IN THE 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 the University of North Carolina,

Defendants.

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

MEMORANDUM IN SUPPORT OF UNOPPOSED MOTION TO INTERVENE BY THE HON. PHIL BERGER, PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE, AND THE HON. TIM MOORE, SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES

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MEMORANDUM IN SUPPORT OF UNOPPOSED MOTION TO INTERVENE

INTRODUCTION AND SUMMARY

This civil rights action by the ACLU and certain individuals (collectively "ACLU") is a case of unusual importance to North Carolina and to Proposed Intervenors, Phil Berger, the President pro tempore of the North Carolina Senate, and Tim Moore, the Speaker of the North Carolina House of Representatives ("Proposed Intervenors" or "Intervenors"). This motion is not opposed by any plaintiffs or defendants. Intervention is warranted for three reasons.

First, this suit directly challenges the validity under federal law of a critically important state statute—the Public Facilities Privacy and Security Act (the "Act"), commonly known as HB2—which protects the privacy and safety of people using public bath, locker and shower facilities throughout North Carolina. None of the existing defendants has the Proposed Intervenors' comprehensive interests in defending the Act. The State's attorney general Roy Cooper, who was originally named as a defendant but not in the First Amended Complaint, has not only refused to defend the Act in related proceedings, but has publicly attacked it. The other defendants—Governor McCrory, UNC, and the UNC Board of Governors and its chairman—have authority over only limited segments of the state entities and instrumentalities that would be affected by an adverse decision. In particular, their authority does not extend to the Legislative Branch, which is covered by the Act and squarely within the Intervenors' authority. Nor does it extend to the State's many public schools, whose facilities are subject to the same federal law—Title IX—that is the basis for the claims against UNC. Moreover, Governor

McCrory is not named in the Title IX counts and may lack standing to defend the Act against Title IX challenges. Finally, the potential cumulative effect of this suit on the State's treasury is immense and would fall on the General Assembly to administer.

Furthermore, in addition to challenging the Act itself, the ACLU challenges the integrity of the legislative process that passed it; attacks various alleged statements by Proposed Intervenors Moore and Berger themselves; and impugns the very authority of the General Assembly to enact legislation designed to preempt local ordinances. Consequently, the General Assembly, through its representatives, must be allowed to vigorously defend these direct challenges to its power and process.

Second, the ACLU's remarkable legal theory in this case would leave the State with no effective way to protect the legitimate expectations of privacy and safety that have long prevailed in the intimate setting of public bath, locker and shower facilities. Under the ACLU's theory, it is illegal for the police to preventatively bar a person with mature male genitalia from a public women's bath, locker or shower facility if that person merely *claims* to "identify" as a "woman." That radical theory subjects every North Carolina female who uses a public facility to the unwelcome and perhaps traumatic sight of unclothed males in the intimate settings of locker rooms and showers. It also subjects every North Carolina female using such a facility to a heightened risk of sexual predation by men *falsely* claiming to "identify" as women—including some 23,000 registered sex offenders currently in the state. Proposed Intervenors have a fiduciary interest in protecting all North Carolina women and girls from these threats, especially those in public schools and other facilities not within the jurisdiction of the named

defendants. For the ACLU's subjective theory of "gender identity" would allow no objective means for enforcing any restroom or locker room policy for anyone.

Third, the ACLU's suit is an assault on the bedrock legal and social understanding of what differentiates men from women. Under North Carolina's view—embedded throughout its law—whether one is a man or a woman, and entitled to be treated as such, is an objective inquiry, driven by anatomy and genetics. But under the ACLU's view, this view is itself discriminatory and bigoted, and must—as a matter of federal law—be replaced by a subjective view in which male or female is a mere psychological construct. The ACLU's avant-garde view is absurd, and its implementation would wreak havoc on North Carolina law in numerous areas, including state employment law, fair housing law, and family law. These are all matters within Intervenors' particular responsibilities as leaders of the General Assembly. They are thus best situated to elaborate these issues as the Court wrestles with the ACLU's proposed brave new world.

For all these reasons, and those elaborated below, this is the quintessential case for application of the North Carolina statute giving these Intervenors the right to intervene to defend laws passed by the General Assembly. *See* N.C. GEN. STAT. § 1-72.2; *see also, e.g., Fisher-Borne v. Smith*, 14 F.Supp.3d 699 (M.D.N.C. 2014) (granting intervention under Section 1-72.2). Permissive or mandatory intervention is thus plainly appropriate under Federal Rule of Civil Procedure 24.

BACKGROUND

In relevant part, the Act provides that public multiple-occupancy restrooms, changing facilities, and showers shall be used only by persons of the same "biological

sex" reflected on their birth certificates. 2015 Bill Text NC H.B. 2B (Mar. 23, 2016), amending N.C. Gen. Stat. § 115C-47. The Act explicitly allows public agencies to make accommodations for persons needing them through single-occupancy facilities, *id.* §§ 1.2(C), 1.3(C), and the Act does nothing to prevent the development of different policies in privately-owned restrooms, changing facilities, and showers.

The Act was passed by special session of the General Assembly on March 23, 2016, provoking a flurry of legal activity. The ACLU filed the present action on March 28, 2016, asserting claims under the Equal Protection and Due Process Clauses and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq*. They seek declaratory relief and preliminary and permanent injunctive relief.

Subsequently, on May 4, 2016, the Department sent letters to Governor McCrory, the DPS Secretary and the UNC President, claiming that the Act facially violated two federal laws in addition to Title IX—Title VII of the Civil Rights Act of 1964 and the Violence Against Women Act (VAWA). The Department gave each recipient until Monday, May 9 to repudiate the Act and, additionally, to put in place new policies whereby persons who declare their "gender identity" to diverge from their biological sex be allowed to use the public bathroom, locker, and shower facilities of their choosing.

In response, on May 9, 2016, three declaratory judgment actions were filed. Proposed Intervenors sued the Department in the Eastern District of North Carolina seeking a declaration that the Act facially complies with Title VII, Title IX, and VAWA and that the Department's actions violate both the Administrative Procedure Act and the United States Constitution. Complaint, *Berger v. United States Dep't of Justice*, No.

5:16-cv-00240 (E.D.N.C. May 9, 2016) ("Berger Complaint") (App'x A). The Governor and the DPS Secretary also sued the Department in the Eastern District, seeking a declaration that the Act complies with Title VII and VAWA, but without mentioning Title IX. Complaint, *McCrory v. United States*, No. 5:16-cv-00238 (E.D.N.C. May 9, 2016) ("McCrory Complaint") (App'x B). The Department then filed suit in this Court against Governor McCrory, the DPS, UNC, and UNC's Board of Governors, seeking a declaration that the Act facially violates Title VII, Title IX, and VAWA, and seeking preliminary and permanent injunctive relief. Complaint, *United States v. State of North Carolina et al.,* No. 1:16-cv-00425 (M.D.N.C. May 9, 2016) ("DOJ Complaint") (App'x C). Proposed Intervenors moved to intervene in that action on May 17, 2016.

Proposed Intervenors, in their official capacities as leaders of the North Carolina General Assembly, now seek to intervene in this action, both permissively under Rule 24(b), and by right under Rule 24(a), to defend the validity of the Act.

ARGUMENT

I. The Court should grant permissive intervention, under Rule 24(b), to ensure that the Act receives the strongest possible defense.

Permissive intervention is appropriate under Rule 24(b) when "an applicant's claim or defense and the main action have a question of law or fact in common," and when the proposed intervention is "timely" and will not "unduly prejudice or delay the rights of the original parties." *See* FED. R. CIV. P. 24(b)(1)(B); 24(b)(3); *Wright v. Krispy Kreme Doughnuts, Inc.*, 231 F.R.D. 475, 479 (M.D.N.C. 2005); *see also generally* 6-24 MOORE'S FEDERAL PRACTICE—CIVIL §§ 24.10-24.11 (3d ed. 1997)). Whether to permit

intervention lies within the Court's sound discretion, *Hill v. Western Elec. Co.*, 672 F.2d 381, 385-86 (4th Cir. 1982), but the Fourth Circuit has counseled that "liberal intervention is desirable to dispose of as much of a controversy 'involving as many apparently concerned persons as is compatible with efficiency and due process.'" *Feller v. Brock*, 802 F.2d 722, 729 (4th Cir. 1986) (quoting *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967)). Under these standards, the Court should permit Senator Berger and Speaker Moore to intervene.

A. The General Assembly's leaders have claims and defenses that share multiple common questions of law and fact with the ACLU's action.

The key factor under Rule 24(b)—namely, whether movant has claims or defenses that share "a common question of law or fact" with the main action—is plainly met here.

First, lying at the heart of this suit (as well as the three related suits) is the ACLU's novel theory equating "gender identity" with biological sex for purposes of constitutional and civil rights law. *See, e.g.,* ACLU Amended Compl. at ¶27 ("Gender identity is the primary determinant of sex."). The ACLU's theory is nearly identical to the one advanced by the Department in the related suits in which Intervenors are already parties (or proposed intervenors). *See, e.g.,* DOJ Compl. at ¶32 ("For individuals with 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.").

Thus, all four actions—this suit, the *Berger* and *McCrory* actions pending in the Eastern District, and the Department's action pending in this Court—raise multiple common questions of law and fact. As to law, both the ACLU and the Proposed

Intervenors seek declaratory judgments concerning whether the Act violates Title IX as well as the Equal Protection and Due Process Clauses of the Fourteenth Amendment.[1] The ACLU's claims and Intervenors' proposed claims and defenses thus require resolution of the same legal questions. *See, e.g.,* Prop. Answer, at ¶¶ 81-126, 131-151 (responding to the ACLU's legal claims and asserting parallel counter-claims).

As to fact, both the ACLU's complaint and Intervenor's proposed answer raise factual allegations concerning precisely the same transactions—namely, the enactment and content of the Act. *Compare* ACLU First Amended Compl. at ¶¶141-158, *with* Berger Compl. at ¶¶21-28 *and* Prop. Answer at ¶¶132-142. Indeed, the ACLU's complaint quotes statements allegedly made by both of the Proposed Intervenors, as well as by other legislators.[2] The Complaint further challenges virtually every aspect of the process used to pass the Act. *See* ACLU First Amended Compl. at ¶¶145-155, 158 (challenging call of the special session, its cost, sufficiency of notice, time allotted for comment, number of senators present for the vote, and speed of passage).

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[1] The ACLU's suit does not allege violations of Title VII at present. But its First Amended Complaint does assert that Plaintiff 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 . . . ." Amended Compl., at ¶57. As noted, the related Berger, McCrory and Department actions all address Title VII.

[2] *See* ACLU First Amended Compl., at ¶144 (quoting a press release by "the Speaker of the House, Tim Moore"); *id.* at ¶156 (citing "comments made by lawmakers both during the debate, in the press, and through their social media"); *id.* at ¶156(a) (quoting three statements by "State Senate President Pro Tempore Phil Berger"); *id.* at ¶156(b) (quoting "State Senator Buck Newton"), ¶156(c) (quoting "State Senator David Curtis"); *id.* at ¶156(d) (quoting "State Senator Andrew Brock"); *id.* at ¶156(e) (quoting Speaker Moore); *id.* at ¶156(f) (quoting "State Representative Mark Brody"); *id.* at ¶156(g) (quoting "State Representative John Blust"); *id.* at ¶157 (criticizing "debate in both chambers of the North Carolina General Assembly").

Second, the Proposed Intervenors are the leaders of the Legislative Branch of the North Carolina government, which is directly subject to the requirements of the Act, would be directly subject to the ACLU's proposed remedies under the Fourteenth Amendment, and is not subject to the authority of the Governor or the other defendants here. Thus, in their capacities as the leaders of the Legislative Branch, Intervenors are subject to most of the same claims as the defendants in the main action, and have the same defenses.

For all of these reasons, the Proposed Intervenors' claims and defenses therefore share multiple common questions of law and fact with the main action.

B. This intervention is timely and will not delay the case's resolution or prejudice the original parties.

Rule 24(b) also requires that an intervention motion be "timely" and not "unduly delay or prejudice the adjudication of the original parties' rights." FED. R. CIV. P. 24(b)(1); 24(b)(3). The proposed intervention easily satisfies both requirements.

First, the motion is undoubtedly timely, given that the main action is less than two months old and no responsive pleadings have yet been filed by any existing defendants.[3] By way of comparison, courts in this Circuit have granted motions to intervene filed one, six, and nine months—and even up to two years—after the filing of a complaint. *See,*

[3] *See Alt v. United States EPA*, 758 F.3d 588, 591 (4th Cir. 2014) (examining progress of suit in determining timeliness); *see also, e.g.*, *Ohio Valley Envtl. Coalition, Inc. v. McCarthy*, 313 F.R.D. 10, 17 (S.D. W.Va. 2015) (holding intervention timely when "other than filing the Complaint, Amended Complaint, and Answer, no other action had taken place in this case before [applicant] filed its motion to intervene"); *United States v. Virginia*, 282 F.R.D. 403, 405 (E.D. Va. 2012) ("Where a case has not progressed beyond the initial pleading stage, a motion to intervene is timely.").

e.g., *Alt*, 758 F.3d at 589 (one and six months); *Wright*, 231 F.R.D. at 478 (nine months); *CVLR Performance Horses, Inc. v. Wynne*, No. 6:11-cv-00035, 2013 WL 6409894, at *1-2 (W.D. Va. Dec. 9, 2013) (two years), *aff'd*, 792 F.3d 469 (4th Cir. 2015).

Second, for largely the same reasons, the proposed intervention will not unduly delay or prejudice adjudication of the original parties' rights. For instance, the intervention could not possibly complicate discovery, since none has yet occurred. *See, e.g., Liner v. DiCresce*, 905 F. Supp. 280, 294 (M.D.N.C. 1994) ("The parties have not engaged in any discovery, so adding new plaintiffs will not require any duplication of discovery nor create any undue delay."); *Stuart v. Huff,* 706 F.3d 345, 355 (4th Cir. 2013) (finding undue delay when adding parties would complicate discovery). And while the ACLU may have to respond to additional arguments if intervention is granted, the ACLU "can hardly be said to be prejudiced by having to prove a lawsuit it chose to initiate." *Security Ins. Co. v. Schipporeit, Inc.*, 69 F.3d 1377, 1381 (7th Cir. 1995). In sum, "[a]t this early stage of the case, where even the named defendants are not yet required to answer, no prejudice to plaintiffs can be shown." *Marshall v. Meadows*, 921 F. Supp. 1490, 1492 (E.D. Va. 1996). Furthermore, the fact that the ACLU has now moved for a preliminary injunction only underscores the need to allow the Proposed Intervenors to enter the case and advance their specific and unique institutional interests in defending the validity of the Act, as described in greater detail below.

C. Unlike existing defendants, the General Assembly's leaders have general oversight of the Act with respect to all functions of North Carolina government—and the Legislative Branch itself.

In addition to the factors set forth in Rule 24(b), a Court deciding whether to grant permissive intervention may consider other factors, such as "the nature and extent of the intervenor's interest," the intervenor's "standing to raise relevant legal issues," and whether the intervenor will "significantly contribute to the full development of the underlying factual issues" and, by extension, the underlying legal arguments.[4] These additional considerations also strongly support permissive intervention.

First, as leaders of the Legislative Branch, which is subject to both the Act and the constitutional provisions invoked by the ACLU, Proposed Intervenors have a concrete legal interest in defending the Act. They are expressly authorized by North Carolina law to defend the Act in litigation. *See* N.C. GEN. STAT. § 1-72.2 (Speaker and President pro tem "jointly have standing to intervene on behalf of the General Assembly as a party in any judicial proceeding challenging a North Carolina statute or provision of the North Carolina Constitution"). That is a sufficient basis for intervention.

Second, for the same reasons, the Proposed Intervenors clearly have standing to defend the Act in federal court.[5] Thus, they are not merely "concerned bystanders"

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[4] *Perry v. Schwarzenegger*, 630 F.3d 898, 905 (9th Cir. 2011) (quoting *Spangler v. Pasadena City Bd. of Ed.*, 552 F.2d 1326, 1329 (9th Cir. 1977)), *vacated on other grounds*, *Hollingsworth v. Perry*, 133 S.Ct. 2652 (2013); *see also, e.g., L.S. v. Cansler*, 2011 U.S. Dist. LEXIS 139311, at 4-5 (E.D.N.C. Dec. 5, 2011) (citing *Spangler*, *supra*); *and see generally* 6-24 MOORE'S FEDERAL PRACTICE, at §24.10[2][b] (discussing range of factors governing permissive intervention).

[5] *See, e.g., Arizonans for Official English v. Arizona*, 520 U.S. 43, 65 (1997) (confirming that "state legislators have standing to contest a decision holding a state statute unconstitutional if

lacking a cognizable interest in the litigation, *Diamond v. Charles*, 476 U.S. 54, 62 (1986) (internal quotations omitted), but are instead state officials legally designated by North Carolina to act on the legislature's behalf in defending challenged laws. These considerations not only support the right to intervene under Rule 24(a), *see infra* part II, but *a fortiori* they strengthen the case for permissive intervention under Rule 24(b).

Third, the Proposed Intervenors' interests in the Act are broad and comprehensive. Unlike the other named defendants, the leaders of the General Assembly have general oversight of *all* areas of North Carolina government potentially impacted by litigation over the Act's validity. For example, the General Assembly oversees not only the maintenance and financing of North Carolina's higher education system, including UNC and "the other public institutions of higher education," N.C. Const. Art. IX, §§ 8, 9; *id.* Art. V, § 12, but also the organization and financing of all public schools, N.C. Const. Art. IX, § 2, and the organization of public educational districts, *id.* Art IX, § 4.

None of the existing defendants has the General Assembly's comprehensive authority over the areas potentially impacted by the ACLU's challenge. For instance, while having some role in public education, the Governor lacks the General Assembly's broad authority over state educational budgeting, funding, and governance. As the North Carolina Supreme Court has explained, the state constitution's "mandate" for establishing public schools is "exclusively within the province of the General Assembly." *Moore v.*

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state law authorizes legislators to represent the State's interests") (citing *Karcher v. May*, 484 U.S. 72, 82 (1987)); *Hollingsworth v. Perry*, 133 S.Ct. 2652, 2664 (2013) (noting that "a State must be able to designate agents to represent it in federal court").

Board of Education, 193 S.E. 732, 733 (N.C. 1937). That authority extends to setting school district boundaries and selecting which education programs to fund.[6] The General Assembly also retains supervisory authority over the State Board of Education and county educational systems—authority the Governor lacks. *Hughey*, 253 S.E.2d at 900; *State v. Williams*, 117 S.E.2d 444, 447 (N.C. 1960). Finally, while the Governor "prepare[s] and recommend[s]" a comprehensive annual state budget, and "administers" it, the General Assembly alone "enact[s]" the budget. N.C. Const. Art. III, § 5.

Consequently, although the Governor may have limited ability to defend the Act with respect to the education funding threatened by the Title IX claims, it is not clear that he can or will do so here. As noted, the Governor has not been named as a defendant in the ACLU's Title IX claims. Likewise, the Department's letter to the Governor did not mention Title IX and the Governor's own declaratory judgment action did not raise a Title IX claim. By contrast, the Proposed Intervenor's declaratory judgment action, as well as the proposed pleading accompanying its intervention motion here, raise numerous defenses and counterclaims regarding Title IX.

The same considerations apply to the UNC defendants. Those entities do not have comprehensive authority over public education in North Carolina, and they have no role in local public education. But any judgment against them will impact funding for all educational programs throughout the State. Only the Proposed Intervenors have broad

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[6] *Leandro v. State*, 488 S.E.2d 249, 258 (N.C. 1997); *Hughey v. Cloninger*, 253 S.E.2d 898, 900 (N.C. 1979); *Kings Mt. Bd. of Educ. v. N.C. State Bd. of Educ.*, 583 S.E.2d 629, 633 (N.C. App. 2003).

legislative and oversight authority over state public education at all levels, and consequently they are in a far better position to comprehensively defend *all* of North Carolina's interests in avoiding a potentially catastrophic loss of federal funding.

Finally, there can be no doubt that the nature and extent of Proposed Intervenor's interests, their standing, and their familiarity with the facts make them eminently suited to defend this action. As noted above, the ACLU's First Amended Complaint criticizes at length the legislative process used in passing the Act, as well as the statements, motives and actions of various legislators involved—including specifically Speaker Moore and Senator Berger. No existing defendant has Intervenors' familiarity with the genesis of the Act. Moreover, the ACLU challenges the very authority of the General Assembly to enact legislation designed to preempt local ordinances. *See* ACLU First Amended Compl., at 30 ("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.") But the state constitution expressly gives the General Assembly the power to supersede or preempt local laws in conflict with general or uniformly applicable laws, *see* N.C. Const., Art. XIV, § 3, and no one is better situated to protect this power than the Proposed Intervenors.

In sum, these additional considerations strongly counsel in favor of allowing the Proposed Intervenors to enter the lawsuit so that at least one party is presenting a vigorous and comprehensive defense of the Act with respect to all aspects of North Carolina government put in jeopardy by the ACLU's action.

II. Alternatively, Senator Berger and Speaker Moore have a right to intervene under Rule 24(a)(2).

Although the Court need not reach the question, Proposed Intervenors also have a right to intervene under Federal Rule of Civil Procedure 24(a)(2). To establish such a right, an applicant must:

> (1) "make a timely motion to intervene; (2) have an interest in 'the subject of the action'; (3) be 'so situated that the disposition of the action may … impair or impede the applicant's ability to protect that interest'; and (4) show that he is not adequately represented by existing parties."

Fisher-Borne, 14 F.Supp.3d at 702 (quoting FED. R. CIV. P. 24(a)(2); *Wright*, 231 F.R.D. at 477). As noted above, these intervention factors should be given a "liberal" application so to as to "dispose of as much of a controversy involving as many apparently concerned persons as is compatible with efficiency and due process." *Feller*, 802 F.2d at 729 (internal quotations and citation omitted). The Court must accept as true the non-conclusory allegations of the motion and the accompanying pleading.[7]

A. The motion to intervene is timely.

As already shown, the motion to intervene is timely because it was filed less than two months after the ACLU filed its action and, moreover, before any responsive pleadings were filed. For the same reasons, the intervention will not unduly delay the action or prejudice existing parties. *See supra* part I.B.

[7] *See Chesapeake Bay Found. v. Am. Recovery Co.*, 769 F.2d 207, 209 n.* (4th Cir. 1985) (absent "evidentiary testing," the court "must accept plaintiffs' allegations as true""); *Va. Uranium, Inc. v. McAuliffe*, 2015 U.S. Dist. LEXIS 141459, *6 (W.D. Va. Oct. 19, 2015); *see also Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 819 (9th Cir. 2001) (collecting circuit court cases).

B. Proposed Intervenors have a significantly protectable interest.

To justify intervention of right a movant's interest must also be "'significantly protectable,' … meaning that the interest must be more than a general concern with the subject matter." *Fisher-Borne*, 14 F.Supp.3d at 703 (citing *Donaldson v. United States*, 400 U.S. 517, 531 (1971)). The Proposed Intervenors easily meet this standard.

First, as noted, Proposed Intervenors are directly responsible for the Legislative Branch of the North Carolina Government. That Branch is subject to the Act and, if the ACLU's position prevailed here, it would therefore suffer the same harm as all other state entities. *See supra* part I.C.

Second, North Carolina law expressly empowers the Intervenors to defend challenged state laws. *See supra* part I.C.; N.C. GEN. STAT. § 1-72.2. A recent decision from this District has already determined, correctly, that this statute creates a sufficient interest under Rule 24(a) by "provid[ing] a … mechanism through which the Speaker of the House and President Pro Tempore of the Senate may defend laws passed by the North Carolina General Assembly." *Fisher-Borne*, 14 F.Supp.3d at 703 (citing N.C. GEN. STAT. § 1-72.2) *see also* Order granting motion to intervene, *American Civil Liberties Union v. Tennyson*, No. 13-1030 (dkt. no. 43), 815 F.3d 183 (4th Cir. 2016).

Third, Proposed Intervenors have an interest in protecting North Carolina's public education system. As explained, the General Assembly alone has comprehensive authority over the structure, governance, and financing of that system. *See supra* part I.C. The system's integrity is directly imperiled by the ACLU's attempt to force a radical revision of basic privacy and security in public restrooms, locker rooms, and shower

facilities—a revision, moreover, that once accomplished would extend to numerous other areas. *See*, *e.g.*, Department of Education, *Dear Colleague Letter on Transgender Students* (May 13, 2016), *available at* http://1.usa.gov/25aBJLM (noting impacts on education records, identification documents, athletics, and housing accommodations).

North Carolina stands to lose billions in federal educational funds which are placed in jeopardy by this action. According to the ACLU, the State has received over $4 billion in such funds, both in direct funding to the school and funding to the students via mechanisms such as Pell Grants. For perspective, the entire state budget is $21.7 billion and the entire UNC budget is $2.7 billion. 2015 NC H.B. 97 (enacted Sep. 18, 2015). Loss of this funding would be a catastrophic result that the General Assembly has an overwhelming interest in preventing. No other existing defendant would bear ultimate responsibility for administering such a loss.

Fourth, the Proposed Intervenors have an interest in vindicating the General Assembly's core lawmaking function. *See, e.g.*, *Coleman v. Miller*, 307 U.S. 433, 438 (1939) (state legislators have "a plain, direct and adequate interest in maintaining the effectiveness of their votes"). At a minimum, as leaders of the General Assembly, the Proposed Intervenors have an interest in defending the Act's sensible balancing of privacy, security, and personal dignity. More profoundly, the Proposed Intervenors have a keen interest in safeguarding the overall integrity of North Carolina law, which in numerous areas recognizes the basic distinction between "male" and "female." *See*, *e.g.*, N. .C. Gen. Stat § 14-33 (rape laws); N.C. Gen. Stat. § 78C-86(3) (athletic programs);

N.C. Gen. Stat. § 153A-228 (segregation in prisons). At bottom, the ACLU's action seeks to radically redefine those basic categories.

C. Disposition of the main action may impair or impede the Proposed Intervenors' ability to protect their interests in defending the Act.

For the same reasons, disposition of the ACLU's action will "impair or impede" the Proposed Intervenors' interests. If the Act is invalidated, the following interests will be *directly* impeded: (1) the Intervenors' ability to govern the Legislative Branch; (2) their statutorily-conferred interest in defending the Act (*see* N.C. GEN. STAT. § 1-72.2); (3) their authority over North Carolina's system of public schools; (4) their constitutional authority to preempt local laws; and (5) their interests in protecting the integrity of North Carolina's laws—namely, the ubiquitous distinction between "male" and "female."

D. Because the existing defendants have only limited authority, they may not be in a position to fully defend the Act across all state functions.

Finally, Proposed Intervenors' interests are not adequately represented by the existing parties. An intervenor's burden to show inadequate representation "'should be treated as minimal.'" *Teague v. Bakker*, 931 F.2d 259, 262 (4th Cir. 1991) (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). The movant need *not* show that the current representation of his interests will "definitely" be inadequate," only that it "may be" inadequate." *JLS, Inc. v. Pub. Serv. Comm'n of W. Va.*, 321 F. App'x 286, 289 (4th Cir. 2009) (citing *Trbovich*, 404 U.S. at 538 n.10; *Teague*, 931 F.2d at 262). "Many factors may suggest inadequate representation." *Titan Atlas Mfg. v. Sisk*, 2014 U.S. Dist. LEXIS 27094, at 15 (W.D. Va. Mar. 4, 2014), such as (1) whether the

interests of intervenors and existing parties are identical or may diverge[8]; (2) whether intervenors have "stronger incentives" to defend their interests than existing parties[9]; and (3) whether intervenors raise additional legal theories.[10] Under these standards, numerous grounds suggest the Intervenors' interests are inadequately represented.

First, as explained, among existing parties only the Proposed Intervenors can represent North Carolina's general interests in the validity of the Act across all areas of North Carolina government—and across all areas of North Carolina law potentially impacted by the ACLU's radical position in this case. None of the existing defendants can do so. By contrast, the Proposed Intervenors are specifically empowered to do so by state law. *See supra* part I.C.

Second, among existing parties only the Proposed Intervenors can represent North Carolina's general interests in the integrity and financial solvency of its public educational system. As explained, the Governor, UNC, and the North Carolina Board of Governors all lack the comprehensive interests in North Carolina's system of public education expressly delegated to the General Assembly under the North Carolina Constitution. *See supra* part I.C.

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[8] *See, e.g., In re Sierra Club*, 945 F.2d 776, 780 (4th Cir. 1991) (noting interests may converge in some respects but diverge in others); *Felman Prod. v. Indus. Risk Insurers*, 2009 U.S. Dist. LEXIS 117672, at 9-10 (S.D. W.Va. Dec. 16, 2009) (granting intervention when interests of parties and intervenor "are not coextensive") (citing *Teague*, 931 F.2d at 262); *Liberty Mut. Fire Ins. Co. v. Lumber Liquidators, Inc.*, 2016 U.S. Dist. LEXIS 16610, at 16 (E.D. Va. Feb. 9, 2016) (finding "distinguishable interests" sufficient for intervention).

[9] *Titan Atlas*, 2014 U.S. Dist. LEXIS at 16; *Teague*, 931 F.2d at 262.

[10] *Titan Atlas*, 2014 U.S. Dist. LEXIS at 15-16 (citing *JLS*, 321 F.App'x at 291).

Third, specifically with respect to the crucial Title IX component of the ACLU's action, Proposed Intervenors have a direct interest in defending the Act that the existing parties lack. As already explained, the Governor declined to raise a Title IX claim in his declaratory judgment action, has not been named in the Title IX count here, and Title IX was not addressed in the Department's letter to the Governor—all of which suggest that the Governor may lack standing to litigate the Title IX claims. Moreover, UNC lacks the Proposed Intervenors' top-to-bottom interest in public education.

Finally, the North Carolina Attorney General, who was previously a defendant in this action, has publicly attacked the Act and refused to defend it in court. While it is the attorney general's duty to defend North Carolina whenever it is sued, *see* N.C. GEN. STAT. § 114-2(1), here the attorney general has instead publicly called the Act "a national embarrassment," argued that the Act violates federal law, and declined to defend any of the existing parties in legal challenges to the Act. *See* Anne Blythe, *NC Attorney General Refuses to Defend State from HB2 Legal Challenge*, THE NEWS & OBSERVER (Mar. 29, 2016), *available at:* http://www.newsobserver.com/news/politics-government/state-politics/article 68780657.html.[11]

[11] For all of these reasons, no "presumption of adequacy of representation" applies here. *See Stuart v. Huff*, 706 F.3d 345, 350-51 (2013). First, this is not a case where private parties seek to join government parties in defending a statute. *See, e.g., United States v. N.C.*, 2014 U.S. Dist. LEXIS 14787 (M.D.N.C. Feb. 6, 2014) (denying motion by private group to intervene). Instead, Intervenors are themselves government actors specifically designated to defend the Act. Second, this is not a case where the Intervenors share the same objectives as existing parties. *Cf., e.g., Stuart*, 706 F.3d at 351. Instead, the Intervenors' interests in defending the Act are both different from existing defendants' interests (because Intervenors alone can defend the prerogatives of the Legislative Branch) and more comprehensive (because Intervenors alone can defend the Act across all government functions).

Consequently, absent intervention by the leaders of the General Assembly, this case will lack participation by any state official with broad authority to vigorously defend the North Carolina law. That would be a glaring omission, given the radical nature of the ACLU's action—which not only seeks to undermine the integrity and solvency of North Carolina's educational system, but also seeks to deprive the North Carolina General Assembly of its authority to protect the privacy and safety of North Carolina's citizens.

CONCLUSION

For the foregoing reasons, Proposed Intervenors respectfully ask the Court to grant them intervention, either permissively or by right.

Respectfully submitted,

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May 25, 2016

CERTIFICATE OF SERVICE

I hereby certify that on May 25, 2016, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

/s/ S. Kyle Duncan
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Attorney for Proposed Intervenors

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. __:_____-CV-___-__

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

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF JUSTICE; LORETTA E. LYNCH, in her official capacity as Attorney General of the United States; VANITA GUPTA, in her official capacity as Principal Deputy Assistant Attorney General,

Defendants.

COMPLAINT FOR DECLARATORY RELIEF

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INTRODUCTION

1. When people find themselves in the intimate settings of public bathrooms, locker rooms, or showers, they expect to encounter only other people of the same biological sex. Until very recently, that simple expectation of bodily privacy would have been taken for granted. Yet when North Carolina sought to protect that expectation in law—by enacting the "Public Facilities Privacy and Security Act" (the "Act"), commonly known as HB2—a torrent of vicious criticism was unleashed against the State, its officials, and its citizens. The abuse has now reached its apex with the unprecedented threats by the United States Department of Justice ("Department"), the defendant here. Last week, the Department sent letters to North Carolina public officials and agencies informing them that, by complying with the Act, they were engaging in a "pattern or practice" of discrimination in violation of three federal civil rights laws. They were bluntly ordered to repudiate the Act within five calendar days—that is, by today—or else face enforcement actions that would drastically impact North Carolina, including the potentially catastrophic elimination of more than two billion dollars in federal funding. Instead of meekly complying, plaintiffs—the leaders of both chambers of the North Carolina General Assembly—have filed this declaratory judgment action.

2. A declaratory judgment is urgently needed for two basic reasons. First, it is needed to vindicate the sovereign right of North Carolina's citizens to decide how best to protect their own bodily privacy and dignity in intimate public settings. Second, it is needed to instruct the Department in no uncertain terms that its

overbearing abuse of executive authority flouts our Constitution's limitations on federal power and tramples on the sovereign dignity of the States and their citizens.

3. The ideological extremity—and utter unworkability—of the Department's position on the issues in this case is astonishing. Unlike the people of North Carolina, the Department believes that the only valid approach to issues of gender dysphoria is to allow *anyone* to use *any* communal public bathroom, locker room, or shower based solely on that person's self-declared "gender identity." Never mind that no federal statute or regulation remotely requires the Department's policy. Never mind that the Department's policy will inevitably lead to women and girls in public changing facilities encountering individuals who, whatever their gender identity, still have fully functional male genitals. Never mind that the Department's policy, on its face, demands that North Carolina allow biologically male prison inmates who identify as females to take showers with biologically female inmates—which, besides being absurd and dangerous, also violates the Department's *own* federal prison regulations. Apparently, the Department believes that these obvious social costs are outweighed by the policy's purported psychological benefits to persons of conflicted gender identity.

4. The people of North Carolina came to a different and far more sensible conclusion, one they enacted in the law at issue in this case. Despite being grossly mischaracterized in the media, the Act does not embody hostility towards those whose gender identity differs from their biological sex. To the contrary, the Act specifically allows a flexible system of single-occupancy facilities for persons who do

not wish to use public facilities designated for their biological sex. The Act also leaves in place existing provisions allowing a person to obtain a sex-change operation, make a corresponding change to their birth certificate, and then use the public facilities consistent with their new anatomy. And the Act allows *private* businesses and other entities to determine their own bathroom policies—including, if they wish, policies closer to the Department's views.

5. But the Act also reflects concern and compassion for the many North Carolina residents—especially girls and women—who do not wish to be in close proximity to persons with genitals characteristic of the opposite sex when using public restrooms, locker rooms, and showers. Those people reasonably believe that a policy allowing people of the opposite biological sex into those spaces would be an assault on *their* dignity, privacy, and safety, and an affront to the legitimate and longstanding privacy expectations of all North Carolinians. That is why, in *publicly* owned facilities, the Act simply requires that everyone—regardless of their "gender identity" use the facilities that correspond to their current anatomy.

6. In short, the Act is not, as it has been mischaracterized in the press, an "anti-transgender" law. It is, rather, a law that promotes both privacy and safety, while accommodating the legitimate interests of persons with conflicts between their biological and gender identities.

7. Nonetheless, in a series of highly publicized and unusual letters sent to North Carolina officials and agencies last week, the Department announced its "determination" that the Act, *on its face*, violates three federal civil rights statutes—

Title VII, Title IX, and the Violence Against Women Act. As explained more fully elsewhere in this Complaint, the legal theories reflected in the Department's determination letters are gravely flawed. For example, those theories all rest on the implausible premise that a privacy policy expressly designed to *avoid* making distinctions based on gender identity—by relying on anatomy instead—nonetheless "facially" discriminates on the basis of gender identity. That is nonsensical.

8. More important for present purposes, the Department's "determination" that the Act violates these civil rights laws represents an all-out assault, not only on the sovereign right of North Carolinians to determine their own policies regarding public bath and shower facilities, but on the right of every other State and local government to do the same. It is a remarkable act of executive overreach, one that unnecessarily insists on political correctness at the expense of privacy and safety for other vulnerable citizens, especially women and girls.

9. Relatedly, the Department's "determination" is also an assault on the whole system of single-sex bathrooms that, precisely because of privacy concerns, has been an accepted part of our Nation's social compact since time out of mind. As a legal matter, if a biologically male individual can access a women's bathroom based on a claim of "gender identity," then *any* males can gain access on the same kind of claim, regardless of whether they "identify" as male or female: If discrimination based on "gender identity" is unlawful when the person seeking access identifies as a female, then it must be equally unlawful when that person identifies as a male. Furthermore, as a practical matter, if owners of public

bathrooms, lockers, and shower facilities cannot exclude persons with male genitals from women's bathrooms, soon enough the public will sensibly demand that single-sex bathrooms be abandoned altogether in favor of single-occupancy facilities.

10. To be sure, owners of private bath, locker, and shower facilities may decide to move in that direction on their own. But state taxpayers should not be forced to shoulder the enormous costs of such a transition at the behest of federal officials who offer nothing more than policy arguments masquerading as law. Nor should innocent state residents be forced to endure the assault on their privacy that policy would produce in the interim.

11. In sum, declaratory relief is urgently needed in this case. It is needed to protect the sovereignty of North Carolina's people to set public policy on sensitive and controversial matters of bodily privacy and security. It is needed to shield North Carolina from an open-ended threat of a potentially catastrophic loss of federal funding based on nothing more than the Department's novel and untested misreading of longstanding federal requirements. And it is needed to clarify that federal officials abuse their authority—and violate the Constitution—when they peremptorily order a sovereign State to abandon properly enacted legislation, as if North Carolina were nothing more than a tributary of the federal government.

JURISDICTION AND VENUE

12. The Court has jurisdiction under 28 U.S.C. § 1331 because the action arises under the United States Constitution and federal law.

13. The Court may enter declaratory relief and any other appropriate relief under 28 U.S.C. § 2201 and § 2202.

14. The Court may review agency action and enter declaratory and other appropriate relief under the Administrative Procedure Act, 5 U.S.C. §§ 702-706.

15. Venue is proper under 28 U.S.C. § 1391(b) because a substantial part of the events or omissions giving rise to this action occurred in this judicial district.

16. Venue is also proper under 28 U.S.C. § 1391(e) because, in this action against officers and agencies of the United States, a substantial part of the events or omissions giving rise to this action occurred in this judicial district and because the Plaintiffs reside in this district and no real property is involved in this action.

PARTIES

17. Plaintiffs Phil Berger and Tim Moore serve as President pro tempore of the North Carolina Senate and as Speaker of the North Carolina House of Representatives, respectively. President pro tempore Berger and Speaker Moore lead the two chambers of the North Carolina General Assembly, which is constitutionally tasked with budgeting for the operation of all facets of state government and with enacting laws for the health, safety, and welfare of North Carolinians. Moreover, under North Carolina law, President Berger and Speaker Moore "jointly have standing to intervene on behalf of the General Assembly as a party in any judicial proceeding challenging a North Carolina statute or provision of the North Carolina Constitution." N.C. Gen. Stat. § 1-72.2-2.

18. Defendant United States Department of Justice ("Department") is an executive agency of the United States and is responsible for the enforcement of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*, and the Violence Against Women Reauthorization Act of 2013, 42 U.S.C. § 13925, *et seq.*

19. Defendant Loretta E. Lynch is the United States Attorney General. In this capacity she is responsible for the operation and management of the Department. She is sued in her official capacity only.

20. Defendant Vanita Gupta is a Principal Deputy Assistant Attorney General at the United States Department of Justice and an official of the Civil Rights Division of the United States Department of Justice. She has been delegated the responsibility to bring an enforcement action under Title VII, Title IX, and VAWA against the State of North Carolina and its public agencies and officials. She has been sued in her official capacity only.

FACTS

I. THE ACT

21. On March 23, 2016, the General Assembly of North Carolina passed the "Public Facilities Privacy and Security Act" (the "Act"), commonly known as HB2. 2015 Bill Text NC H.B. 2B (Mar. 23, 2016), amending N.C. Gen. Stat. § 115C-47.

22. As relevant here, the Act requires that a "multiple occupancy restroom or changing facility" operated by any "public agency" in North Carolina be

"designated for and only used by persons based on their biological sex." HB2, § 1.3(B).

23. "Biological sex" is defined as "[t]he physical condition of being male or female, which is stated on a person's birth certificate." *Id.* § 1.3(A)(1).

24. A "multiple occupancy restroom or changing facility" is defined as "[a] facility designed or designated to be used by more than one person at a time where persons may be in various states of undress in the presence of other persons" and "may include, but is not limited to, a restroom, locker room, changing room, or shower room." *Id.* § 1.3(A)(3).

25. A "public agency" includes executive branch agencies; the legislative and judicial branches; political subdivisions; local and municipal governments; all state agencies, boards, offices and departments under the direction and control of a member of the council of state; and local boards of education. *Id.* § 1.3(4)(A)-(H); § 1.2.

26. The Act, however, does not apply to any "single occupancy bathroom or changing facility," which is defined as "[a] facility designed or designated to be used by only one person at a time where persons may be in various states of undress," and includes "a single stall restroom designated as unisex or for use based on biological sex." *Id.* § 1.3(A)(5); § 1.2(A)(3).

27. In fact, the Act expressly allows public agencies to "provid[e] accommodations such as single occupancy bathroom or changing facilities upon a person's request due to special circumstances[.]" *Id.* § 1.3(C); *see also id.* § 1.2(C)

(providing that "[n]othing in this section shall prohibit local boards of education from providing accommodations such as single occupancy bathrooms or changing facilities or controlled use of faulty facilities upon a request due to special circumstances").

28. On April 12, 2016, Governor McCrory issued Executive Order No. 93, entitled "To Protect Privacy and Equality." Among other things, the Order (1) affirmed that "private businesses can set their own rules for their own restroom, locker room and shower facilities"; (2) confirmed that multiple-occupancy restroom, locker rooms, and shower facilities in cabinet agencies must comply with the Act; but (3) emphasized that "all cabinet agencies shall provide a reasonable accommodation of a single occupancy restroom, locker room or shower facility upon request due to special circumstances," and encouraged all "council of state agencies, cities, counties, the University of North Carolina System and the North Carolina Community College System" to make similar accommodations where practicable.

II. THE DEPARTMENT'S "DETERMINATION" LETTERS

29. On May 4, 2016, the Department, through its Civil Rights Division, sent a letter to North Carolina Governor Patrick McCrory (the "McCrory Determination Letter").

30. The McCrory Determination Letter stated that the Department had "determined" and "concluded" that, as a result of complying with the Act, Governor McCrory and the State of North Carolina were "in violation of Title VII of the Civil Rights Act of 1964" because the State was "engaging in a pattern or practice of

discrimination against transgender state employees and both you, in your official capacity, and the State are engaging in a pattern or practice of resistance to the full enjoyment of Title VII rights by transgender employees of public agencies."

31. The McCrory Determination Letter explained that the Department had adopted the view that Title VII "applie[s] to discrimination against transgender individuals based on sex, including gender identity," and that Title VII requires "[a]ccess to sex-segregated restrooms and other workplace facilities consistent with gender *identity*." The letter further stated that under Title VII such "access … is a term, condition, or privilege of employment."

32. The McCrory Letter concluded that "H.B. 2 ... is *facially discriminatory* against transgender employees on the basis of sex because it treats transgender employees, whose gender identity does not match their 'biological sex,' as defined by H.B. 2, differently from similarly situated non-transgender employees" (emphasis added). The letter further informed the Governor that, given the State's "pattern and practice" of Title VII discrimination, the Attorney General "may apply to the appropriate court for an order that will ensure compliance with Title VII."

33. Finally, the McCrory Determination Letter ordered the Governor to "advise" the Department "no later than close of business on May 9, 2016" whether he would "remedy these violations of Title VII, including by confirming that the State will not comply with or implement H.B. 2, and that it has notified employees of the State and public agencies that, consistent with federal law, they are

permitted to access bathrooms and other facilities consistent with their gender identity."

34. Also on May 4, 2016, the Department, through its Civil Rights Division, sent a letter to North Carolina Department of Public Safety ("DPS") Secretary Frank Perry (the "Perry Determination Letter").

35. The Perry Determination Letter "concluded" that the North Carolina DPS was in violation of Title VII, for the same reasons as those outlined in the McCrory Determination Letter.

36. In addition, the Perry Determination Letter "concluded" that DPS, as a receiver of federal funds from the Office on Violence Against Women ("OVW") "is in violation of the Violence Against Women Reauthorization Act of 2013" ("VAWA").

37. The Perry Determination Letter went on to allege that compliance with VAWA requires that any "individual" in "buildings controlled or managed by DPS or its sub-recipients"—buildings which would obviously include prisons throughout the State—be permitted "to access bathrooms and other facilities consistent with their gender identity."

38. Finally, the letter ordered Secretary Perry to "advise" the Department "no later than close of business on May 9, 2016" whether DPS has "remedied these violations to comply fully with Title VII and VAWA, including by confirming that DPS will not comply with H.B. 2, and that it has notified individuals and employees at facilities controlled or managed by DPS or its sub-recipients that, consistent with

federal law, they are permitted to access bathrooms and other facilities consistent with their gender identity."

39. Also on May 4, 2016, the Department, through its Civil Rights Division, sent a letter to the President of the University of North Carolina, Margaret Spellings (the "UNC Determination Letter").

40. The UNC Determination Letter "determined" that UNC was in violation of Title VII and VAWA, for the same reasons as those outlined in the McCrory and Perry Determination Letters.

41. In addition, the UNC Determination Letter "determined" that UNC was in violation of Title IX because of UNC's compliance with the Act.

42. Finally, the UNC Determination Letter ordered UNC President Margaret Spellings to "advise" the Department "no later than close of business on May 9, 2016" whether UNC has "remedied these violations to comply fully with Title IX and VAWA, as well as its obligations as an employer under Title VII, including by . . . advising the public, including UNC students, employees, and third parties that, in accordance with federal law, individuals are permitted to access UNC restrooms and other facilities consistent with their gender identity." The UNC Determination Letter threatened "enforcement action" if UNC failed to comply with the Department's order.

43. The Department's letters are calculated, not only to prevent North Carolina public officials from enforcing or implementing the Act, but also to pressure the North Carolina General Assembly into repealing the Act. Accordingly,

the Department's letters harm these plaintiffs as well as other members of the General Assembly.

III. THE DEPARTMENT'S LETTERS CONSTITUTE FINAL AGENCY ACTION UNDER THE APA.

44. The Department of Justice is a federal agency for purposes of the Administrative Procedures Act ("APA"). 5 U.S.C. § 701(b).

45. Under the APA, a court may review agency decisions that constitute "final agency action." 5 U.S.C. § 704.

46. Generally, an agency action is final when it "mark[s] the 'consummation' of the agency's decisionmaking process" and [is] one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow[.]'" *Bennett v. Spear,* 520 U.S. 154, 177-78 (1997) (internal citations omitted).

47. Final agency action may take the form of a letter announcing the agency's position on a substantive legal matter. "[A]n agency may not avoid judicial review merely by choosing the form of a letter to express its definitive position on a general question of statutory interpretation." *Ciba-Geigy Corp. v. United States EPA*, 801 F.2d 430, 438 n.9 (1986); *accord CSI Aviation Servs. v. US DOT,* 637 F.3d 408, 412 (D.C. Cir. 2011) (citing *Ciba-Geigy*).

48. Indeed, "a letter from an agency official stating the agency's position and threatening enforcement action constitute[s] final agency action[.]" *Barrick Goldstrike Mines, Inc. v. Browner*, 215 F.3d 45, 48 (D.C. Cir. 2000); *see also CSI Aviation Servs.*, 637 F.3d at 412 (finding final agency action where DOT "warning letter" constituted a "definitive statement of the agency's legal position"). That is

especially true where the letter "declare[s] in no uncertain terms" the agency's position on "a purely legal" question of "statutory interpretation." *CSI Aviation Servs.,* 637 F.3d at 412

49. Yet another indication that such action is final is when an actor's "only alternative to obtaining judicial review is to violate [the agency's] directives, … and then defend an enforcement proceeding." *Barrick Goldstrike Mines*, 215 F.3d at 49; *see also CSI Aviation Servs.*, 637 F.3d at 412 (finding final agency action where DOT "cease and desist" letter "put the [plaintiff] to the painful choice between costly compliance and the risk of prosecution at an uncertain point in the future"). And that is especially true when the consequences of not complying with the agency demand are great. *See, e.g., CSI Aviation Servs.,* 637 F.3d at 412 (finding final agency action where DOT enforcement letter "imposed an immediate and significant burden on [the recipient]" and "cast a cloud of uncertainty over the viability of [the recipient's] ongoing business").

50. The Department's Determination Letters to McCrory, Perry, and Spellings constitute reviewable final agency action under the APA.

51. All three letters reflect a settled and definitive agency position. The letters note that the Department has "concluded" and "determined" that the State of North Carolina, and its public agencies and officials, are actively violating federal law.

52. All three letters unambiguously threaten enforcement action against North Carolina and its public agencies and officials absent compliance. Each

explains that the Attorney General—who is responsible for actions taken by the Department, including the letters—may apply for a court order to seek enforcement of the federal statutes at issue absent compliance by North Carolina and its public agencies and officials.

53. All three letters indicate the Department's clear and settled position that, absent compliance by the State and its public agencies and officials, the Department's next step is not to seek further discussions or commence a factual investigation, but rather to bring an enforcement action.

54. The letters unambiguously alter the legal positions of North Carolina, and its public agencies and officials, by putting them to the choice of ceasing to enforce the Act or facing a federal enforcement proceeding.

55. The letters directly harm the State and its public agencies and officials by requiring them to yield their responsibility as officers of a sovereign state to enforce the Act, or face federal enforcement proceedings. Furthermore, the letters directly harm plaintiffs by disrupting the work of the North Carolina General Assembly in safeguarding the privacy and safety of North Carolina's citizens and in establishing the budget for North Carolina's public agencies and programs.

56. The letters take a definitive position on a purely legal question of statutory interpretation. None of the letters suggest that any additional factual inquiry needs to take place. Moreover, the letters assert that the Act violates the relevant federal laws, not just as applied in particular circumstances, but facially.

57. Finally, as noted, the letters are calculated, not only to prevent North Carolina public officials from enforcing or implementing the Act, but also to pressure the North Carolina General Assembly into repealing the Act. Accordingly, the Department's letters harm the plaintiffs as well as other members of the General Assembly.

IV. THE DETERMINATION LETTERS' ADVERSE EFFECTS

58. The Department's stunningly overbroad and conclusory determinations that the Act "facially violates" Title VII, Title IX, and VAWA place plaintiffs and the State of North Carolina in an intolerable position that threatens to disrupt the integrity of its public agencies, the financial stability of its universities and school systems, and, most profoundly, the ability of its public officials to provide for the common good of North Carolina citizens.

59. On the one hand, if plaintiffs and other legislators in the North Carolina General Assembly and the State's public agencies and officials resist the Department's demands and continue implementing the will of the citizenry as expressed in the Act, the State's school systems could lose hundreds of millions of dollars of federal education funds. Such a loss would not only impair the teaching and research mission of UNC, but would also affect K-12 education throughout the State. Local schools would likely be forced to curtail programs, fire teachers and increase class sizes—all to the detriment of the State's hundreds of thousands of schoolchildren. All this because the federal government, if the Department carries

out its threat, would refuse to return to the people of North Carolina federal tax dollars that those very people have paid into the federal treasury.

60. Similarly, the Department's demands carry a threat to cut off over $100 million in annual federal funding currently provided to the State's Department of Public Safety. Here again, these are funds that North Carolina citizens have already paid into the federal treasury in the form of tax payments. Yet the Department's Determination Letters implicitly threaten to withhold those funds—which could lead to more crowding of North Carolina's prisons, reduced numbers of prisons guards, and thus an increased risk of crime both inside and outside those prisons.

61. On the other hand, if plaintiffs and other legislators in the North Carolina General Assembly, or any of the State's public agencies and officials, capitulate to the Department's demands, this would subject the people of North Carolina to the very risks the Act was designed to prevent. As previously explained, the Department demands that the State allow *anyone* to use *any* public bathroom, locker room or shower based solely on that person's self-declared gender "identity." Such a policy would necessarily lead to partially or fully unclothed women and girls coming into close proximity and visual contact with individuals who, whatever their gender identity, nonetheless display male sex organs.

62. Such a policy would also create an opportunity for sexual predators of any sexual orientation to abuse the policy to facilitate their predation. And in so doing, such a policy would violate settled, legitimate expectations of privacy and

safety that have long prevailed in the State. Indeed, under the Department's legal theory, a biological male found in a woman's restroom has a legal right to be there if he merely *claims* to "self-identify" as female. And a police officer summoned to remove such a person in a public restroom, locker room, or shower would have no practical way to determine quickly whether the person is acting in bad faith.

63. Before long, moreover, such a policy would likely provoke a public outcry demanding that single-sex facilities be abandoned altogether and replaced with single-user bathroom, shower and locker facilities. That in turn would likely force the plaintiffs and other members of the General Assembly to authorize funding to retrofit countless public buildings, at a taxpayer cost of hundreds of millions if not billions of dollars.

64. In the prison setting, the consequences of capitulation to the Department's demands would be equally if not more stark. The Department's demand with respect to prisons is not limited to prison employees, but extends to inmates as well—all "individuals" in those prisons. If, as the Department apparently insists, prison officials cannot "discriminate" based on anatomy in granting access to bath, locker and shower facilities, then they cannot, for example, exclude biological males from female bath and shower facilities. And that inability would create an obvious risk of more sexual assaults and increased voluntary sexual activity—thereby leading to more prison pregnancies and sexually transmitted diseases. These effects would likewise impose massive additional costs

on the State's prison system—costs that would require further action by plaintiffs and other members of the General Assembly.

65. Nor would the effects of a capitulation be limited to *publicly* owned bath, locker-room and shower facilities. If as the Department contends, Title VII requires that anyone be allowed to use any such facility based on their asserted sexual orientation, that rule necessarily applies to private as well as public employers and, indeed, businesses generally. There is only one Title VII standard. And if the Department succeeds in imposing its view of Title VII on the State itself, it will be only a short step to imposing that view on virtually every owner of bath, locker and shower facilities throughout the State and, indeed, throughout the Nation.

66. In all these ways, if North Carolina and its public agencies and officials, including plaintiffs, were to capitulate to the Department's demands, they would violate the trust of the North Carolina citizenry to protect their privacy and safety.

CLAIMS FOR RELIEF

CLAIM ONE:
The Act Does Not Facially Violate Title VII, Properly Construed

67. Plaintiffs reallege all matters alleged in paragraphs 1 through 66 and incorporate them herein.

68. For several reasons, the Department's determination that the Act facially violates Title VII is wrong as a matter of both law and proper procedure.

This will be established in greater detail (with appropriate citations) in briefing on the merits. But following are a few of the salient reasons.

69. First, at the threshold, the Department's premise that the Act "facially discriminates" on the basis of gender "identity" is patently incorrect. On the face of the Act, a person's ability to use a particular multi-occupancy bathroom, locker room or shower facility depends, *not* on the person's gender identity, but on the person's "biological sex"—as determined by the person's birth certificate. *See* HB2 §§ 1.2, 1.3. Accordingly, if there is any "discrimination" here, it is discrimination on the basis of biological sex, not gender identity. And, although a "separate but equal" approach is clearly inappropriate with respect to racial classifications, separating the sexes based on legitimate physical and anatomical characteristics has always been viewed as consistent with Title VII and other non-discrimination statutes – especially in the context of bathrooms, locker rooms and showers.

70. Moreover, North Carolina law expressly allows citizens to obtain sex change operations, and then change the sex listed on their birth certificates. *See* N.C. Gen. Stat. Ann. § 130A-118. Thus, for example, a person who was a male at birth but who "identifies" as female has the ability to gain access to women's bathrooms if (s)he so chooses. Accordingly, there simply is no "facial discrimination" against anyone based on their gender identity.

71. Second, and more fundamentally, the Department is incorrect in contending that Title VII's prohibition on discrimination on the basis of "sex" extends to discrimination on the basis of "gender *identity*" or even sexual

orientation. Although that position has recently (and controversially) been adopted by the current Equal Employment Opportunity Commission for claims brought before that agency, the same position has been uniformly rejected by every federal circuit court to consider it, and by virtually all of the district courts as well. (The court cases cited in the Department's letters deal with sex and gender *stereotyping,* not gender identity or sexual orientation per se, and are therefore not controlling on the questions here.) Nor is there any indication in Title VII's language or legislative history of any purpose on Congress's part to reach alleged discrimination on the basis of gender identity.

72. Third, because Congress's decision to extend Title VII to the states rested solely upon Section 5 of the Fourteenth Amendment, any requirements imposed on the states under the guise of that statute must be directed at preventing or remedying violations of the federal Constitution, and must be both "congruent with and proportional" to that goal. Yet the Department does not even contend—nor could it contend—that people with a gender identity different from their biological sex are a protected class, much less that extending Title VII to laws such as the Act is congruent and proportional to the goal of preventing *unconstitutional* discrimination against members of that class. Accordingly, given that it is grounded solely in the Fourteenth Amendment, Title VII cannot constitutionally be applied to the Act or similar laws, and therefore cannot constitutionally be construed in the manner the Department contends.

73. Fourth, in any event, the federal government lacks the constitutional authority to preempt the States' efforts to protect the privacy and safety of residents using State-owned bathroom, locker room and shower facilities. Providing such protection in State-owned facilities falls squarely within the police power protected from federal encroachment by the enumerated powers doctrine and recognized in the Tenth Amendment. And the use of such facilities by people who "identify" with a gender other than their biological sex cannot possibly have an impact on interstate commerce sufficient to justify federal regulation under Article I. Indeed, the Department's determination under Title VII constitutes an improper attempt to commandeer State-owned property in pursuit of a (dubious) federal policy. For that reason too Title VII cannot constitutionally be construed in the manner the Department contends.

74. Finally, even if the Act could hypothetically violate Title VII (properly construed) in *some* of its possible applications, it cannot possibly be unlawful in all of its possible applications, and for that reason cannot be facially unlawful. For example, even under the Department's interpretation of Title VII, the Act would be lawful when applied to prevent a known male sexual predator from falsely claiming to "identify" as female so that he can enter a women's bathroom and prey upon a little girl whom he has seen enter alone. Surely the Department's interpretation of Title VII would not require that people making knowingly false claims of gender identity (and claims that are known to authorities to be false) be allowed to enter a bathroom or shower designated for people of the opposite sex. Because the Act

prevents entry into facilities designated for people of the opposite sex by those making knowingly false claims of gender identity in addition to those making genuine claims of gender identity, the Act clearly is not unlawful in *all* of its applications, and therefore is not unlawful on its face.

75. For all these reasons, the Department's determination that the Act facially violates Title VII is both "contrary to law" and "arbitrary and capricious" within the meaning of the APA. Furthermore, the Department violated the APA and the due process rights of the plaintiffs and the State by reaching its determination without any advance notice or opportunity to be heard.

CLAIM TWO:
The Act Does Not Facially Violate Title IX, Properly Construed

76. Plaintiffs reallege all matters alleged in paragraphs 1 through 75 and incorporate them herein.

77. For several reasons, the Department's determination that the Act facially violates Title IX is wrong as a matter of both law and proper procedure. This will be established in greater detail (with appropriate citations) in briefing on the merits. But following are a few of the salient reasons.

78. First, at the threshold, the Department's premise that the Act "facially discriminates" on the basis of gender "identity" is patently incorrect. On the face of the Act, a person's ability to use a particular multi-occupancy bathroom, locker room or shower facility depends, *not* on the person's gender identity, but on the person's "biological sex"—as determined by the person's birth certificate. *See* HB2 §§ 1.2, 1.3. Accordingly, if there is any "discrimination" here, it is discrimination on

the basis of biological sex, not gender identity. And, although a "separate but equal" approach is clearly inappropriate with respect to racial classifications, separating the sexes based on legitimate physical and anatomical characteristics has always been viewed as consistent with Title IX and other non-discrimination statutes – especially in the context of bathrooms, locker rooms and showers.

79. This conclusion is particularly evident with respect to Title IX, which both by statute and regulation expressly authorizes the provision of facilities or programs segregated by sex, provided each is comparable for males and females. *See, e.g.,* 20 U.S.C. § 1686 (allowing educational institutions to "maintain[ ] separate living facilities for the different sexes"); 34 C.F.R. § 106.32 (allowing funding recipients to "provide separate housing on the basis of sex," provide those facilities are "[p]roportionate in quantity" and "comparable in quality and cost"); 34 C.F.R. § 106.34 (allowing "separation of students by sex" within physical education classes and certain sports "the purpose or major activity of which involves bodily contact"). Most pertinent here, longstanding Title IX regulations issued by the Department of Education in 1975, and reaffirmed in 1980, expressly allow recipients of federal funding to "provide separate toilet, locker room, and shower facilities on the basis of sex," provided that the facilities provided for "students of one sex" are "comparable" to the facilities provided for "students of the other sex." 34 C.F.R. § 106.33.

80. In light of that, the Department is plainly wrong to conclude that, by complying with the Act, the plaintiffs are thereby engaging in a "pattern or practice of discrimination" under Title IX. By requiring public multiple-occupancy

bathrooms, locker rooms, and showers to be segregated by "biological" sex, the Act has done nothing remotely out of line with the clear statutory and regulatory directives in Title IX. To the contrary, the Act is *authorized* by the most directly applicable Title IX regulation, which allows sex-segregated "toilet[s], locker room[s], and shower facilities." 34 C.F.R. § 106.33.

81. Second, and more fundamentally, the Department is incorrect in contending that Title IX's prohibition on discrimination on the basis of "sex" extends to discrimination on the basis of "gender identity." There is no indication in Title IX's language or legislative history of any purpose on Congress's part to reach alleged discrimination on the basis of gender identity. Furthermore, that view has been uniformly rejected by every federal circuit court to consider it, and by virtually all of the district courts as well. (The court cases cited in the Department's letters deal with sex and gender *stereotyping,* not gender identity or sexual orientation per se, and are therefore not controlling on the questions here.)

82. Third, the Department compounds its erroneous reading of Title IX by relying on a recent Department of Education "opinion letter" suggesting that Title IX's prohibition on "sex" discrimination extends to discrimination based on "gender identity." *See* Letter from James A. Ferg-Cadima, Acting Deputy Assistant Secretary for Policy, Office for Civil Rights, U.S. Dep't of Education (Jan. 7, 2015). The Department is mistaken. Even assuming the Fourth Circuit was correct in determining recently that a mere "opinion letter" merits deference, *see G.G. v. Gloucester County School Board*, 2016 U.S. App. LEXIS 7026 (4th Cir. Jan. 27,

2016), the Department nonetheless cannot prevail here because the opinion letter is plainly erroneous, inconsistent with Title IX and its regulations, and would render Title IX unconstitutional. *See id.*, 2016 U.S. App. LEXIS at 23 (explaining that agency interpretation of Title IX regulation merits deference under *Auer v. Robbins*, 519 U.S. 452 (1997), unless interpretation is "plainly erroneous or inconsistent with the regulation or statute"); *id.* at 32 (observing that there was "no constitutional challenge to the regulation or agency interpretation").

83. The opinion letter's notion that "sex" discrimination encompasses "gender identity" discrimination is plainly erroneous and inconsistent with both Title IX and its implementing regulations. Among other things, it would render incoherent Title IX's longstanding and express allowance of sex-segregated facilities and programs. More fundamentally, the opinion letter's interpretation would render Title IX unconstitutional: as explained below, it would require States to violate persons' constitutional rights to bodily privacy and parents' constitutional rights to direct the education and upbringing of their children; it would violate the Spending Clause and the Tenth Amendment by conditioning States' receipt of federal funds on a novel requirement that no State could have reasonably foreseen; and it would violate the constitutional separation of powers by purporting to enact new legislation outside the constraints of Article I of the Constitution.

84. Moreover, *Gloucester* does not purport to decide the actual question at issue in this case—namely, whether Title IX *itself* is facially violated if a State limits public multiple-occupancy restrooms, changing facilities, and showers to

persons of the same biological sex (while permitting a system for accommodating persons with conflicting gender identities through single-occupancy facilities). *Gloucester* did not reach that issue (and, indeed, had nothing to do with changing facilities or showers at all), but decided only that a Department of Education opinion letter purporting to interpret an implementing regulation under Title IX merits *Auer* deference, absent a showing that the letter is plainly erroneous, inconsistent with Title IX, or unconstitutional. *Gloucester* remanded for further proceedings on the Title IX issue, leaving open the ultimate question of whether Title IX facially permits a State to require public multiple-occupancy restrooms, changing facilities, and showers to be segregated by biological sex (while permitting a system for accommodating persons with conflicting gender identities through single-occupancy facilities).

85. In addition, the Fourth Circuit's *Gloucester* opinion is incorrect. An agency can impose new obligations or prohibitions on regulated parties only through notice-and-comment rulemaking—not through a unilateral "opinion letter." Thus, the Department cannot rely on the "opinion letter" to re-cast Title IX's prohibition on "sex" discrimination as a prohibition on "gender identity" discrimination. Instead, the Department can only rely on the plain meaning of Title IX and its implementing regulations, which for decades have unambiguously permitted sex-segregated restrooms, changing rooms, and shower facilities.

86. Fourth, the federal government lacks the constitutional authority to deploy the Department's novel reading of Title IX to preempt the States' efforts to

protect the privacy and safety of residents using public bathroom, locker room and shower facilities. Indeed, the Department's reading of Title IX would *compel* States to violate persons' constitutional rights to bodily privacy and parents' constitutional rights to direct the education and upbringing of their children with respect to matters of sexuality. The Department's reading of Title IX would therefore infringe the States' Tenth Amendment authority to provide for their citizens' privacy and well-being, and would additionally constitute an unconstitutional commandeering of state property and lawmaking processes. For those reasons, too, Title IX cannot constitutionally be construed in the manner the Department contends.

87. Fifth, the Department's novel reading of Title IX to encompass "gender identity" discrimination would make Title IX run afoul of the Spending Clause and the Tenth Amendment. The conditions the federal government attaches to the States' receipt of federal funds must be clear and unambiguous, so that States may make an informed choice about whether to accept the funds. No State could have reasonably foreseen that a condition on accepting federal funds prohibiting "sex" discrimination would somehow evolve through unilateral agency action into a prohibition on "gender identity" discrimination—particularly when Title IX's longstanding regulations expressly allow States to maintain sex-segregated restrooms, locker rooms, and shower facilities. Furthermore, by exposing the State to a potentially catastrophic loss of federal funding if the State did not acquiesce in the agency's novel reading of Title IX, the Department would violate the Tenth Amendment.

88. Finally, even if the Act could hypothetically violate Title IX (properly construed) in *some* of its possible applications, it cannot possibly be unlawful under Title IX in all of its possible applications, and for that reason cannot be facially unlawful. For example, even under the Department's interpretation of Title IX, the Act would be lawful when applied to prevent a known male sexual predator from falsely claiming to "identify" as female so that he can enter a women's bathroom and prey upon a little girl whom he has seen enter alone. Surely the Department's interpretation of Title IX would not require that people making knowingly false claims of gender identity (and claims that are known to authorities to be false) be allowed to enter a bathroom or shower designated for people of the opposite gender. Because the Act prevents entry into facilities designated for people of the opposite sex by those making knowingly false claims of gender identity in addition to those making genuine claims of gender identity, the Act clearly is not unlawful in *all* of its applications, even under the Department's interpretation of Title IX, and therefore is not unlawful on its face.

89. For all these reasons, the Department's determination that the Act facially violates Title IX is both "contrary to law" and "arbitrary and capricious" within the meaning of the APA. Furthermore, the Department violated the APA and the due process rights of the plaintiffs and the State by reaching its determination without any advance notice or opportunity to be heard.

CLAIM THREE:
The Act Does Not Facially Violate VAWA, Properly Construed

90. Plaintiffs reallege all matters alleged in paragraphs 1 through 89 and incorporate them herein.

91. For several reasons, the Department's determination that the Act facially violates VAWA is wrong as a matter of both law and proper procedure. This will be established in greater detail (with appropriate citations) in briefing on the merits. But following are a few of the salient reasons.

92. First, at the threshold, the Department's premise that the Act "facially discriminates" on the basis of gender "identity" is patently incorrect. On the face of the Act, a person's ability to use a particular multi-occupancy bathroom, locker room or shower facility depends, *not* on the person's gender identity, but on the person's "biological sex"—as determined by the person's birth certificate. *See* HB2 §§ 1.2, 1.3. Accordingly, if there is any "discrimination" here, it is discrimination on the basis of biological sex, not gender identity. And, although a "separate but equal" approach is clearly inappropriate with respect to racial classifications, separating the sexes based on legitimate physical and anatomical characteristics has always been viewed as consistent with VAWA and other non-discrimination statutes – especially in the context of bathrooms, locker rooms and showers.

93. Second, VAWA itself dispels any notion that the Act facially violates VAWA's grant conditions. As the Department's letter fails to note, VAWA explicitly allows funding recipients to consider an individual's sex in establishing sex-segregated or sex-specific programming. While VAWA does prohibit discrimination

in funded programs on the basis of "sex" and "gender identity," 42 U.S.C. § 13925(b)(13)(A), the statute contains an "exception" that allows funded programs to consider an individual's sex "[i]f sex-segregation or sex-specific programming is necessary to the essential operation of a program." *Id.* § 13925(b)(13)(B). A program grantee satisfies VAWA requirements in such cases "by providing comparable services to individuals who cannot be provided with the sex-segregated or sex-specific programming." *Id.*

94. In light of VAWA's explicit safe-harbor for sex-segregated and sex-specific programs, the Department is plainly wrong to conclude that, by complying with the Act, Perry and the North Carolina DPS are "in violation of the non-discrimination provision of [VAWA]." By requiring public multiple-occupancy bathrooms, locker rooms, and showers in North Carolina correctional facilities to be segregated by "biological" sex, the Act has done nothing remotely out of line with the clear grant conditions in VAWA. To the contrary, the Act is *authorized* by the most directly applicable VAWA grant condition, which allows grantees to consider an individual's sex where, as here, "sex segregation or sex-specific programming is necessary to the essential operation of a program." *Id.* For reasons explained elsewhere, and as a matter of common sense, sex segregation in multi-user bathrooms, locker rooms and shower facilities is "necessary to the essential operation" of such facilities.

95. Third, the fact that the alleged VAWA violation in this case concerns North Carolina prison inmates make the Department's conclusion astonishing. The

Department's determination plainly extends, not just to prison employees, but to any "individual" in "buildings controlled or managed by DPS or its sub-recipients," and it orders Perry to allow those individuals to "access restrooms and changing facilities that are consistent with their gender identity." Thus, by the plain terms of its determination letter, the Department has concluded that any North Carolina correctional facility receiving any VAWA funding must allow prison inmates to access restrooms and changing facilities (as well as showers, which the Department fails to mention) consistent with their "gender identity" or else be subject to a Department enforcement action.

96. The Department cites not a single authority to support its reading of VAWA's grant condition, and for good reason—the consequences of the Department's position would fly in the face of every sensible notion of prison management, security, and safety. North Carolina correctional facilities would be required to allow any biologically male prison inmate whose *self-expressed* "gender identity" is female to use communal bathrooms, changing facilities, and showers with biologically female prison inmates—and vice-versa. The mere statement of that conclusion is sufficient to refute it.

97. Fourth, the Department's conclusion that North Carolina correctional facilities violate VAWA by refusing to allow "gender identity" to determine inmate use of communal restrooms, changing facilities, and showers contradicts the Department's own prison regulations. In regulations entitled "Prison Rape Elimination Act National Standards," the Department requires that, in deciding

whether to assign "a transgender or intersex inmate" to a male or female prison facility, or in making other "housing and programming assignments" for such inmates, the agency "shall consider *on a case-by-case basis* whether a placement would ensure the inmate's health and safety, and whether the placement would present management or security problems." 28 C.F.R. § 115.42(c) (emphasis added). Furthermore, the Department's regulations also require that "[t]ransgender and intersex inmates shall be given the opportunity to shower *separately* from other inmates." *Id.* § 115.42(f) (emphasis added). Neither of those regulations would survive the Department's current view of VAWA, as expressed in its determination letter, which would now require inmates to be allowed access restrooms, changing facilities, and showers consistent with their self-professed "gender identity," quite apart from any case-by-case assessment of whether such access would impact prison security or imperil the inmate's safety.

98. Fifth, if the Department's conclusion regarding VAWA were correct, then VAWA would be unconstitutional on numerous grounds. It would violate the Tenth Amendment by invading the State's basic constitutional authority to provide for order and safety in its correctional facilities. It would violate the Spending Clause by placing a condition on the receipt of federal funds that no State could have remotely anticipated when receiving the funds—especially in light of the Department's own regulations. For similar reasons, the Department's new position would violate the Tenth Amendment by coercing North Carolina to alter the basic structure of its correctional facilities or else lose large amounts of federal prison

funding. It would also require North Carolina to violate its own prisoners' constitutional rights to bodily privacy and safety and expose them to dangerous conditions in violation of the Eighth Amendment.

99. Finally, even if the Act could hypothetically violate VAWA (properly construed) in *some* of its possible applications, it cannot possibly be unlawful in all of its possible applications, and for that reason cannot be facially unlawful. For example, even under the Department's interpretation of VAWA, the Act would be lawful when applied to prevent biologically male prisoner from falsely claiming to "identify" as female so that he can enter a communal bathroom, changing facility, or shower in order to victimize biologically female prisoners. Surely the Department's interpretation of VAWA would not require that people making knowingly false claims of gender identity (and claims that are known to authorities to be false) be allowed to enter a bathroom or shower designated for people of the opposite sex. Because the Act prevents entry into facilities designated for people of the opposite sex by those making knowingly false claims of gender identity in addition to those making genuine claims of gender identity, the Act clearly is not unlawful in *all* of its applications, even under the Department's apparent view of VAWA, and therefore is not unlawful on its face.

100. For all these reasons, the Department's determination that the Act facially violates VAWA is both "contrary to law" and "arbitrary and capricious" within the meaning of the APA. Furthermore, the Department violated the APA

and the due process rights of the plaintiffs and the State by reaching its determination without any advance notice or opportunity to be heard.

CLAIM FOUR:
The Department's Actions Violate the Separation of Powers in the United States Constitution

101. Plaintiffs reallege all matters alleged in paragraphs 1 through 100 and incorporate them herein.

102. Multiple provisions of the federal Constitution make clear that, if the federal government is to impose new legal requirements on the States, those requirements must be imposed by or at the behest of Congress, not by the Executive Branch acting on its own. Those provisions include but are not limited to the "vesting" clause of Article I Section 1, the bicameralism and presentment clauses of Article I Section 7, the "take care" clause of Article II Section 3, and the "appropriate legislation" provision of Section 5 of the Fourteenth Amendment.

103. The requirement that the Department's "determination" seeks to impose upon North Carolina—i.e., a requirement of open "access" to all state-owned "sex-segregated … facilities consistent with gender identity" (McCrory Determination Letter at 1)—is a new legal requirement. For reasons explained above, that requirement—which would logically extend to every other State and virtually all private employers as well—is simply not found in Title VII, Title IX or VAWA. The Department's attempt to impose that requirement on North Carolina on its own is therefore a usurpation of Congress's exclusive authority under Article I of the Constitution, which provides that "all legislative powers herein granted shall be vested in … Congress." Such action is also a violation of the President's

obligation under Article II Section 3 to "take care that the laws be *faithfully* executed."

104. For all these reasons, the Department's determination that North Carolina and its officials must grant "access to sex-segregated restrooms and other [similar] facilities consistent with gender *identity*" is both "contrary to law" and "arbitrary and capricious" within the meaning of the APA. Furthermore, the Department violated the APA and the due process rights of the plaintiffs and the State by reaching its determination without any advance notice or opportunity to be heard.

CLAIM FIVE:
The Department's Actions Violate the Federalism Guarantees of the United States Constitution

105. Plaintiffs reallege all matters alleged in paragraphs 1 through 104 and incorporate them herein.

106. Several provisions of the federal Constitution also make clear that the States remain independent sovereigns in the federal system, that they joined the Union with their sovereignty—including their traditional police power—intact, and that the federal government is one of limited, enumerated powers. Those provisions include but are not limited to Article I section 8, and section 1 of the Thirteenth, Fourteenth and Fifteenth Amendments—all of which together delineate specific and limited subjects on which Congress may legislate—and the Tenth Amendment, which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Aside from racial discrimination, none of those

provisions authorizes any arm of the federal government to impose requirements for "access" to state-owned bathrooms, locker rooms or shower facilities, much less authorizes the federal government to regulate the manner in which the states seek to protect the privacy and safety of those using such state-owned facilities. Certainly nothing in the Constitution authorizes any arm of the federal government to impose regulations governing access to such facilities on the basis of "gender identity"—a concept unknown to those who wrote and ratified the relevant provisions of the federal Constitution.

107. The Act, by contrast, seeks to vindicate the right to sexual and reproductive privacy protected by the Fifth and Fourteenth Amendments, as well as the right of parents to direct the upbringing of their children, also protected by the Fifth and Fourteenth Amendments. And the Act does so in a manner that is well within the States' traditional police power.

108. Because the federal government lacks the constitutional authority to regulate North Carolina's (and the other States') efforts to protect the privacy and safety of those who use state-owned bath, locker room and shower facilities, the Department's attempt to impose the "access" requirement at issue here represents a usurpation of the States' authority over such facilities.

109. Relatedly, the Constitution's federalism guarantees constrain the federal government's ability to place conditions on the States' receipt of federal funds through legislation under the Spending Clause of Article I. The federal government must make its conditions on receipt of federal funds clear and

unambiguous, so that States may make an informed decision about whether to accept the funds and the resulting diminution in their sovereign authority. Furthermore, the federal government may not attach conditions to the receipt or retention of federal funding that effective coerce the States into accepting the conditions.

110. Based on those settled principles, the Department's attempt to impose novel and unforeseeable interpretations of Title IX and VAWA on North Carolina constitutes a violation of the Spending Clause and the Tenth Amendment. When North Carolina officials and agencies accepted the conditions originally attached to federal funding under those statutes, they could not have foreseen the radical change in those conditions represented by the Department's recent determination letters. Furthermore, by deeming North Carolina in violation of its novel reinterpretation of Title IX and VAWA, the Department has attempted to coerce North Carolina into complying with the Department's illegal demand, in violation of the Tenth Amendment.

111. For all these reasons, the Department's determination that North Carolina and its officials must grant "access to sex-segregated restrooms and other [similar] facilities consistent with gender *identity*" is both "contrary to law" and "arbitrary and capricious" within the meaning of the APA. Furthermore, the Department violated the APA and the due process rights of the plaintiffs and the State by reaching its determination without any advance notice or opportunity to be heard.

PRAYER FOR RELIEF

For the foregoing reasons, the plaintiffs respectfully ask the Court to enter a final judgment in plaintiffs' favor declaring plaintiffs' rights as follows:

a) A final judgment declaring that the Act does not facially violate Title VII;

b) A final judgment declaring that the Act does not facially violate Title IX;

c) A final judgment declaring that the Act does not facially violate VAWA;

d) A final judgment declaring that the Department's attempt to enforce its erroneous interpretation of those federal statutes against North Carolina violates the separation of powers required by the United States Constitution;

e) A final judgment declaring that the Department's attempt to enforce its erroneous interpretation of those federal statutes against North Carolina violates the Tenth Amendment to and other federalism provisions in the United States Constitution;

f) A final judgment declaring that the Department's attempt to enforce its erroneous interpretation of those federal statutes against North Carolina violates section 706 of the Administrative Procedure Act;

g) An award of attorneys' fees and costs;

h) Any other relief to which plaintiffs are entitled.

Respectfully submitted,

By: /s/ S. Kyle Duncan
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GENE C. SCHAERR*
SCHAERR | DUNCAN LLP
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DC Bar No. 416638
Attorneys for Plaintiffs

**Appearing Pursuant to Local Civil Rule 83.1; notice of appearance to be filed*

By: /s/ Robert D. Potter, Jr.
ROBERT D. POTTER, JR.
ATTORNEY AT LAW
2820 Selwyn Avenue, #840
Charlotte, NC 28209
704-552-7742
E-mail: rdpotter@rdpotterlaw.com
NC Bar No. 17553
Local Civil Rule 83.1 Counsel for Plaintiffs

May 9, 2016

JS 44 (Rev. 11/15)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS

Phil Berger, in his official capacity as President pro tem of the North Carolina Senate; Tim Moore, in his official capacity as Speaker of the North Carolina House of Representatives

(b) County of Residence of First Listed Plaintiff Wake County
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
Schaerr Duncan LLP, 1717 K St NW, Ste 900, Wash DC 20006, 202-714-9492; Robert Potter, 2820 Selwyn Ave. #840, Charlotte, NC 28209, 704-552-7742

DEFENDANTS

United States Department of Justice; Loretta Lynch, in her official capacity as United States Attorney General; Vanita Gupta, in her official capacity as Principal Deputy Assistant Attorney General

County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ❒ 1 U.S. Government Plaintiff
- ❒ 3 Federal Question *(U.S. Government Not a Party)*
- ☒ 2 U.S. Government Defendant
- ❒ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*

(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	❒ 1	❒ 1	Incorporated *or* Principal Place of Business In This State	❒ 4	❒ 4
Citizen of Another State	❒ 2	❒ 2	Incorporated *and* Principal Place of Business In Another State	❒ 5	❒ 5
Citizen or Subject of a Foreign Country	❒ 3	❒ 3	Foreign Nation	❒ 6	❒ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

CONTRACT
- ❒ 110 Insurance
- ❒ 120 Marine
- ❒ 130 Miller Act
- ❒ 140 Negotiable Instrument
- ❒ 150 Recovery of Overpayment & Enforcement of Judgment
- ❒ 151 Medicare Act
- ❒ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ❒ 153 Recovery of Overpayment of Veteran's Benefits
- ❒ 160 Stockholders' Suits
- ❒ 190 Other Contract
- ❒ 195 Contract Product Liability
- ❒ 196 Franchise

TORTS

PERSONAL INJURY
- ❒ 310 Airplane
- ❒ 315 Airplane Product Liability
- ❒ 320 Assault, Libel & Slander
- ❒ 330 Federal Employers' Liability
- ❒ 340 Marine
- ❒ 345 Marine Product Liability
- ❒ 350 Motor Vehicle
- ❒ 355 Motor Vehicle Product Liability
- ❒ 360 Other Personal Injury
- ❒ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ❒ 365 Personal Injury - Product Liability
- ❒ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ❒ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ❒ 370 Other Fraud
- ❒ 371 Truth in Lending
- ❒ 380 Other Personal Property Damage
- ❒ 385 Property Damage Product Liability

FORFEITURE/PENALTY
- ❒ 625 Drug Related Seizure of Property 21 USC 881
- ❒ 690 Other

LABOR
- ❒ 710 Fair Labor Standards Act
- ❒ 720 Labor/Management Relations
- ❒ 740 Railway Labor Act
- ❒ 751 Family and Medical Leave Act
- ❒ 790 Other Labor Litigation
- ❒ 791 Employee Retirement Income Security Act

IMMIGRATION
- ❒ 462 Naturalization Application
- ❒ 465 Other Immigration Actions

BANKRUPTCY
- ❒ 422 Appeal 28 USC 158
- ❒ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ❒ 820 Copyrights
- ❒ 830 Patent
- ❒ 840 Trademark

SOCIAL SECURITY
- ❒ 861 HIA (1395ff)
- ❒ 862 Black Lung (923)
- ❒ 863 DIWC/DIWW (405(g))
- ❒ 864 SSID Title XVI
- ❒ 865 RSI (405(g))

FEDERAL TAX SUITS
- ❒ 870 Taxes (U.S. Plaintiff or Defendant)
- ❒ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ❒ 375 False Claims Act
- ❒ 376 Qui Tam (31 USC 3729(a))
- ❒ 400 State Reapportionment
- ❒ 410 Antitrust
- ❒ 430 Banks and Banking
- ❒ 450 Commerce
- ❒ 460 Deportation
- ❒ 470 Racketeer Influenced and Corrupt Organizations
- ❒ 480 Consumer Credit
- ❒ 490 Cable/Sat TV
- ❒ 850 Securities/Commodities/ Exchange
- ❒ 890 Other Statutory Actions
- ❒ 891 Agricultural Acts
- ❒ 893 Environmental Matters
- ❒ 895 Freedom of Information Act
- ❒ 896 Arbitration
- ☒ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ❒ 950 Constitutionality of State Statutes

REAL PROPERTY
- ❒ 210 Land Condemnation
- ❒ 220 Foreclosure
- ❒ 230 Rent Lease & Ejectment
- ❒ 240 Torts to Land
- ❒ 245 Tort Product Liability
- ❒ 290 All Other Real Property

CIVIL RIGHTS
- ❒ 440 Other Civil Rights
- ❒ 441 Voting
- ❒ 442 Employment
- ❒ 443 Housing/ Accommodations
- ❒ 445 Amer. w/Disabilities - Employment
- ❒ 446 Amer. w/Disabilities - Other
- ❒ 448 Education

PRISONER PETITIONS

Habeas Corpus:
- ❒ 463 Alien Detainee
- ❒ 510 Motions to Vacate Sentence
- ❒ 530 General
- ❒ 535 Death Penalty

Other:
- ❒ 540 Mandamus & Other
- ❒ 550 Civil Rights
- ❒ 555 Prison Condition
- ❒ 560 Civil Detainee - Conditions of Confinement

V. ORIGIN *(Place an "X" in One Box Only)*

☒ 1 Original Proceeding ❒ 2 Removed from State Court ❒ 3 Remanded from Appellate Court ❒ 4 Reinstated or Reopened ❒ 5 Transferred from Another District *(specify)* ❒ 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing ***(Do not cite jurisdictional statutes unless diversity)***:
28 U.S.C. § 2201-02; 5 U.S.C. §§ 702-706

Brief description of cause:
Declaratory Judgment Action concerning federal agency action against North Carolina agencies and officials

VII. REQUESTED IN COMPLAINT:

❒ CHECK IF THIS IS A **CLASS ACTION** UNDER RULE 23, F.R.Cv.P.

DEMAND $

CHECK YES only if demanded in complaint:
JURY DEMAND: ❒ Yes ☒ No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE Terrence W. Boyle DOCKET NUMBER No. 16-cv-00238-BO

DATE 05/09/2016

SIGNATURE OF ATTORNEY OF RECORD s/ Robert D. Potter, Jr.

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I.(a) Plaintiffs-Defendants. Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) County of Residence. For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) Attorneys. Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. Jurisdiction. The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below**; NOTE: federal question actions take precedence over diversity cases.**)

III. Residence (citizenship) of Principal Parties. This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. Nature of Suit. Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.

V. Origin. Place an "X" in one of the six boxes.
Original Proceedings. (1) Cases which originate in the United States district courts.
Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.

VI. Cause of Action. Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service

VII. Requested in Complaint. Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. Related Cases. This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

UNITED STATES DISTRICT COURT

for the

Eastern District of North Carolina

Phil Berger and Tim Moore

Plaintiff(s)

v.

UNITED STATES DEPARTMENT OF JUSTICE, LORETTA LYNCH, in her official capacity as Attorney General of the United States, et al.

Defendant(s)

Civil Action No.

Text

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* UNITED STATES DEPARTMENT OF JUSTICE,
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Robert D. Potter, Jr.
Attorney at Law
2820 Selwyn Ave., #840
Charlotte, NC 28209

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No.

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____

was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____

_____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____

_____ , a person of suitable age and discretion who resides there,

on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is

designated by law to accept service of process on behalf of *(name of organization)* _____

_____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0 .

I declare under penalty of perjury that this information is true.

Date: _____

_____

Server's signature

_____

Printed name and title

_____

Server's address

Additional information regarding attempted service, etc:

UNITED STATES DISTRICT COURT

for the

Eastern District of North Carolina

Phil Berger and Tim Moore

Plaintiff(s)

v.

UNITED STATES DEPARTMENT OF JUSTICE, LORETTA LYNCH, in her official capacity as Attorney General of the United States, et al.

Defendant(s)

Civil Action No.

Text

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* UNITED STATES DEPARTMENT OF JUSTICE,
Attorney General Loretta Lynch
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Robert D. Potter, Jr.
Attorney at Law
2820 Selwyn Ave., #840
Charlotte, NC 28209

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No.

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____ , a person of suitable age and discretion who resides there,
on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

UNITED STATES DISTRICT COURT

for the

Eastern District of North Carolina

Phil Berger and Tim Moore

Plaintiff(s)

v.

UNITED STATES DEPARTMENT OF JUSTICE, LORETTA LYNCH, in her official capacity as Attorney General of the United States, et al.

Defendant(s)

Civil Action No.

Text

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* UNITED STATES DEPARTMENT OF JUSTICE,
Principal Deputy Assistant Attorney General VANITA GUPTA
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Robert D. Potter, Jr.
Attorney at Law
2820 Selwyn Ave., #840
Charlotte, NC 28209

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No.

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____ , a person of suitable age and discretion who resides there,
on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
Case No.

Plaintiff(s), Phil Berger and Tim Moore, in their official capacities

vs

Defendant(s). United States Department of Justice et al.

DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER ENTITIES WITH A DIRECT FINANCIAL INTEREST IN LITIGATION

Pursuant to Fed.R.Civ.P. 7.1 and Local Civil Rule 7.3, or Fed.R.Crim.P. 12.4 and Local Criminal Rule 12.3,

Phil Berger and Tim Moore (name of party) who is all plaintiffs (plaintiff/defendant/other:_____),

makes the following disclosure:

1. Is party a publicly held corporation or other publicly held entity?

YES ◯ NO Ⓧ

2. Does party have any parent corporations?

YES ◯ NO Ⓧ

If yes, identify all parent corporation, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party owned by a publicly held corporation or other publicly held entity?

YES ◯ NO Ⓧ

If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Civil Rule 7.3 or Local Criminal Rule 12.3)?

YES ◯ NO (X)

If yes, identify entity and nature of interest:

5. Is party a trade association?

YES ◯ NO (X)

If yes, identify all members of the association, their parent corporations, and any publicly held companies that own 10% or more of a member's stock:

6. If case arises out of a bankruptcy proceeding, identify any trustee and the members of any creditors's committee:

Signature: _____

Date: 5-9-2016

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. _____
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.	)	

COMPLAINT FOR DECLARATORY JUDGMENT

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") seek declaratory and injunctive relief against the United States of America ("United States"), the United States Department of Justice, Loretta Lynch, in her official capacity as United States Attorney General, and Vanita Gupta, in her official capacity as Principal Deputy Assistant Attorney General, for their radical reinterpretation of Title VII of the Civil Rights Act of 1964 which would prevent plaintiffs from protecting the bodily privacy rights of state employees while accommodating the needs of transgendered state employees. The United States, through its Department of Justice ("Department"), by letters dated May 4, 2016, threatened legal action

against Governor McCrory, Secretary Perry, and others, because plaintiffs intend to follow North Carolina law requiring public agencies to generally limit use of multiple occupancy bathroom and changing facilities to persons of the same biological sex. The Department contends that North Carolina's common sense privacy policy constitutes a pattern or practice of discriminating against transgender employees in the terms and conditions of their employment because it does not give employees an unfettered right to use the bathroom or changing facility of their choice based on gender identity. The Department's position is a baseless and blatant overreach. This is an attempt to unilaterally rewrite long-established federal civil rights laws in a manner that is wholly inconsistent with the intent of Congress and disregards decades of statutory interpretation by the Courts. The overwhelming weight of legal authority recognizes that transgender status is not a protected class under Title VII. If the United States desires a new protected class under Title VII, it must seek such action by the United States Congress. In any event, North Carolina law allows plaintiffs to accommodate transgender employees while protecting the bodily privacy rights of other state employees, and nothing in Title VII prohibits such conduct or constitutes discrimination in the terms and conditions of employment of transgender employees. Moreover, the Department has similarly overreached in its interpretation of the Violence Against Women Reauthorization Act of 2013 ("VAWA"). Even if VAWA specifically includes gender identity as a protected class, the North Carolina law is not discriminatory because it allows accommodations based on special circumstances, including but not limited to transgender individuals.

PARTIES

1. Plaintiff Patrick L. McCrory is the Governor of North Carolina. Under North Carolina law, Governor McCrory is the chief executive authority for executive branch agencies

within state government. Complying with the demands made in defendants' letter of May 4, 2016, would prevent Governor McCrory from discharging his obligations under the North Carolina Constitution.

2. Plaintiff Frank Perry is the Secretary of the North Carolina Department of Public Safety ("DPS"). Secretary Perry is the chief executive authority for DPS, which is an executive branch agency reporting to Governor McCrory. Complying with the demands made in defendants' letter of May 4, 2016, would prevent Secretary Perry from discharging his obligations under North Carolina law.

3. Defendant the United States, through its co-defendant the Department of Justice, has the authority to bring enforcement actions pursuant to Title VII and VAWA. The Department has threatened to bring such an enforcement action against the State of North Carolina and its officials.

4. Defendant United States Department of Justice is a federal executive agency and possesses responsibility for enforcement of Title VII and VAWA.

5. Defendant Loretta E. Lynch is the current Attorney General of the United States and head of the United States Department of Justice. She is sued in her official capacity only.

6. Defendant Venita Gupta is a Principal Deputy Assistant Attorney General at the United States Department of Justice and head of the Civil Rights Division of the United States Department of Justice. She has been delegated the responsibility to bring an enforcement action under Title VII against the State of North Carolina. She has been sued in her official capacity only.

JURISDICTION AND VENUE

7. In this action, plaintiffs seek a declaratory judgment 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 whether plaintiffs' implementation of North Carolina's common sense bodily privacy law constitutes a violation of Title VII and VAWA.

8. The Court has federal question jurisdiction pursuant to 28 U.S.C. § 1331.

9. Venue is proper in this District under 28 U.S.C. § 1391(e) because the plaintiffs in their official capacities are residents of this District, specifically Raleigh, North Carolina, plaintiffs have employees in this District, and substantially all of the events creating the dispute between the parties occurred in this District.

FACTS

10. On March 23, 2016, the North Carolina General Assembly enacted the Public Facilities Privacy and Security Act ("the Act"). 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. 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." The Act also allows accommodations based on special circumstances.

11. On April 12, 2016, Governor McCrory issued "Executive Order 93 to Protect Privacy and Equality" ("EO 93"). EO 93 expanded discrimination protections to state employees on the basis of sexual orientation and gender identity, among others. 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. EO 93 also

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.

12. Upon information and belief, no transgender employee of the State of North Carolina has advanced a claim that the state employment policy as outlined above is discriminatory under Title VII.

13. Upon information and belief, no person has advanced a claim that the law is discriminatory under VAWA.

14. Nonetheless, on May 4, 2016, the Department asserted in letters to Governor McCrory and Secretary Perry that state law as outlined above constitutes a "pattern or practice" of discriminating against transgender state employees by denying such employees access to the bathroom or other changing facility of their chosen gender identity.

15. In addition, the Department asserted that the North Carolina Department of Public Safety has violated the non-discrimination provision of VAWA.

16. The Department further threatened to "apply to [an] appropriate court for an order that will ensure compliance with" the Department's misguided interpretations of Title VII and VAWA.

17. The Department's threat is real but misplaced. North Carolina does not treat transgender employees differently from non-transgender employees. All 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.

18. Moreover, the overwhelming weight of authority has refused to expand Title VII protections to transgender status absent Congressional action. Courts consistently find that Title VII does not protect transgender or transsexuality *per se*. See Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1224 (10th Cir. 2007) ("Etsitty may not claim protection under Title VII based upon her transsexuality *per se*."); Lopez v. River Oaks Imaging & Diagnostic Grp., Inc., 542 F. Supp. 2d 653, 658 (S.D. Tex. April 3, 2008) (Atlas, J.) (acknowledging that "[c]ourts consistently find that transgendered persons are not a protected class under Title VII per se"); Spearman v. Ford Motor Co., 231 F.3d 1080 (7th Cir. 2000) ("Congress intended the term 'sex' to mean 'biological male or biological female,' and not one's sexuality or sexual orientation."); Oiler v. Winn-Dixie Louisiana, Inc., 2002 WL 31098541, at *6 (E.D. La. Sept. 16, 2002) ("[T]he phrase 'sex' has not been interpreted to include sexual identity or gender identity disorders."); Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1084 (7th Cir. 1984) ("The words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder…."); Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (8th Cir. 1982) ("Because Congress has not shown an intention to protect transsexuals, we hold that discrimination based on one's transsexualism does not fall within the protective purview of [Title VII].")

19. In any event, even if transgender employees were covered by Title VII, plaintiffs intend, and are authorized under North Carolina law, to accommodate such individuals in the terms and conditions of their employment. Title VII does not prohibit employers, including state employers, from balancing the special circumstances posed by transgender employees with the right to bodily privacy held by non-transgender employees in the workplace. Title VII allows gender specific regulations in the workplace. See Finnie v. Lee Cnty., Miss., 907 F. Supp. 2d 750, 772 (N.D. Miss. Jan. 17, 2012) (Title VII "was never intended to interfere in the

promulgation and enforcement of personal appearance regulations by private employers."); Jackson v. Houston Gen. Ins. Co., 122 F.3d 1066, 1066 (5th Cir. 1997) (an employer does not violate Title VII by imposing different grooming and dress standards for male and female employees); Nichols v. Azteca Rest. Enterprises, Inc., 256 F.3d 864, 878 n.7 (9th Cir. 2001) ("We do not imply that all gender-based distinctions are actionable under Title VII. For example, our decision does not imply that there is any violation of Title VII occasioned by reasonable regulations that require male and female employees to conform to different dress and grooming standards"); Jespersen v. Harrah's Operating Co., Inc., 444 F.3d 1104, 1109-10 (9th Cir.2006) (en banc) (holding that Harrah's grooming standards requiring women to wear makeup and styled hair and men to dress conservatively was not discriminatory because the policy did not impose unequal burdens on either sex); Willingham v. Macon Tel. Pub. Co., 507 F.2d 1084, 1091-92 (5th Cir. 1975) (concluding that a grooming policy concerning hair length differences for males and females did not constitute sex discrimination and noting that such a policy relates "more closely to the employer's choice of how to run his business than to equality of employment opportunity").

20. Plaintiffs desire to implement state employment policies that protect the bodily privacy rights of state employees in bathroom and changing facilities. Plaintiffs also desire to accommodate the needs of state employees based on special circumstances, including but not limited to transgender employees. Defendants instead threaten to force plaintiffs to implement their reinterpretation of Title VII and VAWA while ignoring the bodily privacy of plaintiffs' employees. Such action by defendants threaten to expose plaintiffs to actual liability under Title VII, VAWA, and other provisions protecting the bodily privacy rights of employees in the workplace.

21. There is an actual controversy between the parties concerning whether plaintiffs may follow North Carolina law regarding bathroom and changing facility use.

22. A declaratory judgment will serve a useful purpose in clarifying and settling the legal issues, and will afford relief from uncertainty, insecurity, and controversy giving rise to the proceeding.

23. Plaintiffs and the State of North Carolina will suffer significant and irreparable harm unless this Court intervenes.

COUNT ONE:
DECLARATION THAT PLAINTIFFS
ARE IN COMPLIANCE WITH TITLE VII

24. The allegations of paragraphs 1 through 23 are re-alleged and incorporated herein by reference.

25. North Carolina does not treat transgender employees differently from non-transgender employees. All state employees are required to use the bathroom and changing facilities assigned to persons of their same biological sex, regardless of gender identity, or transgendered status.

26. Therefore, Plaintiffs respectfully request a declaration that they are not violating Title VII by following state law regarding bathroom and changing facility use by state employees.

COUNT TWO:
DECLARATION THAT PLAINTIFFS
ARE IN COMPLIANCE WITH VAWA

27. The allegations of paragraphs 1 through 26 are re-alleged and incorporated herein by reference.

28. Even if VAWA specifically includes gender identity as a protected class, North Carolina law is not discriminatory because it allows accommodations based on special circumstances, including but not limited to transgender individuals.

29. Therefore, Plaintiffs respectfully request a declaration that they are not violating VAWA by following state law regarding bathroom and changing facility use.

DECLARATORY RELIEF

WHEREFORE, plaintiffs pray for judgment pursuant to 28 U.S.C. § 2201 declaring that:

1. Plaintiffs are not violating Title VII or VAWA by following state law regarding bathroom and changing facility use by state employees;

2. Plaintiffs are not violating Title VII or VAWA by following state law allowing accommodations under special circumstances for employees who need exceptions to state policy regarding bathroom and changing facility use by state employees;

3. Plaintiffs are not in violation of Title VII or VAWA;

4. That this dispute be resolved in favor of plaintiffs such that plaintiffs do not have to incur damages in the form of back pay, front pay, benefits, liability, and other associated costs;

5. That plaintiffs recover their fees and costs in this matter; and

6. Such other further relief as the Court deems just and proper.

Respectfully submitted,

BOWERS LAW OFFICE LLC

By: /s/ Karl S. Bowers, Jr.

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*appearing pursuant to Local Rule 83.1(e)

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*appearing as Local Rule 83.1 Counsel
Counsel for Governor Patrick L. McCrory

MILLBERG GORDON STEWART PLLC

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tbrooks@mgsattorneys.com
Counsel for Governor Patrick L. McCrory

Dated: May 9, 2016
Raleigh, North Carolina

JS 44 (Rev. 11/15)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS
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

(b) County of Residence of First Listed Plaintiff Wake
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
See Attachment

DEFENDANTS
United States of America, U.S. Dept. of Justice, Loretta A. Lynch, in her official capacity as U.S. Attorney General, and Vanita Gupta, in her official capacity as Principal Deputy Assistant Atty General

County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question *(U.S. Government Not a Party)*
- ☒ 2 U.S. Government Defendant
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Management Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Employee Retirement Income Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 376 Qui Tam (31 USC 3729(a))
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

CIVIL RIGHTS
- ☐ 440 Other Civil Rights
- ☐ 441 Voting
- ☒ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 448 Education

PRISONER PETITIONS

Habeas Corpus:
- ☐ 463 Alien Detainee
- ☐ 510 Motions to Vacate Sentence
- ☐ 530 General
- ☐ 535 Death Penalty

Other:
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

V. ORIGIN *(Place an "X" in One Box Only)*

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District *(specify)* ☐ 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity)*:
28 USC Sec. 2201

Brief description of cause:
Action for Declatory Relief

VII. REQUESTED IN COMPLAINT: ☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. **DEMAND $** CHECK YES only if demanded in complaint: **JURY DEMAND:** ☐ Yes ☐ No

VIII. RELATED CASE(S) IF ANY *(See instructions)*: JUDGE DOCKET NUMBER

DATE 05/09/2014

SIGNATURE OF ATTORNEY OF RECORD /s/ William W. Stewart, Jr.

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I.(a) **Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) **County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) **Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. **Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)

III. **Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. **Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.

V. **Origin.** Place an "X" in one of the six boxes.
Original Proceedings. (1) Cases which originate in the United States district courts.
Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.

VI. **Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service

VII. **Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. **Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

Attorneys for Plaintiffs

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Counsel for Governor Patrick L. McCrory

UNITED STATES DISTRICT COURT

for the

Eastern District of North Carolina

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 *Plaintiff(s)* v. United States of America, U.S. Dept. of Justice, Loretta E. Lynch, in her official capacity as U.S. Attorney General, and Vanita Gupta, in her official capacity as Principal Deputy Assistant Atty General *Defendant(s)*	)	Civil Action No. 5:16-cv-238

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* 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; and

c/o Attorney General of the United States, U.S. Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530-0001

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: 1) Karl S. Bowers, Jr., P.O. Box 50549, Columbia, SC 29250;

2)Robert C. Stephens, General Counsel, Office of the Governor of North Carolina, 20301 Mail Service Center, Raleigh, NC 27699;

3) William W. Stewart, Jr., Frank J. Gordon, B. Tyler Brooks, Millberg Gordon Stewart PLLC, 1101 Haynes Street, Suite 104, Raleigh, NC 27604

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No. 5:16-cv-238

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____ , a person of suitable age and discretion who resides there,
on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

UNITED STATES DISTRICT COURT

for the

Eastern District of North Carolina

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 *Plaintiff(s)* v. United States of America, U.S. Dept. of Justice, Loretta E. Lynch, in her official capacity as U.S. Attorney General, and Vanita Gupta, in her official capacity as Principal Deputy Assistant Atty General *Defendant(s)*	)	Civil Action No. 5:16-cv-238

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* United States Department of Justice, 950 Pennsylvania Avenue, NW, Washington DC 20530-0001; and
c/o United States of America c/o Civil Process Clerk, Office of the United States Attorney, Eastern District of North Carolina, 310 New Bern Ave., Federal Building, Suite 800, Raleigh, NC 27601-1461; and
c/o Attorney General of United States, U.S. Department of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530-0001

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: 1) Karl S. Bowers, Jr., P.O. Box 50549, Columbia, SC 29250;

2)Robert C. Stephens, General Counsel, Office of the Governor of North Carolina, 20301 Mail Service Center, Raleigh, NC 27699;

3) William W. Stewart, Jr., Frank J. Gordon, B. Tyler Brooks, Millberg Gordon Stewart PLLC, 1101 Haynes Street, Suite 104, Raleigh, NC 27604

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No. 5:16-cv-238

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____ , a person of suitable age and discretion who resides there,
on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

UNITED STATES DISTRICT COURT

for the

Eastern District of North Carolina

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 *Plaintiff(s)* v. United States of America, U.S. Dept. of Justice, Loretta E. Lynch, in her official capacity as U.S. Attorney General, and Vanita Gupta, in her official capacity as Principal Deputy Assistant Atty General *Defendant(s)*	)	Civil Action No. 5:16-cv-238

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* 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; and
c/o 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, NC 27601-1461; and c/o Attorney General of the United States, U.S. Department of Justice, 950 Pennsylvania Ave., NW, Washington DC 20530-0001

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: 1) Karl S. Bowers, Jr., P.O. Box 50549, Columbia, SC 29250;

2)Robert C. Stephens, General Counsel, Office of the Governor of North Carolina, 20301 Mail Service Center, Raleigh, NC 27699;

3) William W. Stewart, Jr., Frank J. Gordon, B. Tyler Brooks, Millberg Gordon Stewart PLLC, 1101 Haynes Street, Suite 104, Raleigh, NC 27604

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No. 5:16-cv-238

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____

was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____

_____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____

_____ , a person of suitable age and discretion who resides there,

on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is

designated by law to accept service of process on behalf of *(name of organization)* _____

_____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____ _____

Server's signature

_____

Printed name and title

_____

Server's address

Additional information regarding attempted service, etc:

UNITED STATES DISTRICT COURT

for the

Eastern District of North Carolina

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 *Plaintiff(s)* v. United States of America, U.S. Dept. of Justice, Loretta E. Lynch, in her official capacity as U.S. Attorney General, and Vanita Gupta, in her official capacity as Principal Deputy Assistant Atty General *Defendant(s)*	)	Civil Action No. 5:16-cv-238

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)* 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; and
c/o 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, NC 27601-1461; and c/o Attorney General of the United States, U.S. Department of Justice, NW, Washington, DC 20530-0001

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are: 1) Karl S. Bowers, Jr., P.O. Box 50549, Columbia, SC 29250;

2)Robert C. Stephens, General Counsel, Office of the Governor of North Carolina, 20301 Mail Service Center, Raleigh, NC 27699;

3) William W. Stewart, Jr., Frank J. Gordon, B. Tyler Brooks, Millberg Gordon Stewart PLLC, 1101 Haynes Street, Suite 104, Raleigh, NC 27604

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

Civil Action No. 5:16-cv-238

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____

was received by me on *(date)* _____ .

❒ I personally served the summons on the individual at *(place)* _____

_____ on *(date)* _____ ; or

❒ I left the summons at the individual's residence or usual place of abode with *(name)* _____

_____ , a person of suitable age and discretion who resides there,

on *(date)* _____ , and mailed a copy to the individual's last known address; or

❒ I served the summons on *(name of individual)* _____ , who is

designated by law to accept service of process on behalf of *(name of organization)* _____

_____ on *(date)* _____ ; or

❒ I returned the summons unexecuted because _____ ; or

❒ Other *(specify):*

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

_____

Server's signature

_____

Printed name and title

_____

Server's address

Additional information regarding attempted service, etc:

Print Save As... Reset

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

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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

Shaheena A. Simons
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Educational Opportunities Section
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United States Department of Justice

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ATTORNEYS FOR THE UNITED STATES OF AMERICA

JS 44 (Rev. 11/15)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS
UNITED STATES OF AMERICA

(b) County of Residence of First Listed Plaintiff _____
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
ATTACHMENT B

DEFENDANTS
ATTACHMENT A

County of Residence of First Listed Defendant Durham County
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*
ATTACHMENT B

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☒ 1 U.S. Government Plaintiff
- ☐ 2 U.S. Government Defendant
- ☐ 3 Federal Question *(U.S. Government Not a Party)*
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☒ 440 Other Civil Rights
- ☐ 441 Voting
- ☒ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☒ 448 Education

PRISONER PETITIONS

Habeas Corpus:
- ☐ 463 Alien Detainee
- ☐ 510 Motions to Vacate Sentence
- ☐ 530 General
- ☐ 535 Death Penalty

Other:
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Management Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Employee Retirement Income Security Act

IMMIGRATION
- ☐ 462 Naturalization Application
- ☐ 465 Other Immigration Actions

BANKRUPTCY
- ☐ 422 Appeal 28 USC 158
- ☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
- ☐ 375 False Claims Act
- ☐ 376 Qui Tam (31 USC 3729(a))
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District *(specify)* ☐ 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity)*:
42 U.S.C. 2000e, et seq.; 42 U.S.C. 13925(b)(13); 20 U.S.C. 1681, et seq., 28 C.F.R. Part 54, 34 C.F.R. Part 106

Brief description of cause:
Violation of federal civil rights acts by compliance with & implementation of N.C. Session Law 2016-3, House Bill 2

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A **CLASS ACTION** UNDER RULE 23, F.R.Cv.P.

DEMAND $

CHECK YES only if demanded in complaint:
JURY DEMAND: ☐ Yes ☐ No

VIII. RELATED CASE(S) IF ANY *(See instructions)*:

JUDGE Thomas D. Schroeder DOCKET NUMBER 1:16-cv-236

DATE 5/9/16

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

ATTACHMENT A

DEFENDANTS

Continued from the Civil Cover Sheet:

State of North Carolina; Governor Patrick McCrory, in his official capacity as Governor of North Carolina; North Carolina Department of Public Safety; University of North Carolina; Board of Governors of the University of North Carolina

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