustice at Every Turn*, which documented the high levels of harassment, discrimination, and violence that transgender people have faced and continue to face.

96. In the 2011 national report cited above, 90% of respondents reported being harassed at work or taking actions to avoid harassment while 26% reported being fired because they are transgender. Forty-seven percent reported some form of employment discrimination because they are transgender, including not being hired, not being promoted, or being fired. Fifty-three percent reported being verbally harassed or disrespected in a place of public accommodation, and 22% report being denied equal treatment by a government agency or official, because they are transgender.

97. In 2013, it was estimated that there were more than 250,000 LGBT adults in North Carolina, out of an adult population of approximately eight million people. In addition, there are an estimated 37,800 transgender people (of any age) in North Carolina, including 15,600 individuals who are 13 to 19 years old. While transgender individuals

only make up a small minority of the population, they are disproportionately targeted for hate crimes in the United States.

98. On Monday, February 22, 2016, the Charlotte City Council approved by a 7-to-4 vote the Ordinance, which, *inter alia*, amended its existing public accommodations protections by barring discrimination in public accommodations based on "gender identity, gender expression" and "sexual orientation."

99. The City Council's vote was met with a firestorm of opposition from vocal opponents of the part of the Ordinance that would have required certain public accommodations to allow transgender people to use single-sex facilities, such as restrooms and locker rooms, in accordance with their gender identity.

100. Opponents of the Ordinance distorted the truth of what the Ordinance's non-discrimination requirement would accomplish and formed a vocal campaign decrying a purported attempt to permit "men in women's restrooms."

C. The Events Leading to H.B. 2, Contemporary Statements by Decisionmakers, and Departures From the Normal Legislative Process Revealed a Series of Official Actions Taken for Invidious Purposes.

101. The State of North Carolina has rarely, if ever, exercised authority to preempt local ordinances providing broader protections than under state law. For example, in 1968 Charlotte adopted an ordinance prohibiting discrimination in public accommodations on the basis of race, color, religion, and national origin. In 1972, the Council amended the ordinance to prohibit discrimination based on sex, which the Council further modified in 1985.

102. Even though all of these protections extended beyond the reach of the State's public accommodations law, which until H.B. 2 prohibited only public accommodations discrimination based on disability, the State allowed Charlotte's ordinance to stand undisturbed for decades. It was only after Charlotte took steps to protect LGBT people that the State rushed to preempt the ordinance.

103. Even before the Charlotte City Council had cast its vote on the Ordinance, Governor McCrory informed Charlotte City Council members that the State would likely take immediate action to put a halt to the Ordinance—even as Governor McCrory conceded that was an exceedingly unusual step. In an email to Charlotte City Council members, Governor McCrory noted that he "made a point as the former 14 year Mayor and current Governor to stay out of specific issues being voted on by the Charlotte City Council." Governor McCrory nonetheless characterized the Ordinance's non-discrimination protections for LGBT people as "changing basic long-established values and norms" surrounding "public restrooms," and ominously warning of "possible danger from deviant actions by individuals taking improper advantage of a bad policy." Governor McCrory said that the Ordinance would "most likely cause immediate State legislative intervention which I would support as governor."

104. On Tuesday, February 23, 2016, the Speaker of the House, Tim Moore, issued a press release announcing that he would work with fellow Republicans to explore a "legislative intervention to correct [Charlotte's] radical course."

105. In North Carolina, it is the state's Governor who typically calls a special session, but in this case, Governor McCrory refused to call a special session because he was concerned the legislature would go beyond addressing the Charlotte Ordinance.

106. As a result of the Governor's refusal to call a special session, legislative leaders opted for a rarely used law that allows special sessions when three-fifths of legislators in both chambers support the call. That provision in the state constitution had not been used since 1981, according to Lt. Governor Dan Forest's chief of staff, Hal Weatherman. The special session cost approximately $42,000 to convene.

107. The text of H.B. 2, which was named the "Public Facilities Privacy and Security Act," was not shared with most legislators until they arrived to debate the bill.

108. North Carolina House of Representatives Minority Leader Larry Hall ("Minority Leader Hall") stated "We don't know what we're discussing here, we don't know what we're voting on. *What we're doing is a perversion of the process.*"

109. Minority Leader Hall said that Democrats were initially told that the special session would take place Thursday, March 24, 2016, when instead the special session was held on March 23, 2016. Minority Leader Hall stated that, as a result, a number of legislators were "caught off guard" and were "scrambling to try to come back" for the session.

110. Comments made by lawmakers both during the debate, in the press, and through their social media used vitriolic language to make clear their aim at undoing Charlotte's protections for LGBT people:

a. Senate President Pro Tempore Phil Berger's descriptions of the legislature's work included:

i. "Senate unanimously votes to stop radical ordinance allowing men into public bathrooms with women and young girls."

ii. "Lawmakers were forced to come back to session to address the serious safety concerns created by the dangerous ordinance – which violated existing state criminal trespass law, indecent exposure law and building codes and created a loophole that any man with nefarious motives could use to prey on women and young children . . ."

iii. "How many fathers are now going to be forced to go to the ladies' room to make sure their little girls aren't molested?"

b. North Carolina state Senator Buck Newton said, "The Charlotte City Council should have never passed this unlawful and reckless bathroom and locker room ordinance. Politics have reached a new extreme when a municipality's top priority is allowing men into women's bathrooms and locker rooms. But tens of thousands of our constituents from across the state have called on us to stand up to the political correctness mob, fight for common sense and put a stop to this nonsense once and for all."

c. North Carolina state Senator David Curtis ("Senator Curtis") said, "This liberal group is trying to redefine everything about our society. Gender and marriage — just the whole liberal agenda." Senator Curtis added that while, "We generally don't get involved in local politics. We need to do what's right." Senator

Curtis said that H.B. 2 was necessary because, "The gays would go into a business, make some outrageous demand that they know the owner cannot comply with and file a lawsuit against that business owner and put him out of business."

d. North Carolina state Senator David Brock said, "You know, $42,000 is not going to cover the medical expenses when a pervert walks into a bathroom and my little girls are in there."

111. Debate in both chambers of the North Carolina General Assembly focused specifically on reversing the Charlotte Ordinance, with lawmakers in both chambers condemning the anti-discrimination protections for LGBT people, including transgender individuals' right to use facilities in accordance with their gender identity.

112. Less than 10 hours after it was introduced, the bill unanimously passed both houses. Governor McCrory signed the bill that same night, issuing a signing statement making clear once again the targets of H.B. 2. His signing statement said, "This radical breach of trust and security under the false argument of equal access not only impacts the citizens of Charlotte but people who come to Charlotte to work, visit or play. This new government regulation defies common sense and basic community norms by allowing, for example, a man to use a woman's bathroom, shower or locker room." H.B. 2 took effect immediately.

D. H.B. 2 Harms Transgender People.

113. H.B. 2 amended North Carolina's General Statutes to mandate that school boards *require* students to use restrooms and other single-sex facilities in accordance with

their "biological sex" providing that,

> Local boards of education shall require every multiple occupancy bathroom or changing facility that is designated for student use to be designated for and used only by students based on their biological sex.

114. H.B. 2 also imposes the same mandate on all executive branch agencies (which are expressly defined to include Defendant University of North Carolina), and all public agencies, providing that they,

> shall require every multiple occupancy bathroom or changing facility to be designated for and only used by persons based on their biological sex.

115. Each of those provisions defines "biological sex" as follows,

> Biological sex. – The physical condition of being male or female, which is stated on a person's birth certificate.

116. Changing the gender marker on one's birth certificate is not a viable option for many transgender people, as every jurisdiction has a different set of often onerous and unnecessary requirements for updating the gender listed on a birth certificate.

117. For instance, a person born in North Carolina can only update the gender marker listed on a North Carolina-issued birth certificate with proof of certain surgeries that may not be medically necessary, advisable, or affordable for any given person. Even more troubling, a person born in neighboring Tennessee can never change the gender listed on a Tennessee-issued birth certificate.

118. Medical treatment such as the surgery required to update a person's North Carolina birth certificate does not alter a person's gender (or what H.B. 2 calls "biological sex"), but rather merely brings a person's body into alignment with the

gender they have always been. Gender identity is instead the chief determinant of a person's gender.

119. H.B. 2's provisions requiring use of single-sex facilities in accordance with the sex stated on their birth certificate not only disproportionately burdens transgender people, but intentionally targets them for differential treatment. Lawmakers made clear that H.B. 2 was specifically aimed at transgender people. For example, an FAQ released by Governor McCrory after H.B. 2's enactment states, "Why did North Carolina pass this law in the first place? Answer: The bill was passed after the Charlotte City Council voted to impose a regulation requiring businesses to allow a man into a women's restroom, shower, or locker room if they choose," even though it does not do that, but only allows a transgender woman to use a women's restroom or other multiple user facility for women.

120. Prior to the passage of H.B. 2, it was already illegal for a person to enter a restroom or locker room to assault or injure another. Moreover, protecting transgender people from discrimination in public accommodations, as has been done in numerous states and hundreds of localities, has resulted in no increase in public safety incidents in any jurisdiction anywhere in the United States, and including transgender people in public life in no way impacts the safety or well-being of non-transgender people.

121. The painful message of stigma sent by H.B. 2 echoes the dehumanizing rhetoric employed by a number of lawmakers, suggesting that transgender people are somehow predatory or dangerous to others. In fact, it is H.B. 2 that exposes transgender

people to harassment and potential violence. Transgender people are already disproportionately targeted for physical violence and harassment in North Carolina and across the country. When a transgender person is forced to disclose their transgender status to strangers, such disclosure puts them at a high risk for violence. H.B. 2's requirement that transgender people be shunted into single-sex spaces that do not match their gender identity invades their privacy and exposes this vulnerable population to harassment and potential violence by others.

122. Upon information and belief, after the enactment of H.B. 2, some school officials that had been respecting their students' gender identity without any problem called parents to say that their children would be forced out of the single-sex facilities that match their gender identity.

123. H.B. 2's broad sweep means that the same result applies to executive and public agencies, including routine places such as libraries, public health centers, airports, and the Division of Motor Vehicles, as well as places where people may turn in times of crisis, such as state hospitals, police departments, and courthouses. Transgender individuals working in such agencies may not be able to safely use any bathroom any longer, threatening their ability to keep their job.

124. H.B. 2's restroom ban also deters transgender people from participating in the state and local democratic process. It bans them from using the restroom consistent with their gender identity when visiting the North Carolina General Assembly, petitioning their legislator, or entering any building operated by the legislative branch. It

also bans them from using the restroom consistent with their gender identity at a city council meeting or at a mayor's office.

125. H.B. 2's harms extend even farther, creating conflicts between state law and various federal laws. The conflict with Title IX, for example, puts at risk the more than $4.5 billion in federal education funding that North Carolina is expected to receive in 2016. Employers subject to Title VII also will violate the U.S. Equal Employment Opportunity Commission's decree that discriminating against transgender people with respect to restroom use is impermissible sex discrimination. Public hospitals that receive federal funding also will violate Section 1557 of the Affordable Care Act if they comply with H.B. 2.

126. All of this follows a history of discrimination by the decisionmakers against transgender people, including for example, Governor McCrory's participation in a Fourth Circuit *amicus curiae* brief arguing that a transgender student's request to access restrooms in accordance with his gender identity is "radical."

E. H.B. 2 Harms Lesbian, Gay, and Bisexual Individuals, as well as Transgender Individuals.

127. H.B. 2 also disproportionately burdens lesbian, gay, and bisexual individuals, as well as transgender individuals, by stripping them of or barring them from anti-discrimination projections under local law. H.B. 2 took aim at the Charlotte ordinance in a section providing,

> The General Assembly declares that the regulation of discriminatory practices in employment is properly an issue of general, statewide concern, such that this Article and other applicable provisions of the General Statutes supersede and

> preempt any ordinance, regulation, resolution, or policy adopted or imposed by a unit of local government or other political subdivision of the State that regulates or imposes any requirement upon an employer pertaining to the regulation of discriminatory practices in employment, except such regulations applicable to personnel employed by that body that are not otherwise in conflict with State law.

128. H.B. 2 stripped lesbian, gay, and bisexual individuals of anti-discrimination protections in Charlotte, because no such sexual orientation anti-discrimination protections exist in state law. The preemptive effect of this section did not fall equally on all North Carolinians, however.

129. Recognizing that North Carolina law had no statewide public accommodations protection of any kind except for people with disabilities, H.B. 2 actually enacted a new public accommodations statute—so that the other groups whose protections also would have been preempted under the Charlotte Ordinance were spared that result. The new public accommodations statute prohibits discrimination based on "race, religion, color, national origin, or biological sex"—omitting the sexual orientation protections that had been included in the Charlotte Ordinance.

130. The North Carolina legislature has a history of targeted discrimination toward lesbian, gay, and bisexual people. For example, the legislature approved and referred to voters a constitutional amendment barring access to marriage for same-sex couples. Legislative leaders also intervened in litigation challenging the constitutionality of the exclusion of same-sex couples from marriage pursuant to a statute authorizing them to act on behalf of the General Assembly. In 2015, the legislature also passed a bill that allows county magistrates to recuse themselves from performing civil marriages.

131. The preemptive effect of H.B. 2 also harmed transgender people as well. While the Charlotte Ordinance had prohibited discrimination based on sex, gender identity, and gender expression, the new public accommodations statute restricted its protections solely to "biological sex," which is defined in an effort to deliberately exclude transgender people from protection.

CLAIMS FOR RELIEF

COUNT I
Deprivation of Equal Protection
U.S. Const. Amend. XIV

132. Plaintiffs incorporate paragraphs 1 through 131 as though fully set forth herein.

133. Plaintiffs state this cause of action against Defendants in their official capacities for purposes of seeking declaratory and injunctive relief, and challenge H.B. 2 both facially and as applied to them.

134. The Fourteenth Amendment to the United States Constitution, enforceable pursuant to 42 U.S.C. § 1983, provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

A. Sex Discrimination in Single-Sex Restrooms and Facilities (H.B. 2, Part I)

135. Section A of Count I is asserted by Plaintiffs Carcaño, McGarry, Equality NC, and ACLU of NC against Defendants Governor McCrory, Cooper, Board of Governors, and Bissette.

136. Under the Equal Protection Clause of the Fourteenth Amendment, discrimination based on sex is presumptively unconstitutional and subject to heightened scrutiny.

137. H.B. 2 discriminates against transgender people on the basis of sex.

138. Discrimination based on sex includes but is not limited to discrimination based on gender nonconformity, gender identity, transgender status, and gender transition.

139. H.B. 2 facially classifies people based on sex, gender identity, and transgender status.

140. H.B. 2 treats transgender people differently than non-transgender people who are similarly situated.

141. Under H.B. 2, non-transgender people are able to access restrooms and other single-sex facilities consistent with their gender identity, but transgender people are banned from restrooms and other single-sex facilities consistent with their gender identity.

142. H.B. 2 discriminates against transgender people based on gender nonconformity. For example, although Mr. Carcaño and Mr. McGarry are men, are perceived as men in public, and have had medical treatment to bring their body into alignment with their male gender identity, they have birth certificates with female gender markers that do not conform to H.B. 2's expectations for men. Furthermore, if transgender men such as Mr. Carcaño and Mr. McGarry had been assigned male at birth,

they would not be banned by H.B. 2 from the restrooms and other single-sex facilities consistent with their gender identity. No person has any control over the sex that person is assigned at birth.

143. H.B. 2's discrimination against transgender people based on sex is not substantially related to any important government interest. Indeed, it is not even rationally related to any legitimate government interest.

144. H.B. 2 endangers the safety, privacy, security, and well-being of transgender individuals. For example, if a transgender woman were to use the men's restroom, she likely would be harassed and might be assaulted by men who believed that she should not be in the men's restroom. Similarly, if a transgender man were to use the women's restroom, he likely would be harassed and might be assaulted by women who believe he should not be in the women's restroom.

145. H.B. 2 does not promote the safety, privacy, security, or well-being of non-transgender people.

146. H.B. 2 deprives transgender people of their right to equal dignity, liberty, and autonomy by branding them as second-class citizens.

147. H.B. 2's discrimination against transgender people based on sex denies them the equal protection of the laws, in violation of the Equal Protection Clause of the Fourteenth Amendment.

B. Sex and Sexual Orientation Discrimination in Preemption of Local Non-Discrimination Protections (H.B. 2, Part II, Sections 2.2 & 2.3; H.B. 2, Part III)

148. Section B of Count I is asserted by Plaintiffs Carcaño, McGarry, Gilmore, Equality NC, and ACLU of NC against Defendants Governor McCrory and Cooper.

149. Under the Equal Protection Clause of the Fourteenth Amendment, discrimination based on sex and discrimination based on sexual orientation are presumptively unconstitutional and subject to heightened scrutiny.

150. H.B. 2 deprives LGBT people of protections against discrimination based on sexual orientation, gender identity, and gender expression.

151. H.B. 2 was motivated by an intent to treat LGBT people differently, and worse, than other people, including by stripping them of the protections afforded by the City of Charlotte's Ordinance and precluding any local government from taking action to protect LGBT people against discrimination.

152. H.B. 2 was enacted for the purpose of disadvantaging LGBT people and is based on animus against LGBT people. H.B. 2 was also enacted because of, and not in spite of, its adverse effects on LGBT people.

153. The justifications cited in H.B. 2 for its enactment, including a purported governmental interest in consistent statewide obligations, are pretext for discrimination and did not reflect the actual motivations for the bill. For example, proposals to add sexual orientation and gender identity and expression protections to the statewide public accommodations law were rejected.

154. By blocking anti-discrimination protections for LGBT people at the local level, H.B. 2 imposes a different and more burdensome political process on LGBT people than on non-LGBT people who have state protection against identity-based discrimination. H.B. 2 accordingly places a special burden on LGBT people within the governmental process with an intent to injure that minority group.

155. H.B. 2 deprives LGBT people of their right to equal dignity, liberty, and autonomy by branding them as second-class citizens.

156. H.B. 2's discrimination against LGBT people based on sex and sexual orientation denies them the equal protection of the laws, in violation of the Equal Protection Clause of the Fourteenth Amendment.

C. Discrimination Based on Transgender Status Warrants Heightened Scrutiny.

157. Transgender people have suffered a long history of extreme discrimination in North Carolina and across the country, and continue to suffer such discrimination to this day.

158. Transgender people are a discrete and insular group and lack the political power to protect their rights through the legislative process. Transgender people have largely been unable to secure explicit local, state, and federal protections to protect them against discrimination.

159. A person's gender identity or transgender status bears no relation to a person's ability to contribute to society.

160. Gender identity is a core, defining trait and is so fundamental to one's identity and conscience that a person cannot be required to abandon it as a condition of equal treatment.

161. Gender identity generally is fixed at an early age and highly resistant to change through intervention.

D. Discrimination Based on Sexual Orientation Warrants Heightened Scrutiny.

162. Lesbian, gay, and bisexual people have suffered a long history of extreme discrimination in North Carolina and across the country, and continue to suffer such discrimination to this day.

163. Lesbian, gay, and bisexual people are a discrete and insular group and lack the political power to protect their rights through the legislative process. Lesbian, gay, and bisexual people have largely been unable to secure explicit local, state, and federal protections to protect them against discrimination.

164. A person's sexual orientation bears no relation to a person's ability to contribute to society.

165. Sexual orientation is a core, defining trait and is so fundamental to one's identity and conscience that a person cannot be required to abandon it as a condition of equal treatment.

166. Sexual orientation generally is fixed at an early age and highly resistant to change through intervention.

COUNT II
Violation of Right to Privacy
U.S. Const. Amend. XIV
Plaintiffs Carcaño, McGarry, Equality NC, and ACLU of NC against Defendants Governor McCrory, Cooper, Board of Governors, and Bissette

167. The Due Process Clause of the Fourteenth Amendment places limitations on state action that deprives individuals of life, liberty, or property.

168. Substantive protections of the Due Process Clause include the right to avoid disclosure of sensitive, personal information.

169. There is a fundamental right of privacy in preventing the release of, and in deciding in what circumstances to release: (1) personal information whose release could subject them to bodily harm; and (2) information of a highly personal and intimate nature.

170. H.B. 2 requires the disclosure of highly personal information regarding transgender people to each person who sees them using a restroom or other facility inconsistent with their gender identity or gender expression. This disclosure places them at risk of bodily harm.

171. There is no compelling state interest that is furthered by H.B. 2, nor is H.B. 2 narrowly tailored or the least restrictive alternative for promoting a state interest. H.B. 2 also is not even rationally related to a legitimate state interest.

172. In addition, the privacy interests of transgender people that are invaded outweigh any purported interest the government could assert.

COUNT III
Violation of Liberty and Autonomy in the Right to Refuse Unwanted Medical Treatment
U.S. Const. Amend. XIV
Plaintiffs Carcaño, McGarry, Equality NC, and ACLU of NC against Defendants Governor McCrory, Cooper, Board of Governors, and Bissette

173. The Fourteenth Amendment's Due Process Clause protects individuals' substantive rights to be free to make certain private decisions without unjustified governmental intrusion.

174. The right to make certain private decisions without unjustified governmental intrusion includes the right to refuse unwanted medical treatment.

175. H.B. 2 forces transgender people to undergo medical procedures that may not be medically appropriate or available in order to access facilities consistent with their gender identity.

176. Not all transgender individuals undergo gender confirmation surgery. For some, the surgery is not medically necessary, while for others it is medically impossible. For example, because medical treatment for gender dysphoria is individualized, hormone treatment may be sufficient to manage the distress associated with gender dysphoria for some individuals. Surgery may be medically necessary for others who do not have health insurance coverage for it and cannot afford to pay for the surgery out-of-pocket.

177. Some states require proof of surgery before they will allow the gender marker on a birth certificate to be changed. For those born in North Carolina, state law requires proof of "sex reassignment surgery." N.C. Gen. Stat. § 130A-11B.

178. For example, Mr. McGarry has not been able to amend his North Carolina birth certificate to accurately reflect his gender because surgery is not medically necessary for him. Accordingly, H.B. 2 bans him from accessing restrooms and other facilities consistent with his gender identity.

179. There is no compelling state interest that is furthered by H.B. 2, nor is H.B. 2 narrowly tailored or the least restrictive alternative for promoting a state interest. H.B. 2 is not even rationally related to a legitimate state interest.

COUNT IV
Violation of Title IX
20 U.S.C. § 1681, et seq.
Plaintiff Carcaño against Defendant University of North Carolina

180. Plaintiff incorporates paragraphs 1 through 131 as though fully set forth herein.

181. Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).

182. Under Title IX, discrimination "on the basis of sex" includes discrimination on the basis of gender nonconformity, gender identity, transgender status, and gender transition.

183. Defendant University of North Carolina is an education program receiving federal financial assistance.

184. Defendant University of North Carolina is an executive branch agency as defined by H.B. 2.

185. Pursuant to H.B. 2, Defendant University of North Carolina "shall require every multiple occupancy bathroom or changing facility to be designated for and only used by persons based on their biological sex."

186. By requiring Mr. Carcaño – a transgender man – to use a restroom that is inconsistent with his gender identity, Defendant University of North Carolina excludes Mr. Carcaño from participation in, denies him the benefits of, and subjects him to discrimination in educational programs and activities at Defendant's constituent campus, UNC-Chapel Hill, "on the basis of sex," which violates Mr. Carcaño's rights under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*

COUNT V
Violation of Title IX
20 U.S.C. § 1681, et seq.
Plaintiff McGarry against Defendant University of North Carolina

187. Plaintiff incorporates paragraphs 1 through 131 as though fully set forth herein.

188. Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).

189. Under Title IX, discrimination "on the basis of sex" includes discrimination on the basis of gender nonconformity, gender identity, transgender status, and gender transition.

190. Defendant University of North Carolina is an education program receiving federal financial assistance.

191. Defendant University of North Carolina is an executive branch agency as defined by H.B. 2.

192. Pursuant to H.B. 2, Defendant University of North Carolina "shall require every multiple occupancy bathroom or changing facility to be designated for and only used by persons based on their biological sex."

193. By requiring Mr. McGarry – a transgender man – to use a restroom that is inconsistent with his gender identity, Defendant University of North Carolina excludes Mr. McGarry from participation in, denies him the benefits of, and subjects him to discrimination in educational programs and activities at Defendant's constituent campus, UNC-Greensboro, "on the basis of sex," which violates Mr. McGarry's rights under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment:

A. Declaring that the provisions of and enforcement by Defendants of H.B. 2 as discussed above violate Plaintiffs' rights under the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution;

B. Declaring that the provisions of and enforcement by Defendants of H.B. 2 as discussed above violate Plaintiffs' rights under Title IX;

C. Preliminarily and permanently enjoining enforcement by Defendants of H.B. 2 as discussed above;

D. Requiring Defendants in their official capacities to allow individuals, including transgender people, to use single-sex facilities in accordance with their gender identity in all public schools and universities, executive branch agencies, and public agencies; and requiring Defendants in their official capacities to allow local governments to enact and to continue to enforce anti-discrimination protections for LGBT people;

E. Awarding Plaintiffs their costs, expenses, and reasonable attorneys' fees pursuant to 42 U.S.C. § 1988 and other applicable laws; and

F. Granting such other and further relief as the Court deems just and proper.

G. The declaratory and injunctive relief requested in this action is sought against each Defendant; against each Defendant's officers, employees, and agents; and

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against all persons acting in active concert or participation with any Defendant, or under any Defendant's supervision, direction, or control.

Dated: March 28, 2016

Respectfully submitted,

/s/ Christopher A. Brook
Christopher A. Brook
N.C. State Bar No. 33838
AMERICAN CIVIL LIBERTIES UNION FOR NORTH CAROLINA LEGAL FOUNDATION
Post Office Box 28004
Raleigh, North Carolina 27611
Telephone: 919-834-3466
Facsimile: 866-511-1344
cbrook@acluofnc.org

Elizabeth O. Gill*
Chase B. Strangio*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad St., 18th Fl.
New York, NY 10004
Telephone: 212-549-2627
Facsimile: 212-549-2650
egill@aclunc.org
cstrangio@aclu.org

Tara L. Borelli*
Peter C. Renn*
Kyle A. Palazzolo*
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
730 Peachtree Street NE, Suite 1070
Atlanta, GA 30308-1210
Telephone: 404-897-1880
Facsimile: 404-897-1884
tborelli@lambdalegal.org
prenn@lambdalegal.org
kpalazzolo@lambdalegal.org

Counsel for Plaintiffs

* Appearing by special appearance pursuant to L.R. 83.1(d).

EXHIBIT C

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

JOAQUÍN CARCAÑO; PAYTON GREY MCGARRY; H.S., by her next friend and mother, KATHRYN SCHAFER; ANGELA GILMORE; KELLY TRENT; BEVERLY NEWELL; and AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA,

Plaintiffs,

v.

PATRICK MCCRORY, in his official capacity as Governor of North Carolina; UNIVERSITY OF NORTH CAROLINA; BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA; and W. LOUIS BISSETTE, JR., in his official capacity as Chairman of the Board of Governors of the University of North Carolina,

Defendants.

No. 1:16-cv-00236-TDS-JEP

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This lawsuit challenges a sweeping North Carolina law, House Bill 2 ("H.B. 2"), which bans transgender people from accessing restrooms and other facilities consistent with their gender identity and blocks local governments from protecting lesbian, gay, bisexual, and transgender ("LGBT") people against discrimination in a wide

variety of settings. By singling out LGBT people for disfavored treatment and explicitly writing discrimination against transgender people into state law, H.B. 2 violates the most basic guarantees of equal treatment and the U.S. Constitution.

2. In February 2016, the City of Charlotte enacted an ordinance (the "Ordinance") that extended existing municipal anti-discrimination protections to LGBT people. In light of the pervasive discrimination faced by LGBT people—and particularly transgender people—advocates had long pressed the Charlotte City Council for these protections. Because North Carolina state law does not expressly prohibit discrimination based on sexual orientation or gender identity, many LGBT residents of Charlotte—as well as LGBT residents throughout the state—are exposed to invidious discrimination in their day-to-day lives simply for being themselves. After two hours-long hearings, in which there was extensive public comment on both sides of the issue, the Charlotte City Council voted to adopt the Ordinance.

3. Before the Ordinance could take effect, the North Carolina General Assembly rushed to convene a special session with the express purpose of passing a statewide law that would preempt Charlotte's "radical" move to protect its residents from discrimination. In a process rife with procedural irregularities, the legislature introduced and passed H.B. 2 in a matter of hours, and the Governor signed the bill into law that same day. Lawmakers made no attempt to cloak their actions in a veneer of neutrality, instead openly and virulently attacking transgender people, who were falsely portrayed as predatory and dangerous to others. While the discriminatory, stated focus of the

legislature in passing H.B. 2—the use of restrooms by transgender people—is on its own illegal and unconstitutional, H.B. 2 in fact wreaks far greater damage by also prohibiting local governments in North Carolina from enacting express anti-discrimination protections based on sexual orientation and gender identity.

4. Plaintiffs are individuals and a nonprofit organization whose members and constituents will be directly impacted by H.B. 2. Like the three transgender plaintiffs in the case, transgender people around the state of North Carolina immediately suffered harm under H.B. 2 in that they are not able to access public restrooms and other single-sex facilities that accord with their gender identity. Additionally, all LGBT people are harmed by H.B. 2 in that it strips them of, or bars them from, anti-discrimination protections under local law. Plaintiffs seek a declaratory judgment that H.B. 2 violates their or their members' constitutional and statutory rights to equal protection, liberty, dignity, autonomy, and privacy, as well as an injunction preliminarily and permanently enjoining enforcement by of H.B. 2 by Defendants.

PARTIES

A. Plaintiffs.

5. Plaintiff Joaquín Carcaño ("Mr. Carcaño") is a 27-year-old man who resides in Carrboro, North Carolina. Mr. Carcaño is employed by the University of North Carolina, and he works at the University of North Carolina at Chapel Hill ("UNC-Chapel Hill"). He is transgender.

6. Plaintiff Payton Grey McGarry ("Mr. McGarry") is a 20-year-old man who resides in Greensboro, North Carolina. Mr. McGarry is a full-time student at the University of North Carolina at Greensboro ("UNC-Greensboro"). He is transgender.

7. Plaintiff H.S. is a 17-year-old young woman from Raleigh, North Carolina who attends school and resides in Winston-Salem, North Carolina. Plaintiff H.S. is a student at the University of North Carolina School of the Arts High School ("UNCSA-HS"). She is transgender.

8. Plaintiff Angela Gilmore ("Ms. Gilmore") is a 52-year-old woman who resides in Durham, North Carolina and is an Associate Dean and Professor at North Carolina Central University School of Law. Ms. Gilmore is a lesbian.

9. Plaintiffs Kelly Trent ("Ms. Trent") and Beverly Newell ("Ms. Newell") are a lesbian couple who reside in Charlotte, North Carolina. Ms. Trent is a 39-year-old registered nurse, and Ms. Newell is a 46-year-old realtor.

10. Plaintiff American Civil Liberties Union of North Carolina ("ACLU of NC") is a private, non-profit membership organization with its principal office in Raleigh, North Carolina. It has approximately 8,500 members in the State of North Carolina, including LGBT members. The mission of the ACLU of NC is to defend and advance the individual freedoms embodied in the United States Constitution, including the rights of LGBT people to be free from invidious discrimination and infringements on their liberty interests. The ACLU of NC sues on behalf of its members, some of whom are transgender individuals who are barred by H.B. 2 from using restrooms and other

facilities in accordance with their gender identity in schools (including those subject to N.C. Gen. Stat. § 115C-521.2) and government buildings, and some of whom are lesbian, gay, bisexual, or transgender individuals who have been stripped of or barred from local non-discrimination protections based on their sexual orientation and sex, including gender identity.

B. Defendants.

11. Defendant Patrick McCrory ("Defendant McCrory" or "Governor McCrory" or "the Governor") is sued in his official capacity as the Governor of North Carolina. Pursuant to Article III, Section 1 of the State Constitution, "the executive power of the State" is vested in Defendant McCrory in his capacity as Governor. Article III, Section 5(4) also provides that it is the duty of Defendant McCrory in his capacity as Governor to "take care that the laws be faithfully executed." Governor McCrory is a person within the meaning of 42 U.S.C. § 1983 and was acting under color of state law at all times relevant to this complaint.

12. Defendant University of North Carolina is an education program or activity receiving federal financial assistance. Defendant University of North Carolina includes its constituent institutions, the University of North Carolina at Chapel Hill, the University of North Carolina at Greensboro, and the University of North Carolina School of the Arts High School.

13. Defendant Board of Governors of the University of North Carolina ("the Board") is a corporate body charged with the general control, supervision, and

governance of the University of North Carolina's constituent institutions. The Board is capable of being sued in "all courts whatsoever" pursuant to N.C. Gen. Stat. § 116-3.

14. Defendant W. Louis Bissette, Jr. ("Defendant Bissette" or "Mr. Bissette") is sued in his official capacity as the Chairman of the Board of Governors of the University of North Carolina and has the power to ensure the Board's compliance with any injunctive relief.

15. Defendants, through their respective duties and obligations, are responsible for enforcing H.B. 2. Each Defendant, and those subject to their direction, supervision, or control, has or intentionally will perform, participate in, aide and/or abet in some manner the acts alleged in this complaint, has or will proximately cause the harm alleged herein, and has or will continue to injure Plaintiffs irreparably if not enjoined. Accordingly, the relief requested herein is sought against each Defendant, as well as all persons under their supervision, direction, or control, including, but not limited to, their officers, employees, and agents.

JURISDICTION AND VENUE

16. This action arises under 42 U.S.C. § 1983 to redress the deprivation under color of state law of rights secured by the United States Constitution and under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.* ("Title IX").

17. This Court has original jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1343 because the matters in controversy arise under laws of the United States and the United States Constitution.

18. Venue is proper in this Court under 28 U.S.C. § 1391(b)(1) and (2) because Defendant University of North Carolina resides within the District, and all Defendants reside within the State of North Carolina; and because a substantial part of the events that gave rise to the Plaintiffs' claims took place within the District.

19. This Court has the authority to enter a declaratory judgment and to provide preliminary and permanent injunctive relief pursuant to Rules 57 and 65 of the Federal Rules of Civil Procedure, and 28 U.S.C. §§ 2201 and 2202.

20. This Court has personal jurisdiction over Defendants because they are domiciled in North Carolina.

FACTUAL ALLEGATIONS

A. Plaintiffs.

21. **Plaintiff Joaquín Carcaño** works for the University of North Carolina at Chapel Hill ("UNC-Chapel Hill") Institute for Global Health and Infectious Disease as a Project Coordinator. The project that he coordinates provides medical education and services such as HIV testing to the Latino/a population.

22. Mr. Carcaño is a man.

23. Until the passage of H.B. 2, Mr. Carcaño was recognized and treated like all other men at his job at UNC-Chapel Hill.

24. Mr. Carcaño is transgender. What that means is that his sex assigned at birth was female, as his birth certificate reflects, but that designation does not accurately reflect his gender identity, which is male.

25. A person's gender identity refers to the person's internal sense of belonging to a particular gender. There is a medical consensus that gender identity is innate and that efforts to change a person's gender identity are unethical and harmful to a person's health and well-being.

26. The gender marker on a birth certificate is designated at the time of birth generally based upon the appearance of external genitalia. However, determinations of sex can involve multiple factors, such as chromosomes, hormone levels, internal and external reproductive organs, and gender identity.

27. Gender identity is the primary determinant of sex.

28. Mr. Carcaño was diagnosed with gender dysphoria, the medical diagnosis for the clinically significant distress that individuals whose gender identity differs from the sex they were assigned at birth can experience.

29. Gender dysphoria is a serious medical condition that, if left untreated, can lead to clinical distress, debilitating depression, and even suicidal thoughts and acts.

30. Gender dysphoria is a condition recognized in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fifth ed. (2013) (DSM-V), and by the other leading medical and mental health professional groups, including the American Medical Association and the American Psychological Association.

31. Medical treatment for gender dysphoria must be individualized for the medical needs of each patient.

32. Treatment for gender dysphoria includes living one's life consistent with one's gender identity, including when accessing single-sex spaces such as restrooms and locker rooms.

33. Forcing a transgender person to use single-sex spaces that do not match the person's gender identity is inconsistent with medical protocols and can cause anxiety and distress to the transgender person and result in harassment of and violence against them.

34. Mr. Carcaño was born and raised in South Texas. Since a very young age, around 7 or 8 years old, Mr. Carcaño was aware that he did not feel like a girl, but he did not know how to express how he felt.

35. Mr. Carcaño ultimately acknowledged his male gender identity to himself later in his adult life.

36. Since 2013, Mr. Carcaño has been in the continuous care of a licensed mental health clinician, who diagnosed Mr. Carcaño with gender dysphoria. Mr. Carcaño initially sought treatment for depression, which was caused in part by his gender dysphoria.

37. Mental health and medical professionals worldwide recognize and follow the evidence-based standards of care for the treatment of gender dysphoria developed by the World Professional Association for Transgender Health ("WPATH"). After diagnosing Mr. Carcaño with gender dysphoria, his therapist developed a course of treatment consistent with those standards. The goal of such treatment is to alleviate distress by helping a person live congruently with the person's gender identity, the

primary determinant of sex. Consistent with that treatment and his identity, in January 2015, Mr. Carcaño explained to his family and friends that he is a man.

38. A critical component of the WPATH Standards of Care is a social transition to living full-time consistently with the individual's gender identity. For Mr. Carcaño, that includes living in accordance with his gender identity in all respects, including the use of a male name and pronouns and use of the men's restrooms.

39. For transgender people, it is critical that social transition include transition in the workplace, including with respect to restrooms. Excluding a transgender man from the restroom that corresponds to his gender identity, or forcing him to use a separate facility from other men, communicates to the entire workplace that he should not be recognized as a man and undermines the social transition process.

40. Mr. Carcaño also began using Joaquín as his first name in January 2015. His friends, family, and coworkers now recognize him as a man, and they refer to him using his male name and male pronouns.

41. Also consistent with the WPATH Standards of Care, Mr. Carcaño's physician recommended and prescribed hormone treatment, which Mr. Carcaño has received since May 2015. For both hormone therapy and surgical treatment, the WPATH Standards of Care require persistent, well-documented gender dysphoria, which is a criterion that Mr. Carcaño satisfied. Among other therapeutic benefits, the hormone treatment has deepened Mr. Carcaño's voice, increased his growth of facial hair, and given him a more masculine appearance. This treatment helped alleviate the distress Mr.

Carcaño experienced due to the discordance between his birth-assigned sex and his identity and helped him to feel more comfortable with who he is.

42. As part of the treatment for his gender dysphoria, Mr. Carcaño also obtained a bilateral mastectomy and nipple reconstruction (also known as "top surgery") in January 2016. Consistent with WPATH Standards of Care, Mr. Carcaño satisfied the requirement of having a referral from a qualified mental health professional in order to obtain the surgical treatment.

43. As part of his social transition, Mr. Carcaño began using the men's restroom at work and elsewhere in late 2015, which occurred without incident for the five months or so before H.B. 2's enactment. Mr. Carcaño's therapist had also specifically recommended that he use only the men's restroom. She was concerned that using the women's restroom could compromise his mental health, well-being, and safety. By late 2015, Mr. Carcaño had facial hair facilitated by hormone treatment, and his therapist indicated that others would recognize Mr. Carcaño as a man based on his physical appearance.

44. Mr. Carcaño is now comfortable with the status of his treatment and, with the exception of the distress now caused by the passage of H.B. 2, his distress has been managed through the clinically recommended treatment he has received. He plans to continue treatment under the supervision of medical professionals and based on his medical needs.

45. Apart from the building where he works, Mr. Carcaño also used other men's restrooms on the UNC-Chapel Hill campus without incident for approximately five months prior to H.B. 2's passage. In addition, when out in public, such as at restaurants and stores, Mr. Carcaño uses the men's restroom.

46. The only restrooms on the floor where Mr. Carcaño works at UNC-Chapel Hill are designated either for men or for women. H.B. 2 thus excludes him from using the same restrooms that his coworkers typically use. This exclusion is stigmatizing and marks him as different and lesser than other men.

47. Using the women's restroom is not a viable option for Mr. Carcaño, just as it would not be a viable option for non-transgender men to be forced to use the women's restroom. Forcing Mr. Carcaño to use the women's restroom would also cause substantial harm to his mental health and well-being. It would also force him to disclose to others the fact that he is transgender, which itself could lead to violence and harassment.

48. The idea of being forced into the women's restroom causes Mr. Carcaño to experience significant anxiety, as he knows that it would be distressing for him and uncomfortable for others. He fears for his safety because of the passage of H.B. 2.

49. In the initial period after H.B. 2's passage, Mr. Carcaño generally used a single-occupancy restroom not designated either for men or for women in another building on campus, which was approximately a 10-15 minute walk away from his building each way.

50. Mr. Carcaño was subsequently informed by administrative staff in the building where he works that they had learned of a single-occupancy restroom based on building floor plans. It is accessible using a special service elevator, and the restroom is tucked away in a cubby down a hallway in a part of the building used for housekeeping.

51. Mr. Carcaño is not only humiliated by being singled out and forced to use a separate restroom from his colleagues and all other men that he works with, but also burdened by having to use a separate restroom on a different floor, which increases the likelihood that he will delay or avoid going to the restroom.

52. Mr. Carcaño also visits public agencies as defined by N.C. Gen. Stat. § 143-760(4), and intends to and will do so in the future. For example, as part of his job at UNC-Chapel Hill, Mr. Carcaño has had to visit the offices of the North Carolina Department of Health and Human Services many times in the past, and he will continue to need to do so in the future. Prior to the passage of H.B. 2, he used the men's restroom while at their office, but he will be banned from doing so in the future under H.B. 2.

53. Similarly, Mr. Carcaño has visited state courthouses in Chapel Hill as part of a process to obtain a name change from his current legal name, which includes a traditionally feminine first name, to the name he currently uses. Because that name change process is ongoing, Mr. Carcaño will continue to visit state courthouses in the future, but he will be banned from using the men's restroom there under H.B. 2.

54. Mr. Carcaño has also visited the Division of Motor Vehicles under the North Carolina Department of Transportation on prior occasions (*e.g.*, to obtain a driver's

license) and anticipates doing so again in the future, where he will be banned from using the men's restroom under H.B. 2.

55. Mr. Carcaño also regularly uses the North Carolina Rest Area System, which maintains public restrooms along highways and is operated by the North Carolina Department of Transportation. For example, he uses the restrooms provided by that system when he travels approximately once a month to visit his brother in Atlanta, and when he visits Washington, D.C. periodically. He will need to continue to use those restrooms in the future, but he will be banned from using the men's restroom under H.B. 2.

56. There have been no incidents or, to the best of Mr. Carcaño's knowledge, complaints related to his use of the restrooms designated for men.

57. Mr. Carcaño is currently in the process of pursuing and exhausting administrative remedies before the Equal Employment Opportunity Commission with respect to his rights under Title VII of the Civil Rights Act of 1964.

58. Mr. Carcaño is a member of the ACLU of NC.

59. **Plaintiff Payton Grey McGarry** is a full-time student at the University of North Carolina at Greensboro ("UNC-Greensboro"), where he is double majoring in Business Administration and Accounting. He is also a skilled musician and has played trumpet in many ensembles at UNC-Greensboro. He plays the guitar, baritone, clarinet, and saxophone.

60. Mr. McGarry is close to his family and has a younger brother who is also a member of the LGBT community. Mr. McGarry hopes to use his education to eventually go to law school and work to defend people's civil rights.

61. Mr. McGarry is a man.

62. Mr. McGarry is transgender. As is true for Mr. Carcaño, Mr. McGarry's sex assigned at birth was female, as his birth certificate reflects, but that designation does not conform to his gender identity, which is male.

63. Mr. McGarry was diagnosed with gender dysphoria.

64. Mr. McGarry was born and raised in Wilson, North Carolina. Throughout his childhood, Mr. McGarry felt like a boy and never really thought of himself as a girl. It was not until he started to go through puberty that he began to wrestle with the disconnect between his identity as a boy and his assigned birth sex.

65. Mr. McGarry realized while he was in high school that he is transgender.

66. In October 2013, during his senior year in high school, Mr. McGarry began mental health treatment with a licensed clinical social worker who diagnosed him with gender dysphoria.

67. After diagnosing Mr. McGarry with gender dysphoria, his therapist developed a course of treatment in accordance with medical standards for treating the condition.

68. Consistent with that treatment and his identity, in the fall and winter of 2013, Mr. McGarry explained to his friends and family that he is male and began to use male pronouns.

69. In April 2014, under the care of an endocrinologist, Mr. McGarry began hormone therapy. This treatment helped alleviate the distress that Mr. McGarry experienced due to the discordance between his birth-assigned sex and his identity and helped him to feel more comfortable with who he is.

70. By the time he graduated high school in June 2014, Mr. McGarry used the name Payton and male pronouns in all aspects of his life. He is known as Payton McGarry to his family, friends, and peers, although he has not yet changed his legal first name to Payton.

71. In the fall of 2014, Mr. McGarry enrolled as a freshman at UNC-Greensboro as Payton McGarry and as male.

72. Since arriving at UNC-Greensboro, Mr. McGarry has identified and has been known to others as male for all purposes.

73. Mr. McGarry is a member of Phi Mu Alpha Sinfonia, a music fraternity, and is the Vice President of the Iota Epsilon Chapter of that fraternity. His fraternity brothers are aware that he is transgender and have no concerns with his use of men's restrooms and locker rooms.

74. Though Mr. McGarry currently lives off campus, he is on campus six or seven days per week and always uses the restroom designed for men in on-campus buildings.

75. Mr. McGarry regularly uses the locker room facilities at UNC-Greensboro and always uses the facilities designed for men.

76. For the past year and a half since he enrolled at UNC-Greensboro, Mr. McGarry has used the men's restrooms and locker rooms on-campus without incident. Mr. McGarry is unaware of any instance in which any person has complained about his use of the men's restroom or locker room.

77. Mr. McGarry works part-time as a visual technician for marching bands at different high schools around the state and regularly uses the bathroom for men when working as a visual technician. There have been no incidents or, to the best of Mr. McGarry's knowledge, complaints related to his use of the restrooms designated for men.

78. In addition, when out in public, such as at restaurants and stores, Mr. McGarry always uses the men's restroom.

79. To Mr. McGarry's knowledge, there are very few single-user restrooms on the UNC-Greensboro campus, and there are no single-user bathrooms in many buildings where he has classes.

80. If Mr. McGarry could not use the men's restroom at UNC-Greensboro, he would have to search for single-user restrooms outside of the buildings where his classes are held every time he had to use the restroom. This would disrupt his ability to attend

class and would interfere with his educational opportunities. Expelling him from the multiple occupancy restrooms and locker rooms available to all other male students is stigmatizing and marks him as different and lesser than other men.

81. Since he started testosterone two years ago, Mr. McGarry's voice has deepened and his face and body have become more traditionally masculine in appearance.

82. Using the women's restroom is not a viable option for Mr. McGarry, just as it would not be a viable option for non-transgender men to be forced to use the women's restroom. Forcing Mr. McGarry to use the women's restroom would also cause substantial harm to his mental health and well-being. It would also force him to disclose to others the fact that he is transgender, which itself could lead to violence and harassment.

83. The idea of being forced into the women's restroom causes Mr. McGarry to experience significant anxiety, as he knows that it would be distressing for him and uncomfortable for others. He fears for his safety because of the passage of H.B. 2.

84. Since the passage of H.B. 2, Mr. McGarry has been barred from using the men's restrooms on campus. Given that he cannot use the women's restroom and there are only a few available single-user restrooms, he often avoids going to the restroom all day.

85. Mr. McGarry has also visited public agencies as defined by N.C. Gen. Stat. § 143-760(4), and intends to and will do so in the future. For example, Mr. McGarry has

visited the Division of Motor Vehicles under the North Carolina Department of Transportation on prior occasions (*e.g.*, to obtain a driver's license) and anticipates doing so again in the future, where he will be banned from using the men's restroom under H.B. 2.

86. Mr. McGarry also has used and will continue to use the North Carolina Rest Area System, which maintains public restrooms along highways and is operated by the North Carolina Department of Transportation. He will need to continue to use those restrooms in the future, but he will be banned from using the men's restroom under H.B. 2.

87. **Plaintiff H.S.** is a junior at the University of North Carolina School of the Arts High School ("UNCSA-HS"). The oldest of four children, she is close to her family, who love and support her. She is an accomplished artist and studies visual arts at UNCSA-HS.

88. H.S. is a girl.

89. Until the passage of H.B. 2, H.S. was recognized as a girl at school and when out in public.

90. H.S. is transgender. She was assigned the sex of male at birth, as her birth certificate reflects, but that designation does not accurately reflect her gender identity, which is female.

91. H.S. has been diagnosed with gender dysphoria.

92. H.S. was born in New Jersey but moved to North Carolina when she was 11 years old. From as young an age two or three, H.S. gravitated towards clothing and toys generally associated with girls. Like many other girls, she would always want to wear the pink princess dresses at pre-school and to play with Barbie dolls.

93. After completing pre-school, H.S. did not feel comfortable expressing her identity as a girl and tried to immerse herself in traditionally masculine spaces and activities. She tried to do things that she felt she was supposed to do as a boy. But nothing felt right.

94. Starting in seventh grade, H.S. again began to gravitate toward clothes and activities that were considered more feminine.

95. By eighth grade, H.S. again began to express a more stereotypically feminine gender and at times would wear makeup and high-heel shoes at school.

96. As puberty began to approach in ninth grade, severe gender dysphoria and anxiety began to hit H.S., and she experienced significant distress around her body and identity. She finally went to her parents, who recognized that she was suffering.

97. In ninth grade, H.S. began therapy with an expert on treating transgender young people and was diagnosed with gender dysphoria.

98. In 2013, H.S. started high school at Broughton High School in Raleigh. In the middle of her freshman year, H.S. began hormone blockers to prevent the onset of male puberty and the development of secondary sex characteristics associated with men. This treatment delayed puberty while H.S. continued to understand her female identity.

Though H.S. continued to experience some distress and dysphoria, the hormone blockers greatly reduced her suffering.

99. At the end of ninth grade, H.S. felt fully comfortable embracing her identity as a girl at school and had the full support of her parents. On the last day of school her freshman year, H.S. wore a skirt to school that her mother had purchased for her. It was an important and symbolic turning point in her comfort with and embrace of her identity as a girl.

100. By sophomore year, H.S. was perceived as a girl and began to use the girls' bathroom at school and in public. She was also known by female pronouns—such as she, her, and hers—by this time.

101. During her sophomore year, H.S. was elected to the Queen's Court at her school, an honor that had, in the seventy-five years of the tradition, been shared only among non-transgender girls.

102. Under the care of her endocrinologist, during her sophomore year in high school, H.S. continued to assess her medical treatment for gender dysphoria and began to consider hormone replacement therapy. At the end of her sophomore year, in the spring of 2015, H.S. began estrogen therapy to continue her medical transition.

103. An accomplished visual artist, H.S. applied to the UNCSA-HS for her junior year and was accepted.

104. In the fall of 2015, H.S. moved to Winston-Salem to attend UNCSA-HS as a boarding student. She studies visual arts and aspires to a career in fashion.

105. H.S. lives in the girls' dormitory at UNCSA-HS.

106. Until the passage of H.B. 2, H.S. exclusively used the girls' restroom at school and could not imagine ever using a restroom designated for boys. H.S. is unaware of any instance in which any person has complained about her use of the girls' restroom.

107. In addition, when out in public, such as at restaurants and stores, H.S. uses the restrooms designated for women and girls.

108. Outside of H.S.'s dorm room, there are no single-user restrooms available to her at UNCSA-HS and it would be disruptive to H.S.'s education to have to avoid the use of the restroom or to return to her room or locate a single-user restroom off campus every time she needed to go to the restroom.

109. Forcing H.S. out of spaces shared with her female peers is stigmatizing and marks her as different and lesser than other girls at school.

110. Particularly because she never went through puberty as a boy and began estrogen treatment earlier this year, H.S. has a traditionally feminine appearance. She is recognized as female in all aspects of her life.

111. Using the boys' or men's restroom is not a viable option for H.S., just as it would not be a viable option for non-transgender women and girls to be forced to use the restrooms designated for men and boys. Forcing H.S. to use the restroom designated for men and boys would also cause substantial harm to her mental health and well-being and would put her in danger of harassment and violence. It would also force her to disclose

to others the fact that she is transgender, which itself could lead to violence and harassment.

112. The idea of being forced into the restroom designated for boys and men at school and in public causes H.S. to experience significant anxiety and brings up painful memories and anxiety from her earlier childhood. She fears for her safety because of the passage of H.B. 2.

113. Since the passage of H.B. 2, H.S. has limited or delayed use of the bathroom because of fear of reprisals if she uses the restroom designated for women and girls and because she fears for her safety if she uses the restroom designated for men and boys, as the law requires.

114. H.S. has also visited public agencies as defined by N.C. Gen. Stat. § 143-760(4), and intends to and will do so in the future. For example, H.S. has visited the Division of Motor Vehicles under the North Carolina Department of Transportation on prior occasions (*e.g.*, to obtain a driver's license) and anticipates doing so again in the future, where she will be banned from using the women's restroom under H.B. 2.

115. H.S. has used and will continue to use the North Carolina Rest Area System, which maintains public restrooms along highways and is operated by the North Carolina Department of Transportation. She will need to continue to use those restrooms in the future, but she will be banned from using the women's restroom under H.B. 2.

116. **Plaintiff Angela Gilmore** is a resident of Durham, North Carolina. Ms. Gilmore has lived in North Carolina since 2011, when she moved from Florida to

take a job at North Carolina Central University. She is currently the Associate Dean for Academic Affairs and Professor of Law at North Carolina Central University.

117. Ms. Gilmore is a lesbian, and has been in a relationship with her wife, Angela Wallace, for almost twenty years. Ms. Gilmore and Ms. Wallace were married in Washington, D.C. in 2014.

118. Ms. Gilmore looked for and accepted a job in North Carolina, after she and her wife fell in love with the state during a visiting teaching job Ms. Gilmore had at Elon University School of Law in Greensboro, North Carolina, in 2010.

119. Both Ms. Gilmore and her wife, African American lesbians, felt that North Carolina, and Durham in particular, was a place where they could be fully themselves, comfortable in terms of both their race and sexual orientation.

120. Ms. Gilmore and her wife love living in Durham—they feel very much part of the community—and prior to the passage of H.B. 2, they had been looking at small towns in North Carolina where they might want to retire.

121. Since moving to North Carolina, Ms. Gilmore has worked towards increasing non-discrimination protections for LGBT people. Ms. Gilmore is a member of the ACLU of NC, and she was on the ACLU of NC board between 2014 and 2015. During that time, the ACLU of NC actively worked to defeat anti-LGBT bills proposed in the state legislature and to pass local ordinances, like the Ordinance, and to protect LGBT people from discrimination at the local level. Ms. Gilmore also has spoken on

panels at her law school and other law schools regarding non-discrimination protections for LGBT people.

122. The passage of H.B. 2 has caused Ms. Gilmore and her wife distress, in that it has significantly undone their sense of belonging and value in the state, which is why they moved to North Carolina. Ms. Gilmore and her wife experience H.B. 2 as sending a clear message to them as lesbians that they are not welcome in North Carolina.

123. Ms. Gilmore and her wife have visited the City of Charlotte and they plan to do so in the future. As two women traveling together with the same first name, they are often asked about the nature of their relationship, and they therefore regularly reveal themselves to be a lesbian couple. Under the Ordinance, Ms. Gilmore and her wife would have been protected from sexual orientation discrimination in public accommodations in the City of Charlotte. With the passage of H.B. 2, Ms. Gilmore worries that she and her wife will now be exposed to discrimination based on their sexual orientation.

124. With the passage of H.B. 2, Ms. Gilmore also is limited in her ability to increase and benefit from non-discrimination protections for LGBT people in North Carolina. Were she able to, Ms. Gilmore would continue to advocate for local ordinances that prohibit discrimination based on sexual orientation and gender identity.

125. As a non-transgender woman who always uses the facilities designated for women in both public and private spaces, Ms. Gilmore does not feel safer in these facilities because of the passage of H.B. 2.

126. **Plaintiffs Kelly Trent and Beverly Newell** are residents of Charlotte, North Carolina. Ms. Trent and Ms. Newell met in 2013, and they were married in Charlotte in December 2014.

127. As a lesbian couple and as residents of Charlotte, Ms. Trent and Ms. Newell would have been protected by the Ordinance from discrimination based on their sexual orientation by public accommodations in Charlotte. With the passage of H.B. 2, public accommodations in Charlotte are now legally permitted to discriminate based on sexual orientation. Ms. Trent and Ms. Newell fear that they are likely to experience discrimination based on their sexual orientation in Charlotte in the future, based on their recent experience of discrimination on that basis.

128. In February 2016, Ms. Trent reached out to a fertility clinic, the website for which listed an office in Charlotte, and made an appointment for an initial consult in early April 2016. Ms. Trent and Ms. Newell are trying to become parents, and they are hoping to have Ms. Trent carry a child. Because they are a lesbian couple, they plan on using donor sperm. At the time of her contact with the clinic, Ms. Trent made it clear that she and Ms. Newell are a same-sex couple seeking fertility services and that they plan on using donor sperm.

129. On April 1, 2016—soon after the passage of H.B. 2—a representative of the clinic called Ms. Trent and cancelled the appointment, claiming that the clinic did not serve "single sex couples" or "same sex couples." The next week, the clinic's website was changed to state that the clinic now does not provide services "requiring the use of

donor sperm," although the clinic does continue to provide services for clients using a "husband's" sperm. The clinic's refusal to serve Ms. Trent and Ms. Newell appears to be based on their sexual orientation.

130. The passage of H.B. 2 prevented Ms. Trent and Ms. Newell from being able to file a public accommodations discrimination complaint with the City of Charlotte Community Relations Committee regarding the clinic's actions, or from having their complaint investigated or conciliated. Had H.B. 2 not passed and preempted the Ordinance, Ms. Trent and Ms. Newell would have filed such a complaint. If Ms. Trent and Ms. Newell suffer future discrimination based on their sexual orientation in a place of public accommodation in Charlotte, they will similarly be denied the ability to avail themselves of the City of Charlotte's Community Relations Committee procedure for receiving, investigating, or conciliating complaints.

131. With the passage of H.B. 2, Ms. Trent and Ms. Newell are also limited in their ability to increase and benefit from non-discrimination protections for LGBT people in North Carolina. As residents of Charlotte, Ms. Trent and Ms. Newell supported the Ordinance, and were they able to, they would support other local ordinances that prohibit discrimination based on sexual orientation and gender identity.

132. As non-transgender women who always use the facilities designated for women in both public and private spaces, Ms. Trent or Ms. Newell do not feel safer in these facilities because of the passage of H.B. 2.

B. The City of Charlotte's Enactment of a Non-Discrimination Ordinance.

133. Advocates have long worked for the passage of an ordinance that would ensure that LGBT people were expressly protected from discrimination within the City of Charlotte. Prior to the vote on the Ordinance, there had been an earlier round of intensive public engagement in late 2014 to early 2015, when the Charlotte City Council previously considered expanding non-discrimination protections to include sexual orientation and gender identity and expression.

134. There was again extensive discussion and deliberation leading up to the February 2016 vote on the Ordinance. The Charlotte City Council heard hours of robust public comment in a forum that included hundreds of people—both those who were in support of the Ordinance and those who were in opposition to the Ordinance. The Charlotte City Council also received significant legal analysis from the Office of the City Attorney regarding its authority to enact the Ordinance and the effect of the Ordinance.

135. The impetus for the Ordinance is the reality that LGBT people often face pervasive discrimination. Although same-sex couples may now marry throughout the United States as a result of the U.S. Supreme Court's 2015 ruling in *Obergefell*, lesbian, gay, and bisexual people remain vulnerable to discrimination in states like North Carolina where there is no express protection for sexual orientation in state law, making local anti-discrimination protections even more vital. Discrimination is especially pervasive for transgender people, as evidenced by a 2011 national study of transgender Americans,

Injustice at Every Turn, which documented the high levels of harassment, discrimination, and violence that transgender people have faced and continue to face.

136. In the 2011 national report cited above, 90% of respondents reported being harassed at work or taking actions to avoid harassment, while 26% reported being fired because they are transgender. Forty-seven percent reported some form of employment discrimination because they are transgender, including not being hired, not being promoted, or being fired. Fifty-three percent reported being verbally harassed or disrespected in a place of public accommodation, and 22% reported being denied equal treatment by a government agency or official because they are transgender.

137. In 2013, it was estimated that there were more than 250,000 LGBT adults in North Carolina, out of an adult population of approximately eight million people. Among this population of North Carolinians, there are an estimated 37,800 transgender people (of any age), including 15,600 individuals who are 13 to 19 years old. While transgender individuals only make up a small minority of the population, they are disproportionately targeted for hate crimes in the United States.

138. On Monday, February 22, 2016, by a 7-to-4 vote, the Charlotte City Council approved the Ordinance, which, *inter alia*, amended its existing public accommodations protections by barring discrimination in public accommodations based on "gender identity, gender expression" and "sexual orientation."

139. The City Council's vote was met with a firestorm of opposition from vocal opponents of the part of the Ordinance that would have required certain public

accommodations to allow transgender people to use single-sex facilities, such as restrooms and locker rooms, in accordance with their gender identity.

140. Opponents of the Ordinance distorted the truth of what the Ordinance's non-discrimination requirement would accomplish and formed a vocal campaign decrying a purported attempt to permit "men in women's restrooms."

C. The Events Leading to H.B. 2, Contemporary Statements by Decisionmakers, and Departures From the Normal Legislative Process Revealed a Series of Official Actions Taken for Invidious Purposes.

141. The State of North Carolina has rarely, if ever, exercised authority to preempt local ordinances providing broader protections than under state law. For example, in 1968 Charlotte adopted an ordinance prohibiting discrimination in public accommodations on the basis of race, color, religion, and national origin. In 1972, the Council amended the ordinance to prohibit discrimination based on sex, which the Council further modified in 1985.

142. Even though all of these protections extended beyond the reach of the State's public accommodations law, which until H.B. 2 prohibited only public accommodations discrimination based on disability, the State allowed Charlotte's ordinance to stand undisturbed for decades. It was only after Charlotte took steps to protect LGBT people that the State rushed to preempt the ordinance.

143. Even before the Charlotte City Council had cast its vote on the Ordinance, Governor McCrory informed Charlotte City Council members that the State would likely take immediate action to put a halt to the Ordinance—even as Governor McCrory

conceded that was an exceedingly unusual step. In an email to Charlotte City Council members, Governor McCrory noted that he "made a point as the former 14 year Mayor and current Governor to stay out of specific issues being voted on by the Charlotte City Council." Governor McCrory nonetheless characterized the Ordinance's non-discrimination protections for LGBT people as "changing basic long-established values and norms" surrounding "public restrooms," and he ominously warned of "possible danger from deviant actions by individuals taking improper advantage of a bad policy." Governor McCrory said that the Ordinance would "most likely cause immediate State legislative intervention which I would support as governor."

144. On Tuesday, February 23, 2016, the Speaker of the North Carolina House of Representatives, Tim Moore ("Speaker Moore"), issued a press release announcing that he would work with fellow Republicans to explore a "legislative intervention to correct [Charlotte's] radical course."

145. In North Carolina, it is the state's Governor who typically calls a special session, but in this case, Governor McCrory refused to call a special session because he was concerned that the legislature would go beyond addressing the Charlotte Ordinance.

146. As a result of the Governor's refusal to call a special session, legislative leaders opted for a rarely used law that allows special sessions when three-fifths of legislators in both chambers support the call. That provision in the state constitution had not been used since 1981, according to Lt. Governor Dan Forest's chief of staff, Hal Weatherman. The special session cost approximately $42,000 to convene.

147. The text of H.B. 2, which was named the "Public Facilities Privacy and Security Act," was not shared with most legislators until they arrived to debate the bill.

148. North Carolina House of Representatives Minority Leader Larry Hall ("Minority Leader Hall") stated "We don't know what we're discussing here, we don't know what we're voting on. *What we're doing is a perversion of the process.*"

149. Minority Leader Hall said that Democrats were initially told that the special session would take place on Thursday, March 24, 2016, when instead the special session was held on March 23, 2016. Minority Leader Hall stated that, as a result, a number of legislators were "caught off guard" and were "scrambling to try to come back" for the session.

150. The special session, which lasted a single day, was substantially shorter than previous special sessions. Before H.B. 2 had been filed, Speaker Moore announced that the committee hearing for the bill would begin five minutes after introduction of the bill and adjournment of the morning session. Shortly thereafter, approximately twelve minutes after the House came to order, H.B. 2 was filed—the first time it was officially made available to the public or the legislators.

151. Approximately three minutes after H.B. 2 was filed, the chairman of the House Judiciary IV Committee—the committee to which H.B. 2 was assigned—stated, in response to a fellow member's question, that it was his "intention" to permit time for public comment on the bill during the committee hearing. Upon information and belief, no prior public notice of the time and place for public comment on H.B. 2 was provided.

152. Only forty-five minutes were allotted for public comment, which was insufficient to permit those who had signed up to speak on H.B. 2 to be heard.

153. In response to complaints during the committee hearing that members had not been given an opportunity to read the text of H.B. 2, the chairman permitted a five-minute break to allow members to read the bill.

154. After a favorable referral from the House Judiciary IV Committee, H.B. 2 received only three hours of debate in the House, after which it was passed and referred to the Senate.

155. The roll call for H.B. 2 in the Senate was called after all Democratic members of the Senate walked out of the chambers in protest, with North Carolina State Senate Democratic Leader Dan Blue calling the special session an "affront to democracy" and stating that the Democratic caucus in the Senate "choose[s] not to participate in this farce." With every Democratic member absent, the Senate passed H.B. 2 unanimously.

156. Comments made by lawmakers both during the debate, in the press, and through their social media used vitriolic language to make clear their aim at undoing Charlotte's protections for LGBT people:

a. North Carolina State Senate President Pro Tempore Phil Berger's descriptions of the legislature's work included:

i. "Senate unanimously votes to stop radical ordinance allowing men into public bathrooms with women and young girls."

ii. "Lawmakers were forced to come back to session to address the serious safety concerns created by the dangerous ordinance—which violated existing state criminal trespass law, indecent exposure law and building codes and created a loophole that any man with nefarious motives could use to prey on women and young children . . ."

iii. "How many fathers are now going to be forced to go to the ladies' room to make sure their little girls aren't molested?"

b. North Carolina State Senator Buck Newton said, "The Charlotte City Council should have never passed this unlawful and reckless bathroom and locker room ordinance. Politics have reached a new extreme when a municipality's top priority is allowing men into women's bathrooms and locker rooms. But tens of thousands of our constituents from across the state have called on us to stand up to the political correctness mob, fight for common sense and put a stop to this nonsense once and for all."

c. North Carolina State Senator David Curtis ("Senator Curtis") said, "This liberal group is trying to redefine everything about our society. Gender and marriage — just the whole liberal agenda." Senator Curtis added that while, "We generally don't get involved in local politics. We need to do what's right." Senator Curtis said that H.B. 2 was necessary because, "The gays would go into a business, make some outrageous demand that they know the owner cannot comply with and file a lawsuit against that business owner and put him out of business." Senator Curtis suggested that H.B. 2 was broadly drafted specifically for the purpose of defending the bathroom

provision it in court: "[w]e feel like we can successfully defend the law and the fact that we made the law much broader," explaining that "[i]n addition to the bathroom issue we restricted the rights of cities and towns to impose a higher minimum wage. The bill has to do with restricting rights of cities and counties. I suspect we will defend it based on that."

d. North Carolina State Senator Andrew Brock said, "You know, $42,000 is not going to cover the medical expenses when a pervert walks into a bathroom and my little girls are in there."

e. Speaker Moore said "They want to protect adults who feel compelled to dress up like the opposite sex. I, on the other hand, oppose the ordinance to protect children, who from the time they've been potty trained, know to go into the bathroom of their god given appropriate gender. Honestly, it's ridiculous we are even having this discussion. I look forward to invalidating this ordinance as soon as possible."

f. North Carolina State Representative Mark Brody said Charlotte's ordinance "violates my Christian values and it violates decency values," adding that he "had to stop it." Representative Brody further stated that "[t]he homosexual community has just stepped too far and that had to stop and that's my basic opinion," noting that "[t]his is driven by the homosexual community and they're emboldened by their victory in the courts on homosexual marriage." Brody elaborated further that H.B. 2 "sends a message to these municipalities who have been taken over by the liberal, homosexual,

prohomosexual ideology that we are going to stick up for traditional values and we'll stick up for them constantly if that's what we have to do."

g. North Carolina State Representative John Blust opined that he "think[s] it's ridiculous that your anatomy isn't what governs what restroom you use," adding that he does not "understand why they have to make way for this .0001 percent of the population."

157. Debate in both chambers of the North Carolina General Assembly focused specifically on reversing the Charlotte Ordinance, with lawmakers in both chambers condemning the anti-discrimination protections for LGBT people, including transgender individuals' right to use facilities in accordance with their gender identity.

158. Fewer than 10 hours after it was introduced, the bill passed both houses. Governor McCrory signed the bill that same night, issuing a signing statement making clear once again the targets of H.B. 2. His signing statement said, "This radical breach of trust and security under the false argument of equal access not only impacts the citizens of Charlotte but people who come to Charlotte to work, visit or play. This new government regulation defies common sense and basic community norms by allowing, for example, a man to use a woman's bathroom, shower or locker room." H.B. 2 took effect immediately.

D. H.B. 2 Harms Transgender People.

159. H.B. 2 amended North Carolina's General Statutes to mandate that school boards *require* students to use restrooms and other single-sex facilities in accordance with

their "biological sex" providing that,

> Local boards of education shall require every multiple occupancy bathroom or changing facility that is designated for student use to be designated for and used only by students based on their biological sex.

160. H.B. 2 also imposes the same mandate on all executive branch agencies (which are expressly defined to include Defendant University of North Carolina), and all public agencies, providing that they

> shall require every multiple occupancy bathroom or changing facility to be designated for and only used by persons based on their biological sex.

161. Each of those provisions defines "biological sex" as follows,

> Biological sex. – The physical condition of being male or female, which is stated on a person's birth certificate.

162. Changing the gender marker on one's birth certificate is not a viable option for many transgender people, as every jurisdiction has a different set of often onerous and unnecessary requirements for updating the gender listed on a birth certificate.

163. For instance, a person born in North Carolina can only update the gender marker listed on a North Carolina-issued birth certificate with proof of certain surgeries that may not be medically necessary, advisable, or affordable for any given person. Meanwhile, a person born in neighboring Tennessee can never change the gender listed on a Tennessee-issued birth certificate.

164. Medical treatment such as the surgery required to update a person's North Carolina birth certificate does not alter a person's gender (or what H.B. 2 calls "biological sex"), but rather merely brings a person's body into alignment with the

gender they have always been. Gender identity is instead the chief determinant of a person's gender.

165. H.B. 2's provisions requiring use of single-sex facilities in accordance with the sex stated on their birth certificate not only disproportionately burdens transgender people, but intentionally targets them for differential treatment. Lawmakers made clear that H.B. 2 was specifically aimed at transgender people. For example, an FAQ released by Governor McCrory after H.B. 2's enactment states, "Why did North Carolina pass this law in the first place? Answer: The bill was passed after the Charlotte City Council voted to impose a regulation requiring businesses to allow a man into a women's restroom, shower, or locker room if they choose," even though it does not do that, but only allows a transgender woman to use a women's restroom or other multiple user facility for women and a transgender man to use a men's restroom or other multiple user facility for men.

166. Prior to the passage of H.B. 2, it was already illegal for a person to enter a restroom or locker room to assault or injure another. Moreover, protecting transgender people from discrimination in public accommodations, as has been done in numerous states and hundreds of localities, has resulted in no increase in public safety incidents in any jurisdiction anywhere in the United States, and including transgender people in public life in no way impacts the safety or well-being of non-transgender people.

167. The painful message of stigma sent by H.B. 2 echoes the dehumanizing rhetoric employed by a number of lawmakers, suggesting that transgender people are

somehow predatory or dangerous to others. In fact, it is H.B. 2 that exposes transgender people to harassment and potential violence. Transgender people are already disproportionately targeted for physical violence and harassment in North Carolina and across the country. When a transgender person is forced to disclose their transgender status to strangers, such disclosure puts them at a high risk for violence. H.B. 2's requirement that transgender people be shunted into single-sex spaces that do not match their gender identity invades their privacy and exposes this vulnerable population to harassment and potential violence by others.

168. Upon information and belief, after the enactment of H.B. 2, some school officials that had been respecting their students' gender identity without any problem called parents to say that their children would be forced out of the single-sex facilities that match their gender identity.

169. H.B. 2's broad sweep means that the same result applies to executive and public agencies, including routine places such as libraries, public health centers, airports, and the Division of Motor Vehicles, as well as places where people may turn in times of crisis, such as state hospitals, police departments, and courthouses. Transgender individuals working in such agencies may not be able to safely use any bathroom any longer, threatening their ability to keep their job.

170. Following the enactment of H.B. 2, the City Attorney of the City of Charlotte issued a memorandum dated April 1, 2016 to the Mayor and City Council of the City of Charlotte, regarding the effect of H.B. 2 on the Ordinance and other city laws

or policies. The memorandum noted that H.B. 2 "invalidates . . . the February 22 amendments to the public accommodations ordinance," and concluded that "[d]ue to the preemption described above, the Community Relations Committee can no longer receive, investigate, and conciliate complaints for violations of the public accommodations ordinance." The memorandum also expressed uncertainty regarding whether H.B. 2 preempted the city's non-discrimination protections for city employees.

171. Following the enactment of H.B. 2, the University of North Carolina President issued a memorandum dated April 5, 2016 to chancellors of constituent UNC schools, including UNC-Chapel Hill, UNC-Greensboro, and UNCSA-HS. The memorandum specifically states that "University institutions must require every multiple-occupancy bathroom and changing facility to be designated for and used only by persons based on their biological sex." The memorandum included a copy of H.B. 2, which includes its definition of "biological sex."

172. Following the enactment of H.B. 2, Governor McCrory issued Executive Order No. 93, dated April 12, 2016. The order affirmed that "[u]nder current law, every multiple occupancy restroom, locker room, or shower facility located in a cabinet agency must be designated for and only used by persons based on their biological sex," and that "restrooms, locker rooms, and shower facilities in public buildings, including our schools" would be maintained by the State "on the basis of biological sex." In a press release and video statement accompanying Executive Order No. 93, the governor stated

that the Executive Order "[m]aintains . . . gender-specific restroom and locker room facilities in government buildings and schools."

173. Executive Order No. 93 required that N.C. Gen. Stat. § 143-760 (H.B. 2, Section 1.3) be interpreted consistent with the following guidance: "[w]hen a private entity leases State real property and the property in the lessee's exclusive possession includes multiple occupancy restrooms, locker rooms or other like facilities, the private entity will control the signage and use of these facilities."

174. Executive Order No. 93 also sought to clarify the ambiguity regarding the scope of preemption provision noted by the City Attorney of the City of Charlotte, stating that "N.C. Gen. Stat. § 143-422.2(c) permits local governments or other political subdivisions of the State to set their own employment policies applicable to their own personnel," and affirming that "local governments may establish their own non-discrimination employment practices."

175. H.B. 2's restroom ban also deters transgender people from participating in the state and local democratic process. It bans them from using the restroom consistent with their gender identity when visiting the North Carolina General Assembly, petitioning their legislator, or entering any building operated by the legislative branch. It also bans them from using the restroom consistent with their gender identity at a city council meeting or at a mayor's office.

176. H.B. 2's harms extend even farther, creating conflicts between state law and various federal laws. The conflict with Title IX, for example, puts at risk the more

than $4.5 billion in federal education funding that North Carolina is expected to receive in 2016. H.B. 2 also could lead to financial penalties under Executive Order 11246, which prohibits federal contractors (such as the University of North Carolina) from barring transgender employees from the restrooms consistent with their gender identity. In addition, public employers subject to Title VII will violate the U.S. Equal Employment Opportunity Commission's decree that discriminating against transgender people with respect to restroom use is impermissible sex discrimination. Public hospitals that receive federal funding also will violate Section 1557 of the Affordable Care Act if they comply with H.B. 2.

177. The enactment of H.B. 2 follows a history of discrimination by decision-makers against transgender people, including, for example, Governor McCrory's participation in a Fourth Circuit *amicus curiae* brief arguing that a transgender student's request to access restrooms in accordance with his gender identity is "radical."

E. H.B. 2 Harms Lesbian, Gay, and Bisexual Individuals, as well as Transgender Individuals.

178. H.B. 2 also disproportionately burdens lesbian, gay, and bisexual individuals, as well as transgender individuals, by stripping them of or barring them from anti-discrimination projections under local law. H.B. 2 took aim at the Charlotte ordinance in a section providing,

> The General Assembly declares that the regulation of discriminatory practices in employment is properly an issue of general, statewide concern, such that this Article and other applicable provisions of the General Statutes supersede and preempt any ordinance, regulation, resolution, or policy adopted or imposed by a unit of local government or other political subdivision of the State that regulates or

> imposes any requirement upon an employer pertaining to the regulation of discriminatory practices in employment, except such regulations applicable to personnel employed by that body that are not otherwise in conflict with State law.

179. H.B. 2 stripped lesbian, gay, and bisexual individuals of anti-discrimination protections in Charlotte, because no such sexual orientation anti-discrimination protections exist in state law. The preemptive effect of this section did not fall equally on all North Carolinians, however.

180. Recognizing that North Carolina law had no statewide public accommodations protection of any kind except for people with disabilities, H.B. 2 actually enacted a new public accommodations statute—so that the other groups whose protections also would have been preempted under the Charlotte Ordinance were spared that result. The new public accommodations statute prohibits discrimination based on "race, religion, color, national origin, or biological sex"—omitting the sexual orientation protections that had been included in the Charlotte Ordinance.

181. The North Carolina legislature has a history of targeted discrimination toward lesbian, gay, and bisexual people. For example, the legislature approved and referred to voters a constitutional amendment barring access to marriage for same-sex couples. Legislative leaders also intervened in litigation challenging the constitutionality of the exclusion of same-sex couples from marriage pursuant to a statute authorizing them to act on behalf of the General Assembly. In 2015, the legislature also passed a bill that allows county magistrates to recuse themselves from performing civil marriages.

182. The preemptive effect of H.B. 2 also harmed transgender people. While the Charlotte Ordinance had prohibited discrimination based on sex, gender identity, and gender expression, the new public accommodations statute restricted its protections solely to "biological sex," which is defined in an effort to deliberately exclude transgender people from protection.

CLAIMS FOR RELIEF

COUNT I

Deprivation of Equal Protection

U.S. Const. Amend. XIV

183. Plaintiffs incorporate paragraphs 1 through 182 as though fully set forth herein.

184. Plaintiffs state this cause of action against Defendants in their official capacities for purposes of seeking declaratory and injunctive relief, and challenge H.B. 2 both facially and as applied to them.

185. The Fourteenth Amendment to the United States Constitution, enforceable pursuant to 42 U.S.C. § 1983, provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

A. Discrimination Based on Sex and Transgender Status in Single-Sex Restrooms and Facilities (H.B. 2, Part I)

186. Section A of Count I is asserted by Plaintiffs Carcaño, McGarry, H.S., and ACLU of NC against Defendants Governor McCrory, Board of Governors, and Bissette.

187. Under the Equal Protection Clause of the Fourteenth Amendment, discrimination based on sex is presumptively unconstitutional and subject to heightened scrutiny.

188. H.B. 2 discriminates against transgender people on the basis of sex.

189. Discrimination based on sex includes, but is not limited to, discrimination based on gender nonconformity, gender identity, transgender status, and gender transition.

190. H.B. 2 facially classifies people based on sex, gender identity, and transgender status.

191. Under the Equal Protection Clause of the Fourteenth Amendment, discrimination based on transgender status is presumptively unconstitutional and subject to heightened scrutiny.

192. H.B. 2 treats transgender people differently than non-transgender people who are similarly situated.

193. Under H.B. 2, non-transgender people are able to access restrooms and other single-sex facilities consistent with their gender identity, but transgender people are banned from restrooms and other single-sex facilities consistent with their gender identity.

194. H.B. 2 discriminates against transgender people based on gender nonconformity. For example, although Mr. Carcaño and Mr. McGarry are men, are perceived as men in public, and have had medical treatment to bring their body into

alignment with their male gender identity, they have birth certificates with female gender markers that do not conform to H.B. 2's expectations for men. Furthermore, if transgender men such as Mr. Carcaño and Mr. McGarry had been assigned male at birth, they would not be banned by H.B. 2 from the restrooms and other single-sex facilities consistent with their gender identity. The same is true for H.S., who is a young woman, is perceived as a woman in public, and has had medical treatment to bring her body into alignment with her gender but has a birth certificate that classifies her as male and therefore does not conform to H.B. 2's expectations for women. Had H.S. been assigned female at birth, she would not be banned by H.B. 2 from restrooms and other single-sex facilities designated for women and girls.

195. No person has any control over the sex that person is assigned at birth. In fact, when a person is born with characteristics associated with both male and female infants, the appropriate course is to assign sex based on likely gender identity and to later re-assign sex based on gender identity once it is known if it conflicts with the original sex assignment.

196. H.B. 2's discrimination against transgender people based on sex or transgender status is not substantially related to any important government interest. Indeed, it is not even rationally related to any legitimate government interest.

197. H.B. 2 endangers the safety, privacy, security, and well-being of transgender individuals. For example, if a transgender young woman, like H.S., were to use the restroom designated for men and boys, she likely would be harassed and might be

assaulted by men or boys who believed that she should not be in that restroom. Similarly, if a transgender man were to use the women's restroom, he likely would be harassed and might be assaulted by women who believe he should not be in the women's restroom.

198. H.B. 2 does not promote the safety, privacy, security, or well-being of non-transgender people.

199. H.B. 2 deprives transgender people of their right to equal dignity, liberty, and autonomy by branding them as second-class citizens.

200. H.B. 2's discrimination against transgender people based on sex denies them the equal protection of the laws, in violation of the Equal Protection Clause of the Fourteenth Amendment.

B. Discrimination Based on Sex, Transgender Status. and Sexual Orientation in Preemption of Local Non-Discrimination Protections (H.B. 2, Part II, Sections 2.2 & 2.3; H.B. 2, Part III)

201. Section B of Count I is asserted by Plaintiffs Carcaño, McGarry, H.S., Gilmore, Trent, Newell, and ACLU of NC against Defendant Governor McCrory.

202. Under the Equal Protection Clause of the Fourteenth Amendment, discrimination based on sex, discrimination based on sexual orientation, and discrimination based on transgender status are presumptively unconstitutional and subject to heightened scrutiny.

203. H.B. 2 deprives LGBT people of protections against discrimination based on sexual orientation, gender identity, and gender expression.

204. H.B. 2 was motivated by an intent to treat LGBT people differently, and worse, than other people, including by stripping them of the protections afforded by the City of Charlotte's Ordinance and precluding any local government from taking action to protect LGBT people against discrimination.

205. H.B. 2 was enacted for the purpose of disadvantaging LGBT people and is based on animus against LGBT people. H.B. 2 was also enacted because of, and not in spite of, its adverse effects on LGBT people.

206. The justifications cited in H.B. 2 for its enactment, including a purported governmental interest in consistent statewide obligations, are pretext for discrimination and did not reflect the actual motivations for the bill. For example, proposals to add sexual orientation and gender identity and expression protections to the statewide public accommodations law were rejected.

207. By blocking anti-discrimination protections for LGBT people at the local level, H.B. 2 imposes a different and more burdensome political process on LGBT people than on non-LGBT people who have state protection against identity-based discrimination. H.B. 2 accordingly places a special burden on LGBT people within the governmental process with an intent to injure that minority group.

208. H.B. 2 deprives LGBT people of their right to equal dignity, liberty, and autonomy by branding them as second-class citizens.

209. H.B. 2's discrimination against LGBT people based on sex and sexual orientation denies them the equal protection of the laws, in violation of the Equal Protection Clause of the Fourteenth Amendment.

C. Discrimination Based on Transgender Status Warrants Heightened Scrutiny.

210. Transgender people have suffered a long history of extreme discrimination in North Carolina and across the country, and continue to suffer such discrimination to this day.

211. Transgender people are a discrete and insular group and lack the political power to protect their rights through the legislative process. Transgender people have largely been unable to secure explicit local, state, and federal protections to protect them against discrimination.

212. A person's gender identity or transgender status bears no relation to a person's ability to contribute to society.

213. Gender identity is a core, defining trait and is so fundamental to one's identity and conscience that a person cannot be required to abandon it as a condition of equal treatment.

214. Gender identity generally is fixed at an early age and highly resistant to change through intervention.

D. Discrimination Based on Sexual Orientation Warrants Heightened Scrutiny.

215. Lesbian, gay, and bisexual people have suffered a long history of extreme discrimination in North Carolina and across the country, and continue to suffer such discrimination to this day.

216. Lesbian, gay, and bisexual people are a discrete and insular group and lack the political power to protect their rights through the legislative process. Lesbian, gay, and bisexual people have largely been unable to secure explicit local, state, and federal protections to protect them against discrimination.

217. A person's sexual orientation bears no relation to a person's ability to contribute to society.

218. Sexual orientation is a core, defining trait and is so fundamental to one's identity and conscience that a person cannot be required to abandon it as a condition of equal treatment.

219. Sexual orientation generally is fixed at an early age and highly resistant to change through intervention.

* * *

COUNT II

Violation of Right to Privacy

U.S. Const. Amend. XIV

Plaintiffs Carcaño, McGarry, H.S., and ACLU of NC against Defendants Governor McCrory, Board of Governors, and Bissette

220. Plaintiffs incorporate paragraphs 1 through 182 as though fully set forth herein.

221. The Due Process Clause of the Fourteenth Amendment places limitations on state action that deprives individuals of life, liberty, or property.

222. Substantive protections of the Due Process Clause include the right to avoid disclosure of sensitive, personal information.

223. There is a fundamental right of privacy in preventing the release of, and in deciding in what circumstances to release: (1) personal information of which the release could subject them to bodily harm; and (2) information of a highly personal and intimate nature.

224. H.B. 2 requires the disclosure of highly personal information regarding transgender people to each person who sees them using a restroom or other facility inconsistent with their gender identity or gender expression. This disclosure places them at risk of bodily harm.

225. There is no compelling state interest that is furthered by H.B. 2, nor is H.B. 2 narrowly tailored or the least restrictive alternative for promoting a state interest. H.B. 2 is not even rationally related to a legitimate state interest.

226. In addition, the privacy interests of transgender people that are invaded outweigh any purported interest the government could assert.

COUNT III

Violation of Liberty and Autonomy in the Right to Refuse Unwanted Medical Treatment

U.S. Const. Amend. XIV

Plaintiffs Carcaño, McGarry, H.S., and ACLU of NC against Defendants Governor McCrory, Board of Governors, and Bissette

227. Plaintiffs incorporate paragraphs 1 through 182 as though fully set forth herein.

228. The Fourteenth Amendment's Due Process Clause protects individuals' substantive rights to be free to make certain private decisions without unjustified governmental intrusion.

229. The right to make certain private decisions without unjustified governmental intrusion includes the right to refuse unwanted medical treatment.

230. H.B. 2 forces transgender people to undergo medical procedures that may not be medically appropriate or available in order to access facilities consistent with their gender identity.

231. Not all transgender individuals undergo gender confirmation surgery. For some, the surgery is not medically necessary, while for others it is medically dangerous or impossible. For example, because medical treatment for gender dysphoria is individualized, hormone treatment may be sufficient to manage the distress associated

with gender dysphoria for some individuals. Surgery may be medically necessary for others who do not have health insurance coverage for it and cannot afford to pay for the surgery out-of-pocket.

232. Some states require proof of surgery before they will allow the gender marker on a birth certificate to be changed. For those born in North Carolina, state law requires proof of "sex reassignment surgery." N.C. Gen. Stat. § 130A-11B.

233. For example, H.S. has not been able to amend her New Jersey birth certificate to accurately reflect her gender because surgery is not medically necessary for her and is generally not available to individuals under 18. Accordingly, H.B. 2 bans her from accessing restrooms and other facilities consistent with her gender identity.

234. There is no compelling state interest that is furthered by H.B. 2, nor is H.B. 2 narrowly tailored or the least restrictive alternative for promoting a state interest. H.B. 2 is not even rationally related to a legitimate state interest.

COUNT IV

Violation of Title IX

20 U.S.C. § 1681, *et seq.*

Plaintiffs Carcaño, McGarry, and H.S.
against Defendant University of North Carolina

235. Plaintiffs incorporate paragraphs 1 through 182 as though fully set forth herein.

236. Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to

discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).

237. Under Title IX, discrimination "on the basis of sex" includes discrimination on the basis of gender nonconformity, gender identity, transgender status, and gender transition.

238. Defendant University of North Carolina is an education program receiving federal financial assistance.

239. Defendant University of North Carolina is an executive branch agency as defined by H.B. 2.

240. Pursuant to H.B. 2, Defendant University of North Carolina "shall require every multiple occupancy bathroom or changing facility to be designated for and only used by persons based on their biological sex." As set forth in the UNC President's memorandum dated April 5, 2016, Defendant University of North Carolina has implemented H.B. 2 by issuing guidance that "[u]niversity institutions must require every multiple-occupancy bathroom and changing facility to be designated for and used only by persons based on their biological sex."

241. By requiring Mr. Carcaño—a transgender man—to use a restroom that is inconsistent with his gender identity, Defendant University of North Carolina excludes Mr. Carcaño from participation in, denies him the benefits of, and subjects him to discrimination in educational programs and activities at Defendant's constituent campus,

UNC-Chapel Hill, "on the basis of sex," which violates Mr. Carcaño's rights under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*

242. By requiring Mr. McGarry—a transgender man—to use a restroom that is inconsistent with his gender identity, Defendant University of North Carolina excludes Mr. McGarry from participation in, denies him the benefits of, and subjects him to discrimination in educational programs and activities at Defendant's constituent campus, UNC-Greensboro, "on the basis of sex," which violates Mr. McGarry's rights under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*

243. By requiring H.S.—a transgender young woman—to use a restroom that is inconsistent with her gender identity, Defendant University of North Carolina excludes H.S. from participation in, denies her the benefits of, and subjects her to discrimination in educational programs and activities at Defendant's constituent campus, UNCSA-HS, "on the basis of sex," which violates H.S.'s rights under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*

* * *

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment:

A. Declaring that the unlawful provisions of H.B. 2 discussed above and their enforcement by Defendants violate Plaintiffs' rights under the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution;

B. Declaring that the unlawful provisions of H.B. 2 discussed above and their enforcement by Defendants violate Plaintiffs' rights under Title IX;

C. Preliminarily and permanently enjoining enforcement by Defendants of the unlawful provisions of H.B. 2 discussed above;

D. Requiring Defendants in their official capacities to allow individuals, including transgender people, to use single-sex facilities in accordance with their gender identity in all public schools and universities, executive branch agencies, and public agencies; and requiring Defendants in their official capacities to allow local governments to enact and to continue to enforce anti-discrimination protections for LGBT people;

E. Awarding Plaintiffs their costs, expenses, and reasonable attorneys' fees pursuant to 42 U.S.C. § 1988 and other applicable laws; and

F. Granting such other and further relief as the Court deems just and proper.

G. The declaratory and injunctive relief requested in this action is sought against each Defendant; against each Defendant's officers, employees, and agents; and against all persons acting in active concert or participation with any Defendant, or under any Defendant's supervision, direction, or control.

Dated: April 21, 2016

Respectfully submitted,

/s/ Christopher A. Brook
Christopher A. Brook
N.C. State Bar No. 33838
AMERICAN CIVIL LIBERTIES UNION FOR NORTH CAROLINA LEGAL FOUNDATION
Post Office Box 28004
Raleigh, North Carolina 27611
Telephone: 919-834-3466
Facsimile: 866-511-1344
cbrook@acluofnc.org

Elizabeth O. Gill*
Chase B. Strangio*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad St., 18th Fl.
New York, NY 10004
Telephone: 212-549-2627
Facsimile: 212-549-2650
egill@aclunc.org
cstrangio@aclu.org

Tara L. Borelli*
Peter C. Renn*
Kyle A. Palazzolo*
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
730 Peachtree Street NE, Suite 1070
Atlanta, GA 30308-1210
Telephone: 404-897-1880
Facsimile: 404-897-1884
tborelli@lambdalegal.org
prenn@lambdalegal.org
kpalazzolo@lambdalegal.org

Paul M. Smith*
Luke C. Platzer*
Mark P. Gaber*
Lorenzo Di Silvio*
Nicholas W. Tarasen*
Thomas D. Garza*
JENNER & BLOCK LLP
1099 New York Avenue, N.W.
Suite 900, Washington, DC 20001
Telephone: 202-639-6000
Facsimile: 202-639-6066
psmith@jenner.com
lplatzer@jenner.com
mgaber@jenner.com
ldisilvio@jenner.com
ntarasen@jenner.com
tgarza@jenner.com

Counsel for Plaintiffs

* Appearing by special appearance pursuant to L.R. 83.1(d).

201 F.3d 436
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. See CTA4 Rule 32.1.
United States Court of Appeals, Fourth Circuit.

Jerry L. LANDERS; Karen L. Landers, his wife, Plaintiffs-Appellants,
v.
DAWSON CONSTRUCTION PLANT, LIMITED, Defendant-Appellee,
and
L.B. FOSTER COMPANY, a Delaware corporation, Defendant.
Jerry L. LANDERS; Karen L. Landers, his wife, Plaintiffs,
and
L.B. FOSTER COMPANY, a Delaware corporation, Defendant-Appellant,
v.
DAWSON CONSTRUCTION PLANT, LIMITED, Defendant-Appellee.

Nos. 98-2709, 98-2763.
|
Nov. 2, 1999.

Appeals from the United States District Court for the Southern District of West Virginia, at Charleston. Charles H. Haden II, Chief District Judge. (CA-97-797-2).

Attorneys and Law Firms

Leslie Renee Stotler, RANSON LAW OFFICES, Charleston, West Virginia; Phillip Carrington Monroe, CAMPBELL, WOODS, BAGLEY, EMERSON, MCNEER & HERNDON, P.L.L.C., Charleston, West Virginia, for Appellants.

Louis Smith, LEBOEUF, LAMB, GREENE, & MACRAE, L.L.P., Newark, New Jersey, for Appellee.

J. Michael Ranson, Cynthia M. Salmons, RANSON LAW OFFICES, Charleston, West Virginia; David A. Mohler, CAMPBELL, WOODS, BAGLEY, EMERSON, MCNEER & HERNDON, P.L.L.C., Charleston, West Virginia, for Appellants.

Theodore D. Aden, LEBOEUF, LAMB, GREENE & MACRAE, L.L.P., Newark, New Jersey, for Appellee.

Before LUTTIG, MICHAEL, and KING, Circuit Judges.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM.

***1** Jerry L. Landers and his wife Karen L. Landers (collectively the "Plaintiffs") sued L.B. Foster Company ("Foster") and Dawson Construction Plant, Ltd. ("Dawson") for injuries suffered by Mr. Landers while working on the Admiral T.J. Lopez Bridge over the Kanawha River at Chelyan, West Virginia. After their claim against Dawson was dismissed for lack of personal jurisdiction, the Plaintiffs sought reinstatement of Dawson as a defendant and transfer of the litigation to the Western District of Pennsylvania. Foster filed a separate motion seeking the same relief. On October 15, 1998, both motions were denied.

The Plaintiffs and Foster appeal from the district court's October 15, 1998 Memorandum Opinion and Order. Finding no reversible error, we affirm.

I.

On April 22, 1996, Mr. Landers, a West Virginia resident and an employee of C.J. Mahan Construction Company, was working on the construction of the Admiral Lopez Bridge when a piece of sheet piling released from a shackle and injured him. The Plaintiffs originally filed suit against Foster on November 20, 1996, in the Circuit Court of Kanawha County, West Virginia, alleging that the accident had occurred as the result of a defective shackle distributed by Foster. Later, on June 12, 1997, they filed an Amended Complaint adding Dawson, the manufacturer of the shackle, as a defendant. In response to the Amended Complaint, Dawson removed the action to the district court for the Southern District of West Virginia, and subsequently filed a motion to dismiss for lack of personal jurisdiction.

On December 15, 1997, the district court concluded that Dawson "had no purposeful contact with West Virginia," and granted Dawson's motion to dismiss. Accordingly, the district

court dismissed both the Plaintiffs' claims and Foster's cross-claims against Dawson.

Attorneys for the Plaintiffs and Foster thereafter travelled to England to depose Robin Dawson, the Managing Director of Dawson, seeking to discover the extent of Dawson's contacts with West Virginia. During the deposition, it was ascertained that Mr. Dawson had met with Michael James Songer, the General Manager of Foster's Equipment Division, in Pittsburgh, Pennsylvania, to discuss distribution of Dawson's products in the United States. Likewise, in an affidavit executed on February 24, 1998, Mr. Songer indicated that he and Mr. Dawson had specifically discussed locating a distributor for the Mid-Atlantic states, including West Virginia. Based on these additional facts, Foster filed a motion for reconsideration of the district court's dismissal of Dawson. However, by order of April 27, 1998, the district court denied the motion for reconsideration. Of note, the two-year Pennsylvania statute of limitations had expired five days earlier, on April 22, 1998.

On September 1, 1998, the Plaintiffs filed a motion seeking reinstatement of Dawson as a defendant and transfer of the litigation to the Western District of Pennsylvania, pursuant to either 28 U.S.C. § 1404(a) or § 1406(a). [1] Foster filed a similar application on September 4, 1998. After considering the relevant factors, the district court, by its October 15, 1998 Memorandum Opinion and Order, denied both motions. The Plaintiffs and Foster have appealed from this Order, asserting that the district court abused its discretion, and that its decision should be reversed.

II.

***2** Under the provisions of either § 1404(a) or § 1406(a), the district court has broad discretion to grant or deny a motion to transfer to another district. *Cote v. Wadel,* 796 F.2d 981, 985 (7th Cir.1986); *accord, Nichols v. G.D. Searle & Co.,* 991 F.2d 1195, 1201 (4th Cir.1993). Therefore, a district court's ruling on a motion to transfer will be reversed only for a clear abuse of discretion. *Id.*

When faced with motions to transfer, district courts must engage in an analysis of convenience and fairness, weighing a number of case-specific factors. *Stewart Organization, Inc. v. Ricoh Corp.,* 487 U.S. 22, 29 (1988). In particular, the following factors are commonly considered in ruling on a motion to transfer:

> (1) the ease of access to the sources of proof; (2) the convenience of the parties and witnesses; (3) the cost of obtaining the attendance of the witnesses; (4) the availability of compulsory process; (5) the possibility of a view by the jury; (6) the interest in having local controversies decided at home; and (7) the interests of justice.

Alpha Welding & Fabricating, Inc. v. Heller, 837 F.Supp. 172, 175 (S.D.W.Va.1993) (citing *Verosol B.V. v. Hunter Douglas, Inc.,* 806 F.Supp. 582, 592 (E.D.Va.1992); *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 508-09, 67 S.Ct. 839, 91 L.Ed. 1055 (1947)). After identifying and balancing these specific factors in this case, the district court concluded that transfer to the Western District of Pennsylvania was not warranted. [2]

The Plaintiffs and Foster contend that the district court abused its discretion in denying the motions to transfer the litigation to the Western District of Pennsylvania, arguing that it was not reasonably foreseeable that personal jurisdiction could not be asserted over Dawson in West Virginia. As a result of the timing of the district court's ruling on the jurisdictional issue, the Plaintiffs' claims against Dawson are now barred by the statute of limitations in Pennsylvania.

We have held that there is no abuse of discretion when a district court denies a plaintiff's motion to transfer "on the ground that the plaintiff's attorney *could reasonably have foreseen* that the forum in which he/she filed was improper." *Nichols,* 991 F.2d at 1201 (emphasis added) (citations omitted). Furthermore, as the authorities relied on in *Nichols* indicate, this principle applies even where the district court dismisses the action based on the absence of personal jurisdiction, and a subsequent action would be barred based on the statute of limitations. [3]

The Plaintiffs and Foster attempt to distinguish *Nichols* by arguing that "it was not reasonably foreseeable that the district court would rule that Dawson did not have minimum contacts with West Virginia in order to sustain personal jurisdiction." Appellants Br. at 21. Relying on the Supreme Court's decision in *Goldlawr, Inc. v. Heiman,* 369 U.S. 463, 82 S.Ct. 913, 8 L.Ed.2d 39 (1962), the Plaintiffs and Foster assert that the facts presented in this case are precisely the type that gave rise to the enactment of § 1404(a) and § 1406(a) in the first place. In *Goldlawr,* the Court stated that the underlying

purpose of these statutes is to avoid the injustice resulting to Plaintiffs from a dismissal of their case "merely because they made an erroneous guess with regard to the existence of some *elusive fact* of the kind upon which venue provisions often turn." *Id.* at 466 (emphasis added). Asserting that the lack of personal jurisdiction as to Dawson in West Virginia was such an "elusive fact," the Plaintiffs and Foster argue that "unless counsel had a crystal ball, they could not have foreseen, in advance, that this civil action should have been filed in the Western District of Pennsylvania." Appellants Reply Br. at 7.

***3** In this civil action, however, the appellants had something more reliable than a crystal ball: the unequivocal order of the district court of December 15, 1997, finding a lack of personal jurisdiction as to Dawson. Here, not only should the Plaintiffs and Foster have "reasonably foreseen" that jurisdiction over Dawson was lacking, there was a direct judicial determination on that issue. Thus, the Plaintiffs' and Foster's reliance on *Goldlawr* is misplaced, because any error against the Plaintiffs in this case did not involve some unforeseeable, elusive fact. Rather, all relevant facts, including the lack of personal jurisdiction over Dawson in West Virginia, were readily apparent to both appellants at least four months prior to the running of the Pennsylvania statute of limitations. Under these circumstances, the district court's adverse rulings do not constitute an abuse of its discretion.

III.

Because the district court did not abuse its discretion in denying the Plaintiffs' and Foster's motions to reinstate Dawson and transfer the litigation to the Western District of Pennsylvania, we are compelled to affirm.

AFFIRMED.

All Citations

201 F.3d 436 (Table), 1999 WL 991419

Footnotes

1 Section § 1404(a) provides as follows: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." Section § 1406(a) states: "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." We note that the analysis of whether a transfer is in the "interest of justice" is the same under both § 1404(a) and § 1406(a). *Nichols v. G.D. Searle & Co.,* 991 F.2d 1195, 1201 n. 5 (4th Cir.1993).

2 In reaching this conclusion, the district court pointed out that (1) Mr. Landers's injuries occurred in West Virginia; (2) the Plaintiffs and most witnesses are located in West Virginia; (3) transfer would come at no cost to the Plaintiffs, but at substantial cost to Dawson and the judicial system; and (4) since West Virginia law would apply in this diversity action, a West Virginia federal court would be more familiar with West Virginia law than a federal court in Pennsylvania. While the Plaintiffs and Foster concede that West Virginia "is the most convenient and appropriate jurisdiction for this litigation," they argue that the district court "eliminated" West Virginia as a forum by dismissing Dawson for lack of personal jurisdiction. This argument is without merit. Under West Virginia law, the Plaintiffs could have obtained a full recovery against Foster in West Virginia for the damages they proved were caused by the defective shackle. *See, e.g., Morningstar v. Black & Decker Mfg. Co.,* 162 W.Va. 857, 253 S.E.2d 666, 683 n. 22 (1979).

3 *See*, *e.g., Spar,Inc. v. Information Resources, Inc.,* 956 F.2d 392, 394 (2d Cir.1992); *Deleski v. Raymark Indus., Inc.,* 819 F.2d 377, 381 (3d Cir.1987); *Cote v. Wadel,* 796 F.2d 981, 985 (7th Cir.1986); *Wood v. Santa Barbara Chamber of Commerce, Inc.,* 705 F.2d 1515, 1523 (9th Cir.1983); *Dubin v. United States,* 380 F.2d 813, 816 n. 5 (5th Cir.1967).

2010 WL 743829
Only the Westlaw citation is currently available.
United States District Court,
S.D. California.

CALLAWAY GOLF COMPANY, Plaintiff,
v.
CORPORATE TRADE INC., Defendant.

No. 09cv384 L(POR).
|
March 1, 2010.

Attorneys and Law Firms

Caryn M. Anderson, Edward P. Swan, Jr., Michelle Ann Herrera, Luce Forward Hamilton and Scripps, San Diego, CA, for Plaintiff.

Bruce Sandy Elder, Micha Danzig, Mintz Levin Cohn Ferris Glovsky & Popeo, San Diego, CA, for Defendant.

ORDER GRANTING MOTION TO TRANSFER [doc. # 4]; DENYING WITHOUT PREJUDICE MOTION TO DISMISS FOURTH CAUSE OF ACTION [doc. # 12]; GRANTING EX PARTE MOTION FOR LEAVE TO FILE DECLARATIONS [doc. # 24] and FOR LEAVE TO FILE NEWLY DISCOVERED EVIDENCE [doc. # 27]

M. JAMES LORENZ, District Judge.

***1** Defendant Corporate Trade Inc. ("CTI") moves to dismiss, transfer or stay this action and to dismiss plaintiff's fourth cause of action under Federal Rule of Civil Procedure 12(b)(6). The motions have been fully briefed; however, plaintiff Callaway Golf Company ("Callaway") seeks leave to file declarations and newly discovered evidence in support of its opposition to CTI's motion to dismiss, transfer or stay the case.

Background

In September 2001, CTI and Spalding Sports Worldwide, Inc. ("Spalding"), a nonparty, agreed that Spalding would sell its excess sporting goods inventory to CTI in exchange for trade credits that Spalding could use for marketing and advertising that CTI would make available to Spalding. In December 2001, CTI and KSL Media, Inc. ("KSLM") agreed that KSLM would place media purchases on behalf of CTI's clients.

Callaway acquired certain of Spaulding's assets in mid–2003 and sought the assignment and full use of the trade credit balance that CTI held in account for Spaulding. On July 1, 2003, CTI and Callaway agreed to assign, *inter alia*, the trade credit balance to Callaway. Callaway alleges in its complaint that the agreement was for CTI to transfer the Spalding trade credit balance to Callaway in exchange for Callaway switching its media placement and planning and all future media trading to CTI's designated media agency, KSLM, once Callaway's media agreement with Dailey & Associates expired. However, CTI asserts that in consideration for the assignment and use of the trade credits, Callaway agreed it would provide to CTI either inventory of products equal to the value of the cash savings on media purchases that Callaway would realize from the use of the trade credits to purchase media; or alternatively, Callaway would pay cash to CTI calculated as 95% of the value of the cash savings on media purchases that Callaway realized from use of the trade credits to purchase media within 48 months of the use of the trade credits. CTI points to a letter from CTI to Callaway dated July 10, 2003 that it contends recognizes and confirms the CTI Trade Credit Compensation Agreement. (Exh. 3 to Declar. of Brian Egan.) It is clear that the parties dispute the terms of the trade credit assignment.

There is no dispute, however, that Callaway executed several media purchase authorizations for print and broadcast media. CTI sent a letter dated July 28, 2004 to Callaway that expressly provided an accounting of the cash-flow savings realized by Callaway in 2003 and 2004 from the use of trade credits to purchase media. (Danzig Declar. Exh. Bates stamp 000255.)

In April 2008, CTI and Callaway entered into another agreement whereby CTI would provide information to Callaway concerning KSLM's alleged improper business practices toward Callaway and Callaway would pay to CTI a percentage of net money Callaway recovered from KSLM plus a percentage of cost saved based on the receipt of the information from CTI. ("Confidentiality Agreement"). Callaway recovered or avoided considerable costs from KSLM and as a result was to pay CTI fees of approximately $227,862. Callaway proposed a written mutual release of all remaining claims under the Confidentiality Agreement in

exchange for a one-time payment of $60,000 and a waiver of all claims and liabilities, including any not yet known or suspected to exist by the parties. (Exh. 7 to Declar. of Brian Egan.) On October 28, 2008, CTI advised Callaway that it was refusing to execute the proposed mutual release because Callaway had not transferred inventory, nor paid cash, based on the use of trade credits for the purchase of media as required by the July 2003 assignment of the Spaulding Agreement to Callaway.

***2** CTI sent an invoice to Callaway on October 31, 2008, for unpaid fees of $932,013.65 which represented 95% of the value of cash savings realized by Callaway from the use of trade credits to purchase media in 2003 and 2004. Callaway questioned the basis of the October 31, 2008 invoice.

Defendant states that a phone conversation between CTI and Callaway occurred on November 22, 2008, in which CTI asserted that it was prepared to send a second invoice to Callaway based on Callaway's use of the trade credits balance from 2005 through 2008 in the amount of $7,981,287.20. In a subsequent phone call on November 26, 2008, Brian Egan of CTI allegedly told Callaway's counsel that unless both invoices were paid by January 19, 2009, CTI would sue Callaway for the amounts owed. Although Callaway does not suggest that this telephonic conversation never occurred, it disputes what was discussed during the call and strongly denies that a threat of litigation was communicated. (Oppo. Exh. 1, Patrick Swan, Jr. Declar. at ¶¶ 14–16.)

On January 5, 2009, CTI sent a second invoice to Callaway for 95% of the value of cash savings, $7,981,287.20, realized by Callaway from the trade credits used to purchase media in 2005 through 2008. Callaway did not communicate with CTI and did not make any payments by the January 19, 2009 deadline. The next day, January 20, 2009, Callaway filed the present action in the Superior Court for the State of California, County of San Diego, for declaratory relief and damages related to the terms of use of trade credits and breaches of contract against CTI. CTI removed this action on January 26, 2009.

On that same date, CTI filed a complaint against Callaway in the United States District Court for the Southern District of New York, seeking damages for breach of contract, unjust enrichment, and for an accounting for monies owed under the agreement concerning Callaway's use of trade credits to purchase media. CTI's action was filed less than a week after Callaway's case was filed here but prior to service of Callaway's complaint.

As noted above, CTI seeks to have this case, the first-filed action, transferred to the District Court for the Southern District of New York. Callaway opposes the motion.

Motion to Transfer, Stay or Dismiss

a. First–to–File Rule

"There is a generally recognized doctrine of federal comity which permits a district court to decline jurisdiction over an action when a complaint involving the same parties and issues has already been filed in another district." *Pacesetter Systems, Inc. v. Medtronic, Inc.*, 678 F.2d 93, 94–5 (9th Cir.1982). This doctrine, known as the first-to-file rule, "gives priority, for purposes of choosing among possible venues when parallel litigation has been instituted in separate courts, to the party who first establishes jurisdiction." *Northwest Airlines, Inc. v. American Airlines, Inc.*, 989 F.2d 1002, 1006 (8th Cir.1993). The rule "serves the purpose of promoting efficiency well and should not be disregarded lightly." *Church of Scientology of California v. United States Dep't of Army*, 611 F.2d 738, 750 (9th Cir.1979).

***3** In applying the first-to-file rule, a court looks to three threshold factors: "(1) the chronology of the two actions; (2) the similarity of the parties, and (3) the similarity of the issues." *Z–Line Designs, Inc. v. Bell'O Int'l LLC*, 218 F.R.D. 663, 665 (N.D.Cal.2003). If the first-to-file rule does apply to a suit, the court in which the second suit was filed may transfer, stay or dismiss the proceeding in order to allow the court in which the first suit was filed to decide whether to try the case. *Alltrade, Inc. v. Uniweld Products, Inc.*, 946 F.2d 622, 622 (9th Cir.1991). In other words, the court with the first-filed action should normally decide whether an exception to the first-to-file rule applies. *Pacesetter*, 678 F.2d at 96 (citing *Kerotest Mfg. Co. v. C–O–Two Fire Equipment Co.*, 342 U.S. 180, 185, 72 S.Ct. 219, 96 L.Ed. 200 (1952)); see also *Alltrade Inc.*, 946 F.2d at 628.

"Circumstances under which an exception to the first-to-file rule typically will be made include bad faith, anticipatory suit and forum shopping." *Id.* at 628 (internal citations omitted). Another exception to the first-to-file rule applies if "the balance of convenience weighs in favor of the later-filed action." *Ward v. Follett Corp.*, 158 F.R.D. 645, 648 (N.D.Cal.1994). This is analogous to the "convenience of

parties and witnesses" on a transfer of venue motion pursuant to 28 U.S.C. § 1404(a). *Med–Tec Iowa, Inc. v. Nomos Corp.*, 76 F.Supp.2d 962, 970 (N.D.Iowa 1999); *800–Flowers, Inc. v. Intercontinental Florist, Inc.*, 860 F.Supp. 128, 133 (S.D.N.Y.1994).

There is no dispute concerning the chronology of the two actions; the similarity of the parties, and the similarity of the issues. Therefore the issue is whether an exception to the firstto-file rule should be applied which would result in the transfer of this action to the Southern District of New York. CTI contends that Callaway filed this anticipatory action and engaged in forum shopping and further asserts that the balance of convenience weighs in favor of transfer of the first-filed case.

1. Anticipatory Action

A suit is "anticipatory" for the purposes of being an exception to the first-to-file rule if the plaintiff in the first-filed action filed suit acts on receipt of specific, concrete indications that a suit by the defendant was imminent. *Ward v. Follett Corporation*, 158 F.R.D. 645, 648 (N.D.Cal.1994). Such anticipatory suits are disfavored because they are examples of forum shopping. *Mission Ins. Co. v. Puritan Fashions Corp.*, 706 F.2d 599, 602 n. 3 (5th Cir.1983). By recognizing this exception to the first-to-file rule, courts seek to eliminate the race to the courthouse door in an attempt to preempt a later suit in another forum. *Northwest Airlines v. American Airlines*, 989 F.2d 1002, 1007 (8th Cir.1993).

Filing a declaratory action after receipt of an intent to sue letter favors a finding that the first-filed suit was done for anticipatory, forum shopping purposes. *See Amerada Petroleum Corp. v. Marshall*, 381 F.2d 661, 663 (5th Cir.1967). In *Ward*, the court recognized the need for "specific, concrete indications that a suit by defendant was imminent [ ]" for a suit to be declared anticipatory. *Ward*, 158 F.R.D. at 648.

***4** As noted above, there a several facts in dispute concerning the terms of the parties' agreement, the existence of documents and the contents of phone conversations. In briefing, Callaway accuses CTI of fabrication of evidence. The parties have provided directly conflicting declarations. Of particular importance is CTI's contention that a date certain, January 19, 2009, was communicated directly to Callaway's counsel as the deadline for payment of the amount it claims Callaway owed in order to avoid litigation. If January 19 was the specific deadline for Callaway to make payment in order to avoid litigation, its filing of the present action appears to be an anticipatory action meant to secure its forum choice.

Callaway declares that no such deadline was ever communicated to it by CTI by telephone conversation, and the January 19 deadline was CTI's invented afterthought in order to support transfer of this action to New York. Instead, Callaway states that there was no rush to the courthouse because there was no threat of litigation by CTI but only an unsubstantiated claim for monies owed.

Most all case law addresses whether a written correspondence, such as a cease and desist letter, acts as specific, concrete indications that a suit by defendant was imminent. Here, there is no written correspondence concerning a deadline for payment in order to avoid litigation. Rather, CTI relies on an unrecorded phone call to show that Callaway was aware that litigation would be imminent. CTI supports its contention that a firm deadline was communicated to Callaway with the declarations of Egan and Weichert, but Callaway's counsel, a participant in the phone conversation, declares that there was no discussion of a particular deadline for payment at all.

Upon reviewing the record, the Court cannot make a factual finding that CTI provided Callaway with specific, concrete indications that a lawsuit was imminent and therefore, Callaway filed the action in this Court in anticipation of CTI's lawsuit and to forum shop. Accordingly, the Court finds that departing from the first-to-file rule on this basis is unwarranted.

2. Balance of Convenience

As noted above, another exception to the first-to-file rule applies if "the balance of convenience weighs in favor of the later-filed action." *Ward v. Follett Corp.*, 158 F.R.D. 645, 648 (N.D.Cal.1994). This is analogous to the "convenience of parties and witnesses" on a transfer of venue motion pursuant to 28 U.S.C. § 1404(a). As noted above, the court with the first-filed action should normally weigh the balance of convenience and decide whether this exception to the first-to-file rule should be applied. *Pacesetter*, 678 F.2d at 96 (citing *Kerotest Mfg. Co. v. C–O–Two Fire Equipment Co.*, 342 U.S. 180, 185, 72 S.Ct. 219, 96 L.Ed. 200 (1952)); see also *Alltrade Inc.*, 946 F.2d at 628.

Section 1404(a) of Title 28 of the United States Code provides that even when venue is proper, the court has discretion

to transfer an action "[f]or the convenience of parties and witnesses, in the interest of justice, ... to any other district or division where it might have been brought." 28 U.S.C. § 1404(a). The purpose of this section is to "prevent the waste 'of time, energy and money' and to 'protect litigants, witnesses and the public against unnecessary inconvenience and expense.' " *Van Dusen v. Barrack*, 376 U.S. 612, 616, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964) (*quoting Continental Grain Co. v. Barge F.B.L.–585*, 364 U.S. 19, 26–27, 80 S.Ct. 1470, 4 L.Ed.2d 1540 (1960)). The party requesting the transfer bears the burden of showing that the balance of conveniences weighs heavily in favor of the transfer in order to overcome the strong presumption in favor of the plaintiff's choice of forum. *Piper Aircraft v. Reyno*, 454 U.S. 235, 255–56, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981); *Decker Coal Co. v. Commonwealth Edison Co.*, 805 F.2d 834, 843 (9th Cir.1986).

***5** To support a motion to transfer under § 1404(a), the moving party must first show that the proposed transferee court possesses subject matter jurisdiction over the action, that the parties would be subject to personal jurisdiction in the transferee court, and that venue would have been proper in the transferee court. *Hoffman v. Blaski*, 363 U.S. 335, 344, 80 S.Ct. 1084, 4 L.Ed.2d 1254 (1960); *A.J. Indus., Inc. v. United States Dist. Ct. for the Cent. Dist. of Cal.*, 503 F.2d 384, 386 (9th Cir.1974). If this requirement is established, the Court next looks at whether the convenience of parties and witnesses, and the interests of justice favor transfer. 28 U.S.C. § 1404(a). Courts in the Ninth Circuit weigh several considerations when determining whether transfer is appropriate: (1) plaintiff's choice of forum; (2) convenience of the parties; (3) convenience of the witnesses and availability of compulsory process; (4) ease of access to the evidence; (5) feasibility of consolidation of other claims; (6) familiarity of each forum with the applicable law; (7) any local interest in the controversy; and (8) the relative court congestion and time of trial in each forum. *Decker Coal*, 805 F.2d at 843; *see Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498–99 (9th Cir.), *cert. denied*, 531 U.S. 928, 121 S.Ct. 307, 148 L.Ed.2d 246 (2000).

a. Threshold Issue

Transfer under 28 U.S.C. § 1404(a) is limited to courts where the action "might have been brought." *Hoffman*, 363 U.S. at 344; *A.J. Indus.*, 503 F.2d at 386. There is no dispute here that the transferee court has personal jurisdiction over defendants, subject matter jurisdiction over the claims, and proper venue had the claims originally been brought in that court. *See Hoffman*, 363 U.S. at 343–44.

b. The Convenience of Parties and Witnesses, and the Interests of Justice

As noted above, once the initial inquiry is satisfied, the court then weighs several practical considerations when determining whether transfer is appropriate.

1. Plaintiff's Choice of Forum

Courts generally afford considerable weight to a plaintiff's choice of forum when deciding a motion to transfer. *Piper Aircraft*, 454 U.S. at 255; *Decker Coal*, 805 F.2d at 843. But if the transactions giving rise to the action lack a significant connection to the plaintiff's chosen forum, the plaintiff's choice of forum is given considerably less weight. *See Pacific Car & Foundry Co. v. Pence*, 403 F.2d 949, 954 (9th Cir.1968) (a plaintiff's choice of forum commands less consideration where the operative facts have not occurred within the forum and the forum has no particular interest in the parties or subject matter); WILLIAM W. SCHWARZER ET AL., CALIFORNIA PRACTICE GUIDE: FEDERAL CIVIL PROCEDURE BEFORE TRIAL § 4:731 at 4–86 (The Rutter Group 2009) The Court must also consider the parties' business contacts with the chosen forum, including those relating to the plaintiff's causes of action. *Pacific Car*, 403 F.2d at 954.

***6** CTI contends that this action has a more significant connection to New York than to California notwithstanding Callaway's corporate presence in this district and its contention that it made all its decisions to enter into the various agreements and transaction from California. The negotiations and execution of the initial agreement between Spalding and CTI occurred in New York and there is a choice of law provision indicating that the agreement is governed by New York law. Further, CTI states that negotiation of the Spalding agreement assignment to Callaway occurred exclusively in New York City.

But Callaway contends that all of the written contractual negotiations were exchanged between CTI in New Jersey and Callaway in California; Callaway decided to engage KSL Media in California; and it placed its media orders with KSL Media in California. How Callaway engaged and made use of its contacts with KSL is not of particular importance. The agreement(s) made between Callaway and CTI are the focus of the action and Callaway's choice of forum does

not have a significant connection to those agreements in terms of contract formation and execution. Thus, while giving Callaway's choice of forum some weight, the Court finds that the weight is not significant.

2. Convenience of the Parties

A defendant wishing to transfer an action must show that the burden on the plaintiff if the action is transferred is less than the burden on defendant if the action is not transferred. *See Merchants Nat. Bank v. Safrabank (California),* 776 F.Supp. 538, 541–42 (D.Kan.1991); *Fink v. Declassis,* 738 F.Supp. 1195, 1198 (N.D.Ill.1990); *Kirschner Bros. Oil, Inc. v. Pannill,* 697 F.Supp. 804, 807 (D.Del.1988). Here, because both parties are corporations, Callaway suggests the relative means and burdens on the parties are inconsequential. As CTI notes, however, it is a small business—"a one-man corporation"—unlike Callaway. As a result of the disparity in size, CTI notes that litigating this action in California will disrupt its business unlike any burden Callaway may experience having to litigate in New York. Because CTI has minimal contacts in California and it would be classified as a small business, the burden of cost for defending this action in California would be significant on CTI but the burden on a national corporation such a Callaway to appear in New York would be insignificant. Thus, this factor weighs in favor of transfer.

3. Convenience of the Witnesses and Availability of Compulsory Process

One of the most important factors in weighing whether to transfer an action is the convenience of the witnesses. *In re Eastern Dist. Repetitive Stress Injury Litig.,* 850 F.Supp. 188, 194 (E.D.N.Y.1994). To demonstrate inconvenience, the moving party:

> should produce information regarding the identity and location of the witnesses, the content of their testimony, and why such testimony is relevant to the action. [citation] The court will consider not only the number of witnesses located in the respective districts, but also the nature and quality of their testimony in relationship to the issues in the case.

***7** *Steelcase, Inc. v. Haworth, Inc.,* 41 U.S.P.Q.2d 1468, 1470 (C.D.Cal.1996).

Defendant provides what it contends are 10 key witnesses who reside within 100 miles of the Southern District of New York, including Ron Drapeau, Callaway's former CEO who currently resides in Connecticut. [1] The witnesses it discusses are relevant to the issues involved in this case and they reside in or near New York. Although Callaway suggests that CTI's representations concerning where relevant witnesses reside "cannot be taken at face value," Callaway has not made a showing that CTI's statements are suspect. Therefore, the Court finds that CTI has made a showing for transfer of this action to New York.

4. Relative Ease of Access to the Evidence

The location of evidence is not a significant factor in a basic contract interpretation case such as this one. Accordingly, this factor is neutral with respect to transfer.

5. Familiarity of Each Forum with the Applicable Law

Either court is equally competent to address claims arising out of state law whether that law is from New York or California. Therefore, this factor is neutral with respect to transfer.

6. Relative Court Congestion

Although CTI does not address the factor of relative court congestion, the Court takes judicial notice that the time to trial for a civil case is essentially the same in the Southern District of California and the Southern District of New York. Accordingly, this factor is neutral with respect to transfer.

7. Interest of Justice

"The question of which forum will better serve the interest of justice is of predominant importance on the question of transfer, and the factors involving convenience of parties and witnesses are in fact subordinate." *Madani v. Shell Oil Co.,* 2008 WL 268986, *2 (N.D.Cal., Jan.30, 2008) (quotation omitted); *see also Mussetter Distrib., Inc. v. DBI Beverage Inc.,* 2009 WL 1992356, *6 (E.D.Cal., July 8, 2009); *Amazon.com v. Cendant Corp.,* 404 F.Supp.2d 1256, 1261 (W.D.Wash.2005).

"An important consideration in determining whether the interests of justice dictate a transfer of venue is the pendency of a related case in the transferee forum." *Madani,* 2008 WL 268986, *2); *Bratton v. Schering–Plough Corp.,* 2007 WL 2023482, *5 (D.Ariz., July 12, 2007) ("In general, cases

should be transferred to districts where related actions are pending."). "The feasibility of consolidation is a significant factor in a transfer decision, although even the pendency of an action in another district is important because of the positive effects it might have in possible consolidation of discovery and convenience to witnesses and parties." *A.J. Indus., Inc. v. U.S. Dist. Court for Cent. Dist. of Cal.*, 503 F.2d 384, 386–87 (9th Cir.1974) (citations omitted). "In addition to the possible consolidation of discovery and the conservation of time, energy and money, centralizing the adjudication of similar cases will also avoid the possibility of inconsistent judgments." *Mussetter Distrib.*, 2009 WL 1992356, *5; *see also Jolly*, 2005 WL 2439197,*2 ("Litigation of related claims in the same tribunal is strongly favored because it facilitates efficient, economical and expeditious pre-trial proceedings and discovery and avoids duplic[ative] litigation and inconsistent results."); *Argonaut Ins. Co. v. MacArthur Co.*, 2002 WL 145400, *4 (N.D.Cal., Jan.18, 2002) ("The best way to ensure consistency is to prevent related issues from being litigated in two separate venues.").

***8** Here, it is undisputed that CTI's case against Callaway is currently pending in the United States District Court for the Southern District of New York. The Court finds that the transfer of this action to the Southern District of New York would serve the interest of justice due to the possible consolidation of discovery and the conservation of time, energy and money, and the avoidance of the possibility of inconsistent judgments.

c. Summary

Having balanced the material circumstances of this case in light of the factors relevant to motions to transfer under section 1404(a), the Court finds that a transfer of the action to the Southern District of New York would be for the convenience of the parties and witnesses and would serve the interest of justice.

Transfer of the first-filed Callaway action is appropriate because New York is the place where the majority of witnesses are located; consolidation of the first-filed action with the New York action is feasible; the New York district court has personal jurisdiction over Callaway; and the suit could have been properly brought in New York. The burden on CTI to litigate in California is substantially greater than the burden on Callaway.

The Court is satisfied that CTI has met its burden of demonstrating the balance of conveniences weighs in favor of transfer and equitable considerations favor of a departure from the first-to-file rule. Accordingly, the motion to transfer will be granted.

Motion to Dismiss Plaintiff's Fourth Cause of Action

Because the Court finds transfer of this action to the District of New York is appropriate, the court need not reach the parties' dispute concerning the sufficiency of plaintiff's fourth cause of action under Federal Rule of Civil Procedure 12(b)(6).

***Ex Parte* Motions**

Callaway has filed two *ex parte* motions concerning additional evidence it would like to present in opposition to CTI's motion to transfer venue. The Court has considered the materials sought to be introduced, CTI's objections thereto and will allow the documents to be filed.

CONCLUSION

For the reasons set forth above, **IT IS ORDERED:**

1. CTI's motion to transfer venue to the United States District Court for the Southern District of New York is **GRANTED.** The Clerk of the Court is directed to **TRANSFER** the above-captioned case to the Southern District of New York forthwith. Upon transfer, this action shall be closed.

2. CTI's motion to dismiss plaintiff's fourth cause of action is **DENIED WITHOUT PREJUDICE.**

3. Callaway's *ex parte* motions to file declarations and newly discovered evidence is **GRANTED.**

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2010 WL 743829

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Footnotes

1 The parties dispute whether Mr. Drapeau is within the subpoena power of the New York district court.