

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

UNITED STATES OF AMERICA,

*Plaintiff,*

v.

STATE OF NORTH CAROLINA, *et al.*,

*Defendants.*

Case No. 1:16-cv-00425

**UNC DEFENDANTS' SUPPLEMENTAL BRIEF IN SUPPORT OF JOINT  
MOTION TO ENJOIN AUTOMATIC SUSPENSION OF VAWA FUNDS**

North Carolina's Public Facilities Privacy and Security Act (the Act) states that public agencies "shall require every multiple occupancy bathroom or changing facility to be designated for and only used by persons based on their biological sex." N.C. Gen. Stat. § 143-760(b). Because the Act contains no specific enforcement mechanisms, however, the University of North Carolina has taken no steps to enforce it and has stated that it has no plans to do so. Despite the absence of any enforcement action by the University, the Federal Government has brought this lawsuit against the University and its Board of Governors (collectively UNC Defendants) under the Violence Against Women Reauthorization Act of 2013 (VAWA).

As an enforcement mechanism, VAWA provides for the automatic suspension of VAWA funding when the Attorney General brings a civil action against a funding recipient, unless a court grants preliminary relief halting the automatic suspension. Recognizing that suspension of VAWA funding to the UNC Defendants would be

inappropriate because of the irreparable harm it would cause to the students, faculty, and staff who rely on services supported by the funding, the Federal Government and UNC Defendants filed a joint motion requesting preliminary relief halting the suspension. Joint Mot. to Enjoin Automatic Suspension, ECF No. 37. At the Court's invitation, the UNC Defendants submit this Supplemental Brief in support of the motion.

### ARGUMENT

VAWA prohibits discrimination “on the basis of . . . sex [or] gender identity” “under any program or activity funded in whole or in part with [VAWA] funds.” 42 U.S.C. § 13925(b)(13)(A). It provides that “[t]he authority of the Attorney General . . . to enforce this [prohibition] shall be the same as it is under [42 U.S.C. § 3789d].” *Id.* § 13925(b)(13)(C). Section 3789d(c)(2)(E), in turn, provides:

Whenever the Attorney General files a civil action . . . and neither party within forty-five days after such filing has been granted such preliminary relief with regard to the suspension or payment of funds as may otherwise be available by law, the Office of Justice Programs shall cause to have suspended further payment of any funds [to the noncompliant program or activity].

VAWA thus expressly contemplates that courts have authority to grant “preliminary relief with regard to the suspension or payment of funds.”

In this case, the Federal Government (the provider of the funding) and the UNC Defendants (the recipient) both agree that preliminary relief is appropriate, and have jointly moved for such relief. The UNC Defendants fully agree with the Federal Government that, under these circumstances, the court should use a more relaxed standard than the test for preliminary injunctions when deciding whether to grant relief.

That said, the Court should still grant preliminary relief even if it concludes that the usual preliminary-injunction standard governs and that all four preliminary-injunction factors are pertinent. As shown below, the UNC Defendants are likely to succeed against the VAWA claim because there is no credible threat that UNC students or employees are or will be denied the use of restrooms and changing facilities consistent with their gender identity; irreparable harm will occur if VAWA funding is suspended; and the balance of hardships and public interest both favor allowing VAWA funding to continue.

Accordingly, the UNC Defendants respectfully request that this Court enter an order relieving the Department of Justice of its obligation to automatically suspend the payment of VAWA funds to the UNC Defendants.

#### **I. THE UNC DEFENDANTS ARE LIKELY TO SUCCEED AGAINST THE VAWA CLAIM**

A defendant succeeds against a claim “even if the cour[t] . . . rejects the . . . claim for a nonmerits reason.” *CRST Van Expedited, Inc. v. EEOC*, 136 S. Ct. 1642, 1651 (2016). A defendant (unlike a plaintiff) can thus establish likelihood of success against a claim by showing that a procedural obstacle—such as lack of jurisdiction—precludes the court from entertaining that claim. *See, e.g., Aslam v. Chertoff*, No. 07-331, 2008 WL 341434, \*1 (E.D. Va. Feb. 4, 2008) (defendants’ argument that court lacks subject-matter jurisdiction shows likelihood of success); *Hong Leong Fin. Ltd. v. Pinnacle Performance Ltd.*, 297 F.R.D. 69, 74 (S.D.N.Y. 2013) (same).

In this case, the UNC Defendants are likely to succeed against the Federal Government’s VAWA claim because threshold obstacles preclude the court from hearing

that claim in the first place. As the UNC Defendants have already explained at greater length in a companion case (*see* UNC Defts’ Br. in Resp. to Plfs’ Mot. for Prelim. Inj., ECF No. 50, *Carcaño v. McCrory*, No. 16-236), the Act challenged by the Federal Government is silent about enforcement, and the UNC Defendants consequently neither enforce nor threaten to enforce it. This lack of ongoing or imminent enforcement means that the claims against the UNC Defendants are neither justiciable under Article III nor ripe as a prudential matter.

**A. The VAWA Claim Against The UNC Defendants Does Not Present A Justiciable Case Or Controversy Under Article III**

Article III of the Constitution limits the jurisdiction of federal courts to “Cases” and “Controversies.” U.S. Const. art. III, § 2, cl. 1. Article III expressly makes this limitation applicable “to Controversies to which the United States shall be a party.” *Id.* A challenge to the validity of a statute presents a justiciable case or controversy only if the defendant enforces or threatens to enforce the statute. *Doe v. Duling*, 782 F.2d 1202, 1206 (4th Cir. 1986). Yet, in light of the Act’s lack of enforcement provisions, the UNC Defendants have neither enforced nor threatened to enforce it.

**1. A challenge to a statute is justiciable only if the defendant enforces or threatens to enforce it**

The “mere existence” of a statute does not make a challenge to that statute “an adversary case” under Article III. *Poe v. Ullman*, 367 U.S. 497, 507 (1961) (plurality opinion); *see Doe*, 782 F.2d. at 1207. To the contrary, a challenge to a statute qualifies as a case or controversy only if the defendant enforces the statute, or there exists a “credible

threat” that the defendant will enforce the statute. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014); *see Doe*, 782 F.2d at 1206.

This credible-threat requirement flows from the doctrine of Article III standing. A plaintiff—including the United States—has standing to maintain a lawsuit in federal court only if (1) it has suffered an “injury in fact”—*i.e.*, an “invasion” of a judicially cognizable interest that is “concrete and particularized” and “actual or imminent,” (2) the injury is “fairly traceable to the challenged action of the defendant,” and (3) it is “likely” that “the injury will be redressed by a favorable decision.” *United States v. Windsor*, 133 S. Ct. 2675, 2686 (2013) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)) (alterations and internal quotation marks omitted); *see also, e.g., United States ex rel. Milam v. Univ. of Tex. M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 49 (4th Cir. 1992) (ordinary Article III standing requirements apply to cases brought on behalf of the United States). A challenged statute can cause “actual or imminent” injury only if the defendant is enforcing it, or if there is a “credible threat” that the defendant will enforce it. *Susan B. Anthony List*, 134 S. Ct. at 2341–42.

The credible-threat requirement also flows from the ripeness doctrine. Article III prohibits federal courts from adjudicating “abstract disagreements” that have not ripened into “concrete case[s] or controvers[ies].” *Thomas v. Union Carbide Agr. Prods. Co.*, 473 U.S. 568, 579–80 (1985). A disagreement about a statute’s validity does not become “a ripe controversy” until there is a “live dispute involving the actual or threatened application” of the challenged law. *Renne v. Geary*, 501 U.S. 312, 320–21 (1991).

The Supreme Court and Fourth Circuit have enforced the credible-threat requirement in a wide range of cases. *See, e.g., CIO v. McAdory*, 325 U.S. 472, 475 (1945) (holding that challenge to statutory provision regulating labor unions was not justiciable because state officials “ha[d] agreed not to enforce [the provision] until the final decision as to the [provision’s] validity [in a companion case]”); *Poe*, 367 U.S. at 508 (holding that challenge to law regulating contraception was not justiciable because “years of Connecticut history” revealed a “tacit agreement” not to enforce the law); *Doe*, 782 F.2d at 1206 (holding that challenge to law prohibiting “fornication and cohabitation” was not justiciable because “[r]ecorded cases” and “recent arrest records” revealed that the challengers “face[d] only the most theoretical threat of prosecution”).

As these cases make clear, the requirement that plaintiffs demonstrate a credible threat of enforcement protects vitally important interests. It “maintains proper separation of powers” by ensuring that federal courts do not “come to operate as second vetoes, through whom laws must pass for approval before they could be enforced.” *Id.* at 1205–06. It safeguards “the integrity of the judicial process” (*Poe*, 367 U.S. at 505) by “provid[ing] courts with arguments sharpened by the adversarial process” and “narrow[ing] the scope of judicial scrutiny to specific facts” (*Doe*, 782 F.2d at 1205). And it “protects federalism by allowing the states to control the application of their own” statutes. *Id.*

**2. The Act does not address enforcement, and the UNC Defendants do not enforce or threaten it**

To show that the defendant enforces or threatens to enforce a statute, a plaintiff

“must show more than the fact that state officials stand ready to perform their general duty to enforce laws.” *Vernon Beigay, Inc. v. Traxler*, 790 F.2d 1088, 1091 (4th Cir. 1986). A defendant negates the existence of a case or controversy by “agree[ing] not to enforce” the law. *CIO*, 325 U.S. at 475.

In this case, there is no allegation that the UNC Defendants enforce or threaten to enforce the Act. The Federal Government’s complaint (understandably) does not identify any instance in which the UNC Defendants have taken or threatened to take any disciplinary action (or any other enforcement steps) against a person who uses a bathroom consistent with his or her gender identity.

To the contrary, the record unequivocally demonstrates that this lawsuit is not justiciable. President Margaret Spellings and other University officials have said time and again—to employees, students, and the Department of Justice—that the Act itself does not contain enforcement provisions, and that the University accordingly does not intend to enforce the Act:

- “The Act does not contain provisions concerning enforcement of the bathroom and changing facility requirements.” Guidance Memorandum 2, Spellings Decl. Ex. 4.
- “We caution that the law does not address enforcement and confers no authority for the University or any other public agency to undertake enforcement actions.” Spellings April 11 Statement, Francisco Decl. Ex. A.

- “The law does not address enforcement and confers no authority for the University . . . to undertake enforcement actions. . . . The University has no process or means to enforce [the Act’s] provisions.” Shanahan April 13 Letter to Department of Justice, Francisco Decl. Ex. B.
- “Throughout all of this time, the University has recognized that the Act does not address enforcement and therefore has not taken any steps to enforce the statute’s requirements on its campuses.” Spellings May 9 Letter to Department of Justice, Francisco Decl. Ex. C.
- “The University has not threatened to enforce the Act’s requirement that the University require individuals to use the restroom or changing facility that corresponds with their biological sex, as listed on their birth certificate. In fact, I have repeatedly cautioned the constituent institutions that the Act confers no enforcement authority on the University or any other entity.” Spellings Decl. ¶ 13.
- “If any transgender student or employee does complain that they have been forced to use a restroom inconsistent with their gender identity, I will ensure that the complaint is investigated to determine whether there has been a violation of the University nondiscrimination policy and applicable law.” *Id.* ¶ 15.
- “Pending a final judgment in this case, I have no intent to exercise my authority to promulgate any guidelines or regulations that require that

transgender students use the restrooms consistent with their biological sex.”

*Id.* ¶ 16.

In light of these repeated assurances, any suggestion that the UNC Defendants will enforce the Act is purely speculative.

**3. Arguments that the VAWA claim is justiciable lack merit**

**a. The Guidance Memorandum does not make the VAWA claim justiciable**

As noted in the Government’s complaint, a Guidance Memorandum issued by President Spellings to Chancellors of constituent institutions states that ““University institutions must require every multiple-occupancy bathroom and changing facility to be designated for and used only by persons based on their biological sex.”” Compl. ¶ 20. The quoted statement, however, is not a description of the University’s policy; it is instead a description of the Act’s provisions. The Guidance Memorandum and other statements issued by University officials make plain that the UNC Defendants have not changed (and do not intend to change) their nondiscrimination policies, and that the UNC Defendants have not taken (and do not intend to take) any disciplinary or other action to enforce the Act.

To begin, the Guidance Memorandum as a whole makes it abundantly clear that the language quoted above describes *the Act’s* requirements, not *the University’s* position. The memorandum “responds to requests for guidance . . . concerning *the Act’s requirements.*” Guidance Memorandum 1 (emphasis added). It explains that “[*t*]he Act requires multiple occupancy bathrooms and changing facilities in government buildings

to be designated for and only used by persons based on biological sex.” *Id.* (emphasis added). It continues: “2. What are the University’s obligations *under the Act* relating to bathrooms and changing facilities? A: 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.” *Id.* (emphasis added and deleted).

Subsequent statements confirm that the quoted language from the Guidance Memorandum merely describes the Act’s requirements. President Spellings’ April 11 Statement explains that the Guidance Memorandum is “a Q&A summary of the requirements of the [Act]” and “provid[es] factual guidance on the requirements of the law.” A letter from the University to the Department of Justice states *twice* that the memorandum “provides only factual statements on the requirements of [the Act].” Shanahan Letter at 2, 5.

In all events, even if the University had imposed an independent “requirement” excluding transgender people from bathrooms consistent with their gender identity—and it has not—the Federal Government’s VAWA claim against the UNC Defendants *still* would not be justiciable. A challenge to a university policy (no less than a challenge to a statute) qualifies as a case or controversy only if the defendant enforces or threatens to enforce the policy; the bare existence of a policy does not suffice. *Rock for Life-UMBC v. Hrabowski*, 411 Fed. Appx. 541, 548 (4th Cir. 2010); *Lopez v. Candele*, 630 F.3d 775, 781 (9th Cir. 2010). Here, even if the University had a policy of excluding transgender people from bathrooms consistent with their gender identity—and it does not—the UNC

Defendants have neither enforced nor threatened to enforce it.

**b. The University's response to the Act does not make the VAWA claim justiciable**

Nor does the allegation that the UNC Defendants are “compl[ying] with” the Act (Compl. ¶ 47) render this case justiciable, because “complying with” a law is not the same thing as enforcing or threatening to enforce it. Indeed, the University has done only three things to comply with the Act: (1) maintained existing bathroom signage designating bathrooms for use by men or use by women, (2) provided factual information about what the Act says, and (3) provided information about the location of single-occupancy bathrooms. Guidance Memorandum 2. None of these measures discriminates on the basis of sex or gender identity, and none does anything to prevent transgender people from using bathrooms consistent with their gender identity. In short, VAWA does not forbid any of the actions that the UNC Defendants *did* take (the actions detailed above); instead, under the Federal Government's interpretation, it forbids actions that the UNC Defendants have not taken and are not imminently poised to take (enforcement of the Act). The VAWA claim is therefore not justiciable, and the UNC Defendants are accordingly likely to succeed against it.

**B. The VAWA Claim Against The UNC Defendants Is Not Prudentially Ripe**

Even if there were Article III jurisdiction here, the VAWA claim against the UNC Defendants still would not be “ripe for judicial review” as a “prudential” matter. *Nat'l Park Hospitality Ass'n v. Dept. of Interior*, 538 U.S. 803, 808 (2003); *see also Sansotta v. Town of Nags Head*, 724 F.3d 533, 545 (4th Cir. 2013) (distinguishing “constitutional”

from “prudential ripeness”). To determine whether a case is prudentially ripe, “courts must balance ‘the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.’” *Franks v. Ross*, 313 F.3d 184, 194 (4th Cir. 2002) (quoting *Ohio Forestry Ass’n v. Sierra Club*, 523 U.S. 726, 733 (1998)). The plaintiff bears “[t]he burden of proving ripeness.” *Miller v. Brown*, 462 F.3d 312, 319 (4th Cir. 2006).

The same reasons that preclude justiciability under Article III also preclude fitness for judicial review. “[P]rematurity and abstractness” constitute “insuperable obstacles” to judicial review (*Socialist Labor Party v. Gilligan*, 406 U.S. 583, 588 (1972)), and a challenge to a state law is both “premature” and “abstract” so long as there is no imminent threat of enforcement (*Doe*, 782 F.2d at 1207–08). *See, e.g., Int’l Acad. of Oral Med. & Toxicology v. N.C. State Bd. of Dental Exam’rs*, 451 F. Supp. 2d 746, 751 (E.D.N.C. 2006) (holding that a challenge to an administrative policy concerning dental practices was unfit for review because the state dental board “d[id] not plan to take any action” on the basis of the policy). Here, the challenge is both premature and abstract because the UNC Defendants have not and do not plan to take any enforcement action on the basis of the Act.

Nor would this Court’s refusal to exercise jurisdiction cause hardship. “The hardship prong is measured by the immediacy of the threat and the burden imposed on the [people] who would be compelled to act under threat of enforcement of the challenged law.” *Miller*, 462 F.3d at 319. Immediate review is justified only if the harm

“is immediate, direct, and significant.” *W. Va. Highlands Conservancy, Inc. v. Babbitt*, 161 F.3d 797, 801 (4th Cir. 1998); *see, e.g., Charter Fed. Sav. Bank v. Office of Thrift Supervision*, 976 F.2d 203, 209 (4th Cir. 1992) (refusing to review a claim against an agency because “several contingencies separate[d] [the plaintiff] from a threat of . . . agency action”). In this case, of course, there is *no* threat of enforcement—much less an *immediate* one—and thus no immediate, direct, and significant harm.

In sum, the lack of fitness and absence of hardship render the VAWA claim against the UNC Defendants is prudentially unripe. It follows that the UNC Defendants are likely to succeed when defending against the claim.

## **II. SUSPENSION OF FUNDS THREATENS IRREPARABLE INJURY TO THE UNC DEFENDANTS**

As Chief Justice Roberts recently explained in his capacity as Circuit Justice for the Fourth Circuit, a state government suffers an “ongoing irreparable harm” to its “law enforcement and public safety interests” whenever its ability to prevent or respond to “serious crimes” is impaired. *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers). The harm remains irreparable even if it lasts only a short duration—for example, the “several months” it takes for a lawsuit to be resolved by a court. *Id.*

Suspending VAWA funds would significantly impair the UNC Defendants’ ability to prevent and respond to serious crimes. Constituent institutions of the University receive VAWA funds under the Grants to Reduce Sexual Assault, Domestic Violence, Dating Violence, and Stalking on Campus Program. In particular, constituent institutions have been awarded \$1,217,522 in VAWA grants since October 2012. Smith Decl. ¶ 3.

The Federal Government administers these awards on a cost-reimbursement basis—*i.e.*, constituent institutions make monthly claims and receive payments as reimbursements for their expenditures. *Id.* A total unexpended balance of \$674,098 has not yet been paid, and remains to be paid, to the constituent institutions. *Id.*

The constituent institutions rely on these funds in their efforts to prevent sexual assault, domestic and dating violence, and stalking. For example, VAWA funds support “programming and resources designed to prevent interpersonal violence on campus,” “a skills training program [that] . . . gives students the knowledge, skills, and confidence to recognize the early warning signs of violence and take preventive action,” and “[a program that] works to promote awareness of cultural factors that support violence and to combat these factors.” *Id.* ¶¶ 7, 14. Constituent institutions likewise rely on VAWA funds in their efforts to help victims of these crimes. For example, VAWA funds support “victim advocates,” “temporary nurses,” “direct services . . . to victims of interpersonal violence,” and “confidential resource[s] for students, faculty, and staff recovering from sexual assault, relationship violence, or stalking.” *Id.* ¶¶ 6, 11.

If federal funds were cut off, UNC constituent institutions’ ability to provide these services would be “significantly compromised.” *Id.* ¶¶ 4, 8, 15, 19. The impairment of these law-enforcement and public-safety interests is irreparable. *See King*, 133 S. Ct. at 3. Even if the suspended funds were subsequently restored, people who endured sexual assault, domestic or dating violence, or stalking in the meantime due to the funding suspension could not be made whole.

### **III. THE BALANCE OF HARDSHIPS AND PUBLIC INTEREST FAVOR THE UNC DEFENDANTS**

The UNC Defendants, the Federal Government, and the public all have an interest in the continued flow of VAWA funds to the University's constituent institutions. All of these entities seek to prevent, and help the victims of, sexual assault, domestic and dating violence, and stalking. As just explained, and as the Federal Government agrees, cutting off funds under VAWA would frustrate that interest.

To be sure, the Federal Government and the public also have a countervailing interest in the enforcement of VAWA's prohibition upon discrimination on the basis of sex and gender identity. VAWA's express authorization of "preliminary relief with regard to the suspension or payment of funds," however, shows that Congress believed that other interests sometimes outweigh the interest in using automatic funding suspensions to enforce VAWA. This is one of those times.

In the first place, the Federal Government *agrees* that the interest in protecting beneficiaries of VAWA funds outweighs the interest in immediately suspending funds as a tool to prevent an alleged violation of VAWA in the present circumstances. Understandably so; while eliminating unlawful discrimination is unquestionably a weighty public objective, the interest in preventing sexual assault and domestic violence is likewise compelling. Here, as the parties have explained in their joint brief, these varying interests are best furthered by allowing VAWA funds to continue while the Government pursues its interest in enforcing VAWA and other laws in judicial proceedings. Mem. in Support of Joint Mot. 7–8, ECF No. 38. This is particularly so

given the assessment of the Executive Branch—the entity responsible for enforcing federal laws—about the relative importance of enforcing VAWA in these circumstances.

In any event, the focus of the Federal Government’s challenge is the Act enacted by the General Assembly, rather than any policy or practice adopted by the University. The UNC Defendants neither enforce nor threaten to enforce that Act, and all the actions they are taking in response to the Act comply with even the Federal Government’s interpretation of VAWA. As a result, any interest in enforcing VAWA does not apply to the UNC Defendants. It would frustrate rather than promote VAWA’s goals to suspend funding under these circumstances.

### CONCLUSION

This Court should grant the Joint Motion to Enjoin Automatic Suspension of VAWA Funds as to the UNC Defendants.

Dated: June 20, 2016

Respectfully submitted,

/s/ Carolyn C. Pratt  
Carolyn C. Pratt  
NC Bar No. 38438  
The University of North Carolina  
P.O. Box 2688  
Chapel Hill, NC 27515  
Tel: (919) 962-3406  
Fax: (919) 962-0477  
Email: ccpratt@northcarolina.edu

/s/ Noel J. Francisco  
Noel J. Francisco  
Glen D. Nager  
James M. Burnham  
JONES DAY  
51 Louisiana Avenue NW  
Washington, DC 20001  
Tel: (202) 879-3939  
Fax: (202) 626-1700  
Email: njfrancisco@jonesday.com

*Counsel for the University of North Carolina and the Board of Governors of the  
University of North Carolina*

## CERTIFICATE OF SERVICE

I certify that on June 20, 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notice of electronic filing to all registered parties.

Dated: June 20, 2016

/s/ Noel J. Francisco

Noel J. Francisco

JONES DAY

51 Louisiana Avenue NW

Washington, DC 20001

Tel: (202) 879-3939

Fax: (202) 626-1700

Email: njfrancisco@jonesday.com

*Counsel for the University of North Carolina  
and the Board of Governors of the University of  
North Carolina*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

**JOAQUÍN CARCAÑO; et al.,**

*Plaintiffs,*

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

**v.**

**PATRICK MCCRORY, et al.,**

*Defendants*

**DECLARATION OF PRESIDENT SPELLINGS**

I, Margaret Spellings, President of the University of North Carolina, declare:

1. I am the President of the University of North Carolina (the “University”), a North Carolina, public and multi-campus university.

2. As President of the University, I am the chief administrative and executive officer of the University with complete authority to manage the affairs and execute the policies of the University and its constituent institutions, subject to the direction and control of the Board of Governors and the provisions of *The Code of the Board of Governors* (“*The Code*”). *The Code*, Sec. 501 A. Exhibit 1.

3. The University’s seventeen constituent institutions receive federal financial assistance from the United States Department of Education and the University must comply with the requirements of Title IX of the Education Amendments of 1972 (“Title IX”), which prohibit discrimination on the basis of sex.

4. The University has a policy of prohibiting “discrimination against any person on the basis of . . . sex, sexual orientation, [or] gender identity.” *The Code*, Sec. 103. Exhibit 2.

5. The University, in accordance with its non-discrimination policies, does not have a policy or practice of prohibiting transgender students from using single-sex restrooms consistent with their gender identity.

6. On March 23, 2016, the North Carolina General Assembly passed the Public Facilities Privacy and Security Act, Act of March 23, 2016, 2016 N.C. Sess. Laws 3 (“the Act”), which amended the North Carolina General Statutes to provide, among other things, that the University and all other public agencies “shall require every multiple occupancy bathroom or changing facility to be designated for and only used by persons based on their biological sex,” which is defined as “the physical condition of being male or female, which is stated on a person’s birth certificate.” Exhibit 3.

7. On April 5, 2016, I sent a memorandum entitled “Guidance - Compliance with the Public Facilities Privacy & Security Act” (“Guidance Memorandum”) to the chancellors of the University’s constituent institutions that set forth the requirements of the Act. Exhibit 4.

8. The Guidance Memorandum stated that the Act “does not require University institutions to change their nondiscrimination policies, and those policies should remain in effect.”

9. The Guidance Memorandum cautioned the chancellors that “[t]he Act does not contain provisions concerning enforcement of the bathroom and changing facility requirements.”

10. The Guidance Memorandum noted that “UNC institutions already designate and label multiple-occupancy bathrooms and changing facilities for single-sex use with signage and should maintain these designations and signage.”

11. The Guidance Memorandum also reminded institutions that they could “provide accommodations such as single-occupancy bathrooms or changing facilities and may designate those facilities as gender-neutral.”

12. At the time of the Act’s passage, the University had no policy and had not issued any instructions to any of its constituent institutions directing that they require students, employees, or third parties to use the restroom or changing facility that corresponds with their biological sex, as listed on their birth certificate.

13. The University has not threatened to enforce the Act’s requirement that the University require individuals to use the restroom or changing facility that corresponds with their biological sex, as listed on their birth certificate. In fact, I

have repeatedly cautioned the constituent institutions that the Act confers no enforcement authority on the University or any other entity.

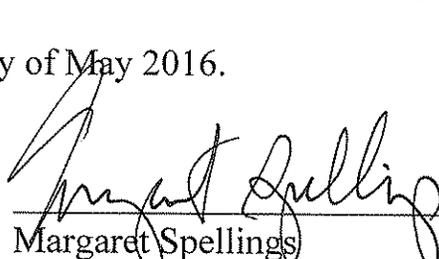
14. Since the passage of the Act, I am not aware of any complaints from any transgender students or employees that any University staff or administrator has required them to use the restroom or changing facility that corresponds with their biological sex, as listed on their birth certificate.

15. If any transgender student or employee does complain that they have been forced to use a restroom inconsistent with their gender identity, I will ensure that the complaint is investigated to determine whether there has been a violation of the University nondiscrimination policy and applicable law.

16. Pending a final judgment in this case, I have no intent to exercise my authority to promulgate any guidelines or regulations that require that transgender students use the restrooms consistent with their biological sex. UNC Policy Manual 100.2 3.(a). Exhibit 5.

17. I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 26<sup>th</sup> day of May 2016.

  
\_\_\_\_\_  
Margaret Spellings  
President of the University of North Carolina

# **EXHIBIT 1**

*CODE*

SECTION 501. PRESIDENT OF THE UNIVERSITY.

501 A. General Authority.

The president of the University of North Carolina shall be the chief administrative and executive officer of the University. [See G.S. 116-14(a)] The president shall have complete authority to manage the affairs and execute the policies of the University of North Carolina and its constituent institutions, subject to the direction and control of the Board of Governors and the provisions of this Code. The president shall personally represent before the state, the region and the nation the ideals and the spirit of the University of North Carolina. As the chief executive, the president shall be the official administrative spokesperson for and the interpreter of the University to the alumni and alumnae as a whole, the news media, the educational world, and the general public. The president shall be responsible for the presentation and interpretation of all University policies, recommendations, and requests to the General Assembly, the governor, state officers and commissions, and the federal government.

501 B. Relation of the President to the Board of Governors.

(1) The president, as the chief executive officer of the University, shall perform all duties prescribed by the Board of Governors. The president shall be responsible to the Board of Governors for the prompt and effective execution of all laws relating to the University of North Carolina and of all resolutions, policies, rules, and regulations adopted by the board for the operation of the University of North Carolina and for the government of any and all of its constituent institutions, and the president's discretionary powers shall be broad enough to meet the extensive responsibilities of the presidency.

(2) The president shall make recommendations to the Board of Governors with respect to the adoption, modification, revision or reversal of policies, rules, and regulations applicable to the University of North Carolina and any or all of its constituent institutions. To this end, the president shall establish and maintain agencies of inquiry and administrative lines of communication, which include the constituent institutions, to ensure prompt perception of needs for problem identification and analysis, decision, and policy formulation.

(3) The president shall prepare and submit to the Board of Governors such reports and recommendations concerning the University of North Carolina and its constituent institutions as the president may deem wise or as the board may require.

(4) The president shall attend and may participate in, without the privilege of voting, the meetings of the Board of Governors and its various committees, and the president may attend the meetings of all the boards of trustees.

(5) The president shall be the official administrative medium of communication between the Board of Governors and all individuals, officials, agencies, and organizations, both within and without the University and its constituent institutions.

(6) The president, consistent with the provisions of Section 500 B(2), shall make nominations for all appointments that are to be acted upon by the Board of Governors and shall make recommendations for all promotions, salaries, transfers, suspensions, and dismissals that are to be acted upon by the board. The board reserves the right, in all instances, to act on its own initiative.

(7) The president shall assume, and retain at all times, control over the budget of the University of North Carolina, subject to the direction and control of the Board of Governors. The president shall prepare the proposed budget of the University of North Carolina and shall submit such proposed budget to the Board of Governors for approval; administrative procedures uniformly applicable to all institutions shall be established by the president to ensure that each institution has full opportunity to provide information

and advice concerning the formulation of such proposed budget. The president shall be responsible for the presentation and explanation of budget requests approved by the Board of Governors to the director of the budget and the Advisory Budget Commission, the General Assembly and its committees, officers, and members. The president shall be responsible for the execution of the budget of the University of North Carolina as approved by the General Assembly. All revisions of the budget which require approval of the Advisory Budget Commission shall be acted upon by the Board of Governors on recommendation of the president.

(8) The president, with the approval of the Board of Governors, shall appoint an advisory committee composed of representative presidents of the private colleges and universities of the state. [See G.S. 116-14(c)]

501 C. Relation of the President to the University.

(1) The president shall be the leader of the University of North Carolina and its constituent institutions and shall coordinate the activities of all constituent institutions in accordance with the principle of allocated functions prescribed by the Board of Governors. The president shall promote the general welfare and development of the University in its several parts and as a whole.

(2) The president shall be a member of, and shall have the privilege of attending meetings of, all faculties of the constituent institutions of the University of North Carolina.

(3) In the absence of policies prescribed by the Board of Governors, the president shall resolve all issues of jurisdiction and dispute among the constituent institutions of the University.

(4) Repealed

(5) The president may refer for investigation, report, and advice any question of University concern to any council, faculty, or scientific, extension, or administrative staff.

(6) The medium for official communications between the president and the constituent institutions of the University shall be the respective chancellors.

(7) The president shall establish administrative organizations to carry out the policies of the University and shall interpret these organizations to the Board of Governors and to the officers and faculties of the University. The president shall ensure that the University and its constituent institutions are properly staffed with personnel competent to discharge their responsibilities effectively. In carrying out the president's duties and responsibilities, the president shall be assisted by staff officers and by the chancellors of the constituent institutions. The president shall prescribe the duties and assignments of the staff officers reporting to the president. The president may establish and define the duties of all-University councils and committees to advise and assist the president in the execution of the president's duties. The president may delegate to other officers portions of the president's duties and responsibilities, with the required authority for their fulfillment. However, such delegation shall not reduce the president's overall responsibility for those portions of duties which the president may choose to delegate.

# EXHIBIT 2

*CODE*

SECTION 103.

EQUALITY OF OPPORTUNITY IN THE UNIVERSITY.

Admission to, employment by, and promotion in the University of North Carolina and all of its constituent institutions shall be on the basis of merit, and there shall be no unlawful discrimination against any person on the basis of race, color, religion, sex, sexual orientation, gender identify, national origin, age, disability, genetic information, or veteran status.

# **EXHIBIT 3**

GENERAL ASSEMBLY OF NORTH CAROLINA  
SECOND EXTRA SESSION 2016

SESSION LAW 2016-3  
HOUSE BILL 2

1 AN ACT TO PROVIDE FOR SINGLE-SEX MULTIPLE OCCUPANCY BATHROOM AND  
2 CHANGING FACILITIES IN SCHOOLS AND PUBLIC AGENCIES AND TO CREATE  
3 STATEWIDE CONSISTENCY IN REGULATION OF EMPLOYMENT AND PUBLIC  
4 ACCOMMODATIONS.

5 Whereas, the North Carolina Constitution directs the General Assembly to provide for  
6 the organization and government of all cities and counties and to give cities and counties such  
7 powers and duties as the General Assembly deems advisable in Section 1 of Article VII of the  
8 North Carolina Constitution; and

9 Whereas, the North Carolina Constitution reflects the importance of statewide laws  
10 related to commerce by prohibiting the General Assembly from enacting local acts regulating  
11 labor, trade, mining, or manufacturing in Section 24 of Article II of the North Carolina  
12 Constitution; and

13 Whereas, the General Assembly finds that laws and obligations consistent statewide for  
14 all businesses, organizations, and employers doing business in the State will improve intrastate  
15 commerce; and

16 Whereas, the General Assembly finds that laws and obligations consistent statewide for  
17 all businesses, organizations, and employers doing business in the State benefit the businesses,  
18 organizations, and employers seeking to do business in the State and attracts new businesses,  
19 organizations, and employers to the State; Now, therefore,

20  
21 The General Assembly of North Carolina enacts:

22  
23  
24 **PART I. SINGLE-SEX MULTIPLE OCCUPANCY BATHROOM AND CHANGING**  
25 **FACILITIES**

26 **SECTION 1.1.** G.S. 115C-47 is amended by adding a new subdivision to read:

27 "(63) To Establish Single-Sex Multiple Occupancy Bathroom and Changing  
28 Facilities. – Local boards of education shall establish single-sex multiple  
29 occupancy bathroom and changing facilities as provided in G.S. 115C-521.2."

30 **SECTION 1.2.** Article 37 of Chapter 115C of the General Statutes is amended by  
31 adding a new section to read:

32 **"§ 115C-521.2. Single-sex multiple occupancy bathroom and changing facilities.**

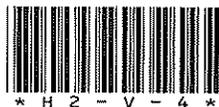
33 (a) Definitions. – The following definitions apply in this section:

34 (1) Biological sex. – The physical condition of being male or female, which is  
35 stated on a person's birth certificate.

36 (2) Multiple occupancy bathroom or changing facility. – A facility designed or  
37 designated to be used by more than one person at a time where students may be  
38 in various states of undress in the presence of other persons. A multiple  
39 occupancy bathroom or changing facility may include, but is not limited to, a  
40 school restroom, locker room, changing room, or shower room.

41 (3) Single occupancy bathroom or changing facility. – A facility designed or  
42 designated to be used by only one person at a time where students may be in  
43 various states of undress. A single occupancy bathroom or changing facility  
44 may include, but is not limited to, a single stall restroom designated as unisex  
45 or for use based on biological sex.

46 (b) Single-Sex Multiple Occupancy Bathroom and Changing Facilities. – Local boards of  
47 education shall require every multiple occupancy bathroom or changing facility that is designated  
48 for student use to be designated for and used only by students based on their biological sex.



1 (c) Accommodations Permitted. – Nothing in this section shall prohibit local boards of  
2 education from providing accommodations such as single occupancy bathroom or changing  
3 facilities or controlled use of faculty facilities upon a request due to special circumstances, but in  
4 no event shall that accommodation result in the local boards of education allowing a student to use  
5 a multiple occupancy bathroom or changing facility designated under subsection (b) of this section  
6 for a sex other than the student's biological sex.

7 (d) Exceptions. – This section does not apply to persons entering a multiple occupancy  
8 bathroom or changing facility designated for use by the opposite sex:

9 (1) For custodial purposes.

10 (2) For maintenance or inspection purposes.

11 (3) To render medical assistance.

12 (4) To accompany a student needing assistance when the assisting individual is an  
13 employee or authorized volunteer of the local board of education or the  
14 student's parent or authorized caregiver.

15 (5) To receive assistance in using the facility.

16 (6) To accompany a person other than a student needing assistance.

17 (7) That has been temporarily designated for use by that person's biological sex."

18 **SECTION 1.3.** Chapter 143 of the General Statutes is amended by adding a new

19 Article to read:

20 "Article 81.

21 "Single-Sex Multiple Occupancy Bathroom and Changing Facilities.

22 "**§ 143-760. Single-sex multiple occupancy bathroom and changing facilities.**

23 (a) Definitions. – The following definitions apply in this section:

24 (1) Biological sex. – The physical condition of being male or female, which is  
25 stated on a person's birth certificate.

26 (2) Executive branch agency. – Agencies, boards, offices, departments, and  
27 institutions of the executive branch, including The University of North Carolina  
28 and the North Carolina Community College System.

29 (3) Multiple occupancy bathroom or changing facility. – A facility designed or  
30 designated to be used by more than one person at a time where persons may be  
31 in various states of undress in the presence of other persons. A multiple  
32 occupancy bathroom or changing facility may include, but is not limited to, a  
33 restroom, locker room, changing room, or shower room.

34 (4) Public agency. – Includes any of the following:

35 a. Executive branch agencies.

36 b. All agencies, boards, offices, and departments under the direction and  
37 control of a member of the Council of State.

38 c. "Unit" as defined in G.S. 159-7(b)(15).

39 d. "Public authority" as defined in G.S. 159-7(b)(10).

40 e. A local board of education.

41 f. The judicial branch.

42 g. The legislative branch.

43 h. Any other political subdivision of the State.

44 (5) Single occupancy bathroom or changing facility. – A facility designed or  
45 designated to be used by only one person at a time where persons may be in  
46 various states of undress. A single occupancy bathroom or changing facility  
47 may include, but is not limited to, a single stall restroom designated as unisex  
48 or for use based on biological sex.

49 (b) Single-Sex Multiple Occupancy Bathroom and Changing Facilities. – Public agencies  
50 shall require every multiple occupancy bathroom or changing facility to be designated for and only  
51 used by persons based on their biological sex.

52 (c) Accommodations Permitted. – Nothing in this section shall prohibit public agencies  
53 from providing accommodations such as single occupancy bathroom or changing facilities upon a  
54 person's request due to special circumstances, but in no event shall that accommodation result in  
55 the public agency allowing a person to use a multiple occupancy bathroom or changing facility  
56 designated under subsection (b) of this section for a sex other than the person's biological sex.

57 (d) Exceptions. – This section does not apply to persons entering a multiple occupancy  
58 bathroom or changing facility designated for use by the opposite sex:

59 (1) For custodial purposes.

- 1           (2)    For maintenance or inspection purposes.
- 2           (3)    To render medical assistance.
- 3           (4)    To accompany a person needing assistance.
- 4           (4a) For a minor under the age of seven who accompanies a person caring for that
- 5               minor.
- 6           (5)    That has been temporarily designated for use by that person's biological sex."
- 7

8   **PART II. STATEWIDE CONSISTENCY IN LAWS RELATED TO EMPLOYMENT AND**  
9   **CONTRACTING**

10           **SECTION 2.1.** G.S. 95-25.1 reads as rewritten:

11   "**§ 95-25.1. Short title and legislative purpose; local governments preempted.**

12       (a)    This Article shall be known and may be cited as the "Wage and Hour Act."

13       (b)    The public policy of this State is declared as follows: The wage levels of employees,  
14 hours of labor, payment of earned wages, and the well-being of minors are subjects of concern  
15 requiring legislation to promote the general welfare of the people of the State without jeopardizing  
16 the competitive position of North Carolina business and industry. The General Assembly declares  
17 that the general welfare of the State requires the enactment of this law under the police power of  
18 the State.

19       (c)    The provisions of this Article supersede and preempt any ordinance, regulation,  
20 resolution, or policy adopted or imposed by a unit of local government or other political  
21 subdivision of the State that regulates or imposes any requirement upon an employer pertaining to  
22 compensation of employees, such as the wage levels of employees, hours of labor, payment of  
23 earned wages, benefits, leave, or well-being of minors in the workforce. This subsection shall not  
24 apply to any of the following:

- 25           (1)    A local government regulating, compensating, or controlling its own  
26               employees.
- 27           (2)    Economic development incentives awarded under Chapter 143B of the General  
28               Statutes.
- 29           (3)    Economic development incentives awarded under Article 1 of Chapter 158 of  
30               the General Statutes.
- 31           (4)    A requirement of federal community development block grants.
- 32           (5)    Programs established under G.S. 153A-376 or G.S. 160A-456."

33   **SECTION 2.2.** G.S. 153A-449(a) reads as rewritten:

34       (a)    Authority. – A county may contract with and appropriate money to any person,  
35 association, or corporation, in order to carry out any public purpose that the county is authorized  
36 by law to engage in. A county may not require a private contractor under this section to abide by  
37 ~~any restriction that the county could not impose on all employers in the county, such as paying~~  
38 ~~minimum wage or providing paid sick leave to its employees, regulations or controls on the~~  
39 ~~contractor's employment practices or mandate or prohibit the provision of goods, services, or~~  
40 ~~accommodations to any member of the public as a condition of bidding on a contract, contract or a~~  
41 ~~qualification-based selection, except as otherwise required or allowed by State law."~~

42   **SECTION 2.3.** G.S. 160A-20.1(a) reads as rewritten:

43       (a)    Authority. – A city may contract with and appropriate money to any person,  
44 association, or corporation, in order to carry out any public purpose that the city is authorized by  
45 law to engage in. A city may not require a private contractor under this section to abide by ~~any~~  
46 ~~restriction that the city could not impose on all employers in the city, such as paying minimum~~  
47 ~~wage or providing paid sick leave to its employees, regulations or controls on the contractor's~~  
48 ~~employment practices or mandate or prohibit the provision of goods, services, or accommodations~~  
49 ~~to any member of the public as a condition of bidding on a contract, contract or a~~  
50 ~~qualification-based selection, except as otherwise required or allowed by State law."~~

51  
52   **PART III. PROTECTION OF RIGHTS IN EMPLOYMENT AND PUBLIC**  
53   **ACCOMMODATIONS**

54           **SECTION 3.1.** G.S. 143-422.2 reads as rewritten:

55   "**§ 143-422.2. Legislative declaration.**

56       (a)    It is the public policy of this State to protect and safeguard the right and opportunity of  
57 all persons to seek, obtain and hold employment without discrimination or abridgement on  
58 account of race, religion, color, national origin, age, biological sex or handicap by employers  
59 which regularly employ 15 or more employees.

1 (b) It is recognized that the practice of denying employment opportunity and  
2 discriminating in the terms of employment foments domestic strife and unrest, deprives the State  
3 of the fullest utilization of its capacities for advancement and development, and substantially and  
4 adversely affects the interests of employees, employers, and the public in general.

5 (c) The General Assembly declares that the regulation of discriminatory practices in  
6 employment is properly an issue of general, statewide concern, such that this Article and other  
7 applicable provisions of the General Statutes supersede and preempt any ordinance, regulation,  
8 resolution, or policy adopted or imposed by a unit of local government or other political  
9 subdivision of the State that regulates or imposes any requirement upon an employer pertaining to  
10 the regulation of discriminatory practices in employment, except such regulations applicable to  
11 personnel employed by that body that are not otherwise in conflict with State law."

12 SECTION 3.2. G.S. 143-422.3 reads as rewritten:

13 **"§ 143-422.3. Investigations; conciliations.**

14 The Human Relations Commission in the Department of Administration shall have the  
15 authority to receive charges of discrimination from the Equal Employment Opportunity  
16 Commission pursuant to an agreement under Section 709(b) of Public Law 88-352, as amended by  
17 Public Law 92-261, and investigate and conciliate charges of discrimination. Throughout this  
18 process, the agency shall use its good offices to effect an amicable resolution of the charges of  
19 discrimination. This Article does not create, and shall not be construed to create or support, a  
20 statutory or common law private right of action, and no person may bring any civil action based  
21 upon the public policy expressed herein."

22 SECTION 3.3. Chapter 143 of the General Statutes is amended by adding a new  
23 Article to read:

24 "Article 49B.

25 "Equal Access to Public Accommodations.

26 **"§ 143-422.10. Short title.**

27 This Article shall be known and may be cited as the Equal Access to Public Accommodations  
28 Act.

29 **"§ 143-422.11. Legislative declaration.**

30 (a) It is the public policy of this State to protect and safeguard the right and opportunity of  
31 all individuals within the State to enjoy fully and equally the goods, services, facilities, privileges,  
32 advantages, and accommodations of places of public accommodation free of discrimination  
33 because of race, religion, color, national origin, or biological sex, provided that designating  
34 multiple or single occupancy bathrooms or changing facilities according to biological sex, as  
35 defined in G.S. 143-760(a)(1), (3), and (5), shall not be deemed to constitute discrimination.

36 (b) The General Assembly declares that the regulation of discriminatory practices in places  
37 of public accommodation is properly an issue of general, statewide concern, such that this Article  
38 and other applicable provisions of the General Statutes supersede and preempt any ordinance,  
39 regulation, resolution, or policy adopted or imposed by a unit of local government or other  
40 political subdivision of the State that regulates or imposes any requirement pertaining to the  
41 regulation of discriminatory practices in places of public accommodation.

42 **"§ 143-422.12. Places of public accommodation – defined.**

43 For purposes of this Article, places of public accommodation has the same meaning as defined  
44 in G.S. 168A-3(8), but shall exclude any private club or other establishment not, in fact, open to  
45 the public.

46 **"§ 143-422.13. Investigations; conciliations.**

47 The Human Relations Commission in the Department of Administration shall have the  
48 authority to receive, investigate, and conciliate complaints of discrimination in public  
49 accommodations. Throughout this process, the Human Relations Commission shall use its good  
50 offices to effect an amicable resolution of the complaints of discrimination. This Article does not  
51 create, and shall not be construed to create or support, a statutory or common law private right of  
52 action, and no person may bring any civil action based upon the public policy expressed herein."

53  
54 **PART IV. SEVERABILITY**

55 SECTION 4. If any provision of this act or its application is held invalid, the  
56 invalidity does not affect other provisions or applications of this act that can be given effect  
57 without the invalid provisions or application, and to this end the provisions of this act are  
58 severable. If any provision of this act is temporarily or permanently restrained or enjoined by  
59 judicial order, this act shall be enforced as though such restrained or enjoined provisions had not

1 been adopted, provided that whenever such temporary or permanent restraining order or injunction  
2 is stayed, dissolved, or otherwise ceases to have effect, such provisions shall have full force and  
3 effect.  
4

5 **PART V. EFFECTIVE DATE**

6 **SECTION 5.** This act is effective when it becomes law and applies to any action  
7 taken on or after that date, to any ordinance, resolution, regulation, or policy adopted or amended  
8 on or after that date, and to any contract entered into on or after that date. The provisions of  
9 Sections 2.1, 2.2, 2.3, 3.1, 3.2, and 3.3 of this act supersede and preempt any ordinance, resolution,  
10 regulation, or policy adopted prior to the effective date of this act that purports to regulate a  
11 subject matter preempted by this act or that violates or is not consistent with this act, and such  
12 ordinances, resolutions, regulations, or policies shall be null and void as of the effective date of  
13 this act.

14 In the General Assembly read three times and ratified this the 23<sup>rd</sup> day of March, 2016.  
15

16  
17 s/ Daniel J. Forest  
18 President of the Senate  
19

20  
21 s/ Tim Moore  
22 Speaker of the House of Representatives  
23

24  
25 s/ Pat McCrory  
26 Governor  
27

28  
29 Approved 9:57 p.m. this 23<sup>rd</sup> day of March, 2016

# EXHIBIT 4

**Constituent Universities**

Appalachian  
State University

East Carolina  
University

Elizabeth City  
State University

Fayetteville State  
University

North Carolina  
Agricultural and  
Technical State  
University

North Carolina  
Central University

North Carolina  
State University  
at Raleigh

University of  
North Carolina  
at Asheville

University of  
North Carolina  
at Chapel Hill

University of  
North Carolina  
at Charlotte

University of  
North Carolina  
at Greensboro

University of  
North Carolina  
at Pembroke

University of  
North Carolina  
at Wilmington

University of  
North Carolina  
School of the Arts

Western Carolina  
University

Winston-Salem  
State University

**Constituent High School**

North Carolina  
School of Science  
and Mathematics

An Equal Opportunity/  
Affirmative Action Employer

**Margaret Spellings  
President**

Office: 919-962-9000

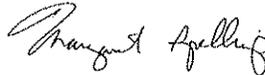
Fax: 919-843-9695

Email: [margaret.spellings@northcarolina.edu](mailto:margaret.spellings@northcarolina.edu)

**MEMORANDUM**

**TO:** Chancellors

**FROM:** Margaret Spellings



**DATE:** April 5, 2016

**SUBJECT:** Guidance - Compliance with the Public Facilities Privacy & Security Act

The General Assembly and Governor McCrory enacted the Public Facilities Privacy & Security Act (the "Act," copy attached) on March 23, 2016. This memorandum responds to requests for guidance from UNC system institutions concerning the Act's requirements.

The Act amends the state's public policy statement regarding nondiscrimination, and provides that it supersedes nondiscrimination regulations imposed upon employers and public accommodations by political subdivisions of the state, including local governments. The Act does not limit the ability of local governments and universities to adopt policies with respect to their own employees. The Act requires multiple occupancy bathrooms and changing facilities in government buildings to be designated for and only used by persons based on biological sex.

1. *Does the Act require the University to change its nondiscrimination policies?*

*Answer:* No. The Act does not require University institutions to change their nondiscrimination policies, and those policies should remain in effect.

2. *What are the University's obligations under the Act relating to bathrooms and changing facilities?*

*Answer:* 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.

3. *How should University institutions meet their obligations related to bathrooms and changing facilities?*

*Answer:* University institutions should take the following actions to fully meet their obligations under the Act:

- a. Designate and label multiple-occupancy bathrooms and changing facilities for single-sex use with signage.
- b. Provide notice of the Act to campus constituencies as appropriate.
- c. Consider assembling and making information available about the locations of designated single-occupancy bathrooms and changing facilities on campus.

UNC institutions already designate and label multiple-occupancy bathrooms and changing facilities for single-sex use with signage and should maintain these designations and signage. Institutions may provide accommodations such as single-occupancy bathrooms or changing facilities and may designate those facilities as gender-neutral.

4. *Does the Act address enforcement of the bathroom and changing facility provisions?*

*Answer:* The Act does not contain provisions concerning enforcement of the bathroom and changing facility requirements.

5. *What is the status of the lawsuit filed against the Governor, the Attorney General, and the University and how will it affect the implementation of the Act?*

*Answer:* The lawsuit is pending in federal court. The plaintiffs include a student, a faculty member, and a staff member from UNC system institutions. Once the lawsuit is formally served, the University will have several weeks to file a response. The lawsuit alleges that the Act violates rights to equal protection, due process, and privacy protected by the United States Constitution and discriminates on the basis of sex in violation of Title IX. The plaintiffs have asked the court to declare the Act unconstitutional and to stop the state from enforcing its provisions. The Attorney General has announced that he will not represent the Governor or the University in the lawsuit. The University will work with the Attorney General's office to make arrangements for counsel in the lawsuit. Like all public agencies, the University is required to fulfill its obligations under the law unless or until the court directs otherwise.

6. *What should constituent institutions do if contacted by a federal regulatory agency concerning the Act and its implementation?*

*Answer:* If your institution is contacted by a federal agency with questions about the Act, please notify the Division of Legal Affairs at UNC General Administration.

7. *What is the effective date of the Act?*

*Answer:* The Act took effect and became law on March 23, 2016.

8. *Are there any other issues that institutions should consider?*

*Answer:* State and federal law protect personal privacy and limit the personal information that may be requested and/or disclosed by the University concerning students, employees, visitors, patients, and others. In addition, constituent institutions must continue to operate in accordance with their nondiscrimination policies and must take prompt and appropriate action to prevent and address any instances of harassment and discrimination in violation of University policies.

If you have specific questions about your facilities and the Act, please address those with your campus legal counsel. We will continue to provide further guidance and information as appropriate.

Attachment

GENERAL ASSEMBLY OF NORTH CAROLINA  
SECOND EXTRA SESSION 2016

HOUSE BILL 2  
RATIFIED BILL

AN ACT TO PROVIDE FOR SINGLE-SEX MULTIPLE OCCUPANCY BATHROOM AND CHANGING FACILITIES IN SCHOOLS AND PUBLIC AGENCIES AND TO CREATE STATEWIDE CONSISTENCY IN REGULATION OF EMPLOYMENT AND PUBLIC ACCOMMODATIONS.

Whereas, the North Carolina Constitution directs the General Assembly to provide for the organization and government of all cities and counties and to give cities and counties such powers and duties as the General Assembly deems advisable in Section 1 of Article VII of the North Carolina Constitution; and

Whereas, the North Carolina Constitution reflects the importance of statewide laws related to commerce by prohibiting the General Assembly from enacting local acts regulating labor, trade, mining, or manufacturing in Section 24 of Article II of the North Carolina Constitution; and

Whereas, the General Assembly finds that laws and obligations consistent statewide for all businesses, organizations, and employers doing business in the State will improve intrastate commerce; and

Whereas, the General Assembly finds that laws and obligations consistent statewide for all businesses, organizations, and employers doing business in the State benefit the businesses, organizations, and employers seeking to do business in the State and attracts new businesses, organizations, and employers to the State; Now, therefore,

The General Assembly of North Carolina enacts:

**PART I. SINGLE-SEX MULTIPLE OCCUPANCY BATHROOM AND CHANGING FACILITIES**

**SECTION 1.1.** G.S. 115C-47 is amended by adding a new subdivision to read:

"(63) To Establish Single-Sex Multiple Occupancy Bathroom and Changing Facilities. – Local boards of education shall establish single-sex multiple occupancy bathroom and changing facilities as provided in G.S. 115C-521.2."

**SECTION 1.2.** Article 37 of Chapter 115C of the General Statutes is amended by adding a new section to read:

**"§ 115C-521.2. Single-sex multiple occupancy bathroom and changing facilities.**

(a) Definitions. – The following definitions apply in this section:

- (1) Biological sex. – The physical condition of being male or female, which is stated on a person's birth certificate.
- (2) Multiple occupancy bathroom or changing facility. – A facility designed or designated to be used by more than one person at a time where students may be in various states of undress in the presence of other persons. A multiple occupancy bathroom or changing facility may include, but is not limited to, a school restroom, locker room, changing room, or shower room.
- (3) Single occupancy bathroom or changing facility. – A facility designed or designated to be used by only one person at a time where students may be in various states of undress. A single occupancy bathroom or changing facility may include, but is not limited to, a single stall restroom designated as unisex or for use based on biological sex.

(b) Single-Sex Multiple Occupancy Bathroom and Changing Facilities. – Local boards of education shall require every multiple occupancy bathroom or changing facility that is



designated for student use to be designated for and used only by students based on their biological sex.

(c) Accommodations Permitted. – Nothing in this section shall prohibit local boards of education from providing accommodations such as single occupancy bathroom or changing facilities or controlled use of faculty facilities upon a request due to special circumstances, but in no event shall that accommodation result in the local boards of education allowing a student to use a multiple occupancy bathroom or changing facility designated under subsection (b) of this section for a sex other than the student's biological sex.

(d) Exceptions. – This section does not apply to persons entering a multiple occupancy bathroom or changing facility designated for use by the opposite sex:

- (1) For custodial purposes.
- (2) For maintenance or inspection purposes.
- (3) To render medical assistance.
- (4) To accompany a student needing assistance when the assisting individual is an employee or authorized volunteer of the local board of education or the student's parent or authorized caregiver.
- (5) To receive assistance in using the facility.
- (6) To accompany a person other than a student needing assistance.
- (7) That has been temporarily designated for use by that person's biological sex."

**SECTION 1.3.** Chapter 143 of the General Statutes is amended by adding a new Article to read:

"Article 81.

"Single-Sex Multiple Occupancy Bathroom and Changing Facilities.

**"§ 143-760. Single-sex multiple occupancy bathroom and changing facilities.**

(a) Definitions. – The following definitions apply in this section:

- (1) Biological sex. – The physical condition of being male or female, which is stated on a person's birth certificate.
- (2) Executive branch agency. – Agencies, boards, offices, departments, and institutions of the executive branch, including The University of North Carolina and the North Carolina Community College System.
- (3) Multiple occupancy bathroom or changing facility. – 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. A multiple occupancy bathroom or changing facility may include, but is not limited to, a restroom, locker room, changing room, or shower room.
- (4) Public agency. – Includes any of the following:
  - a. Executive branch agencies.
  - b. All agencies, boards, offices, and departments under the direction and control of a member of the Council of State.
  - c. "Unit" as defined in G.S. 159-7(b)(15).
  - d. "Public authority" as defined in G.S. 159-7(b)(10).
  - e. A local board of education.
  - f. The judicial branch.
  - g. The legislative branch.
  - h. Any other political subdivision of the State.
- (5) Single occupancy bathroom or changing facility. – A facility designed or designated to be used by only one person at a time where persons may be in various states of undress. A single occupancy bathroom or changing facility may include, but is not limited to, a single stall restroom designated as unisex or for use based on biological sex.

(b) Single-Sex Multiple Occupancy Bathroom and Changing Facilities. – Public agencies shall require every multiple occupancy bathroom or changing facility to be designated for and only used by persons based on their biological sex.

(c) Accommodations Permitted. – Nothing in this section shall prohibit public agencies from providing accommodations such as single occupancy bathroom or changing facilities upon a person's request due to special circumstances, but in no event shall that accommodation result in the public agency allowing a person to use a multiple occupancy bathroom or

changing facility designated under subsection (b) of this section for a sex other than the person's biological sex.

(d) Exceptions. – This section does not apply to persons entering a multiple occupancy bathroom or changing facility designated for use by the opposite sex:

- (1) For custodial purposes.
- (2) For maintenance or inspection purposes.
- (3) To render medical assistance.
- (4) To accompany a person needing assistance.
- (4a) For a minor under the age of seven who accompanies a person caring for that minor.
- (5) That has been temporarily designated for use by that person's biological sex."

## **PART II. STATEWIDE CONSISTENCY IN LAWS RELATED TO EMPLOYMENT AND CONTRACTING**

**SECTION 2.1.** G.S. 95-25.1 reads as rewritten:

**"§ 95-25.1. Short title and legislative ~~purpose~~; purpose; local governments preempted.**

(a) This Article shall be known and may be cited as the "Wage and Hour Act."  
(b) The public policy of this State is declared as follows: The wage levels of employees, hours of labor, payment of earned wages, and the well-being of minors are subjects of concern requiring legislation to promote the general welfare of the people of the State without jeopardizing the competitive position of North Carolina business and industry. The General Assembly declares that the general welfare of the State requires the enactment of this law under the police power of the State.

(c) The provisions of this Article supersede and preempt any ordinance, regulation, resolution, or policy adopted or imposed by a unit of local government or other political subdivision of the State that regulates or imposes any requirement upon an employer pertaining to compensation of employees, such as the wage levels of employees, hours of labor, payment of earned wages, benefits, leave, or well-being of minors in the workforce. This subsection shall not apply to any of the following:

- (1) A local government regulating, compensating, or controlling its own employees.
- (2) Economic development incentives awarded under Chapter 143B of the General Statutes.
- (3) Economic development incentives awarded under Article 1 of Chapter 158 of the General Statutes.
- (4) A requirement of federal community development block grants.
- (5) Programs established under G.S. 153A-376 or G.S. 160A-456."

**SECTION 2.2.** G.S. 153A-449(a) reads as rewritten:

(a) Authority. – A county may contract with and appropriate money to any person, association, or corporation, in order to carry out any public purpose that the county is authorized by law to engage in. A county may not require a private contractor under this section to abide by ~~any restriction that the county could not impose on all employers in the county, such as paying minimum wage or providing paid sick leave to its employees,~~ regulations or controls on the contractor's employment practices or mandate or prohibit the provision of goods, services, or accommodations to any member of the public as a condition of bidding on a ~~contract~~ contract or a qualification-based selection, except as otherwise required or allowed by State law."

**SECTION 2.3.** G.S. 160A-20.1(a) reads as rewritten:

(a) Authority. – A city may contract with and appropriate money to any person, association, or corporation, in order to carry out any public purpose that the city is authorized by law to engage in. A city may not require a private contractor under this section to abide by ~~any restriction that the city could not impose on all employers in the city, such as paying minimum wage or providing paid sick leave to its employees,~~ regulations or controls on the contractor's employment practices or mandate or prohibit the provision of goods, services, or accommodations to any member of the public as a condition of bidding on a ~~contract~~ contract or a qualification-based selection, except as otherwise required or allowed by State law."

## PART III. PROTECTION OF RIGHTS IN EMPLOYMENT AND PUBLIC ACCOMMODATIONS

SECTION 3.1. G.S. 143-422.2 reads as rewritten:

### "§ 143-422.2. Legislative declaration.

(a) It is the public policy of this State to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of race, religion, color, national origin, age, biological sex or handicap by employers which regularly employ 15 or more employees.

(b) It is recognized that the practice of denying employment opportunity and discriminating in the terms of employment foments domestic strife and unrest, deprives the State of the fullest utilization of its capacities for advancement and development, and substantially and adversely affects the interests of employees, employers, and the public in general.

(c) The General Assembly declares that the regulation of discriminatory practices in employment is properly an issue of general, statewide concern, such that this Article and other applicable provisions of the General Statutes supersede and preempt any ordinance, regulation, resolution, or policy adopted or imposed by a unit of local government or other political subdivision of the State that regulates or imposes any requirement upon an employer pertaining to the regulation of discriminatory practices in employment, except such regulations applicable to personnel employed by that body that are not otherwise in conflict with State law."

SECTION 3.2. G.S. 143-422.3 reads as rewritten:

### "§ 143-422.3. Investigations; conciliations.

The Human Relations Commission in the Department of Administration shall have the authority to receive charges of discrimination from the Equal Employment Opportunity Commission pursuant to an agreement under Section 709(b) of Public Law 88-352, as amended by Public Law 92-261, and investigate and conciliate charges of discrimination. Throughout this process, the agency shall use its good offices to effect an amicable resolution of the charges of discrimination. This Article does not create, and shall not be construed to create or support, a statutory or common law private right of action, and no person may bring any civil action based upon the public policy expressed herein."

SECTION 3.3. Chapter 143 of the General Statutes is amended by adding a new Article to read:

"Article 49B.

"Equal Access to Public Accommodations.

### "§ 143-422.10. Short title.

This Article shall be known and may be cited as the Equal Access to Public Accommodations Act.

### "§ 143-422.11. Legislative declaration.

(a) It is the public policy of this State to protect and safeguard the right and opportunity of all individuals within the State to enjoy fully and equally the goods, services, facilities, privileges, advantages, and accommodations of places of public accommodation free of discrimination because of race, religion, color, national origin, or biological sex, provided that designating multiple or single occupancy bathrooms or changing facilities according to biological sex, as defined in G.S. 143-760(a)(1), (3), and (5), shall not be deemed to constitute discrimination.

(b) The General Assembly declares that the regulation of discriminatory practices in places of public accommodation is properly an issue of general, statewide concern, such that this Article and other applicable provisions of the General Statutes supersede and preempt any ordinance, regulation, resolution, or policy adopted or imposed by a unit of local government or other political subdivision of the State that regulates or imposes any requirement pertaining to the regulation of discriminatory practices in places of public accommodation.

### "§ 143-422.12. Places of public accommodation – defined.

For purposes of this Article, places of public accommodation has the same meaning as defined in G.S. 168A-3(8), but shall exclude any private club or other establishment not, in fact, open to the public.

### "§ 143-422.13. Investigations; conciliations.

The Human Relations Commission in the Department of Administration shall have the authority to receive, investigate, and conciliate complaints of discrimination in public accommodations. Throughout this process, the Human Relations Commission shall use its good

offices to effect an amicable resolution of the complaints of discrimination. This Article does not create, and shall not be construed to create or support, a statutory or common law private right of action, and no person may bring any civil action based upon the public policy expressed herein."

**PART IV. SEVERABILITY**

**SECTION 4.** If any provision of this act or its application is held invalid, the invalidity does not affect other provisions or applications of this act that can be given effect without the invalid provisions or application, and to this end the provisions of this act are severable. If any provision of this act is temporarily or permanently restrained or enjoined by judicial order, this act shall be enforced as though such restrained or enjoined provisions had not been adopted, provided that whenever such temporary or permanent restraining order or injunction is stayed, dissolved, or otherwise ceases to have effect, such provisions shall have full force and effect.

**PART V. EFFECTIVE DATE**

**SECTION 5.** This act is effective when it becomes law and applies to any action taken on or after that date, to any ordinance, resolution, regulation, or policy adopted or amended on or after that date, and to any contract entered into on or after that date. The provisions of Sections 2.1, 2.2, 2.3, 3.1, 3.2, and 3.3 of this act supersede and preempt any ordinance, resolution, regulation, or policy adopted prior to the effective date of this act that purports to regulate a subject matter preempted by this act or that violates or is not consistent with this act, and such ordinances, resolutions, regulations, or policies shall be null and void as of the effective date of this act.

In the General Assembly read three times and ratified this the 23<sup>rd</sup> day of March, 2016.

s/ Daniel J. Forest  
President of the Senate

s/ Tim Moore  
Speaker of the House of Representatives

\_\_\_\_\_  
Pat McCrory  
Governor

Approved \_\_\_\_\_ .m. this \_\_\_\_\_ day of \_\_\_\_\_, 2016

# **EXHIBIT 5**

### **Adoption of the Policy Manual, Rescission of Prior Policies and Promulgation of Policies**

The Board of Governors adopts *The University of North Carolina Policy Manual* as the official document articulating Board of Governors' policies and the administrative regulations and guidelines of the president. Policies existing prior to the adoption of this policy and not included in the *Policy Manual* are rescinded and are no longer in effect.

#### **1. Definitions**

a. **Policies:** Policies direct the University of North Carolina, its constituent institutions and affiliated entities according to the board's mission and philosophies. Policies should articulate in a concise manner the official statement of the board on issues it deems important to the governance of the University. The Board of Governors is the only entity that may establish a policy of the University.

b. **Regulations:** Regulations are those rules or requirements of the President that the General Administration, the constituent institutions and the designated affiliated entities are required to follow.

c. **Guidelines:** Guidelines are interpretations of policies or other requirements that are issued for the assistance of the General Administration, the constituent institutions and the University's affiliated entities in conducting the affairs of the University.

d. **Transmittal letters:** Transmittal letters will be used to transmit new or amended policies, regulations, or guidelines to the campuses. They will not contain information with long-term significance and will not be included in the *Policy Manual*. Transmittal letters will be sequentially numbered.

#### **2. Procedures for adoption or amendment of policies**

a. Before the board may adopt, amend or repeal a policy, a standing or special committee of the board must give notice of its proposed action concerning the policy by making a public announcement at a prior meeting of the board or by notice given to members of the board at least 28 days prior to the meeting at which action on the policy is proposed. At the meeting of the board at which the board is to take action, the committee's proposal may be adopted, adopted with amendments, or rejected.

b. Once a board policy is adopted, the Vice President and General Counsel will assign it an outline number and the Secretary of the University will incorporate it in the *Policy Manual*, denoting it in the contents with capital letters. The first page of every policy shall note its promulgation date and dates of amendment. Policies and amendments shall state an effective date if that date is different from the date of adoption.

c. The Secretary of the University will maintain a permanent record of each policy adopted or amended by the Board of Governors and will prepare a transmittal letter to transmit each to the vice presidents, chancellors, and others, as designated by the President.

#### **3. Procedures for adoption of regulations and guidelines**

a. Regulations and guidelines pertaining to board policies, or other matters not addressed by a policy, will be promulgated by the president and distributed to the campuses. The terms "policy," "policies," or "procedures" will not be used to designate regulations or guidelines.

b. Regulations or guidelines may be issued by the President on the President's initiative or on the recommendation of a vice president after the President's cabinet has had an opportunity to

review and comment on the proposal. All regulations and guidelines issued by the President will be signed and dated by the President.

c. The Vice President and General Counsel will assign an outline number for use when the regulation or guidelines are incorporated into the *Policy Manual*.

d. The President or the vice president responsible for proposing a new or amended regulation or guidelines shall, after it is signed by the President, prepare an appropriate transmittal letter, obtain a number for the transmittal letter from the Secretary of the University, and shall transmit it to the vice presidents, chancellors, Secretary of the University, and others, as designated by the President.

e. The Secretary of the University will control the numbering of transmittal letters and will keep a permanent record of each transmittal letter and the accompanying regulation or guideline.

4. Maintaining the *Policy Manual*

The *Policy Manual* will be maintained in hard copy form and in a format accessible via the world wide web. The Secretary of the University, in consultation with the Vice President and General Counsel, will be responsible for updating the electronic version of the *Policy Manual* regularly and the hard copy version of it biennially by including new or amended policies, regulations, and guidelines. Hard copies will be distributed to the members of the Board of Governors, the President, the vice presidents, chancellors, and others, as designated by the President.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

JOAQUÍN CARCAÑO, *et al.*

*Plaintiffs,*

v.

PATRICK MCCRORY, in his official capacity as  
Governor of North Carolina, *et al.*

*Defendants.*

Case No. 1:16-cv-00236

**DECLARATION OF NOEL J. FRANCISCO**

1. My name is Noel J. Francisco. I am a licensed attorney and represent the University of North Carolina, its Board of Governors, and the Chairman of the Board of Governors (collectively UNC Defendants) in the above-captioned case. I make this declaration in support of UNC Defendants' Brief in Response to Plaintiffs' Motion for Preliminary Injunction.

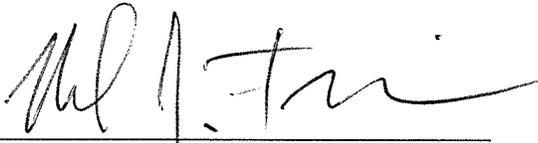
2. Attached as Exhibit A is a copy of a statement issued by Margaret Spellings, President of the University of North Carolina, on April 11, 2016, titled "President Spellings comments on Public Facilities Privacy and Security Act (HB2)."

3. Attached as Exhibit B is a copy of a letter sent by Thomas C. Shanahan, Senior Vice President and General Counsel of the University of North Carolina, to Shaheena Ahmad Simons, Acting Chief of the Educational Opportunities Section of the Civil Rights Division of the United States Department of Justice, on April 13, 2016.

4. Attached as Exhibit C is a copy of a letter sent by President Spellings to Vanita Gupta, Principal Deputy Assistant Attorney General of the United States, on May 9, 2016.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: June 9, 2016



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Noel J. Francisco

**Declaration of Noel J. Francisco**

# EXHIBIT A



## **President Spellings comments on Public Facilities Privacy and Security Act (HB2)**

Last week, UNC General Administration issued a Q&A summary of the requirements of the Public Facilities Privacy and Security Act (HB2) enacted on March 23. That Q&A was developed in response to campus requests for guidance on how to interpret the new law and how to apply it across the University. As a state institution, the University is bound to comply with HB2 and all other laws passed by the General Assembly and signed by the Governor.

We have heard from students, faculty, and staff who see HB2 as an effort to single out individuals based on their sexual orientation or gender identity for ridicule or harassment. They are hurt, angry, and even afraid. It is apparent that our providing factual guidance on the requirements of the law has been misinterpreted by many as an endorsement of the law. Nothing could be further from the truth.

The guidance we issued simply states what the General Assembly and Governor passed into law, and it addresses some key issues:

- We clarify that UNC and its campuses will not change existing non-discrimination policies that apply to all students and employees, and that we will not tolerate any sort of harassing or discriminatory behavior on the basis of gender identity or sexual orientation;
- We explicitly say that campuses need not change existing labeling of bathrooms; and
- We caution that the law does not address enforcement and confers no authority for the University or any other public agency to undertake enforcement actions.

The University's fundamental values include a commitment to diversity, inclusion, academic freedom, free speech, free expression, and the pursuit of free inquiry. We want our campuses to be welcoming and safe places for students and faculty of all backgrounds, beliefs and identities.

I have contacted state leaders and advised them that this law is sending a chill throughout the University of North Carolina. It is adversely affecting faculty, staff, and student recruitment and retention. Some alumni are rescinding donations. This law could negatively impact the significant federal funding on which the University relies. One federal lawsuit has already been filed. And major conferences hosted by UNC campuses are now being delayed, cancelled, or moved to other states. Legislative leaders tell me they are open to hearing the University's concerns during the upcoming legislative short session, and we plan to take full advantage of that opportunity.

We will continue to share information with the University community as it becomes available.

**Declaration of Noel J. Francisco**

# **EXHIBIT B**

**Constituent Universities**

Appalachian  
State University

East Carolina  
University

Elizabeth City  
State University

Fayetteville State  
University

North Carolina  
Agricultural and  
Technical State  
University

North Carolina  
Central University

North Carolina  
State University  
at Raleigh

University of  
North Carolina  
at Asheville

University of  
North Carolina  
at Chapel Hill

University of  
North Carolina  
at Charlotte

University of  
North Carolina  
at Greensboro

University of  
North Carolina  
at Pembroke

University of  
North Carolina  
at Wilmington

University of  
North Carolina  
School of the Arts

Western Carolina  
University

Winston-Salem  
State University

**Constituent High School**

North Carolina  
School of Science  
and Mathematics

An Equal Opportunity/  
Affirmative Action Employer

**Thomas C. Shanahan**  
**Senior Vice President and General Counsel**

Phone: 919-962-4588  
Fax: 919-962-0477  
Email: [tcshanahan@northcarolina.edu](mailto:tcshanahan@northcarolina.edu)

April 13, 2016

**VIA ELECTRONIC AND U.S. MAIL:** [shaheena.simons@usdoj.gov](mailto:shaheena.simons@usdoj.gov)

Ms. Shaheena Ahmad Simons, Acting Chief  
U.S. Department of Justice  
Civil Rights Division  
Educational Opportunities Section  
950 Pennsylvania Ave, NW  
Washington, D.C. 20530

**Subject:** The Department of Justice's request for information on the University of North Carolina's compliance with Title IX of the Education Amendments of 1972 (Title IX) and the federal regulations implementing Title IX and the Violence Against Women Reauthorization Act of 2013 (VAWA)

Dear Acting Chief Simons:

I write to respond to your letter of April 8, 2016, requesting information about the University of North Carolina's compliance with Title IX, the regulations implementing Title IX, and VAWA. The University of North Carolina (the University) is a public multi-campus university composed of sixteen institutions of higher education and a constituent high school. The University's constituent institutions receive federal financial support and are covered by Title IX and VAWA.

We understand that your request has been prompted by the enactment of the Public Facilities Privacy and Security Act (H.B. 2), which was passed by the North Carolina General Assembly on March 23, 2016, following a one-day special session. The bill was quickly signed into law by the Governor and took effect that same day. After first receiving notice of the bill's contents on the morning of the General Assembly's special session, University staff discovered that the University would be subject to Part I, Section 1.3 of H.B. 2 as a public agency of the State of North Carolina. The University advised the General Assembly through staff that, as written, the bill could conflict with the University's obligations under Title IX and other federal regulations or sub-regulatory guidance as a recipient of federal funds.

With that background and context, I am able to provide the following information and answers to your questions:

**1. Is the document attached to this letter a true and accurate copy of a memorandum from you to the UNC Chancellors?**

Yes. The memorandum you provided dated April 5, 2016, is a true and accurate copy of the memorandum from President Spellings to the UNC constituent institutions' chancellors.

**2. Does the attached memorandum still reflect the position of the UNC system regarding its obligations under, and its plans to comply with, H.B. 2?**

The April 5, 2016, memorandum provides only factual statements on the requirements of H.B. 2. It is neither an endorsement of the law nor a statement of the position of the University concerning H.B. 2. With regard to H.B. 2's specific provisions related to multiple-occupancy bathroom and changing facility identification and use, our constituent institutions had been labeling multiple-occupancy bathrooms and changing facilities for male or female use, and some had been designating single occupancy facilities for family/unisex/gender-neutral use, prior to the new law's passage. The memorandum affirms that the adoption of H.B. 2 will not result in any changes in our constituent institutions' practices for signage or labeling of bathrooms.

The memorandum also addresses three other key issues relevant to your inquiry:

- The University and its constituent institutions will not change existing non-discrimination policies that apply to all students and employees, and we will not tolerate any sort of harassing or discriminatory behavior on the basis of gender identity or sexual orientation. The University's Policy Statement on Equality of Opportunity in the University is included with this response, and continues to include gender identity and sexual orientation as protected statuses, along with race, color, religion, sex, national origin, age, disability, genetic information, and veteran status. See **Attachment 1**.
- The law does not address enforcement and confers no authority for the University or any other public agency to undertake enforcement actions. Moreover, state and federal law protect personal privacy and prohibit the University from requesting and disclosing personal information concerning students, employees, patients, and others.
- The University and its constituent institutions will continue to operate in accordance with our non-discrimination policies and will address and remedy any instances of discrimination and harassment in accordance with existing University policy and applicable law.

Following the issuance of the memorandum, President Spellings reaffirmed the University's fundamental commitment to diversity and inclusion and to ensuring that our campuses are welcoming and safe places for students and faculty of all backgrounds, beliefs, and identities. A written statement issued by President Spellings is included with this response as **Attachment 2**. She has maintained contact on this issue with state leaders, including the Governor and members of the General Assembly, and has informed them not only of the reactions to the law from our students, faculty, staff, and University communities, but explained how H.B. 2 has affected campus climate. President Spellings has also shared information with state leaders about the growing costs and impact that the passage of the law is having in areas such as faculty, staff, and student recruitment; attendance at and participation in academic conferences; private fundraising; and competition for research and grant funding.

**3. Please provide information about any additional steps UNC is taking to implement H.B. 2 beyond the issuance of the attached memorandum.**

The University is taking no additional action. The April 5, 2016, memorandum from President Spellings provides only factual statements about the requirements of H.B. 2. The University's non-discrimination policies and equal opportunity practices and procedures remain in place; they are unaffected by the passage of H.B. 2. The passage of H.B. 2 has not required any change in practices for labeling bathrooms. As noted above, President Spellings continues to talk with state leaders about the effects of the law on the University.

**4. Please provide any additional guidance documents that UNC has prepared for implementation of H.B. 2 on UNC campuses.**

The University has no other guidance documents prepared for implementation of H.B. 2.

**5. Please provide any other information that UNC believes is relevant for consideration.**

The University did not request that H.B. 2 be considered or adopted; however, 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. The Fourth Circuit has not yet determined whether discrimination based on "sex" includes discrimination based on "gender identity," and U.S. Supreme Court and Fourth Circuit case law is clear that state legislative enactments are presumptively valid and constitutional until an appropriate court determines otherwise.

During the special session on March 23, the University offered information and technical guidance to the General Assembly staff about the potential effects of the law. The University explained that H.B. 2's provisions could create tension with Title IX, Title VII, Executive Order 11246, as amended, and their associated regulations and with previous sub-regulatory guidance from the federal government. We also explained that the bill could affect more than \$1 billion in funding to the University's constituent institutions due to our receipt of federal financial aid and grants and the status of the University and many of our constituent institutions as federal contractors.

Because H.B. 2 permits employers to have more expansive non-discrimination policies for their own employees, the University will not change any of its existing policies and equal opportunity practices, which already address sexual orientation and gender identity. See again **Attachment 1** and **Attachment 2**. The Governor issued Executive Order No. 93 on April 12, 2016, to clarify H.B. 2's requirements, and it affirms the University's interpretation that this law permits the University to include broader non-discrimination protections for employees and students than H.B. 2 explicitly provides. See **Attachment 3**. Additionally, and consistent with the University's existing Policy Statement on Equality of Opportunity, Executive Order No. 93 further expands the state's employment policy for state employees by including sexual orientation and gender identity as protected statuses. Although Executive Order No. 93 affirms that H.B. 2 requires the University to comply with the provisions of the new law related to bathrooms and changing facilities, the executive order, like H.B. 2, does not address enforcement in any way. The University has no process or means to enforce H.B. 2's provisions. The University and its constituent institutions did not take steps to verify or prohibit individuals from accessing bathrooms according to their gender identity prior to H.B. 2's passage, and will not adopt any such practices as a result of H.B. 2's passage.

Shaheena Ahmad Simons, Acting Chief  
Page 4 of 5  
April 13, 2016

In drafting and considering the bill, we understand that some legislators and staff in the General Assembly may have relied in part upon information found in a flyer entitled “Dispelling the Myths.” This flyer is included with this response as **Attachment 4**. The flyer’s content is based on the observation that federal sub-regulatory guidance that identifies gender identity as a protected class has not been determined to be legally binding on the University and also that no school has lost federal funding since the enactment of Title IX.

We gather that in supporting H.B. 2, some members of the North Carolina General Assembly and staff have relied on the District Court’s order in *Grimm v. Gloucester County School Board*, a case now on appeal to the Fourth Circuit Court of Appeals. We know that the Department of Justice is fully familiar with that case, having filed a brief in support of the plaintiff, but some brief explanation may help put the provisions of H.B. 2 into context. In *Grimm*, a parent acting on behalf of her child who was born as a biological female but identifies and presents as male, contested the Gloucester County School Board’s resolution and resulting policy that required students to use restroom and locker room facilities that corresponded to their “biological genders” and that called for students with “gender identity issues” to be provided with alternative appropriate private facilities. The plaintiff challenged the policy under the Equal Protection Clause of the Fourteenth Amendment and Title IX of the Education Amendments of 1972 and also sought a preliminary injunction. The School Board filed a motion to dismiss the Title IX claim, and the District Court granted the motion upon determining that the Department of Education’s interpretive guidance that sex includes gender identity should not be given deference, in part because Title IX regulations are not ambiguous about the permissibility of having separate toilet or shower facilities based on sex. As you know, the District Court did not determine whether “sex” includes “gender identity.”

As you may also know, the University is now a named defendant in a federal lawsuit, *Carcaño, et al. v. McCrory, et al.*, brought by the ACLU, Equality North Carolina, and three individuals who are either students or employees at constituent institutions of the University. That complaint is included with this response as **Attachment 5**. This lawsuit was filed within days of the enactment of H.B. 2. It challenges the constitutionality of the law under the Fourteenth Amendment and asserts that H.B. 2’s treatment of transgender people violates Title IX of the Education Amendments of 1972. The plaintiffs are seeking declaratory and injunctive relief.

Appreciation of diversity and a commitment to inclusiveness are values inherent to the University. We therefore take our responsibilities under Title IX, Title VII, VAWA, Executive Orders 13672 and 11246, and other authority seriously. We are committed to providing safe and welcoming environments for all of our employees, students, and visitors. We will continue to work with our legislative leaders to address any concerns. We therefore welcome any additional authority or guidance that the Department of Justice or Department of Education may provide that would facilitate resolving this matter quickly.

Please let me know if you have any further questions or if I can be of additional assistance.

Sincerely,



Thomas C. Shanahan

Shaheena Ahmad Simons, Acting Chief  
Page 5 of 5  
April 13, 2016

cc: Margaret Spellings, President  
W. Louis Bissette, Jr., Chair of the UNC Board of Governors

Enclosures (5):

- Attachment 1 - Section 103 of *The Code of The University of North Carolina*
- Attachment 2 - President Spellings' Written Statement on H.B. 2 from April 12, 2016
- Attachment 3 - Executive Order No. 93 Issued by Governor McCrory on April 12, 2016
- Attachment 4 - "Dispelling the Myths" Flyer
- Attachment 5 - *Carcaño, et al. v. Patrick McCrory, Roy Cooper III, University of North Carolina; Board of Governors of the University of North Carolina; and W. Louis Bissette, Jr.*

**Declaration of Noel J. Francisco**

# EXHIBIT C

*Constituent Universities*

Appalachian  
State University

East Carolina  
University

Elizabeth City  
State University

Fayetteville State  
University

North Carolina  
Agricultural and  
Technical State  
University

North Carolina  
Central University

North Carolina  
State University  
at Raleigh

University of  
North Carolina  
at Asheville

University of  
North Carolina  
at Chapel Hill

University of  
North Carolina  
at Charlotte

University of  
North Carolina  
at Greensboro

University of  
North Carolina  
at Pembroke

University of  
North Carolina  
at Wilmington

University of  
North Carolina  
School of the Arts

Western Carolina  
University

Winston-Salem  
State University

*Constituent High School*

North Carolina  
School of Science  
and Mathematics

An Equal Opportunity/  
Affirmative Action Employer

**Margaret Spellings**  
**President**

Office: 919-962-9000

Fax: 919-843-9695

Email: [margaret.spellings@northcarolina.edu](mailto:margaret.spellings@northcarolina.edu)

May 9, 2016

Vanita Gupta  
Principal Deputy Assistant Attorney General  
U.S. Department of Justice  
Washington, D.C. 20530

Dear Ms. Gupta,

We write in response to your letter of May 4, 2016 notifying the University of North Carolina ("University") that the Department of Justice has concluded that the University is in violation of Title IX of the Education Amendments of 1972 ("Title IX"), the Violence Against Women Reauthorization Act of 2013 ("VAWA"), and Title VII of the Civil Rights Act of 1964 ("Title VII"). According to your letter, the basis for this determination is the fact that the University, as a state agency, is subject to the recently enacted North Carolina Public Facilities Privacy and Security Act ("the Act" or "House Bill 2"), which provides that all public agencies in North Carolina shall require every multiple-occupancy bathroom and changing facility to be designated for and used only by persons based on their biological sex.

The University takes its obligations to comply with federal non-discrimination statutes and their implementing regulations very seriously. We believe that the University has at all times acted in compliance with federal law, and the University intends to continue to comply in the future. Nothing is more important to the University than the safety and well-being of its students, faculty, and staff. We have always worked to make our campuses welcome and safe for students and faculty of all backgrounds, beliefs, and identities. Toward that end, longstanding policy prohibits University personnel from discriminating on the basis of, among other things, gender identity, sex, or sexual orientation.

After the Act's passage, our chancellors, faculty, staff, and students responded with a flurry of questions and expressed substantial concerns. My April 5 memorandum and April 11 statement regarding the Act reflected good faith efforts on behalf of the University to answer some of these questions and to offer reassurance. Communicating in real time was not only essential, but also exceedingly difficult given the uncertainty in response to the Act. Throughout all of this time, the University has recognized that the Act does not address enforcement and therefore has not taken any steps to enforce the statute's requirements on its campuses.

We hope that the Department of Justice appreciates that the University is in a difficult position. The University, created by the State of North Carolina, has an obligation to adhere to laws duly enacted by the State's General Assembly and Governor. So, too, does the University have an equally clear obligation to follow federal law, including federal prohibitions on discrimination. In ordinary circumstances, these obligations are not in tension. In this instance, however, the Department has explained the conflict it sees between the Act and federal civil rights law. The Act remains the law of the State, however, and the

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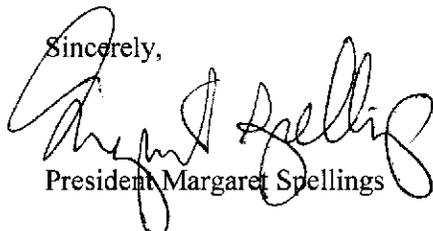
University has no independent power to change that legal reality. As you know, the question of whether Title IX requires schools to allow use of bathrooms and other single-sex facilities based on gender identity remains before the Fourth Circuit in *G.G. v. Gloucester County School Board*. A petition for rehearing *en banc* in that case is pending, and thus the Court has not issued its mandate.

In response to your request for assurances that the University is taking these matters seriously, the Board of Governors has scheduled a special meeting for tomorrow afternoon. At this time, the University pledges its good faith commitment to assure the proper application of non-discrimination law in the university setting, where there remain many difficult and unanswered questions.

We believe that this letter – which unequivocally confirms that the University has and will continue to comply with the requirements of Title IX, VAWA, and Title VII – should suffice at the present time to provide the assurance you sought about the University’s efforts to ensure continued compliance with federal law.

If I can answer any questions or be of any further assistance, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read 'Margaret Spellings', written in a cursive style.

President Margaret Spellings

cc: W. Louis Bisette, Jr.  
Thomas C. Shanahan

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

UNITED STATES OF AMERICA,

*Plaintiff,*

v.

STATE OF NORTH CAROLINA, *et al.*,

*Defendants.*

Case No. 1:16-cv-00425

**DECLARATION OF SARAH SMITH**

I, Sarah Smith, hereby declare:

1. I am the Director of Sponsored Programs at the University of North Carolina General Administration (“UNC-General Administration”).
2. As Director of Sponsored Programs, I am responsible for pre- and post-award administration of contracts and grants awarded to UNC-General Administration. I also serve as the primary liaison between UNC program directors and sponsors.
3. Since October of 2012, the constituent institutions of the University of North Carolina have received awards of federal funding under the Violence Against Women Act (“VAWA”) in the total amount of \$1,217,522. These awards are administered on a cost-reimbursement basis; constituent institutions make monthly claims and then receive payments to reimburse them for their expenditures. As of June 10, 2016, a total unexpended balance of \$674,098 has not yet been paid, and remains to be paid, to the constituent institutions.

4. There are currently three constituent institutions that receive funding directly from the federal government under VAWA: the University of North Carolina at Chapel Hill (“UNC-CH”), the University of North Carolina at Wilmington (“UNC-W”), and Elizabeth City State University (“ECSU”). As detailed below, the programming efforts by these institutions, which are aimed at preventing interpersonal violence and providing support to victims of interpersonal violence, would be significantly compromised if the funding for these programs were suspended.

5. UNC-CH receives funding under two grants from the United States Department of Justice under VAWA. In 2012, UNC-CH received a four-year grant in the total amount of \$299,978, and in 2015, it received an additional three-year grant in the total amount of \$299,123. Of this amount, an unexpended balance of \$400,750 has not yet been paid, and remains to be paid, to UNC-CH.

6. This funding supports personnel and other costs associated with UNC-CH’s Interpersonal Violence Prevention and Intervention Project. A portion of this award pays staff that provide direct services on a confidential basis to individuals who have been impacted by or the victims of interpersonal violence (sexual assault, dating violence, and stalking). These critical resources are in high demand by individuals on campus at UNC-CH.

7. These awards also support UNC-CH’s Title IX response programs and its One Act program, which is a skills training program for UNC-CH students. The training

gives students the knowledge, skills, and confidence to recognize the early warning signs of violence and take preventive action.

8. Without the VAWA grant funding, UNC-CH's capacity to provide support to victims of interpersonal violence as well as intervention programs would be significantly compromised.

9. UNC-W currently receives funding under two VAWA grants from the Department of Justice, in the total amount of \$300,000. Of this amount, an unexpended balance of \$173,348 has not yet been paid, and remains to be paid, to UNC-W.

10. This funding is used to support personnel and other costs associated with UNC-W's CROSSROADS Project, which provides services to individuals who have been impacted by interpersonal violence (sexual assault, dating violence, and stalking). These services are in high demand by individuals on campus at UNC-W.

11. UNC-W's VAWA awards also fund victim advocates, temporary nurses, and other resources dedicated to providing support for the University's Title IX response programs. This includes CARE, a confidential resource for students, faculty, and staff recovering from sexual assault, relationship violence, or stalking.

12. Without these resources, UNC-W's capacity to provide support to victims of interpersonal violence as well as intervention programs would be significantly compromised.

13. ECSU has received an award in the total amount of \$293,188 to fund its Prevention of Violence Against Women Project. Of this amount, an unexpended balance of \$100,000 has not yet been paid, and remains to be paid, to ECSU.

14. The Prevention of Violence Against Women Project is focused on providing programming and resources designed to prevent interpersonal violence on campus. A portion of these funds also support services provided by the Women's Center, which works to promote awareness of cultural factors that support violence and to combat these factors in efforts to change cultural norms on campus related to sexual assault, relationship violence, domestic violence, and stalking.

15. The loss of these important funds would significantly compromise ECSU's support, prevention, and outreach efforts related to interpersonal violence on campus.

16. Finally, in addition to the three institutions who receive direct federal funding under VAWA, North Carolina Agricultural & Technical University ("NC A&T") received sub-awards from Bennett College in the total amount of \$25,233 as part of a consortium grant on their joint Resources, Intervention, Services and Education Project ("RISE"). Of this amount, an unexpended balance of approximately of \$4,321 has not yet been paid, and remains to be paid, to NC A&T.

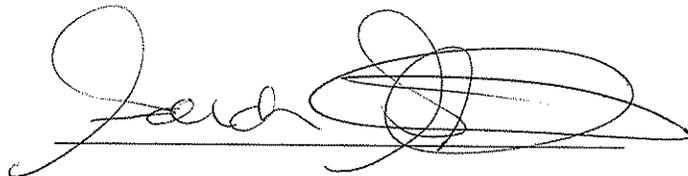
17. The RISE project is designed to help NC A&T's campus community reduce domestic violence, dating violence, sexual assault, and stalking. This will include activities such as outreach programming, training, and resources on victim safety, accountability, and prevention.

18. NC A&T's funding also supports on-going technical assistance provided by the Office of Violence Against Women, which assists and advises the institution on its sexual misconduct policies, website, training, programming.

19. The loss of these funds would severely compromise the successful implementation of NC A&T's RISE project and significantly impact the level of support for the University community in these areas.

20. I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 20<sup>th</sup> day of June 2016.

A handwritten signature in black ink, appearing to read "Sarah Smith", written over a horizontal line. The signature is stylized with large loops and flourishes.

Sarah Smith  
Director of Sponsored Programs  
The University of North Carolina