UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

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

Plaintiffs,

v.

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

Defendants,

and

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

Defendants-Intervenors.

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

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Underneath the inflammatory rhetoric in the legislative record, and the ominous speculation about criminals and predators in Defendants' briefs,[1] are the transgender people—including three young plaintiffs—who were quietly going about their lives, participating in and contributing to civil society before House Bill 2 ("H.B. 2") targeted them. Now, these plaintiffs and other transgender North Carolinians face the impossible choice of subjecting themselves to harassment and violence by using facilities plainly inconsistent with their gender; physical harm from not being able to use public restrooms to perform one of life's most basic functions; or violation of the law and their schools' policies and any consequences that follow. In essence, Plaintiffs' request for preliminary relief is about restoring the security, normalcy, and dignity that they—along with everyone else—possessed before H.B. 2 branded them as outcasts by expelling them from the public spaces they previously used without incident. In addition to suffering irreparable harm if an injunction does not issue, Plaintiffs are likely to succeed on the merits, the balance of hardships is in their favor, and the injunction sought is in the public interest. The Court should thus enter an order preliminarily enjoining Part I of H.B. 2.

[1] In response to Plaintiffs' motion for preliminary injunction (ECF No. 21) and supporting memorandum (ECF No. 22, or "Pl. Mem."), separate responses were filed by Governor McCrory ("Governor") at ECF No. 55 ("Gov. Opp."), the University of North Carolina ("UNC") Defendants at ECF No. 50 ("UNC Opp."), and Defendants-Intervenors ("Intervenors") at ECF No. 61 ("Int. Opp."). Except where otherwise specified, "Decl." (*e.g.*, "Mull Decl.") refers to declarations submitted with Plaintiffs' opening brief (ECF Nos. 22-1 *et seq.*), "Reply Decl." (*e.g.*, "McGarry Reply Decl.") refers to declarations submitted contemporaneously herewith, and exhibit numbers (*e.g.*, Ex. _) refer to exhibits to the Reply Declaration of Luke C. Platzer submitted contemporaneously herewith.

ARGUMENT

I. Plaintiffs Are Likely to Succeed on Their Title IX Claim.

A. Plaintiffs' Claims Against the UNC Defendants are Justiciable.

After making clear that they are subject to H.B. 2, the UNC Defendants now argue that the claims against them are not justiciable because, they contend, H.B. 2 imposes no new obligation on UNC, UNC has no power to enforce H.B. 2, and UNC has taken no steps to implement the law. UNC Opp. at 8-23. These arguments are belied both by the law and by UNC's own statements and actions: UNC is subject to H.B. 2's discriminatory mandate, has taken steps to implement that mandate, and is required to do so not only by UNC's general obligation to comply with state law, but also by H.B. 2's express terms. UNC's carefully drafted representations should not be allowed to obscure what is actually happening: since the passage of H.B. 2, transgender individuals on UNC campuses have ***not*** been free to use the restrooms or locker rooms that correspond to their gender identity.

UNC administrators' evasive statements do not provide Plaintiffs with assurance that they can live, learn, and work in UNC's facilities without fear of discriminatory consequences. To the contrary, UNC has made clear that "the University *is required* to fulfill its obligations under the law unless or until the [C]ourt directs otherwise." ECF No. 38-5 at 2 (emphasis added). Such direction from this Court is precisely the remedy Plaintiffs seek and the remedy to which they are entitled. It follows that Plaintiffs' claims against UNC are plainly justiciable.

1. UNC is Subject to H.B. 2's Discriminatory Mandate, Is Empowered to Implement that Mandate, and Has Done So.

The UNC Defendants' response relies on a logically incoherent premise: that somehow UNC can fulfill its obligations under H.B. 2 while creating no actionable harm to Plaintiffs. But UNC itself has recognized that its "obligations" under H.B. 2 are clear, stating that UNC "must require every multiple-occupancy bathroom and changing facility to be . . . used only by persons based on their biological sex." ECF No. 38-5 at 1 (April 5, 2016 guidance from President Spellings); *see also* UNC Opp. Ex. B at 3 (April 13, 2016 letter from UNC General Counsel: "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"); N.C. Exec. Order 93 § 3 (ECF No. 23-24 at 3); N.C. Gen. Stat. § 143-760(a)(2), (b). This is precisely the discrimination that Plaintiffs are challenging.

The UNC Defendants' attempt to create some sort of distinction between "*the Act's* requirements" and "*the University's* position," UNC Opp. at 17, is untenable. If UNC is complying with H.B. 2, then H.B. 2's discriminatory mandate *is* its position, and it is inflicting actionable harm on Plaintiffs by excluding them from restrooms and other facilities consistent with their gender identity. And UNC has unequivocally stated that it *is* complying with H.B. 2. *See* ECF No. 38-5 at 2 (April 5: "the University is required to fulfill its obligations under the law unless or until the [C]ourt directs otherwise"); *id.* at 1 (directing constituent schools to "fully meet their obligations under the Act"); UNC Opp. Ex. A (April 11: "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."); ECF No. 23-27 at 2-3 (May 9: "The Act remains the law of the State, however, and the University has no independent power to change that legal reality.").

The UNC Defendants offer three arguments to distract the Court from its actionable discrimination, but none is availing. First, they contend that UNC's nondiscrimination policies "remain unchanged." UNC Opp. at 18. But that is irrelevant for purposes of this litigation, because defendants nowhere assert that they will apply the nondiscrimination policy *instead of* H.B. 2. *See, e.g.*, UNC Opp. Ex. B. To the contrary, President Spellings' message that "the University is bound to comply with HB2" (UNC Opp. Ex. A) makes clear that any internal nondiscrimination policy is subservient to state law. That the UNC Defendants will continue to apply their nondiscrimination policies in *other contexts* does not render their compliance with H.B. 2 any less actionable.

Second, the UNC Defendants contend that they are without authority to enforce H.B. 2, because the law does not contain any specific provision for enforcement. UNC Opp. at 18. This argument is a red herring: H.B. 2 provides defendants all of the enforcement authority they need by directing that they "shall require every multiple occupancy bathroom or changing facility to be . . . only used by persons based on their biological sex." N.C. Gen. Stat. § 143-760(b). That the act does not specify the precise mechanism by which defendants "shall require" compliance does not obviate their obligation to do so. If the UNC Defendants' argument were taken to its logical conclusion, then UNC would be powerless to discipline students or employees who

violate any generally applicable law absent specific enforcement authority from the legislature. In any event, UNC has plenary authority to regulate conduct on its campuses. *See* N.C. Gen. Stat. § 116-11. Furthermore, as a factual matter, UNC has already assumed the ability to enforce state laws of general applicability: UNC-Greensboro and UNC-Chapel Hill both have codes of conduct that require compliance with state law and permit discipline for violating it.[2] *See* ECF No. 67-8 at 3 ("Students are responsible for observing . . . all federal and state laws"); ECF No. 67-9 at 7.

Third, the UNC Defendants contend that UNC has not taken any steps to actually implement H.B. 2's discriminatory mandate. UNC Opp. at 18. But President Spellings sent a memorandum to the chancellors of all constituent UNC schools instructing them that they "must" comply with H.B 2, including its discriminatory mandate regarding single-sex facilities. ECF No. 38-5 at 1. The memorandum further directs schools to "fully meet their obligations under the Act," including by "provid[ing] notice of the Act to campus constituencies as appropriate." *Id.* at 1-2. The record demonstrates that the schools complied with this directive, sending campus-wide emails regarding compliance with H.B. 2 that were personally received by Plaintiffs and that reiterated the applicability of H.B. 2's mandates. *See generally* ECF Nos. 67-5, 67-6, 67-11.

[2] Indeed, a key proponent of H.B. 2 has suggested that transgender people who violate H.B. 2 could be charged with trespass for using spaces consistent with their gender identity. ECF No. 67-7 at 7 (article by State Rep. Stam).

2. Plaintiffs Have Standing to Bring Their Title IX and Constitutional Claims Against the UNC Defendants.

The UNC Defendants' decision to comply with H.B. 2—including the steps that UNC has affirmatively taken to implement H.B. 2 where Plaintiffs live, learn, and work—is more than sufficient to establish an actual case or controversy as to whether UNC is violating Plaintiffs' rights under Title IX or the U.S. Constitution. Indeed, UNC's own statements admit that H.B. 2 creates a conflict between state and federal law. *See* ECF No. 23-28 (Chairman Bissette: "the University is . . . caught in the middle between state and federal law"); ECF No. 23-27 at 2 (President Spellings: "In ordinary circumstances, these obligations [of state and federal law] are not in tension."); UNC Opp. Ex. B at 3 (UNC General Counsel: "The University explained [to legislative staff] that H.B. 2's provisions could create tension with Title IX").

The UNC Defendants err in suggesting that they must actually physically bar or remove Plaintiffs from restrooms, or threaten to do so, for Plaintiffs to have standing. The Fourth Circuit's decision in *G.G. ex rel. Grimm v. Gloucester County School Board*, No. 15-2056, -- F.3d --, 2016 WL 1567467 (4th Cir. Apr. 19, 2016), shows why this argument is flawed. There, the school board passed a resolution requiring that single-sex facilities "be limited to the corresponding biological genders," and the Fourth Circuit held that sufficient to support a Title IX claim that plaintiff had been "excluded from participation in an education program," without an additional showing that the plaintiff himself was physically removed from the boys' restroom. 2016 WL 1567467, at *2, *4. H.B. 2's discriminatory mandate harms Plaintiffs by exposing them to stigma, physical

and psychological harm, the disclosure of private information about their transgender status, and the threat of physical violence. Given the UNC Defendants' avowed compliance with H.B. 2's mandate, it is no answer to assert that transgender individuals can resort to self-help by violating state law—and university policy—at their own peril.

Moreover, case law firmly establishes that even the UNC Defendants' litigating position—one that finds no support in its other conduct or statements—is insufficient to moot this controversy. "It is well established that a defendant's 'voluntary cessation of a challenged practice' moots an action only if 'subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Wall v. Wade*, 741 F.3d 492, 497 (4th Cir. 2014) (quoting *Friends of the Earth, Inc. v. Laidlaw Evntl. Servs., Inc.*, 528 U.S. 167, 189 (2000)). And UNC bears a "'heavy burden'" in establishing otherwise. *Id.* (quoting *Friends of the Earth*, 528 U.S. at 189).

The cases cited by the UNC Defendants are factually inapposite. H.B. 2 is not an arcane law that lingers on the books, but rather the subject of numerous recent directives from the UNC Defendants, including direct communications to Plaintiffs. Although the UNC Defendants dismiss Plaintiffs' harms as mere "subjective" fear, university leaders have acknowledged that H.B. 2 serves objectively to exclude transgender individuals from full participation in the university community, stating, "We know [H.B. 2] has generated, and will continue to generate, concern and *concrete consequences* for our students, faculty, staff, and larger community." ECF No. 67-11 (emphasis added); *see also* ECF No. 67-5 at 2; ECF No. 67-6 at 3. This is precisely the type of harm that is

actionable under Title IX: when a university's policy "has a concrete, negative effect on the [plaintiff]'s ability to participate in an educational program or activity." *Jennings v. UNC*, 482 F.3d 686, 699 (4th Cir. 2007) (quotation marks and alterations omitted).

Finally, this Court should reject out of hand the UNC Defendants' attempts to absolve themselves of liability because Plaintiffs' injuries are ultimately rooted in a law passed by the legislature and signed by the governor. UNC Opp. at 20-21. The UNC Defendants are legally responsible for applying state law to UNC students and employees—a role that they have willingly taken up in promising to comply with H.B. 2. The UNC Defendants are not absolved from responsibility for constitutional or statutory violations merely because they are "just following orders." *Kennedy v. City of Cincinnati*, 595 F.3d 327, 337 (6th Cir. 2010) (quotation marks omitted); *see also Busche v. Burkee*, 649 F.2d 509, 517 (7th Cir. 1981). Taken seriously, the UNC Defendants' argument would effectively immunize *every* state officer from section 1983 liability for following unconstitutional state laws enacted by the legislature. In any event, that an injunction forbidding the UNC Defendants and their subordinates from enforcing H.B. 2 would suffice to redress H.B. 2's on-campus harms more than demonstrates that Plaintiffs have sued the correct defendants.

3. The UNC Defendants Are Not Immune From Plaintiffs' Constitutional Claims.

The UNC Defendants also contend that they are not the correct defendants under *Ex parte Young*, 209 U.S. 123 (1908), and thus that they enjoy sovereign immunity from

injunctive relief as to Plaintiffs' constitutional claims. UNC Opp. at 30-33.[3] While the UNC Defendants correctly note that a state officer amenable to suit under *Ex parte Young* must have a "specific duty" with regard to the law at issue, *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 331 (4th Cir. 2001), they err in assuming—without citation—that the Board of Governors and Chairman Bissette have no such role. To the contrary, the Board of Governors is "responsible for the general determination, control, supervision, management and governance of *all affairs* of the constituent institutions." N.C. Gen. Stat. § 116-11(2) (emphasis added). This is not a general authority to enforce all state laws, but rather a specific authority with regard to policies over the State's higher-education institutions. And Chairman Bissette not only chairs the Board of Governors but also has personally announced his and the Board's supervision of President Spellings's actions regarding H.B. 2, including specifically as they related to the interplay between "state and federal law." ECF No. 23-28.

The purpose of the *Ex parte Young* doctrine is to ensure that a defendant who is sued for a constitutional violation is one against whom injunctive relief would be effective. *See S.C. Wildlife Fed'n v. Limehouse*, 549 F.3d 324, 333-34 (4th Cir. 2008). The UNC Defendants offer no reason why an injunction as to the Chairman or the Board (or both)—who are empowered with plenary "control," "supervision," and "governance"

[3] The UNC Defendants' assertion of sovereign immunity applies only to Plaintiffs' constitutional claims. UNC Opp. at 29. Thus, even were this Court to rule that the UNC Defendants are entitled to sovereign immunity, Plaintiffs are still entitled to injunctive relief against UNC as to their Title IX claim.

over UNC, and have exercised such powers specifically as to this subject matter—could not suffice to redress H.B. 2's on-campus harms. For that reason, this Court should reject the UNC Defendants' claim of sovereign immunity.

B. The Fourth Circuit's Ruling in *G.G.* Governs Plaintiffs' Title IX Claim.

The Fourth Circuit's binding decision in *G.G.* compels the conclusion that Plaintiffs are likely to succeed on the merits of their Title IX claim. The UNC Defendants do not challenge Plaintiffs' likelihood of success on their Title IX claim, other than by making the purely procedural arguments discussed above; they do not even reference *G.G.* or attempt to distinguish it. The UNC Defendants' waiver of any argument with respect to Plaintiffs' Title IX claim is an extraordinary, tacit admission that H.B. 2 is unlawful.

Intervenors attempt to step into the UNC Defendants' shoes and challenge on the merits Plaintiffs' likelihood of success on their Title IX claim, Int. Opp. at 10-13, but their attempts to distinguish *G.G.* are meritless. First, Intervenors remarkably assert that "*G.G.* did not 'hold' that 'Title IX requires schools to provide transgender students access to restrooms congruent with their gender identity.'" Int. Opp. at 10. But that was its *verbatim* language: "At the heart of this appeal is whether Title IX requires schools to provide transgender students access to restrooms congruent with their gender identity." *G.G.*, 2016 WL 1567467, at *1. The Fourth Circuit squarely addressed this very issue and reversed the district court's dismissal of G.G.'s Title IX claim. *Id.* On remand, the district court also granted G.G.'s motion for a preliminary injunction. *G.G. v. Gloucester*

Cty. Sch. Bd., No. 4:15-cv-00054 (E.D. Va. June 23, 2016) (ECF No. 69) (Ex. A).

The Fourth Circuit recognized that, unless a statutory or regulatory Title IX exception applied, the school board's exclusion of G.G., a transgender boy, from the boys' restroom would discriminate "on the basis of sex" in violation of Title IX. Therefore, the Fourth Circuit focused on whether a statutory or regulatory exception applied. *G.G.*, 2016 WL 1567467, at *4 (holding that "distinctions on the basis of sex" must qualify for an exception). If the school board policy did not discriminate "on the basis of sex" under Title IX's statutory language, there would have been no purpose in determining whether an exception applied. Furthermore, had the Court merely found a regulatory exception inapplicable—without resolving whether the policy discriminated on the basis of sex under Title IX's statutory language—it could not have held, as it did, that the plaintiff had stated a valid claim under Title IX. *Id.* at *1.

Second, there is no difference between the school board policy in *G.G.* and Part I of H.B. 2. Both condition access to facilities based on so-called "biological gender" or "biological sex" rather than gender identity. That H.B. 2 purports to limit its discrimination to "only a *subset*" of transgender individuals, Int. Opp. at 14, changes nothing. *See infra* Section II.A.2.a. Excluding transgender individuals who have not had genital surgery—which, incidentally, was true of G.G. himself and is true of the individual plaintiffs here—from facilities consistent with their gender identity violates Title IX, regardless of how H.B. 2 treats other transgender individuals.

Third, the *reasoning* of *G.G.* cannot be limited to restrooms, and that reasoning is

binding with respect to the public facilities (including restrooms) at issue here. Intervenors do not explain how the definition of "sex" under Title IX can fluctuate depending on whether an individual stands in a restroom versus a locker room. Int. Opp. at 10-12. And any such distinction would violate *G.G.*'s instruction that "sex" must be "construed uniformly throughout Title IX and its implementing regulations." 2016 WL 1567467, at *8.

Finally, Intervenors assert that the application of Title IX here is unconstitutional, but they refer only to *their answer* as support, thus failing to carry their burden to oppose Plaintiffs' motion. Int. Opp. at 13 (citing "Prop. Answer and Counterclaims [Doc. 36], at ¶¶ 124-125, 128-130"). Intervenors' brief also fails to provide any analysis explaining its assertion of unconstitutionality, thereby further waiving that argument. Merely reciting phrases such as "parents' constitutional rights," "Spending Clause," and "Tenth Amendment" provides nothing for this Court to analyze or for Plaintiffs to answer. Int. Opp. at 13. Such conclusory assertions without legal support are inadequate. *Eriline Co. S.A. v. Johnson*, 440 F.3d 648, 653 n.7 (4th Cir. 2006).[4] Nor can Intervenors' failure to provide *legal* analysis be excused by a purported need for *factual* discovery.

[4] In any event, Intervenors' assertions in their answer that it is *unconstitutional* for the government to bar discrimination against transgender people in accessing facilities—as both Title IX and laws in numerous jurisdictions do—are meritless. Banning such discrimination does not violate the constitutional privacy rights of non-transgender people. *See infra* Section II.B.2. Nor does any parent have a constitutional right to insist that a school discriminate against students. *See Runyon v. McCrary*, 427 U.S. 160, 176-77 (1976); *Herndon ex rel. Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 89 F.3d 174, 179 (4th Cir. 1996). Title IX does not "commandeer" state property or otherwise violate the Tenth Amendment. It is valid under both the Spending Clause and Section 5

II. Plaintiffs Are Likely to Succeed on Their Equal Protection Claim.

A. H.B. 2 Must Be Tested Under the Rigors of Heightened Scrutiny.

The Governor and Intervenors cannot escape the legal conclusion that H.B. 2 triggers heightened equal protection scrutiny, as it plainly amounts to discrimination on the basis of sex and transgender status.[5]

1. *G.G.* Confirms that H.B. 2 Employs a Sex-Based Classification.

The Equal Protection Clause does not provide Plaintiffs with less protection from discrimination on the basis of sex than Title IX does. Although *G.G.* was decided under Title IX, its underlying rationale leaves no room for this Court to chart a contradictory course as to whether "sex" has been taken into account under the Equal Protection Clause.[6] Defendants fail to articulate how the exact same exclusionary treatment can logically be based on sex under Title IX but not under the Equal Protection Clause.

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of the Fourteenth Amendment. *See* Emily Martin, *Title IX and the New Spending Clause*, American Constitutional Soc'y Issue Brief (2012) (Ex. B). And recipients of federal funds like UNC have clear notice that Title IX encompasses all forms of intentional sex discrimination, although notice is also not required for injunctive relief (in contrast to damages). *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175, 182-83 (2005); *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 639 (1999).

[5] The Governor's asserted rationales for immunity (and the authorities he cites) apply only to a congressionally crafted waiver of immunity such as Title IX (which is not asserted against him); they thus have no relevance to Plaintiffs' constitutional claims.

[6] *G.G.*'s recognition that there was differential treatment "on the basis of sex" under Title IX's *statutory* language, *see supra* Section I.A, did not rest upon *Auer* deference. Thus, the Fourth Circuit's opinion cannot be dismissed as merely reflecting the views of an agency and having no relevance to the equal protection question. Defendants also concede that, even if "sex" were limited to external genitalia, as the dissent in *G.G.* argued, H.B. 2 nonetheless employs a sex-based classification that causes injury and thus triggers heightened scrutiny in any event. *See* Pl. Mem. at 13 n.3 & 18.

To be sure, the government may attempt to *justify* a sex-based classification under heightened scrutiny, but that is a fundamentally different inquiry from whether there is a sex-based classification at all. The Governor's attempt to distinguish *G.G.* on the basis that it did not address locker rooms, for example, is a *non sequitur* response to the threshold question of whether H.B. 2 employs a sex-based classification.[7] The Governor conflates the question of what level of scrutiny applies with the application of that test to the discrimination at issue.

2. Discrimination Against Transgender Individuals Is Sex-Based.

a. Sex Stereotyping

The Governor and Intervenors do not contest that all individuals are protected from discrimination based on sex stereotypes, but they instead attempt to draw arbitrary distinctions to limit that protection for transgender people. Gov. Opp. at 10.

The Governor first argues that protection against sex stereotyping extends only to gender nonconforming behavior, such as when a person "fail[s] to act" in conformity with social expectations. Gov. Opp. at 10. That makes no sense. If a tall woman with wide shoulders is fired from a job because she does not fit a physical stereotype of a woman, she has experienced discrimination because of sex, even though her "behavior" is irrelevant. *Cf. Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989) (describing

[7] The Governor also asserts in a footnote—without any analysis whatsoever—that the supposed "redefinition" of sex in *G.G.* violates the Administrative Procedure Act and the separation of powers. Gov. Opp. at 10 n.1. But the Fourth Circuit acted properly both in interpreting the language in a statute—a core judicial function—and in deferring to the agency's regulatory interpretation under *Auer*. *G.G.*, 2016 WL 1567467, at *4-9.

plaintiff's perceived gender nonconformity in appearance). Likewise, a transgender woman who does not conform to the physical characteristics expected of a woman is also protected against discrimination—regardless of which sex-related physical characteristics are targeted. *See, e.g.*, *Finkle v. Howard Cty.*, 12 F. Supp. 3d 780, 789 (D. Md. 2014) (holding that a transgender female stated a claim based on sex stereotyping where she stood 6'3", weighed 220 pounds, and had broad shoulders).

Intervenors then contest the very premise that H.B. 2 discriminates against transgender people: they insist that the law does not apply "across-the-board to *all* gender dysphoric individuals" but instead "bars only a *subset* of those individuals," who have not had "sex reassignment surgery." Int. Opp. at 14 (emphases in original). By that logic, an employer would not discriminate on the basis of race by laying off darker-skinned African-American employees so long as the employer retained lighter-skinned African-American employees. But "[i]t is the individual . . . who is entitled to the equal protection of the laws—not merely a group." *Mitchell v. United States*, 313 U.S. 80, 97 (1941); *see also Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (per curiam) (discrimination against women with children is still sex discrimination even if women without children were not discriminated against).

Moreover, reliance upon a surgical distinction hardly helps Intervenors, because it only exposes the sex-based expectation at issue. H.B. 2 attempts to discriminate against transgender people whose genital characteristics do not conform to what the government expects for men or women. For example, despite Mr. Carcaño's male gender identity, the

Governor views him as "still, *in actuality*" a woman, unless he obtains surgery to conform his genital characteristics to what the government expects of men. Gov. Opp. at 6 (emphasis in original). If the plaintiff in *Price Waterhouse* could not be coerced to "dress more femininely," 490 U.S. at 235, the government cannot insist that individuals go under the knife to conform to its gender-based expectations about their bodies.

The Governor also disagrees that the prohibition against sex stereotyping bars discrimination based on transgender status. But there is no principled distinction between the perceived gender nonconformity at issue in sex stereotyping cases like *Price Waterhouse* and the perceived gender nonconformity of transgender individuals. Courts may not "legitimize discrimination based on the plaintiff's gender non-conformity by formalizing the non-conformity into an ostensibly unprotected classification." *Smith v. City of Salem*, 378 F.3d 566, 574 (6th Cir. 2004). A man like Mr. Carcaño does not satisfy H.B. 2's standard for maleness precisely *because* of the characteristics that define him as a transgender individual—the fact that, even though he has a male gender identity, he was assigned the sex of female at birth.

The Governor's and Intervenors' positions are contrary to "the weight of circuit authority concluding that discrimination against transgender individuals constitutes discrimination 'on the basis of sex.'" *G.G.*, 2016 WL 1567467, at *12 (Davis, J., concurring); *see also* Pl. Mem. at 21-22 (collecting cases). The Governor's reliance upon an anomalous case, *Etsitty v. Utah Transit Authority*, 502 F.3d 1215 (10th Cir. 2007), only reinforces the point. The Fourth Circuit did not follow *Etsitty* in *G.G.*, although the

school board asked it to do so. Brief of Appellee at 16, 24-25, *G.G.*, No. 15-2056 (4th Cir. Nov. 23, 2015) (ECF No. 47; 2015 WL 7565764). Other federal appeals courts have repudiated the authorities on which *Etsitty* relies, because its view that sex is limited to aspects of a person's biology or anatomy cannot be reconciled with *Price Waterhouse*. *See Smith*, 378 F.3d at 573 (holding that *Price Waterhouse* "eviscerated" those authorities); *Glenn v. Brumby*, 663 F.3d 1312, 1318 & n.5 (11th Cir. 2011) (same); *see also Schroer v. Billington*, 577 F. Supp. 2d 293, 305 (D.D.C. 2008) (rejecting the reasoning of *Etsitty*).

Recognizing that H.B. 2 discriminates on the basis of sex stereotyping does not lead to the Governor's hyperbolic fear that everything becomes a stereotype, and any person can use any restroom. Gender identity continues to anchor the definition of sex: the fact that a transgender boy can use the boys' restroom does not mean a non-transgender girl can also use the boys' restroom. The Fourth Circuit's holding in *G.G.* demonstrates that maintaining sex-separated facilities is not mutually exclusive with upholding nondiscrimination. Certainly, Defendants would agree that a non-transgender woman could not be barred from the women's restroom because she is deemed insufficiently feminine by some people. The same protection applies to a transgender woman. Furthermore, a woman (transgender or not) could not successfully invoke sex stereotyping to demand access to the men's restroom for an independent reason: differential treatment does not by itself create an injury in fact when it does not result in any unconstitutional stigma or tangible harm to the plaintiff. *Johnson v. U.S. Office of*

Pers. Mgmt., 783 F.3d 655, 666 (7th Cir. 2015). In sum, protecting against sex stereotypes does not require ending sex-separated facilities.

b. Gender Identity and Transgender Status

The Governor asserts that the Equal Protection Clause protects only so-called "biological sex" and thus does not protect gender identity. This compounds legal errors with factual errors.

First, *Price Waterhouse* conclusively rebuts Defendant's assertion as a matter of law. The plaintiff in that case was not denied partnership because of her chromosomes or her genitalia; she was denied partnership because she failed to conform to what was expected of a woman, without regard to whether that nonconformity was biological or immutable. 490 U.S. at 235; *accord Glenn*, 663 F.3d at 1316; *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000). The Fourth Circuit has similarly recognized that sex discrimination is not limited to biology. *Bauer v. Lynch*, 812 F.3d 340, 347 n.9 (4th Cir. 2016) ("Both biological and cultural differences can give rise to Title VII sex discrimination."). Like Title VII, the Equal Protection Clause also contains no biology-based litmus test for its proscription against sex discrimination.[8] *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 139 n.11 (1994); *Glenn*, 663 F.3d at 1317; *Smith*, 378 F.3d at

[8] Even if the Equal Protection Clause could be limited solely to external genitalia, H.B. 2 would not escape heightened scrutiny, given that H.B. 2 attempts to classify individuals on precisely that basis, rather than gender identity. As the Governor notes, "the Act itself references one's biological sex." Gov. Opp. at 11. While genitalia-based restroom classifications do not cause cognizable injury for non-transgender people, and thus do not trigger heightened scrutiny as to them, as discussed above, the same cannot be said for transgender individuals like Plaintiffs, for whom H.B. 2 causes substantial harm.

574. And contrary to the Governor's bald assertion, many courts have recognized that gender identity is encompassed within protections against sex discrimination. Pl. Mem. at 23-24.

Second, trying to carve out gender identity from the Equal Protection Clause on the grounds that it is not biological or immutable is also factually incorrect. No Defendant rebuts Plaintiffs' showing: that medical evidence suggests a strong biological basis to an individual's gender identity, and that gender identity—regardless of its precise biological origins—is not subject to voluntary control. Adkins Decl. ¶¶ 21-22, 28-34; *infra* Section II.A.3; *cf. Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015) (recognizing that sexual orientation is immutable without opining on its origins). [9]

Third, the Governor's ruminations on "modern gender theory" do not provide a reason to wall off gender identity from sex-discrimination protections. Gov. Opp. at 7. The notion that some individuals may not express their gender in ways stereotypically expected of them is hardly groundbreaking. *See Price Waterhouse*, 490 U.S. at 235. And the notion that some individuals may "manifest a gender identity that otherwise defies traditional classification" is equally true with respect to anatomical sex-related characteristics. Gov. Opp. at 7. For example, there are intersex conditions where an individual has external genitalia typically associated with both males and females, and

[9] Indeed, the Governor attaches a newspaper article confirming that there are individuals whose gender dysphoria has persisted since childhood. Gov. Opp. Ex. F at 2. Those individuals are transgender. Nowhere does the article suggest that those individuals may voluntarily change their gender identity or simply wish their gender dysphoria away.

where an individual's external genitalia changes during the lifespan. Adkins Decl. ¶¶ 28, 35-39; *G.G.*, 2016 WL 1567467, at *6 ("What about intersex individuals? What about an individual born with X-X-Y sex chromosomes? What about an individual who lost external genitalia during an accident?"). Indeed, genital characteristics manifest with sufficient variation that they are classified along a spectrum. Adkins Decl. ¶ 36. However, as the Governor's own materials point out with respect to gender identity, "[t]he gender binary works fine for most of us." Gov. Opp. Ex. D at 2. That is true of transgender individuals just as it is for non-transgender individuals.

c. Gender Transition

The Governor admits that the only way for a transgender individual like Mr. McGarry to access the facilities consistent with his gender identity is if he "completes a transition" on terms dictated by H.B. 2. Gov. Opp. at 11. That requirement applies even if the surgery envisioned by H.B. 2 is medically inadvisable for a particular person. *Cf. De'lonta v. Johnson*, 708 F.3d 520, 523 (4th Cir. 2013) (recognizing that surgical treatment is only necessary for some).

Because the terms of what purportedly constitutes a "complete" transition are sex-based, this confirms that H.B. 2 discriminates on the basis of sex. *See Fabian v. Hosp. of Cent. Conn.*, No. 3:12-cv-1154, -- F. Supp. 3d --, 2016 WL 1089178, at *12 (D. Conn. Mar. 18, 2016) (holding that sex discrimination includes discrimination on the basis of sex-related considerations); *Lusardi v. McHugh*, No. 0120133395, 2015 WL 1607756, at *8 (EEOC Apr. 1, 2015) (holding that an employer may not "condition access to facilities

. . . on the completion of certain medical steps that the [employer] itself has unilaterally determined will somehow prove the bona fides of the individual's gender identity").

By analogy, if the government discriminated against an individual for supposedly failing to "complete" a conversion to Judaism—say, by observing the Sabbath but not keeping kosher—that would similarly discriminate on the basis of religion. *Fabian*, 2016 WL 1089178, at *13 (holding that discrimination "against those who practice . . . religion the 'wrong' way, is obviously discrimination 'because of religion'"). H.B. 2 is no different in its regulation of what constitutes a "complete" gender transition.[10]

3. Discrimination Based on Transgender Status is Subject to Heightened Equal Protection Scrutiny.

The Governor challenges, on three grounds, whether discrimination based on transgender status should be subject to heightened scrutiny. Although Plaintiffs are not required to demonstrate the existence of *every* factor to warrant heightened scrutiny, *see Nyquist v. Mauclet*, 432 U.S. 1, 9 n.11 (1977), the Governor's challenges are unavailing in any event.

As an initial matter, the Governor calls into question whether transgender people

[10] The Governor also argues that, prior to what H.B. 2 deems as the "completion" of gender transition, a transgender person "is treated according to his or her present biological sex" and that "[t]his is the same, equal treatment received by all persons, according to biology." Gov. Opp. at 11. But the mere fact that a classification may be equally applied does not make it discrimination-neutral with respect to the characteristic at issue. *See Loving v. Virginia*, 388 U.S. 1, 8-9 (1967) (rejecting that equal application of anti-miscegenation laws rendered them race-neutral); *J.E.B.*, 511 U.S. at 135-142 (analyzing sex-based peremptory challenges that could be applied equally against men and women).

are a sufficiently discrete group to merit heightened scrutiny. But a trait need not be obvious to passers-by or discernible in every instance for it to merit heightened scrutiny. Classifications based on legitimacy, for example, are subject to heightened scrutiny, *see Trimble v. Gordon*, 430 U.S. 762, 767 (1977), even though they may require a court proceeding to determine. Sex-based classifications are subject to heightened scrutiny, even though individuals do not always fall into traditionally-defined sexual categories (*e.g.*, in the case of intersex individuals, *see* Adkins Decl. ¶¶ 35-39), and even though individuals "transition from one sex to the other," as the Governor himself acknowledges. Gov. Opp. at 12. Indeed, alienage-based classifications are suspect even though that characteristic is not fixed. *See Nyquist*, 432 U.S. at 9. It suffices that gender identity is sufficiently fixed and fundamental that it is repugnant for the government to penalize someone for being unwilling or unable to change it. *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 438-39 (Conn. 2008); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139-40 (S.D.N.Y. 2015).

Nor can the Governor seriously contest that transgender individuals have faced pervasive discrimination. Even if the Governor does not believe that barring transgender individuals from single-sex facilities amounts to discrimination, the evidence offered by Plaintiffs establishes that transgender individuals face widespread discrimination in every aspect of life including employment, education, health care, housing, transportation, places of public accommodation, police protection, courts, and government benefits programs, and that this discrimination too frequently takes the form of violence,

harassment, and other abuse. *See generally* ECF Nos. 23-35, 23-36.

Finally, the Governor errs in focusing on the public reaction to H.B. 2 (which itself has proven insufficient to change state law) as dispositive of the political power of transgender individuals. In *Frontiero v. Richardson*, the Supreme Court applied heightened scrutiny to sex-based classifications even though "the position of women in America has improved markedly in recent decades" and women no longer could be described as a "powerless minority." 411 U.S. 677, 685-86 & n.17 (1973). What the *Frontiero* Court found dispositive was that women continued to face barriers and discrimination, including "most conspicuously, in the political arena," and that the nation's political bodies would thus not adequately ward off bias in lawmaking—therefore meriting greater judicial oversight. *Id.* at 686. Thus properly focused, it is clear that transgender individuals meet this prong: the Governor cannot possibly dispute that that—as a small, stigmatized, and oppressed minority—transgender individuals face immense barriers to asserting their rights through the traditional political process.

B. H.B. 2 Fails Any Level of Scrutiny.

Plaintiffs seek only equal treatment—nothing more and nothing less. Contrary to Defendants' bald assertions, this case is not part of some grand conspiracy to end the practice of separating restrooms and other facilities on the basis of sex. Mr. Carcaño and Mr. McGarry seek to use the men's restroom—not to make all restrooms gender-neutral. Plainly, single-sex facilities existed before H.B. 2, and they will continue to exist after the unlawful provisions of H.B. 2 challenged by Plaintiffs' motion are enjoined.

Accordingly, in analyzing the government's proffered justifications for H.B. 2, the question is not whether providing separate facilities for males and females serves safety or privacy as a general matter, even though the Governor and Intervenors rebut a straw man argument to that effect. *See, e.g.*, Gov. Opp. at 2-3; Int. Opp. at 19-20. Instead, the question is whether the exclusion of transgender individuals from facilities consistent with their gender identity serves those interests. Under either heightened scrutiny or rational basis review, the answer is no.

1. Discrimination Against Transgender Individuals Does Not Promote Safety.

In *G.G.*, the Fourth Circuit refused to dismiss a transgender individual's right to equal treatment under the law based on illusory threats to safety and privacy, and this Court should follow that same path here. Although Intervenors try to distinguish *G.G.*'s dismissal of safety concerns and privacy interests as limited by the evidentiary record in that case, the Fourth Circuit rejected the notion that "G.G.'s use—*or for that matter any individual's appropriate use*—of a restroom" would infringe upon others' constitutional rights. 2016 WL 1567467, at *8 n.10 (emphasis added). Furthermore, the record in *G.G.* mirrors the one here: it too "is devoid of any evidence tending to show that [Plaintiffs'] use" of the facilities matching their gender identity somehow "creates a safety issue." *Id.* at *8 n.11.[11] Defendants' promises to proffer evidence in the future, which they failed to

[11] In *G.G.*, the parties did not engage in any discovery prior to the hearing on plaintiff's preliminary injunction motion, and no testimony was elicited at the hearing. Order at 1, *G.G.*, No. 4:15-cv-00054 (E.D. Va. Sept. 4, 2015) (ECF No. 53) (Ex. C).

proffer when responding to Plaintiffs' motion, despite having the opportunity to do so, cannot change the record that currently exists.

The Governor's and Intervenors' anemic evidentiary submission, which consists solely of news reports, fails to supply the all-important link to connect H.B. 2 with the promotion of safety. To the contrary, the news reports illustrate that criminal conduct can occur without regard to whether state or local law provides express protection to gender identity. *See, e.g.*, Gov. Opp. Ex. B (reporting an incident in Virginia—where state law does not expressly prohibit discrimination on the basis of gender identity—in which an individual filmed others without consent in the restroom of a shopping mall and was criminally charged).[12] None of the articles show how banning transgender people from restrooms or other facilities consistent with their gender identity would have prevented non-transgender people from committing crimes.

The Governor and Intervenors deny the deterrent effect of criminal law—dismissing it as "notoriously ineffective." Int. Opp. at 22. Even if that is so, H.B. 2 does even *less* than a criminal law, given that it imposes no explicit criminal penalties. No Defendant explains the mechanism through which H.B. 2 is supposed to achieve its promised prophylactic benefits if existing criminal law could not achieve those benefits.

[12] The Governor also cites a news report showing that individuals may deliberately use facilities incongruent with their gender identity as political stunts; but nondiscrimination laws provide no shelter for such conduct. *See, e.g.*, Gov. Opp. Ex. A (describing a "protest" against Washington's nondiscrimination law); *Doe v. Reg'l Sch. Unit 26*, 86 A.3d 600, 603 (Me. 2014) (describing male student who followed transgender female student into restroom in order to harass her).

H.B. 2 no more requires stationing government officials outside every government restroom to check birth certificates or genitals before entrance than the criminal law. Thus, while H.B. 2 excludes *law-abiding* transgender people from the government facilities consistent with their gender identity, it does nothing at all to stop Defendants' imagined non-transgender predators, who were already lawbreakers before H.B. 2. *Cf. Whole Woman's Health v. Hellerstedt*, No. 15-274, -- S. Ct. --, 2016 WL 3461560, at *21, (Jun. 27, 2016) ("Determined wrongdoers, already ignoring existing statutes and safety measures, are unlikely to be convinced to adopt safe practices by a new overlay of regulations. . . [and there is] nothing to suggest that H. B. 2 would be more effective").

Defendants' news reports also fall far short of rebutting Plaintiffs' evidence establishing that gender identity-inclusive nondiscrimination protections have not undermined public safety in the myriad jurisdictions where they exist. *See generally* Mull Decl. Indeed, Plaintiffs' requested preliminary injunction does not even seek to restore Charlotte's non-discrimination ordinance; it would merely enjoin government officials from affirmative discrimination against transgender people. Defendants fail to articulate any plausible explanation for why North Carolina suddenly cannot do without this affirmative discrimination requirement. From statehood until March 23, 2016, North Carolina never had any such requirement, and neither do forty-nine other states.

Contrary to the Governor's newfound reliance on safety in this litigation, he has publicly disowned safety as a rationale for H.B. 2. In multiple media appearances, he has disclaimed that H.B. 2 was connected to any safety rationale, pivoting to privacy

arguments instead.[13] The Governor was correct to disavow that argument, as North Carolina's own history shows. Plaintiffs and other transgender people used facilities consistent with their gender identity before H.B. 2, and they continue to do so in private facilities. Carcaño Decl. ¶¶ 15-16, 23, 26, 29-30; H.S. Decl. ¶¶ 19, 25-26; McGarry Decl. ¶¶ 17-22. The Governor concedes that this has caused no public safety problem. *See, e.g.*, ECF No. 23-26 at 13. These are admissions he cannot now recant.

Furthermore, if Defendants' safety justification is to be believed, H.B. 2 leaves gaping swaths of the government's purported interest unprotected, given that the law regulates only public rather than private facilities—and, even then, excludes public facilities leased to private entities. N.C. Exec. Order 93 § 4 (ECF No. 23-24 at 3); *cf. Central Radio Co. v. City of Norfolk*, 811 F.3d 625, 633 (4th Cir. 2016) (holding that an ordinance that prohibited the display of a private flag, but not a government flag, discredited the city's purported safety justification). This defies rationality. If the Governor sincerely believes that H.B. 2 is needed to prevent "terrible things from happening," Gov. Opp. at 14 (referencing rape, assault, and indecent exposure), he fails to explain why those "terrible things" are unworthy of prevention merely because they

[13] During one interview, the Governor admitted that he was not aware of any cases in North Carolina where transgender people had committed crimes in restrooms. ECF No. 23-26 at 13. When asked, "Why not just then let it go if there's . . . not a case of transgender people going in and molesting little girls," he responded, "I haven't used that at all. This is an issue of . . . an expectation of privacy." *Id.* In another appearance, the interviewer noted that "90 percent of the cases of molestation happen with someone you know," and if criminals "want to sneak into a bathroom they'll do it." She asked, "So, what is the fear about the transgender situation and the bathrooms?" McCrory responded that his rationale for supporting H.B. 2 "is not a fear" about safety. Ex. D at 17.

occur in non-government facilities, or why perpetrators would not simply shift their conduct to non-government facilities.

In addition to a safety justification for H.B. 2, the Governor also advances the avoidance of civil liability for the government as a justification for the law. Avoiding purported civil liability based on the mere presence of transgender individuals is not a legitimate government interest; but the notion that H.B. 2 sought to avoid civil liability for the government is also a *post hoc* and implausible contrivance. *See Lusardi*, 2015 WL 1607756, at *9 n.6 (holding that the belief that a transgender employee could raise "liability issues" is illegitimate). The Governor provides no showing that avoidance of government liability actually motivated H.B. 2's enactment. *United States v. Virginia*, 518 U.S. 515, 533 (1996) (prohibiting justifications invented *post hoc*). Nor is there any logic to the idea that the State is avoiding liability by refusing to allow everyone in the State to use facilities consistent with their gender identity, as the State had been doing without incident until the recent passage of H.B. 2.

Exacerbating H.B. 2's lack of connection to any valid government interest is its erroneous reliance on birth certificates as a proxy for genital characteristics. Reliance on this proxy certainly does not "directly advance" a government interest, as required for heightened scrutiny. *Stuart v. Camnitz*, 774 F.3d 238, 250 (4th Cir. 2014). Intervenors' only response is that North Carolina's birth certificate statute—which permits the gender marker on a birth certificate to be changed after surgical treatment—"obviously applies to the vast majority of transgender individuals residing in North Carolina." Int. Opp. at 14-

15. But nearly half of North Carolina residents (42%) were born outside the state. Ex. F. In contrast to North Carolina, several states do not require surgical treatment in order to change gender markers on birth certificates, and some states do not allow changes to gender markers even after such surgery. Pl. Mem. at 32-33. Legislation may not need to have a "perfect" fit to achieve its goals, but H.B. 2 falls short of any adequate fit to achieve its goal.

Taken together, all of these considerations point to the inevitable conclusion that "safety" operates as a mere smokescreen for impermissible animus, as not even H.B. 2's proponents actually believe that the law is needed to preserve safety. Furthermore, the avoidance of civil liability is a mere *post hoc* contrivance that deserves no weight.

2. Discrimination Against Transgender Individuals Cannot Be Justified by Invocations of Privacy.

Defendants also claim that H.B. 2 is necessary to protect privacy in situations involving the "opposite sex," Gov. Opp. at 2, but this argument fails for multiple reasons, in addition to those already discussed in the context of safety. It is premised upon a fundamental misunderstanding of transgender people and a dehumanizing denial of their gender. Adkins Decl. ¶¶ 19-20, 23-34. When Mr. McGarry uses the men's restroom, other men in that facility are not using a restroom with someone of the "opposite sex"; rather, they are using a restroom with a person of the same sex.

Tellingly, no Defendant articulates how H.B. 2 serves an interest in avoiding exposure of one's body in the restroom context. Restrooms have stalls and thus do not

involve the exposure of one's body to others no matter who is using the restroom.[14] Nor does the privacy argument justify discrimination in changing facilities. Any individual who objects to sharing a changing facility with a transgender person can, for example, use a restroom stall to change rather than a locker room. *See* Walker Decl. ¶ 16; ECF No. 23-39 at 14-15; *cf. Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150-51 (1980) (invalidating a sex-based classification where a sex-neutral approach could achieve the government's objective).

There are other alternatives as well. Using privacy partitions and curtains is a practice already recognized in state law, and simple measures like this one have been deployed smoothly and successfully across a range of settings. *See* 10A N.C. Admin. Code 13G.0309 (mandating privacy partitions or curtains for showers and toilets in North Carolina adult care homes); *G.G.*, 2016 WL 1567467, at *2 (noting that the school had made a "series of updates" to improve "privacy for all students, including adding or expanding partitions between urinals in male restrooms"); ECF No. 71 at 14-19. Nor could Defendants object to such straightforward solutions since, as Intervenor Speaker Tim Moore has insisted, the State "cannot put a price tag" on measures to enhance privacy and safety. ECF No. 23-9 at 3.

Both H.B. 2 and the Governor's Executive Order also expressly contemplate the

[14] Megyn Kelly pressed the Governor on this point during his interview, stating, "I've been in women's bathrooms my whole life. . . . We've got like the stalls. And we get to go in, we go to do our business and . . . we don't see each other. So, why are you concerned about . . . young girls exposing themselves or seeing somebody else exposed in a woman's bathroom?" The Governor did not provide an answer. Ex. D at 16.

government's ability to make accommodations "due to special circumstances" in restrooms and other facilities. *See, e.g.*, N.C. Gen. Stat. § 143-760(c); N.C. Exec. Order 93 § 3 (ECF No. 23-24 at 3). Necessarily, then, the State also stands ready to offer accommodations as needed for individuals who object to sharing communal spaces with transgender people.

The Governor responds that those with such objections should not have to "hide" themselves, such as by changing in a "more private place," even though they also paradoxically purport to seek privacy. Gov. Opp. at 15. The Fourth Circuit confronted this same argument in *G.G.* but was not persuaded. Accommodations for those who object to the presence of transgender people impose a "minimal or non-existent hardship" on them—in stark contrast to the painful stigma that class-based segregation imposes on transgender people themselves. *G.G.*, 2016 WL 1567467, at *13 (Davis, J., concurring).

Defendants' hand is not strengthened simply by arguing that the State's interest in protecting privacy is particularly strong for minors, Gov. Opp. at 3-4, 13-14, since the school administrators who actually run school facilities day-in-and-day-out have uniformly disclaimed such arguments. *See generally* Walker Decl.; Ex. E (reporting that Charlotte-Mecklenburg Schools will continue allowing transgender students access to sex-specific facilities in accordance with gender identity); UNC Opp. (declining to make any arguments about safety and privacy); *see also* ECF No. 71 at 14-19.

H.B. 2 also cannot be defended through a newfound "privacy" interest to avoid the mere sight of transgender people. This goes well beyond a right of privacy against

involuntary exposure of one's *own* body discussed in Defendants' cases. Recognizing this deficiency in legal support, the Governor analogizes seeing a transgender man like Mr. McGarry in a men's facility as equivalent to exposing children to "sexually explicit material." Gov. Opp. at 14. That is preposterous and offensive. Mr. McGarry's mere presence in a men's restroom or locker room is not pornographic.

Defendants' hypothesized outcry to the mere sight of transgender individuals in facilities consistent with their gender identity finds no support in any of Plaintiffs' lived experiences, whether in government facilities prior to H.B. 2 or in private facilities. *See generally* Carcaño Decl.; H.S. Decl.; McGarry Decl. Defendants have failed to explain why existing privacy shields (such as private stalls) were inadequate prior to H.B. 2's enactment, or why transgender individuals might want to expose private parts of their bodies to others in communal spaces. Defendants have also failed to substantiate their predicted objections through transgender individuals in North Carolina who *have* obtained updated birth certificates from their home states without having to undergo genital surgery—and who can continue to use facilities consistent with their gender identity under H.B. 2. Indeed, contrary to all of Defendants' predictions, it was when Mr. McGarry used the restroom *inconsistent* with his gender identity that others objected to his presence. McGarry Decl. ¶ 28 (Mr. McGarry's testimony that, when he tried to use women's restrooms in high school, he "would be screamed at, shoved, slapped, and told to get out"). Similarly, Mr. Carcaño's treating medical professional advised him not to use facilities inconsistent with his gender identity, where he would be recognized as male

given his physical appearance. Carcaño Decl. ¶ 15. If H.B. 2 seeks to cater to the preferences of individuals sharing spaces with transgender people, it works in diametric opposition to how those preferences operate in the real world.

Furthermore, even if a right to privacy can be extended to encompass seeing transgender people (in contrast to being seen by transgender people), H.B. 2 would still fail constitutional scrutiny. As already discussed, both the government and the individual who objects to sharing visual space with transgender people have limitless options at their disposal to prevent visual contact—whether that is being seen or seeing others. A privacy curtain, for example, works equally well in both directions.

Ultimately, no matter how a right to privacy is formulated here, the objection that Defendants seek to validate would give one group of objectors the power to oust a minority from communal spaces based on discomfort with the latter's mere presence. That exclusion is profoundly damaging. As history has taught time and again, it is precisely when public attitudes (even those sincerely held) give way to discrimination that an unwavering commitment to the promise of equality is most needed.

III. Plaintiffs Are Likely to Succeed on Their Due Process Claims.

A. Plaintiffs Are Likely to Succeed in Proving that Provisions of H.B. 2 Violate Their Constitutional Right to Privacy.

The constitutional right to privacy protects transgender individuals from the forced or coerced disclosure of their transgender status or any medical information related to their treatment. Pl. Mem. 35-38; *Whalen v. Roe*, 429 U.S. 589, 599-600 & n.23 (1977) (the Due Process Clause provides a "zone of privacy" against "disclosure of personal

matters"); *Walls v. City of Petersburg*, 895 F.2d 188, 192 (4th Cir. 1990) (the constitutional right to privacy protects "[p]ersonal, private information in which an individual has a reasonable expectation of confidentiality"); *Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999) (describing it as "really beyond debate" that transgender individuals have a "particularly compelling" interest in "preserving [the] privacy" of their transgender identities). The Governor's and Intervenors' arguments to the contrary are entirely without merit.

Misconstruing Plaintiffs' claim and misapplying the appropriate legal standard, the Governor argues that any right to keep private one's "biological sex" is not "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty." Gov. Opp. 17-18 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997)). The question is not whether there is a fundamental right to keep private information related to one's "biological sex" as a general mater, but whether the fundamental right to privacy protects against the forced disclosure of one's transgender status. It does.

Numerous courts have recognized that the Due Process Clause protects transgender individuals from involuntarily disclosing their transgender status, and that such involuntary disclosure can expose transgender individuals to violence and discrimination. *Powell*, 175 F.3d at 111-13; *Love v. Johnson*, No. 15-11834, -- F. Supp. 3d --, 2015 WL 7180471, at *5 (E.D. Mich. Nov. 16, 2015) (concluding that "by requiring Plaintiffs to disclose their transgender status, [Michigan's driver's license

policy] directly implicates their fundamental right to privacy"); *K.L. v. Alaska Dep't of Admin., Div. of Motor Vehicles*, No. 3AN-11-05431 CI, 2012 WL 2685183, at *6 (Alaska Super. Ct. Mar. 12, 2012) (agreeing "that one's transgender[] status is private, sensitive personal information" and "is entitled to protection"). Indeed, the Governor does not even attempt to distinguish any of Plaintiffs' authorities—unsurprising, given it is "really beyond debate" that the constitutional right to privacy protects transgender individuals from the forced disclosure of their transgender status. *Powell*, 175 F.3d at 111.

Intervenors recognize a constitutional right to privacy but assert that the forced disclosure of one's transgender status "is not the type [of personal information] that could or would trigger constitutional scrutiny under the Due Process Clause." Int. Opp. at 25 (citing *NASA v. Nelson*, 562 U.S. 134, 149-50 (2011); *Whalen*, 429 U.S. at 602)). But as explained above, the unrebutted case law flatly contradicts Intervenors' argument. Neither of the Intervenors' cited cases supports their argument. To the contrary, *Whalen* supports Plaintiffs' privacy claim by expressly holding that the Due Process Clause provides a "zone of privacy" against "disclosure of personal matters." *Whalen*, 429 U.S. at 599-600 & n.23. To be sure, certain types of disclosure "do[] not automatically amount to an impermissible invasion of privacy," but the *Whalen* Court was referring to the "disclosure[] of private medical information to doctors, to hospital personnel, to insurance companies, and to public health agencies [that] are often an essential part of modern medical practice"—not the forced *public* disclosure of such information. 429 U.S. at 602. If Mr. Carcaño is forced into a women's restroom in every rest stop, his

status as a transgender person is disclosed to every stranger who happens to be in that rest stop and not, as in *Whalen*, to medical personnel and insurance companies who have separate obligations to keep private that information.

Nelson also does not support the public disclosure of private matters. In *Nelson*, the Court expressly relied on federal statutory guarantees against the public dissemination of the information at issue—employee treatment or counseling for recent illegal drug use—in holding that there was no violation of the right to privacy. *NASA v. Nelson*, 562 U.S. 134, 138 (2011). In other words, the Court found no such violation because there were separate safeguards to protect against the widespread disclosure of the private information. Here, there are no such safeguards, and each time a transgender person is forced into a restroom that does not accord with their gender identity, they are in effect forced to announce the fact of their transgender status to complete strangers with no control over what those strangers do with that information.

Intervenors also assert that H.B. 2 does not actually force transgender individuals to publicly disclose their transgender status because the law "expressly encourages accommodations for those in plaintiffs' position through single-occupancy restrooms." Int. Opp. 24-25. But rather than *encourage* accommodations, as Intervenors claim, H.B. 2 simply states that "*nothing in this section shall prohibit*" local boards of education and public agencies "*from providing accommodations* such as single occupancy bathroom or changing facilities *upon a person's request due to special circumstances*." N.C. Gen. Stat. §§ 115C‑521.2(c), 143-760(c) (emphasis added). In addition to the acute

and ongoing harm that Plaintiffs have shown, which flows from forcing a transgender individual to use a segregated facility away from others, the use of conspicuously separate facilities also risks disclosure of their transgender status to others who observe them repeatedly using the separate facilities. Pl. Mem. at 7-8; Carcaño Decl. ¶¶ 20-21; McGarry Decl. ¶¶ 20, 24-25. In any event, places like rest stops and courthouses may not have single-user facilities, thereby forcing transgender individuals to in effect announce their transgender status by entering single-sex spaces that do not accord with their gender identity. This forced disclosure cannot be squared with due process.

Rather than take seriously the privacy interests of transgender individuals, Intervenors make the ill-conceived argument that, because the individual named plaintiffs have disclosed their transgender status in bringing this suit, they cannot have any further privacy interest against forced public disclosure of their transgender identity. Int. Opp. 25. But bringing this suit is quite different from Plaintiffs having to announce their transgender status on a day-to-day basis to strangers and to explain why they are in a particular restroom or locker room. The day-to-day reactions Plaintiffs would receive entail a significant risk of harassment and harm. *Powell*, 175 F.3d at 111-13; *Love*, 2015 WL 7180471, at *5. While Plaintiffs may be recognized as transgender in many aspects of life, one could certainly imagine a situation in which Mr. Carcaño would have to stop to use a rest stop restroom, and by entering the restroom designed for women out himself as transgender to individuals who have no familiarity with him. Furthermore, not all transgender people are out as such, and H.B. 2 forces them to disclose this deeply private

information in all aspects of their lives, threatening their bodily autonomy and security.

In short, neither the Governor nor Intervenors have provided any genuine challenge to Plaintiffs' likelihood of success on their claim that the right to privacy protects transgender individuals from the forced disclosure of their transgender status.

B. Plaintiffs Are Likely to Succeed in Proving that Provisions of H.B. 2 Violate Their Due Process Right to Avoid Forced Surgical Treatment.

The Governor's and Intervenors' briefs further support Plaintiffs' argument that H.B. 2 violates their substantive due process rights by forcing them to undergo serious and invasive surgery—which, for many, is unwanted, unnecessary, or unavailable—in order to use the restroom or other facility that corresponds with their gender identity. As both the Governor and Intervenors not only concede but tout as the reason they say the law is not discriminatory, H.B. 2 explicitly ties access to sex-separated facilities to the gender marker listed on one's birth certificate. Gov. Opp. at 11 ("If a person completes a transition to the opposite biological sex, the law treats that person accordingly."); Int. Opp. at 14 ("In fact, rather than discriminating *against* anyone, HB2 could at most be said to implicitly distinguish *among* gender dysphoric individuals based on whether or not they have taken the necessary steps to have their birth certificates altered" (emphasis in original)).

To the extent that states permitting change of one's birth certificate, including North Carolina, require transgender people to undergo some form of surgical treatment in order to bring the gender marker on their birth certificate into alignment with their gender identity, *see* N.C. Gen. Stat. § 130A-118(b)(4) (requiring "sex reassignment surgery"),

H.B. 2 improperly forces Plaintiffs to either: (1) give up their constitutional right to decline invasive, painful, and in some cases, medically contraindicated surgery, Ettner Decl. ¶ 22, or (2) stop using the restroom that corresponds with their gender identity, even though such use is necessary not only for their psychological well-being but also to avoid the harassment, discrimination, and violence they face if forced to use facilities that are inconsistent with their gender identity. For Plaintiffs and other transgender North Carolinians, this is truly no choice at all, and as such, the provisions of H.B. 2 violate Plaintiffs' autonomy.

IV. Plaintiffs Satisfy the Other Preliminary Injunction Factors.

As Plaintiffs made clear in their motion, a preliminary injunction is necessary to avoid irreparable harm to Plaintiffs, the balance of hardships weighs in favor of an injunction, and an injunction is in the public interest. Defendants have not rebutted Plaintiffs' showing on these factors.[15] Indeed, during the pendency of briefing on the motion, Mr. McGarry has developed health problems after avoiding use of the restroom because of H.B. 2. McGarry Reply Decl. ¶¶ 1-4 (describing significant pain during urination). The facts of *G.G.* further confirm that avoiding use of the restroom often has health consequences. 2016 WL 1567467, at *13 (finding that plaintiff had shown irreparable harm based on psychological harm as well as increased risk for developing

[15] The Governor and Intervenors attempt to delay resolution of this motion by seeking an extended period of discovery before this motion can be decided. Gov. Opp. at 20; Int. Opp. at 27-29. As Plaintiffs will explain in their opposition to the Governor's motion for discovery, his request fails to meet the required standard and should be denied. Plaintiffs have made the showing necessary for immediate issuance of a preliminary injunction.

urinary tract infections (Davis, J., concurring)); *see also* Routh Decl. ¶¶ 14-15.

The Governor erroneously argues that Plaintiffs' burden to demonstrate the preliminary injunction factors is heightened, trying to recast Plaintiffs' request as seeking a mandatory rather than prohibitory injunction. Gov. Opp. at 19. But Plaintiffs simply seek to restore the status quo by returning to "the last uncontested status between the parties which preceded the controversy"—*i.e.*, the state of the law before both H.B. 2 and Charlotte's non-discrimination ordinance were enacted. *League of Women Voters v. North Carolina* ("*LWV*"), 769 F.3d 224, 236 (4th Cir. 2014) (quotation marks omitted). Indeed, this is the state of the law that, as the Governor describes it, had existed for "millennia." Gov. Opp. at 2. "'To be sure, it is sometimes necessary to require a party who has recently disturbed the status quo"—as occurred when H.B. 2 was adopted—"to reverse its actions, but . . . [s]uch an injunction restores, rather than disturbs, the status quo ante.'" *LWV*, 769 F.3d at 236 (quoting *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 378 (4th Cir. 2012)) (quotation marks omitted). That is all that Plaintiffs seek here.

Intervenors claim that Plaintiffs' "delay" of "seven weeks" before seeking preliminary relief undermines their showing of irreparable harm. Int. Opp. at 23. Putting aside that Intervenors waited nearly two months before seeking to join this case, they complain in one breath about the extensive evidence Plaintiffs marshaled to support their motion, Int. Opp. at 9 (noting the "ten different declarations including three expert witnesses and over three hundred pages of evidence" Plaintiffs submitted), while complaining in the next that Plaintiffs did not prepare their evidence overnight.

Plaintiffs filed suit mere days after the legislature abruptly convened to rush H.B. 2 into law. Recognizing the urgency of the issues, Plaintiffs also worked to ensure that their preliminary injunction motion was well-supported given the gravity of the harms suffered by Plaintiffs and thousands of other transgender North Carolinians.

Contrary to Intervenors' argument that Plaintiffs have had "years" to prepare, Int. Opp. at 9, Part I of H.B. 2 is unlike any law passed in the country before or since. Moreover, absent any prejudice, courts have allowed delays much longer between the filing of a complaint and a preliminary injunction motion. *See, e.g.*, *Candle Factory, Inc. v. Trade Assocs. Grp., Ltd.*, 23 F. App'x 134, 137 (4th Cir. 2001) (holding one year delay did not undermine finding of irreparable harm and that only delay coupled with prejudice would support finding no irreparable harm); *Fairbanks Capital Corp. v. Kenney*, 303 F. Supp. 2d 583, 590 (D. Md. 2003) (holding 11-month delay "d[id] not lessen irreparable harm to [Plaintiffs]" and was reasonable).

Intervenors suggest that Plaintiffs' showing of irreparable harm fails unless Plaintiffs have affirmatively proven that there are no single-user restrooms in the range of public buildings across the state. Int. Opp. at 24. This misses the point. Although Plaintiffs have indeed shown that such restrooms often are not readily available, and that they are suffering health consequences as a result, *see* Carcaño Decl. ¶¶ 18-20; H.S. Decl. ¶ 27; McGarry Decl. ¶¶ 23-24; McGarry Reply Decl. ¶¶ 1-4, that is not their burden. H.B. 2's shunting of transgender people out of shared single-sex facilities—deeming them unfit to share communal spaces with others—itself causes irreparable harm.

Plaintiffs' ability to suffer through the violations of federal law foisted on them by H.B. 2 does not defeat their showing of irreparable harm.

Finally, the UNC Defendants argue that because they claim not to be enforcing H.B. 2, Plaintiffs cannot show irreparable harm. UNC Opp. at 24-26. But as described in Section I.A., above, UNC is expressly bound by H.B. 2 and has taken steps to implement it. Indeed, were UNC not enforcing H.B. 2 as they claim, it is difficult to understand how they could object to the preliminary relief Plaintiffs seek here. UNC argues that, without enforcement, there is "no justification for this Court to intrude" on the university's management of its own affairs. UNC Opp. at 28. But Title IX and the Equal Protection Clause cannot be waved off as some form of unwarranted intrusion. Because UNC disclaims any interest in enforcing H.B. 2, the preliminary injunction should be no intrusion at all.

No Defendant seriously disputes that the balance of the equities favors Plaintiffs. Nor could they, given the hardships H.B. 2 imposes on Plaintiffs, and the fact that Plaintiffs simply seek to return to the state of the law before the enactment of H.B. 2 and Charlotte's ordinance. Intervenors offer no new argument for their claim that enjoining H.B. 2 would disserve the public interest, simply repeating their unfounded allegations about risks to safety and privacy. Int. Opp. at 26. Those arguments fail for the reasons stated above. As Plaintiffs demonstrated in their motion, upholding constitutional rights and eliminating sex discrimination from our nation's educational institutions is always in the public interest. Pls. Mem. at 44 (collecting authorities). Plaintiffs respectfully urge

entry of a preliminary injunction to mitigate the profound harms H.B. 2 imposes upon them and thousands of other transgender North Carolinians.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for a preliminary injunction (ECF No. 21) should be granted.

Dated: June 27, 2016

Respectfully submitted,

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

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

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

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

Paul M. Smith*
Scott B. Wilkens*
Luke C. Platzer*
JENNER & BLOCK LLP
1099 New York Avenue, NW Suite 900
Washington, D.C. 20001-4412
Telephone: 202-639-6000
Facsimile: 202-639-6066
psmith@jenner.com
swilkens@jenner.com
lplatzer@jenner.com

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I, Christopher A. Brook, hereby certify that on June 27, 2016, I electronically filed PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION, as well as the supporting declarations and exhibits thereto, using the CM/ECF system, and have verified that such filing was sent electronically using the CM/ECF system to all parties who have appeared with an email address of record.

/s/ Christopher A. Brook
Christopher A. Brook

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

JOAQUÍN CARCAÑO, et al., *Plaintiffs*, v. PATRICK MCCRORY, et al., *Defendants and Defendants-Intervenors*.	No. 1:16-cv-00236-TDS-JEP

DECLARATION OF PAYTON GREY MCGARRY IN SUPPORT OF REPLY

I, Payton Grey McGarry, declare as follows:

1. The enactment of H.B. 2 has impacted and continues to impact my daily life, including through recent health problems that have stemmed from avoiding use of the restroom.

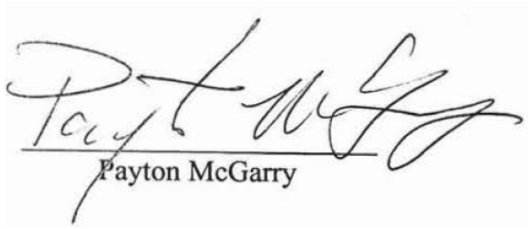
2. Prior to the enactment of H.B. 2, I often used the men's restrooms on the UNC-Greensboro campus, as I have publicly discussed.

3. Shortly after the enactment of H.B. 2 on March 23, 2016, I generally avoided using men's restrooms on the UNC-Greensboro campus.

4. In May 2016, after avoiding use of the men's restroom on the UNC-Greensboro campus as noted, or having to seek out single-user restrooms, which were not often readily or equally accessible, I experienced significant pain during urination.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on June 27, 2016.

By: 
Payton McGarry

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

JOAQUÍN CARCAÑO, et al., *Plaintiffs*, v. PATRICK MCCRORY, et al., *Defendants and Defendants-Intervenors*.	No. 1:16-cv-00236-TDS-JEP

REPLY DECLARATION OF LUKE C. PLATZER

1. I am a member of the bars of the State of New York and of the District of Columbia and have been specially admitted to this Court pursuant to L.R. 83.1(d). I am a partner in the law firm Jenner & Block LLP, counsel for Plaintiffs in this action. I make this declaration on personal knowledge, in further support of Plaintiffs' Motion for Preliminary Injunction (ECF No. 21).

2. Attached as Exhibit A to this declaration is a true and correct copy of *G.G. v. Gloucester Cty. Sch. Bd.*, No. 4:15-cv-00054 (E.D. Va. June 23, 2016) (ECF No. 69) (order on remand from Fourth Circuit, granting preliminary injunction).

3. Attached as Exhibit B to this declaration is a true and correct copy of Emily Martin, *Title IX and the New Spending Clause*, American Constitutional Society Issue Brief (Dec. 2012), available at https://www.acslaw.org/sites/default/files/Martin_-_Title_IX_and_the_New_Spending_Clause_1.pdf.

4. Attached as Exhibit C to this declaration is a true and correct copy of Order, *G.G. v. Gloucester Cty. Sch. Bd.*, No. 4:15-cv-00054 (E.D. Va. Sept. 4, 2015) (ECF No. 53) (order denying preliminary injunction), *rev'd in part and vacated in part, G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, No. 15-2056, -- F.3d --, 2016 WL 1567467 (4th Cir. Apr. 19, 2016).

5. Attached as Exhibit D to this declaration is a true and correct copy of Transcript, Kelly File, *Cruz Reacts to Boehner's Attacks: 'I Don't Know the Guy'; NC Governor Responds to 'Bathroom Bill' Backlash*, Fox News (April 28, 2016), http://www.foxnews.com/transcript/2016/04/28/cruz-reacts-to-boehner-attacks-dont-know-guy-nc-governor-responds-to-bathroom/.

6. Attached as Exhibit E to this declaration is a true and correct copy of Ann Doss Helms, *CMS: Transgender Students Can Choose Identity and Bathroom*, Charlotte Observer (June 20, 2016), available at http://www.charlotteobserver.com/news/local/education/article84889307.html.

7. Attached as Exhibit F to this declaration is a true and correct copy of Rebecca Tippett, *Non-NC Native Population by County*, UNC Carolina Population Center: Carolina Demography (Aug. 4, 2014), http://demography.cpc.unc.edu/2014/08/04/non-nc-native-population-by-county.

* * *

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 27th day of June, 2016.

Luke C. Platzer

Declaration of Luke C. Platzer
June 27, 2016

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

G.G., by his next friend and mother, DEIRDRE GRIMM,

Plaintiff

v. **CIVIL NO. 4:15cv54**

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant.

ORDER

This matter is before the Court on Plaintiff G.G.'s Motion for Preliminary Injunction. ECF No. 11. On September 4, 2015, this Court denied the Motion. ECF No. 53. On appeal, the Court of Appeals vacated this denial and remanded the case for reevaluation of the Motion under a different evidentiary standard. Op. of USCA, ECF No. 62 at 33. The Court of Appeals also reversed this Court's dismissal of G.G.'s claim under Title IX. Id. at 26. In a concurrence, Judge Davis explained why the Preliminary Injunction should issue in light of the Court of Appeals' analysis of Title IX. Id. at 37–44. It appears to the Court from the unrebutted declarations submitted by the parties that the plaintiff is entitled to use the boys' restroom. Therefore, for the reasons set forth in the aforesaid concurrence and based on the declarations submitted by the parties, the Court finds that the plaintiff is entitled to a preliminary injunction.

As noted in the Opinion of the Court of Appeals, this case is only about G.G.'s access to the boys' restrooms; G.G. has not requested access to the boys' locker rooms. Id. at 7 n. 2 ("G.G.

does not participate in the school's physical education programs. He does not seek here, and never has sought, use of the boys' locker room. Only restroom use is at issue in this case."). Accordingly, this injunction is limited to restroom access and does not cover access to any other facilities.

Based on the evidence submitted through declarations previously proffered for the purpose of the hearing on the Preliminary Injunction, this Court, pursuant to Title IX, hereby **ORDERS** that Gloucester County School Board permit the plaintiff, G.G., to use the boys' restroom at Gloucester High School until further order of this Court.

The Clerk is **DIRECTED** to forward a copy of this Order to all Counsel of Record.

IT IS SO ORDERED.

/s/
Robert G. Doumar
Senior United States District Judge
UNITED STATES DISTRICT JUDGE

Newport News, VA
June 23, 2016

Declaration of Luke C. Platzer
June 27, 2016

EXHIBIT B

Title IX and the New Spending Clause

By Emily J. Martin

December 2012

American Constitution Society | 1333 H Street, NW, 11th Floor | Washington, DC 20005

Title IX and the New Spending Clause

Emily J. Martin*

At oral argument in the cases challenging the Affordable Care Act, when Paul Clement argued that the law's expansion of Medicaid exceeded Congress's Spending Clause powers because it left states with no realistic option of refusing to carry out the expansion, Justice Ginsburg seemed troubled. "Let me ask you another thing, Mr. Clement," she began:

> Most colleges and universities are heavily dependent on the government to fund their research programs and other things, and that has been going on for a long time. And then Title IX passes, and a government official comes around and says to the colleges, you want money for your physics labs and all the other things you get it for, then you have to create an athletic program for girls. And the recipient says, I am being coerced, there is no way in the world I can give up all the funds to run all these labs that we have, I can't give it up, so I'm being coerced to accept this program that I don't want.
>
> . . . [I]f your theory is any good, why doesn't it work any time . . . someone receives something that is too good to give up?[1]

Many others have been asking the same question since the Supreme Court's decision in June, which held that Congress unconstitutionally coerced the states when it conditioned states' continued receipt of Medicaid funding on the states expanding Medicaid coverage to all adults under 133 percent of poverty. On SCOTUSblog and NPR's All Things Considered, Kevin Russell, of the Supreme Court litigation boutique Goldstein & Russell, opined that one of the case's major impacts "will be to revive claims that several significant civil rights statutes, enacted under Congress's Spending Power, are unconstitutional."[2] In the *New York Times*, constitutional law expert Pamela Karlan wondered whether the decision would "hamstring" efforts by Congress to condition federal funding on nondiscrimination requirements.[3] *Ed Law Challenges Loom After Health Care Ruling*, ran a headline in *Education Week*, identifying Title IX as a potentially affected statute.[4]

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* Vice President and General Counsel at the National Women's Law Center.

[1] Transcript of Oral Argument at 21:18, Nat'l Fed. Of Ind. Business v. Sebelius, 132 S. Ct. 2566 (No. 11-393), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-400.pdf.

[2] Kevin Russell, *Civil rights statutes put at risk by health care decision*, SCOTUSBLOG (Jun. 29, 2012, 9:54 AM), http://www.scotusblog.com/2012/06/civil-rights-statutes-put-at-risk-by-health-care-decision/; Carrie Johnson, *All Things Considered: How the Health Care Ruling Might Affect Civil Rights*, NATIONAL PUBLIC RADIO (NPR radio broadcast July 10, 2012), *available at* http://wgbhnews.org/post/how-health-care-ruling-might-affect-civil-rights.

[3] Pamela S. Karlan, *No Respite for Liberals*, N.Y. TIMES, at SR 1 (July 1, 2012).

[4] Mark Walsh, *Ed. Law Challenges Loom After Health-Care Ruling*, TEACHHUB (Oct. 8, 2012, 2:33 PM); http://www.teachhub.com/ed-law-challenges-loom-after-health-care-ruling; *See also* Mark Walsh, *Health-Care Ruling Has Implications for Education Spending*, EDUCATION WEEK SCHOOL L. BLOG (Jun. 28, 2012, 4:44 PM), http://blogs.edweek.org/edweek/school_law/2012/06/medicaid_ruling_has_implicatio.html.

This issue brief surveys the legal landscape in which Title IX finds itself in the wake of the Supreme Court's Spending Clause analysis in *NFIB v. Sebelius*.[5] It analyzes the structure and function of Title IX and sets out the key legal distinctions between Title IX and the ACA's Medicaid expansion, providing a roadmap for litigators who inevitably will confront challenges to Title IX's constitutionality by defendants facing Title IX claims. It demonstrates why Title IX remains a wholly constitutional exercise of Congressional authority.[6]

I. The Supreme Court's New Spending Clause Jurisprudence

In March 2010, the 111th Congress passed The Patient Protection and Affordable Care Act, as amended by the Health Care and Education Reconciliation Act of 2010,[7] commonly known as the Affordable Care Act (ACA). Among many other provisions, the ACA significantly expanded the reach of the cooperative state-federal Medicaid program.[8] Beginning in 2014, the ACA requires states to provide Medicaid coverage to all adults under age 65 with incomes below 133 percent of the federal poverty level (FPL).[9] Previously, federal law did not require that adults' eligibility for Medicaid be based solely on income level. Instead, states were required to cover low-income children and certain categories of low-income adults: primarily pregnant women below 133 percent of the FPL, very low-income parents, and elderly and disabled Supplemental Security Income beneficiaries.[10] In addition, states were required to provide a limited form of Medicaid coverage to certain low-income Medicare beneficiaries, covering costs that they would otherwise be required to share under Medicare.[11] As a result, many states currently do not provide Medicaid to childless adults at all and cover parents only at income levels far below 133 percent of the FPL.[12] The ACA further provides that the federal government will bear the entire cost of this coverage expansion for the first two years; the federal share thereafter will be reduced gradually to 90 percent.[13]

Since 1982, every state has participated in Medicaid, but the federal Medicaid statute makes such participation optional—though, of course, a state will only receive federal Medicaid funding if it participates in the program. The federal government generally pays between 50 and 83 percent of a state's Medicaid costs, depending on income levels in the state[14]—far less than the federal share of the ACA Medicaid expansion. In order to provide insurance to low-income individuals, each state can accept federal funding to operate and design its own Medicaid program within the parameters set by the federal government, including the expansion of

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[5] Nat'l Fed. Of Ind. Business v. Sebelius, 132 S. Ct. 2566 (2012) [hereinafter *NFIB*].

[6] While this issue brief focuses on Title IX, its analysis regarding the Spending Clause can be applied in key respects to Title VI of the Civil Rights Act of 1964, § 504 of the Rehabilitation Act, and the Age Discrimination Act of 1975, all antidiscrimination laws that apply to federally funded programs and activities and all of which Title IX mirrors in structure.

[7] Patient Protection and Affordable Care Act, § 2005, Pub. L. No. 111–148, 124 Stat. 119-1025 (2010).

8 42 U.S.C. § 1396a.

9 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII).

[10] *See* 42 U.S.C. § 1396a(a)(10)(A).

[11] *See id.*

[12] States currently must provide Medicaid to children under age 6 with family income up to 133 percent of the FPL and children ages 6 through 18 with family income up to 100 percent of the FPL. 42 U.S.C. §§ 1396a(a)(10)(A)(i)(IV), (VI), (VII), 1396a(l)(1)(B)-(D), 1396a(l)(2)(A)-(C).

[13] Affordable Care Act, § 2005.

[14] 42 U.S.C. § 1396d(b).

coverage required by the ACA, *or* turn down that funding and create a totally different program with state money only, or no program at all.

Following the enactment of the ACA, state attorneys general and others challenged the ACA's expansion of Medicaid eligibility, arguing that withholding Medicaid reimbursement to a state unless that state complies with the expansion of its Medicaid program exceeded Congress's powers under the Spending Clause and violated the Tenth Amendment. The plaintiff states argued that they would be coerced into contributing state funds toward the expanded Medicaid coverage because failure to comply with these increased requirements would expose them to a potential penalty loss of all Medicaid funding. Medicaid represents 40 percent of all federal funds that states receive, and the majority of states currently receive more than $1 billion in Medicaid funding each year.[15] Accordingly, the states argued, because they had no realistic option to turn down this funding, the federal government was unconstitutionally coercing them to undertake the ACA's Medicaid expansion by conditioning future Medicaid funding on implementation of the expansion.[16]

Seven Justices held that Congress's Spending Clause power did not permit it to condition all future Medicaid funds to a state on the state's implementation of the ACA's Medicaid expansion. Justice Roberts wrote the narrower (and thus controlling) opinion on this issue, which Justice Breyer and Kagan joined.[17] While Justices Ginsburg and Sotomayor would have held that the Medicaid expansion was wholly constitutional, they joined Justices Roberts, Breyer, and Kagan in holding that an appropriate remedy for any constitutional violation was to sever the enforcement mechanism permitting all Medicaid funds to be withheld from a state that failed to implement the expansion from the Medicaid expansion itself—and this was the holding of the Court.[18] (Justices Scalia, Thomas, Alito, and Kennedy would have struck down the entire ACA to remedy the violation.[19])

As a result of the Supreme Court's decision, the ACA therefore still provides for the expansion of Medicaid, but states that fail to comply with that expansion may not be penalized by the loss of their existing Medicaid funding. Instead, the federal government may only withhold the federal funding associated with the Medicaid expansion.

An important basis for this result was Justice Roberts' view of the Medicaid expansion not as an enhancement of the existing Medicaid program, but rather as a new program layered on top of the existing Medicaid program.[20] Central to the Court's decision that Congress could not withhold all Medicaid funding if states did not undertake the Medicaid expansion, is Justice Roberts' conclusion that conditions that "take the form of threats to terminate other significant

[15] KENNETH R. THOMAS, CONG. RESEARCH SERV., 7-5700, THE CONSTITUTIONALITY OF FEDERAL GRANT CONDITIONS AFTER NFIB V. SEBELIUS 2 (July 17, 2012).
[16] Brief of State Petitioners at 32-48, State of Florida v. Dep't of Health and Human Services, No. 11-400, (S. Ct. Jan. 10, 2012) (addressing coercion through Medicaid funding).
[17] *NFIB*, 132 S. Ct. at 2601-08.
[18] *Id.* at 2641-42.
[19] *Id.* at 2667-76.
[20] *See id.* at 2605-06 ("The Medicaid expansion . . . accomplishes a shift in kind, not merely degree. . . . Indeed, the manner in which the expansion is structured indicates that while Congress may have styled the expansion a mere alteration of existing Medicaid, it recognized it was enlisting the States in a new health care program.").

independent grants . . . are properly viewed as a means of pressuring the States to accept policy changes."[21]

The Court also emphasized the sheer size of Medicaid and its importance to state budgets in finding the enforcement mechanism unconstitutionally coercive. As noted by the Court, "Medicaid spending accounts for over 20 percent of the average State's total budget, with federal funds covering 50 to 83 percent of these costs."[22] It is by far the largest federal grant to states.[23] The size of the federal grant is such, the Court concluded, that no state could voluntarily turn it down, while "[t]he legitimacy of Congress's exercise of the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'"[24] Contrasting the Medicaid expansion to the Court's 1984 decision in *South Dakota v. Dole*,[25] which concluded that Congress did not unconstitutionally coerce the states or exceed its Spending Clause powers when it conditioned a small portion of federal highway funds to a state on the requirement that the state adopt legislation setting the drinking age at 21, the Court reasoned:

> It is easy to see how the *Dole* court could conclude that the threatened loss of less than half of one percent of South Dakota's budget left that State with a 'prerogative' to reject Congress's desired policy, 'not merely in theory but in fact.' The threatened loss of over ten percent of a State's overall budget, in contrast, is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion.[26]

No state has in fact ever been penalized with loss of its entire Medicaid funding for failure to meet program requirements, but the Court dismissed this fact as insignificant, characterizing the threat of loss of all Medicaid funding as "a gun to the head."[27]

The holding marked a dramatic departure from previous Spending Power jurisprudence. Never before in the nation's history has legislation enacted pursuant to Congress's Spending Power been found to unconstitutionally coerce the states. Indeed, the Court had previously expressed skepticism that the states, as sovereigns, could ever be coerced by a promise of federal funds, as it was always in their power to say no. In rejecting a coercion challenge to an unemployment insurance law passed pursuant to the Spending Power, for example, the Court noted in 1937, "Nothing in the case suggests the exertion of a power akin to undue influence, if we assume that such a concept can *ever* be applied with fitness to the relations between state and nation."[28] As the Court stated in that case and reaffirmed in *Dole*, "[T]o hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. . . Till now the law has been guided by a robust common sense which assumes the freedom of the will as a

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[21] *Id.* at 2604.
[22] *Id.*
[23] *See id.* at 2605 ("The Federal Government estimates that it will pay out approximately $3.3 trillion between 2012 and 2019 in order to cover the costs of *pre*-expansion Medicaid."); *see also id.* at 2662 ("Medicaid has long been the largest federal program of grants to the States.") (Scalia, J., et al, dissenting).
[24] *Id.* at 2602 (citing Pennhurst State Sch. and Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).
[25] South Dakota v. Dole, 483 U.S. 203 (1987).
[26] *NFIB*, 132 S.Ct. at 2605, *quoting Dole*, 483 U.S. at 211-12.
[27] *Id.* at 2604.
[28] Chas. C. Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937) (emphasis added).

working hypothesis in the solution of its problems."[29] In *Dole*, the Court noted that a state's sovereignty was not compromised when a state could "adopt the simple expedient of not yielding" to the alleged federal coercion.[30] Based on these statements, federal courts of appeals consistently rejected claims that Spending Power laws such as Medicaid coerced the states into accepting the terms on which the federal funds were offered, concluding that states in fact were just presented "hard political choices" by these laws, which did not implicate the Constitution.[31]

While seven justices agreed that enforcement of the Medicaid expansion through the threatened loss of all Medicaid funding was unconstitutionally coercive, and thus dramatically changed Spending Power jurisprudence, the Court did not clearly identify a test to apply in future cases.[32] As a result, observers and commentators, soon, no doubt, to be joined by litigants, are raising questions about the constitutionality of a host of other Spending Power laws and programs, including Title IX.

II. Title IX's Powerful Antidiscrimination Mandate

Forty years ago, Congress enacted Title IX of the Education Amendments of 1972, providing that entities receiving federal funding may not discriminate on the basis of sex in education programs or activities. Modeled on Title VI of the Civil Rights Act of 1964, which prohibits race and national origin discrimination by recipients of federal funds, Title IX has had a revolutionary effect in opening educational opportunities to women and girls over the past forty years. It swept away the once common practice of holding women to higher standards in higher education admissions and artificially capping their enrollment in elite colleges and universities. While women received less than 20 percent of Ph.D.'s in life sciences in 1972, today they receive slightly more than half, and the percentage of engineering Ph.D's received by women, although still far too low, has increased from zero percent in 1972 to about 20 percent today.[33] Only seven percent of high school athletes were girls in 1972, but today girls are 41 percent of those playing high school sports.[34] Six times as many women participate in college athletics as did at the time of Title IX's passage.[35] As the result of Title IX, students facing sexual harassment now have a legal remedy.[36] Pregnant students are no longer routinely expelled from high school.[37]

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[29] *Dole*, 483 U.S. at 211 (quoting *Steward Machine*, 301 U.S. at 589-90).
[30] *Id.* at 210.
[31] California v. United States, 104 F.3d 1086, 1092 (9th Cir. 1997); *see also, e.g.*, Van Wyhe v. Reisch, 581 F.3d 639. 652 (8th Cir. 2009); Jim C. v. United States, 235 F.3d 1079, 1082 (8th Cir. 2000) (en banc); Kansas v. United States, 214 F.3d 1196, 1203-1204 (10th Cir. 2000); Padavan v. United States, 82 F.3d 23, 28-29 (2d Cir. 1996); Nevada v. Skinner, 884 F.2d 445, 448-49 (9th Cir. 1989); Oklahoma v. Schweiker, 655 F.2d 401, 413-14 (D.C. Cir. 1981).
[32] *See, e.g.*, *NFIB*, 132 S. Ct. at 2606. ("We have no need to fix a line . . . . It is enough for today that wherever that line may be, this statute is surely beyond it.").
[33] NATIONAL COALITION FOR WOMEN AND GIRLS IN EDUCATION, TITLE IX: WORKING TO ENSURE GENDER EQUALITY IN EDUCATION, CELEBRATING 40 YEARS, at 22 (2012), http://www.ncwge.org/PDF/TitleIXat40.pdf.
[34] *Id.* at 8.
[35] *Id.*
[36] *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999).
[37] *See* 34 C.F.R. § 106.40 (2012).

Title IX's nondiscrimination guarantee reaches all of the operations of any educational institution that receives federal funding.[38] For example, Title IX extends not only to the "traditional educational operations" of a college receiving federal funding, but also to "faculty and student housing, campus shuttle bus service, campus restaurants, the bookstore, and other commercial activities," of the college, as well as its other operations.[39] In addition, any education program or activity operated by an entity that receives federal funding is also covered by Title IX. For example, if a hospital receives federal funding for a particular clinic, then any educational programs operated by the hospital are covered by Title IX.[40]

Title IX is enforceable not only by a private right of action, which provides a vehicle for injunctive relief and damages,[41] but also by the federal agencies providing the financial assistance to the relevant institution, with the Department of Justice playing a coordinating role, in close consultation with the Department of Education.[42] Federal agencies investigate and resolve administrative Title IX complaints against funding recipients.

When an agency concludes that a federal funding recipient has violated Title IX, it must first seek to resolve the violation through voluntary compliance by the recipient.[43] If attempts to achieve voluntary compliance are unsuccessful, the matter may be referred to the Justice Department, which has the authority to bring litigation to resolve the violation.[44] Alternatively, an agency has the power to terminate federal funding based on a Title IX violation, but only after it determines that "compliance cannot be secured by voluntary means."[45] A formal hearing, an express finding of failure to comply, and an approval of fund termination by the agency head must precede any termination of funds.[46] In addition, prior to any termination of funds, the agency must also file a report providing the grounds for the decision to terminate funds with the House and Senate legislative committees having jurisdiction over the relevant program and wait 30 days before terminating funds.[47] Funding can be terminated only when the particular funding

[38] 20 U.S.C. § 1687. This language was added to Title IX by the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988), which overturned the Supreme Court's decision in Grove City College v. Bell, 465 U.S. 555 (1984) (holding that Title IX's antidiscrimination rule applied only to the particular aspect of an institution's operations that actually received federal funding), and restored Title IX's broad reach, as well as the broad reach of other antidiscrimination laws tied to federal funding.

[39] S. REP. NO. 64 at 17 (1988), *reprinted in* 1988 U.S.C.C.A.N. 19.

[40] 20 U.S.C. § 1687; *see also, e.g.*, Jeldness v. Pearce, 30 F.3d 1220 (9th Cir. 1994) (holding that educational activities operated by prisons receiving federal funds were bound by Title IX); U.S. DEP'T OF JUSTICE, CIV. RTS. DIV., TITLE IX LEGAL MANUAL at 53, n. 28 and accompanying text (Jan. 11, 2001), http://www.justice.gov/crt/about/cor/coord/ixlegal.pdf.

[41] *See* Cannon v. University of Chicago, 441 U.S. 677 (1979) (finding an implied private right of action under Title IX); Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992) (finding a right to recover damages for intentional violations of Title IX).

[42] *See* Exec. Order No. 12,250, 3 C.F.R. 298 (1980), *available at* http://www.archives.gov/federal-register/codification/executive-order/12250.html.

[43] 42 U.S.C. § 2000d-1.

[44] *Id.* (authorizing compliance with Title IX to be effect "by any other means authorized by law"); 34 C.F.R. § 100.8 (2012).

[45] 42 U.S.C. § 2000d-1.

[46] Procedure for Effecting Compliance, 34 C.F.R. § 106.71 (2012); 34 C.F.R. § 100.8 (2012).

[47] *Id.*; 20 U.S.C. § 1682.

stream at issue is directly financing discrimination or financing an activity that is infected with discrimination.[48]

III. Title IX and the New Spending Clause

As noted above, Justice Roberts' decision for the Court in *NFIB v. Sebelius* does not set out any precise test for determining whether a Spending Power program is unconstitutionally coercive,[49] but a fair analysis of the holding demonstrates that because Title IX is markedly different from the challenged Medicaid expansion in key ways, Title IX is constitutional, even under the Court's re-envisioning of Spending Power jurisprudence.

First, it is important to note that Title IX's mandate applies to private entities receiving federal money, as well as public entities, in contrast to the Medicaid program where the challenged provisions applied only to states. *NFIB*'s Spending Power analysis is driven solely by a professed concern for "ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system."[50] Thus, the *NFIB* analysis has no applicability to Spending Power statutes as applied to private actors and casts no shadow whatsoever over Title IX's applicability to private federal funding recipients. Title IX also reaches local governments receiving federal money. Given that *NFIB* is singular as a case finding unconstitutional coercion in violation of the Spending Clause, it is unclear if coercion claims are even available to local governments, or whether such claims, if available, would be subject to the same legal standard as applied to claims by states, but there are potentially important differences between the two contexts.[51]

Even as applied to state governments, however, Title IX is sharply distinct from the Medicaid expansion. Much of the Spending Power analysis in *NFIB* suggests that Medicaid is uniquely situated in Spending Power jurisprudence because of the sheer size of the program as a percentage of state budgets. "Medicaid spending accounts for over 20 percent of the average State's total budget, with federal funds covering 50 to 83 percent of those costs," Justice Roberts' opinion emphasized, concluding that the "threatened loss of over 10 percent of a State's overall budget" left states with no choice but to comply.[52] The opinion of Justices Scalia, Kennedy, Thomas, and Alito (which provided the additional four votes to the three votes for Justice Roberts' opinion) further observed:

> The States are far less reliant on federal funding for any other program. After Medicaid, the next biggest federal funding item is aid to support elementary and secondary education, which amounts to 12.8% of total federal outlays to the States, and equals only 6.6% of all state expenditures combined. . . . [E]ven in states with less than average federal Medicaid funding, that funding is at least

[48] 42 U.S.C. § 2000d-1.
[49] *See supra* note 32 and accompanying text.
[50] 132 S. Ct. at 2602.
[51] *Compare* Printz v. United States, 521 U.S. 898, 931 n.15 (1997) (refusing to distinguish between state and local government for purposes of Tenth Amendment analysis) *with* Monell v. Dep't of Social Servs., 436 U.S. 658, 690 n. 54 (1978) (distinguishing between state and local governments for purposes of sovereign immunity analysis).
[52] *NFIB*, 132 S. Ct. at 2604, 2605 (Opinion of Roberts, C.J.).

> twice the size of federal education funding as a percentage of state expenditures.[53]

Four of the justices in the majority thus drew an explicit contrast between Medicaid funding (and states' ability to refuse it) and federal education funding. Given the Court's emphasis on the unique size of Medicaid, on its face *NFIB*'s Spending Clause analysis applies only to Medicaid, and indeed, only to the ACA's very particular type of Medicaid expansion.[54]

Title IX's nondiscrimination rule, of course, attaches not only to aid to support elementary and secondary education, but to any federal funding received by an educational institution and to any federal funding received by an institution that operates an educational program or activity—a much more difficult to calculate category of federal outlays to states. Key differences between the design and operation of the Medicaid expansion and the design and operation of Title IX, however, mean that the size of the federal outlay to which Title IX's requirements attach is largely beside the point for the purposes of Spending Power analysis, even if the total amount of this funding were to rival federal Medicaid funding. The crucial difference lies in the structure of Title IX and the potential penalty for noncompliance.

When the Court considered Medicaid, it considered a funding stream structured as a single, large federally-funded program. Thus, the Court focused on the size of the entire Medicaid grant received by states and states' dependence on that entire Medicaid grant when it considered whether the ACA's expansion of Medicaid eligibility as a condition of future receipt of Medicaid funding was unconstitutionally coercive. Title IX is fundamentally different in its structure from Medicaid as it existed either before or after the ACA expansion. It is not a single federally-funded program, but rather a condition imposed on multiple, separate federal funding streams, each of which operates independently.

The relevance of this difference is made clear by the potential penalty faced by states that fail to comply with Title IX. Through language known as the "pinpoint provision," Title IX narrows and limits the adverse effects of federal fund termination. This provision states that when a federal agency terminates or refuses to grant funding based on a Title IX violation, "such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and *shall be limited in its effect to the particular program, or part thereof,* in which such noncompliance has been so found."[55]

The seminal case interpreting this language is *Board of Public Instruction v. Finch*,[56] a case that arose under Title VI—the source of Title IX's identical pinpoint provision.[57] In *Finch*, a Department of Health, Education, and Welfare (HEW) hearing officer made findings that a school district had not made adequate progress toward racial desegregation, and that the district had instead sought to perpetuate a dual school system through its school construction program. Based on these findings, a final order was entered by the Commissioner of Education terminating

[53] *Id.* at 2663-64.
[54] *See id.* at 2606 (distinguishing the ACA expansion of Medicaid from all previous Medicaid expansions and amendments).
[55] 20 U.S.C. § 1682 (emphasis added).
[56] 414 F.2d 1068 (1969).
[57] *See* 42 U.S.C. § 2000d-1.

"any class of Federal financial assistance" to the district "arising under any Act of Congress" administered by HEW, the National Science Foundation, or the Department of the Interior.

The Fifth Circuit vacated this termination of funding, holding that it exceeded the Commissioner of Education's power under Title VI. The Commissioner's order had terminated federal funding pursuant to three separate statutes—"one concern[ing] federal aid for the education of children of low income families; one involv[ing] grants for supplementary educational centers; [and] the third provid[ing] special grants for the education of adults who have not received a college education."[58] But the Commissioner had made no specific findings as to whether each of these federal grants had been used to support unlawfully segregated education, or if discrimination in one federally funded activity caused discriminatory treatment in the other activities funded by separate federal streams.

The court held that in the absence of such findings, the termination of all three federal funding streams to the school district violated the pinpoint provision. The court focused on the provision's requirement that a termination of funding be "limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found," and concluded that the term "program" referred not to generic categories of programs operated by a recipient (for example, educational programs) but rather to the program of assistance administered by the federal government pursuant to a particular statute.[59] Thus, an agency's fund termination order must be based on grant-statute-specific findings of noncompliance. As the court explained:

> If the funds provided by the grant are administered in a discriminatory manner, or if they support a program which is infected by a discriminatory environment, then termination of such funds is proper. But there will also be cases from time to time where a particular program, within a state, within a county, within a district, even within a school (in short, within a "political entity or part thereof"), is effectively insulated from otherwise unlawful activities. Congress did not intend that such a program suffer for the sins of others. . . . Each [statutory program] must be considered on its own merits to determine whether or not it is in compliance with the Act. Schools and programs are not condemned *en masse* or in gross, with the good and the bad condemned together, but the termination power reaches only those programs which would utilize federal money for unconstitutional ends. Under this procedure each program receives its own "day in court."[60]

The *Finch* court made clear that a program should not be considered "in isolation from its context"; if discrimination has (for example) affected the make-up of the entire student body of the school, then a program offered within the school may in some instances be infected by discrimination, even if it is not itself actively discriminating.[61] But by limiting the termination

[58] *Finch*, 414 F.2d at 1074.
[59] *Id.* at 1072 (quoting 42 U.S.C. § 2000d-1). Further, the court concluded, even if "program" was meant to refer to generic categories of aid, such as "aid to schools" the parenthetical phrase, "or part thereof," must be given meaning. *Id.* at 1077.
[60] *Id.* at 1075, 1078 n.11. *See also* Gautreaux v. Romney, 457 F.2d 124 (7th Cir. 1972).
[61] *Id.* at 1079.

power to activities that are either actually discriminatory or infected by a discriminatory environment, vindictive terminations of funds are avoided and innocent beneficiaries of programs untainted by discrimination are protected.[62]

The *Finch* holding has been consistently followed by courts and federal agencies and remains in effect today. While the Civil Rights Restoration Act of 1988 amended Title IX's definition of "program" to clarify that Title IX applies to all the operations of an educational institution that receives federal funding and all the educational operations of an institution if any part of the institution receives federal financial assistance,[63] this did not affect the pinpoint provision, which limits fund termination to the particular program "or part thereof" found to have discriminated or been infected by discrimination. Thus, to the extent the Civil Rights Restoration Act broadened Title IX's definition of "program," the "or part thereof" language of the pinpoint provision ensured that the federal power to terminate funds to states or other recipients remained unchanged, as legislative history and implementing regulations make clear.[64]

Therefore, Title IX does not contemplate or permit a wholesale termination of (for example) federal education funding to a state in the absence of a showing of sex discrimination infusing and infecting the entirety of a state's federal education funds. As a result, Title IX is not unconstitutionally coercive under *NFIB*. After all, the opinion of the Court did not hold that the expansion of Medicaid was unconstitutionally coercive; rather, it held that the potential penalty of loss of all Medicaid funding for failure to comply with the expansion was unconstitutional. A majority of five Justices agreed that any constitutional violation in the Medicaid expansion was wholly cured by limiting the potential penalty states faced. In other words, as Justice Roberts' decision states, "Nothing in our opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care, and requiring that States accepting such funds comply with conditions on their use. What Congress is not free to do is to penalize States that choose not to participate in that new program by taking away their existing funding."[65] In the language of *NFIB*, Title IX is a condition that "govern[s] the use of the funds" provided to the state, rather than a condition that "take[s] the form of threats to terminate other significant independent grants."[66] Because Title IX requires that any termination of federal funds based on sex discrimination be specific to the grant money that funds the discrimination, it is in complete conformity with the *NFIB* holding requiring the penalty for refusing to expand Medicaid be limited to the loss of federal funding associated with the expansion of Medicaid.

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[62] *Gautreaux*, 414 F.2d at 1075.
[63] 20 U.S.C § 1687. *See supra* note 388 and accompanying text.
[64] *See* S. REP. NO. 100-64, at 20 (June 5, 1987) (noting that the CRRA leaves in effect the *Finch* rule that "Federal funds earmarked for a specific purpose would not be terminated unless discrimination was found in the use of those funds or the use of the funds was infected with discrimination elsewhere in the operation of the recipient"); Conforming Amendments to the Regulations Governing Nondiscrimination Under the Civil Rights Restoration Act of 1987, 65 Fed. Reg. 68050, 6805 (codified at 34 C.F.R. pts. 100, 104, 106, and 110) (Nov. 13 2000) ("It is important to note that these changes do not in any way alter the requirement of the CRRA that a proposed or effectuated fund termination be limited to the particular program or programs 'or part thereof' that discriminates or, as appropriate, to all of the programs that are infected by the discriminatory practices."); U.S. DEP'T OF JUSTICE, CIV. RTS. DIV., TITLE IX LEGAL MANUAL at 149, n. 124 and accompanying text (Jan. 11, 2001), http://www.justice.gov/crt/about/cor/coord/ixlegal.pdf.
[65] 132 S.Ct. at 2607.
[66] *Id*. at 2604.

IV. Title IX and the Fourteenth Amendment

Title IX is not only an appropriate exercise of Congress's Spending Power; as applied to states; it is also an appropriate exercise of Congress's authority to enforce the Equal Protection Clause under Section 5 of the Fourteenth Amendment. Even if a court were somehow to conclude, despite the differences in structure and scope between the Medicaid expansion and Title IX, that Title IX exceeded Congress's Spending Power when applied to states receiving federal funding, Title IX would nevertheless apply to these states as an appropriate exercise of Congress's Section 5 power.

The Equal Protection Clause protects against sex discrimination by state actors. Distinctions on the basis of sex are impermissible unless they are substantially related to an important state interest and based on an exceedingly persuasive justification.[67] Section 5 of the Fourteenth Amendment gives Congress the power to "'enforce,' by 'appropriate legislation'" this constitutional guarantee.[68] Title IX is just such an appropriate enforcement of the Equal Protection Clause's antidiscrimination mandate.

The Supreme Court has set out guidance for determining when a statute "appropriately" enforces the Equal Protection Clause. Congress determines what legislation is necessary to secure the guarantees of the Fourteenth Amendment, and "its conclusions are entitled to much deference."[69] In determining whether legislation is valid under Section 5, the Court has often asked whether Congress had evidence of a pattern of state constitutional violations that the legislation targeted,[70] although the Court has also noted that lack of such a legislative record "is not determinative of the § 5 inquiry."[71] A legislative record is likely less relevant when Congress targets discriminatory practices that are otherwise amply demonstrated in the historical record and recognized in court decisions, as is the history of unconstitutional sex discrimination by states.[72]

"Legislation enacted under § 5 must be targeted at 'conduct transgressing the Fourteenth Amendment's substantive provisions,'"[73] but Congress is not limited to narrowly prohibiting acts forbidden by the Fourteenth Amendment itself.[74] Instead, "Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and

[67] *E.g.*, United States v. Virginia, 518 U.S. 515 (1996).
[68] City of Boerne v. Flores, 521 U.S. 507, 517 (1997).
[69] *Id.* at 536.
[70] Nevada Dep't of Human Resources v. Hibbs, 538 U.S. 721 (2003).
[71] Kimel v. Florida Board of Regents, 528 U.S. 6, 91 (2000); Florida Prepaid v. College Savings Bank, 27 U.S. 627, 646 (1999); *see also City of Boerne*, 521 U.S. at 532.
[72] *E.g.*, *Virginia*, 518 U.S. at 531-32 (observing that women "have suffered . . . at the hands of discriminatory state actors during the decades of our Nation's history"); J.E.B. v. Alabama, 511 U.S. 127 (1994) (concluding that "our Nation has had a long and unfortunate history of sex discrimination, a history which warrants the heightened scrutiny we afford all gender-based classifications today"); Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725 n. 10 (1982) ("History provides numerous examples of legislative attempts to exclude women from particular areas simply because legislators believed women were less able than men to perform a particular function.").
[73] Coleman v. Maryland Court of Appeals, 132 S.Ct. 1327, 1334 (2012).
[74] "Congress' power 'to enforce' the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel*, 528 U.S. at 81.

deter unconstitutional conduct."[75] Legislation that goes beyond the Fourteenth Amendment's own requirements is appropriate under Section 5 when there is "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[76] The Supreme Court has noted that because gender-based classifications are subject to heightened scrutiny under the Constitution, it is "easier for Congress to show a pattern of state constitutional violations" justifying legislation under Section 5 when targeting sex discrimination than it is to show a pattern of state constitutional violations justifying Section 5 legislation when targeting discrimination subject only to rational basis review under the Equal Protection Clause. This is because classifications on the basis of sex are presumptively unconstitutional, so evidence of a history of such classifications by states will in general establish a history of constitutional violations.[77]

Significant evidence of a pattern of unconstitutional discrimination on the basis of sex in education undergirds Title IX. The Supreme Court itself has taken judicial notice of the "volumes of history" documenting sex discrimination in education, including unconstitutional discrimination by states.[78] The exclusion of women from public education is part of the long history of states' discrimination on the basis of sex that the Court has acknowledged on numerous occasions.[79]

Moreover, when Congress passed Title IX in 1972, it had before it significant evidence of unconstitutional sex discrimination in public schools. For example, as summarized by the House Report on the bill:

> During the course of extensive hearings on higher education, much testimony was heard with respect to discrimination against women in our institutions of higher education. Testimony revealed that women are required to meet higher admission standards than men. One instance cited to the Committee occurred at the University of North Carolina where admission of women at the freshman level was "restricted to those who are especially well qualified." No similar restriction existed for male students. A 1964 report of the Virginia Commission for the Study of Educational Facilities in the State of Virginia pointed out that 21,000 women students were turned down for college entrance in the State of Virginia while not one male student was rejected. On the graduate level, testimony revealed that the situation worsens.[80]

Senator Birch Bayh, the lead sponsor of Title IX, decried "an arbitrary and compulsory ration of 2 ½ men to every woman at a State university," and noted the Department of Psychology at Berkeley had not hired a woman since 1924.[81] Data before Congress showed that in higher education "women are under-represented or placed in positions with little power in decision

[75] *Hibbs*, 538 U.S. at 727.
[76] *Coleman*, 132 S.Ct. at 1334.
[77] *Hibbs*, 538 U.S. at 735.
[78] *Virginia*, 518 U.S. at 531; *Id.* at 536-38; 542-44.
[79] *See, e.g.*, *supra* note 72.
[80] H.R. REP. NO. 92-554 (Oct. 9, 1971), *reprinted in* 2 U.S.C.C.A.N. 72-48, 2511.
[81] 117 CONG. REC. 30,156 (Aug. 5, 1971).

making" and that "[t]his is particularly true in the large *public* institutions."[82] Reports relied on by Congress showed that leading public law schools had no or almost no women faculty members.[83]

Congress also had evidence that both public and private colleges provided women with markedly lower levels of scholarship aid than men. A survey of students, more than half of whom were enrolled in public colleges or universities, found that men received larger scholarships and aid packages, while women took out more loans to attend college, despite the fact that the women reported receiving higher college grades than the men did.[84]

The rampant discrimination uncovered by Congress included discrimination in elementary and secondary public education. A report on sex bias in the public schools entered into the Congressional Record in 1971 documented "women assigned to sex-segregated classes, teachers who favor[ed] their male students, and guidance counselors who discourage[d] [women] from many careers."[85] It summarized the widespread practice of assigning girls to home economic courses and boys to shop courses. It described how the leading public high schools in New York City admitted only a handful of girls and had only admitted any beginning in the previous two years as the result of legal action, and noted that specialized public vocational high schools in New York City focusing on automobiles, aviation, and the electrical industries were closed to girls, who instead were offered courses in typing, stenography, and cosmetology.[86] Another report concluded that a survey of city boards of education found that sex segregation in high school vocational programs was "the rule rather than the exception," with many more vocational programs being offered to boys than girls.[87]

In short, evidence before Congress documented an overwhelming culture of sex stereotyping, gender steering, and sex discrimination in education in the United States, including both public and private institutions.[88] For example, a Ford Foundation-funded report on higher education relied on by Congress concluded, "Discrimination against women, in contrast to that against minorities, is still overt and socially acceptable within the academic community."[89]

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[82] 117 CONG. REC. 2658 (Feb. 11, 1971) (statement of Rep. Mink) (emphasis added).
[83] 118 CONG. REC. 3939 (Feb. 15, 1972) (data drawn from the Association of American Law Schools Directory of Law Teachers entered into the record by Sen. Bayh).
[84] 118 CONG. REC. 5759 (Educational Testing Service study entered into the record by Sen. Bayh).
[85] 117 CONG. REC. 25,507 (July 14, 1971) (statement of Rep. Abzug); see also 117 CONG. REC. 39,253 (Nov. 4, 1971) (statement of Rep. Sullivan) (noting discrimination against women in employment at state universities, including University of Connecticut, where 33 percent of instructors, but only 4.8 percent of full professors, were women, the University of Massachusetts, where only two out of 65 women on faculty had tenure, and the University of Michigan, where even in traditionally female courses of study, women professors were grossly underrepresented).
[86] *Id.* at 25,508.
[87] 118 CONG. REC. 3936 (Feb. 15, 1972) (report entered into the record by Sen. Bayh).
[88] This evidence included seven days of hearings on discrimination against women in education, which documented discriminatory practices ranging from public universities expressing preferences for males in job postings, to overt discrimination against women in admissions to public medical schools, to biased counseling discouraging women from pursuing certain fields and certain degrees. *See generally Hearings on Discrimination Against Women, Before the Special Subcmte. on Educ. of the House Cmte. on Education and Labor* (1970), *available at* http://repositories.lib.utexas.edu/bitstream/handle/2152/12878/_Chisholm_DiscriminationAgainstWomenI.pdf?sequence=2.
[89] 118 CONG. REC. 5803 (Feb. 28, 1972) (statement of Sen. Bayh).

In 1988, when Congress passed the Civil Rights Restoration Act, restoring the broad reach of Title IX after its coverage had been narrowed by the Supreme Court, Congress reinforced and updated these findings, again documenting ongoing, persistent sex discrimination in public education, including discrimination in athletics programs and employment, and sexual harassment of students.[90] In fact, a primary impetus for enacting the Civil Rights Restoration Act was Congress's concern about ongoing, invidious sex discrimination in college athletics, which included the athletic programs at public colleges and universities.[91]

Through this evidence and much more like it, the legislative history of Title IX and the Civil Rights Restoration Act reinforces the long pattern of sex discrimination in education, repeatedly recognized by the Supreme Court, and amply demonstrates widespread violations of the guarantee of equal protection of the law by state actors. Moreover, the forty years since passage of Title IX provide numerous examples of ongoing sex discrimination by states (as well as by localities and private actors), highlighting the continuing need for these protections.[92] For these reasons, Title IX rests on a firm basis as a remedy for a pattern of constitutional violations.

The differences in scope between the Equal Protection Clause and Title IX as applied to state actors are relatively minor, [93] and so the statute easily meets the "congruence and proportionality" test. Title IX expressly targets discrimination on the basis of sex, discrimination that is presumptively unlawful under the Constitution when undertaken by state actors. Given the established history of unconstitutional sex discrimination in public education, little more is necessary to demonstrate that Title IX is a congruent and proportional response. As the Eighth Circuit noted in concluding that Title IX is Section 5 legislation, "Because the Supreme Court has repeatedly held that [the Fourteenth Amendment] proscribe[s] gender discrimination in education, . . . we are unable to understand how a statute enacted specifically to combat such discrimination could fall outside the authority granted to Congress by § 5." [94] The Supreme Court has soundly rejected the notion that in the face of evidence of gender discrimination by states, "Congress [can] do no more in exercising its sec. 5 power than simply proscribe such discrimination."[95] Title IX's proscription of such discrimination, which is in some important

[90] *E.g.*, *Hearings on the Civil Rights Restoration Act of 1987 Before the Sen. Labor and Human Resources Cmte.*, S. Hrg. 100-374, at 264-78 (1987).
[91] *See id.*
[92] *E.g.* Mansourian v. Regents of Univ. of Cal., 602 F.3d 957 (9th Cir. 2010) (reversing and remanding district court dismissal of claims that state university discriminated in violation of Title IX and the Constitution based on denial of athletic opportunities to women wrestlers); Jennings v. Univ. of N.C., 482 F.3d 686 (4th Cir. 2007) (en banc) (reversing district court's grant of summary judgment and finding that coach's alleged behavior to female soccer team member, if proven, constituted sexual harassment in violation of Title IX and possibly the Constitution); Williams v. Bd. of Regents of Univ. Sys., 477 F.3d 1282 (11th Cir. 2007) (reversing dismissal of claim that state university violated Title IX based on its inadequate response to sexual assault of female student by male varsity athletes); Communities for Equity v. MIch. High Sch. Athletic Ass'n, 459 F.3d 676 (6th Cir. 2006) (finding that state athletic association violated Title IX and the Constitution by scheduling high school sports seasons in a discriminatory manner).
[93] *See* Fitzgerald v. Barnstable, 555 U.S. 246, 257 (2009).
[94] Crawford v. Davis, 109 F.3d 1281 (8th Cir. 1997).
[95] *Hibbs*, 538 U.S. at 737.

respects *narrower* than the Equal Protection Clause,[96] does not dramatically depart from the Constitution's own and is clearly permissible under Section 5.

For example, Title IX protects against discrimination on the basis of pregnancy as a form of sex discrimination.[97] In *Nevada Department of Human Resources v. Hibbs*, upholding the Family and Medical Leave Act's family leave provisions as Section 5 legislation enforcing the Equal Protection Clause, the Supreme Court made clear that legislation protecting against gender stereotypes and discrimination that focused on women as "mothers or mothers-to-be" was permissible under Section 5.[98] Title IX's protections against pregnancy discrimination and discrimination on the basis of parental status similarly respond to and prevent unconstitutional practices based on gender stereotypes.

Indeed, multiple courts of appeals have recognized that Title IX is not only Spending Power legislation, but also Section 5 legislation.[99] As the Supreme Court recognized in *Hibbs*, Congress can rely on more than one source of constitutional authority in passing a single statute.[100] Congress did not explicitly identify Section 5 as a source of authority when it initially enacted Title IX, but the Supreme Court reiterated in *NFIB* itself that "[t]he 'question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.'"[101] As the Eighth Circuit explained when it determined that Title IX was Section 5 legislation, as well as Spending Clause legislation, the inquiry is an objective one: "As long as Congress had such authority [to legislate] as an objective matter, whether it also had the specific intent to legislate pursuant to that authority is irrelevant."[102] Moreover, when Congress passed the Civil Rights Remedies Equalization Act in 1987 in order to abrogate states' Eleventh Amendment immunity in Title IX suits, it specifically relied not only on the Spending Clause, but also on Section 5.[103] Congress's explicit recognition that Section 5 empowered it to provide

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[96] *E.g. Hogan*, 458 U.S. at 732 (noting that Title IX does not reach admissions policies of undergraduate institutions that have from their establishment admitted only students of one sex, while the Equal Protection Clause has no such exception).

[97] Chipman v. Grant County School Dist., 30 F. Supp. 2d 975 (1998); 34 C.F.R. § 106.40(b).

[98] *Hibbs*, 538 U.S. at 736.

[99] *Crawford*, 109 F.3d at 1283; Escue v. Northern Ok. College, 450 F.3d 1146, 1152 (10th Cir. 2006); Franks v. Kentucky Sch. for the Deaf, 142 F.3d 360, 363 (6th Cir. 1998); *see also* Doe v. Univ. of Illinois, 138 F.3d 653, 660 (1998), *vacated*, 526 U.S. 1142 (1999).

[100] *Hibbs*, 538 U.S. at 726-27 (noting that Congress relied on Commerce Clause Power and Section 5 power in enacting the FMLA).

[101] *NFIB*, 132 S.Ct. at 2598 (quoting Woods v. Cloyd W. Miller Co., 333 U.S. 138, 144 (1948)); *see also* EEOC v. Wyoming, 460 U.S. 226, 243 n. 18 (1983).

[102] *Crawford*, 109 F.3d at 1283. The two court of appeals decisions holding or suggesting that Title IX is not Section 5 legislation were reversed or disapproved by the Supreme Court on other grounds. *See* Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1398-99 (11th Cir. 1997), *rev'd*, 526 U.S. 629 (1999); Rowinsky v. Bryan Ind. Sch. Dist., 80 F.3d 1006, 1012 (1996), *disapproved by* 526 U.S. 629 (1999). Moreover both courts holding or suggesting that Title IX was not Section 5 legislation based their analysis on the theory that Title IX's structure and legislative history indicate that Congress relied on its Spending Clause power in passing the statute; yet, Any argument that Congress can only rely on multiple sources of constitutional authority when it explicitly says it is doing so is impossible to reconcile with the Supreme Court's recent reiteration that Congress need not recite any magic words of intent in order to exercise available constitutional powers.

[103] *See* 131 CONG. REC. 22,346 (1985) (describing legislation as "clearly authorized" by the Spending Clause and Section 5); S. Rep. No. 388, 99th Cong., 2d Sess. 27 (1986).

remedies against states in Title IX cases provides strong reinforcement for the conclusion that Title IX, as applied to state actors, enforces the Equal Protection Clause.

For all these reasons, Title IX is not only valid Spending Clause legislation, it is also valid Section 5 legislation. Indeed, even Paul Clement, no friend to federal mandates, suggested as much when he responded to Justice Ginsburg's question regarding Title IX during the *NFIB* arguments. "I guess the question for this Court would be whether or not Section 5 of the 14th Amendment allowed Congress to do that," he concluded.[104] Section 5 most assuredly does permit Congress to do just that.

V. Conclusion

In the wake of the *NFIB* decision, defendants in Title IX litigation, and other litigation arising under Spending Power antidiscrimination laws, will no doubt seek to expand the Court's holding to undermine these crucial protections. Supreme Court precedent, including the *NFIB* decision itself, provides a clear roadmap for repelling these attacks. The fundamental principle that the federal government can ensure that its funds are not spent in support of invidious discrimination remains robust. Title IX remains strong.

[104] Transcript of Oral Argument at 22:10, Nat'l Fed. Of Ind. Business v. Sebelius, 132 S. Ct. 2566 (No. 11-393), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-400.pdf.

Declaration of Luke C. Platzer
June 27, 2016

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION

G.G., by his next friend and mother, DEIRDRE GRIMM,

Plaintiff

v.

CIVIL NO. 4:15cv54

GLOUCESTER COUNTY SCHOOL BOARD,

Defendant.

ORDER

This matter is before the Court on Plaintiff G.G.'s challenge to a recent resolution (the "Resolution") passed by the Gloucester County School Board (the "School Board") on December 9, 2014. This Resolution addresses the restroom and locker room policy for all students in Gloucester County Public Schools. Specifically, G.G. brings claims under both the Equal Protection Clause of the Fourteenth Amendment and Title IX of the Education Amendments of 1972, seeking to contest the School Board's restroom policy under the Resolution.

On June 11, 2015, G.G. filed a Motion for Preliminary Injunction. ECF No. 11. A hearing on this motion was held on July 27, 2015. ECF No. 47. No testimony was elicited at this hearing. Id. The Court hereby **DENIES** the Plaintiff's Motion for Preliminary Injunction. A memorandum opinion detailing the reasons for the denial will be forthcoming shortly.

The Clerk is **DIRECTED** to forward a copy of this Order to all Counsel of Record.

IT IS SO ORDERED.

/s/
Robert G. Doumar
Senior United States District Judge

UNITED STATES DISTRICT JUDGE

Norfolk, VA
September 4, 2015

Declaration of Luke C. Platzer
June 27, 2016

EXHIBIT D

KELLY FILE

Cruz reacts to Boehner's attacks: 'I don't know the guy'; NC governor responds to 'bathroom bill' backlash

Published April 28, 2016 12 1
FoxNews.com

NOW PLAYING
Cruz reacts to Boehner's attacks: 'I don't know the guy'

This is a rush transcript from "The Kelly File," April 28, 2016. This copy may not be in its final form and may be updated.

MEGYN KELLY, HOST, "THE KELLY FILE": Breaking tonight, presidential candidate Senator Ted Cruz firing back after taking a big hit from one of the best-known Republicans in the country.

Welcome to "The Kelly File," everyone. I'm Megyn Kelly. Just hours after Senator Cruz declared that Carly Fiorina would be his running mate, former House Speaker John Boehner single-handedly managed to upstage the Fiorina news with a very blunt interview at Stanford University. A no holds barred when it came to Boehner's former Congressional colleague. Watch.

(BEGIN VIDEO CLIP)

PROFESSOR DAVID KENNEDY: How about saying your opinions on some of the other people running for the highest people in the land? How about Ted Cruz?

REP. JOHN BOEHNER, R-OHIO, FORMER SPEAKER OF THE HOUSE: Lucifer in the flesh.

(LAUGHTER)

(APPLAUSE)

I have a, I have a great opinion along with almost everyone. I, I in Washington I have as many Democrat friends as I have Republican friends. I got along with almost everybody. But I have never worked with a more miserable son of a (bleep) in my life.

(APPLAUSE)

Over my dead body will he be president.

(END VIDEO CLIP)

KELLY: It is no secret that Speaker Boehner and Senator Cruz had their clashes on Capitol Hill, but that did not stop this headline from becoming the top story in the country today. And tonight we have Republican presidential candidate Senator Ted Cruz here to respond to that among other things. Senator, great to see you. Thanks for being here.

SEN. TED CRUZ, R-TEXAS, PRESIDENTIAL CANDIDATE: Megyn, it's always a pleasure to be with you.

KELLY: What do you make of Lucifer in the flesh? He's never worked with a more miserable son of a "b" and over his dead body will you be president?

CRUZ: Well, you know, I think that reveals everything that's wrong with Washington. Let's start with a little bit of facts. He claims he's never worked with anyone more miserable. I don't know John Boehner. He and I have never worked together. I've probably met him two, three, four times in my life. I'd be surprised if we've said 50 words to each other and everything we've ever said has been empty pleasantries, good to see you, Mr. Speaker. So, his claim that he's never worked with anyone more unpleasant, we've never worked together. In fact, during the government shutdown, I reached out and offered for Mike Lee and me to go over and sit down with the speaker and the majority leader and the response I got was, no interest.

There's no point in talking. We have nothing to say to you. So I don't know the guy. But you know what was striking, Megyn, in that same interview, Boehner reveals that he is texting and golfing buddies with Donald Trump. He thinks Donald Trump is terrific. He also praised Hillary Clinton. If you want to see what is wrong with the corruption in Washington with the Washington establishment and the system, John Boehner and Donald Trump and Hillary Clinton, they're all part of the same problem.
And the reason John Boehner so unhappy --

KELLY: I mean, they would argue that's you bond a little, you go out on the links. I don't know what I'm talking about. Links, that's what you do. And you bond. And that's how you get deals done.

CRUZ: Well, and there's a reason that Donald Trump gave $100,000 to John Boehner's Super PAC that he texts back and forth with the speaker, that they're golfing buddies. If you think John Boehner is the kind of leader you want in the Republican Party, then Donald Trump is your guy. If you think Harry Reid and Nancy Pelosi are good leaders in Congress, then Donald Trump is your guy because Donald Trump has given big checks to Harry Reid and Nancy Pelosi and Hillary Clinton.

KELLY: Let me switch gears with you.

CRUZ: And you know what I find interesting real quickly, is that Donald is trying very hard and the media is trying very hard to paint him as somehow standing up to the system. Donald Trump and Hillary Clinton and John Boehner are the system.

KELLY: Got it.

CRUZ: And the reason John Boehner is mad at me is that I stood with the people who elected me and led the fight to repeal ObamaCare, to stop amnesty, to stop the debt. And there is nothing Washington hates more than-- it's not just that.

KELLY: I want to shift gears. That's enough time on John Boehner.

CRUZ: He doesn't like being held accountable by the voters.

KELLY: With all due to Mr. Boehner, we're giving him too much time. I want to talk about Carly Fiorina.

CRUZ: Absolutely.

KELLY: Because she is beloved by many Republicans, and yet a lot of people yesterday said, well, this is just a stunt. He's 400 delegates away from securing the nomination. Trump is way ahead of him in the popular vote, three million or so. What's he doing naming a running mate? What's your answer?

CRUZ: Well, listen, number one, Carly is fantastic. She's a strong leader. It illustrates the kind of team that will be in the

administration if I'm elected president. But number two, this is an unusual year by any measure, and this nomination, naming her as my VP nominee, ensures that we have a clear choice in this election between Carly and me on the one side, a positive, optimistic, conservative, forward-looking campaign with real policy solutions to bring jobs back to America, to raise wages, to bring manufacturing jobs back to America, to defend the constitution and bill of rights and keep us safe versus on the other hand Donald Trump and Hillary Clinton which are flip sides of the same coin.

They are both the Washington establishment. They're both the system. Donald Trump and Hillary Clinton agree on Planned Parenthood. Donald Trump and Hillary Clinton agree in many respects on ObamaCare. They agree on being neutral between Israel and the Palestinians. And the contrast the voters in Indiana and going forward deserve a clear choice between Carly and me on the one hand, a positive, optimistic, conservative campaign, and Donald Trump and Hillary Clinton both of whom have gotten rich buying and selling influence in Washington, D.C.

KELLY: He denies that. But just for the record, he denies that he's for ObamaCare. He says he's very against it and so on. But I want to ask you about the delegate count because --

CRUZ: But let's be clear, Megyn. Megyn, hold on, hold on! Facts matter.

KELLY: I don't want to talk about ObamaCare.

(CROSSTAK)

He just for the record, he denies that, he says he's against ObamaCare and he wants to repeal it.

CRUZ: Megyn true or false, he said repeatedly he supports the individual mandate in ObamaCare.

KELLY: He said it once to Anderson Cooper and then he came and he took it back.

CRUZ: Okay, so that is a fact. That is a fact.

KELLY: Okay.

CRUZ: That is true. True or false, he said that the government should provide health care for everyone?

KELLY: He said that agreed.

CRUZ: I mean, facts matter.

KELLY: He said that to Scott Pelley, I got you. I got you. Listen, I'm just trying to -- just for the record --

(CROSSTALK)

CRUZ: The facts matter and we can't just dismiss it. Well, he says it's not true. Well, he said it multiple times on television looking in the camera.

KELLY: I got it. I got it. He said the government is going to pay for it. He wants to take care of everyone and the government is going to pay for it.

CRUZ: Okay. Now, that's the truth.

KELLY: I'm just saying he said, he doesn't want Obamacare.

CRUZ: But you know what Megyn, he'll say you're lying for repeating what he's saying.

KELLY: Okay. Let me ask you this.

CRUZ: But he wants to expand it. He doesn't like it because he thinks it doesn't go far enough.

KELLY: Okay.

CRUZ: I don't like it.

KELLY: I got it. I got your point.

CRUZ: I'm going to repeal every word of it as president.

KELLY: He likes some form of government health care is your point, whatever it's called.

CRUZ: He likes massive government health care. He invokes Scotland and Canada. And ObamaCare is the biggest job killer in America, if you're a small business owner, Donald Trump and Bernie Sanders are both going to increase the burdens on you. I'm going to repeal every word of it. And that's why we need a clear contrast. Donald Trump and Hillary are both pretending to be something they're not.

KELLY: You mentioned that. I'm trying to ask you -- I'm trying to ask you about something that is concerning to your supporters. Your supporters who understand how important Indiana is to your campaign.

CRUZ: Yes.

KELLY: But the polls are showing that people, some 65 percent of Republicans, even people who support Ted Cruz, believe the person who enters the convention with the most delegates and the most votes should likely emerge as the nominee, even if it takes, you know, even if he doesn't have a majority. And right now as I mentioned he has got 400 more delegates than you do, he's got 3.2 million more votes -- popular votes than you do. He won 27 states. You won 11. So, given that, how could you possibly unite this party coming out of a contested convention?

CRUZ: Well, let me answer it a couple of ways. Number one, nobody is going to get to 1237. Donald is not getting there. I'm not getting there. Donald can't get there. It's why he's so desperately trying to convince everyone the race is over because he know --

KELLY: He can get there if he wins in Indiana and does very well in California.

CRUZ: But he's not going to. He is not going to. And he's not going to get to 1237. And even when folks try to do all

CRUZ: But he's not going to. He is not going to. And he's not going to get to 1237. And even when folks try to do all sorts of math he falls short. And we're going to a contested convention. And listen, the poll you cited, of course people say yes to that poll. If you called someone up and says, should the person with the most votes win? Anyone goes, duh, yes. How about asking the question that is really the relevant question. Should you have to earn a majority to be the nominee?

KELLY: Yes. That's a fair point.

CRUZ: I agree 60 to 70 percent will say yes to that as well. I mean, that's a poll question that's rigged. The Trumpsters pushes it out there because it suggests, I mean, if you ask anyone, should the person with the most votes win? Of course. But his argument is, he should be the nominee even though he can't win a majority. And let me tell you, we are headed to Cleveland. There will be a contested convention. Donald Trump won't get to 1237. And when that happens, the highest vote total Trump ever has will be the first vote total.

He will go steadily down. And I believe what we're seeing is the Republican Party uniting and Megyn that's one of the reasons people are so excited with my name and Carly as my VP. Because Carly is an incredible -- has an incredible ability to unify and bring this party together. It's why five of the 17 Republican candidates who started have endorsed my campaign including Carly, including Scott Walker and Jeb Bush and Lindsey Graham and Rick Perry. We are uniting the party. And we got to stand on something --

KELLY: But how can you say that? Because the critics say you're not uniting them. When they look at what happened on Tuesday. You lost five states, didn't even get 25 percent of the vote. I know it was the northeast, I know that wasn't a Ted Cruz tailor made election. But your critics say, Donald Trump may not be uniting them, given Never Trump and so on, but nor are you.

CRUZ: Well, Megyn, listen, Donald won his home state and he won several states that immediately are right next to his home state. That's terrific. He did well in the northeast. What I can tell you is right before that, we won five states in a row, five states in a row one after the other after the other from Utah to North Dakota to Wisconsin to Colorado to Wyoming.

KELLY: How confident are you in Indiana? How confident are you in Indiana?

CRUZ: I hope we will do well. We're campaigning and barnstorming. And we're working to earn the votes. Listen, I will say this. I have a great deal of confidence in the Midwestern good sense and good judgment of the Hoosiers state. And the people of Indiana are deciding, do we want to nominate a campaign that is based on yelling, screaming and cursing and insults? Or do we want a campaign with real solutions? You know it's been 48 days since the last Republican debate? I think the people of Indiana deserve a debate. And by the way, today Donald Trump gave a speech once again

screaming that I'm a liar because I did what you did earlier on the show. I actually pointed out his real record and what he says. And when you do that, when you tell the truth about Donald, he calls you a liar.

KELLY: Okay.

CRUZ: Donald, I've got a great idea. Let's have a debate in Indiana. And let's talk about what you believe and what I believe and in particular solutions to bring jobs back to America. I've got a real economic agenda to bring manufacturing jobs back to Indiana, to raise wages. Donald doesn't know how to solve these problems, which is why he's unwilling to debate.

KELLY: I have to leave it there, Senator.

CRUZ: By the way, we have a new website, it's CruzCarly.com. CruzCarly.com. CruzCarly.com.

KELLY: It's great to see you. Thanks for being here, Senator Cruz.

CRUZ: Always a pleasure, Megyn. Thank you.

KELLY: Well, coming up. A well-known magazine just published a controversial profile of Donald Trump's wife Melania Trump. And now she is firing back. Howie Kurtz on one of the first big fights from Melania.

Plus, ever since North Carolina passed the so-called bathroom law, protesters have slammed the state for what they call discrimination against transgender people. Tonight, the governor of North Carolina joins us live to respond to the critics.

KELLY: And then a must-see first for "The Kelly File." Anderson Cooper of CNN joins us for a revealing conversation about family and fame and more. Don't miss this.

(BEGIN VIDEO CLIP)

KELLY: Do you feel like looking back on your 48 years so far, it's been a charmed life? It's been a cursed life?

(END VIDEO CLIP)

KELLY: Breaking tonight, we are getting video just back from Trump Tower here in New York where emergency responders have been called for some sort of suspicious substance. Trace Gallagher is at the breaking news desk with the very latest in what we're learning. Trace.

TRACE GALLAGHER, FOX NEWS CORRESPONDENT: Megyn, the call came in about an hour and ten minutes ago. This is on Fifth Avenue, the high-rise Donald Trump, Trump Towers of course where his campaign office is. They found white powder. We see video right here from outside the building. White powder, unclear exactly where they found it in the building because the Police Department is not confirming that. A local report says it was found in the mail room. But now

six people including a New York police officer have been isolated because in some capacity they were exposed to this suspicious white powder.

You can see a lot of people on scene right there. Donald Trump is not in New York. In fact, Trump is here in California. He speaks in about 45 minutes in Orange County. He won't be back in New York tomorrow either because he speaks at the GOP convention here in the state. Again, suspicious white powder found at Trump Tower where the campaign offices are on Fifth Avenue, unclear exactly what it is. In the process of being tested and the people have been isolated to make sure they are okay as we
get more information on this, Megyn, we will get back to you.

KELLY: Trace, thank you.

(BEGIN VIDEO CLIP)

MELANIA TRUMP, WIFE OF DONALD TRUMP: He's a fighter, and if you elect him to be your president, he will fight for you and for our country. He will work for you and with you, and together we will make America strong and great again. Thank you.

(END VIDEO CLIP)

KELLY: Well, Melania Trump usually gets a warm welcome from her husband's supporters out on the campaign trail, but today she got a harsh lesson in the downside of the political spotlight. GQ Magazine publishing a controversial profile on Mrs. Trump that included some very personal details about her life from cosmetic procedures to revelations of a secret half-brother. And now she is firing back saying in part, quote, "There are numerous inaccuracies in this article including certain statements about my family and claims some personal matters." The author of the article is standing by her reporting.

(BEGIN VIDEO CLIP)

UNIDENTIFIED FEMALE: The piece went through thorough fact checking. It was also vetted by GQ's legal team. The things that -- I think what she's alluding to is the fact that we found her half-brother from -- her father impregnated another woman before he met her mother. And she has a half- brother living in Slovenia that she didn't know about.

(END VIDEO CLIP)

KELLY: Joining me now with more Fox News "MediaBuzz" host Howard Kurtz. Howie, good to see you. So was this a fair piece or not a fair piece?

HOWARD KURTZ, FOX NEWS HOST, "MEDIABUZZ": Another Trump disgusted by the media. Well, Melania has a point. I mean, why on earth is it necessary to publish a piece about Melanie's father back in Slovenia, back in 1965, back before he met Melania's mother, getting involved in a paternity lawsuit and having to pay child suit support to a son who everyone agrees Melania never met. What does this have to do with the potential first lady or with Donald Trump?

KELLY: Why do we care? Why do we care? How does this relate to the vote in 2016?

KURTZ: Exactly. I mean, it's an invasion of privacy. She asked the magazine not to publish it. The dad is hardly a public figure. And it feels like an attempt to get a busy headline. But you know Megyn, this piece kind of wreaks of condescension. There's the $100,000 Dior wedding dress that the laborers --

KELLY: That piece didn't bother me. That's what her wedding dress cost. They had a fancy wedding. So what? It's a vision into the lifestyles of the rich and famous.

KURTZ: Okay. But then we have the supposed friend, blind quote, saying she is not a bimbo, but she's not especially clever.

KELLY: There you go. Now, the author of this piece makes the decision on whether or not to include a line like that. Go ahead.

KURTZ: With nobody's name attached. But there was some investigative reporting in the piece into whether or not Melania had had a boob job. Which she denies. So, we've gone from the size of the hands --

KELLY: Glad we have that figured out.

KURTZ: Yes.

KELLY: Glad we have that figured out.

And the other thing is, you know, I was reading the thing. I want to give the author the benefit of the doubt because, you know, the media especially in articles, they try to be more provocative a piece like this, GQ, they try to sort of be a little titillating. But man, it's clear because she talks about how when he met her he was 52, she was 28. A tall, shy brunette whose face had yet to acquire the taut plasticine squint that makes it looks as if cameras are forever catching her a second before a sneeze. I mean, wow. You walk away thinking that the author does not like Melania Trump and we should not know that if that is how she feels.

KURTZ: Right. I mean, there was some, a lot of reporting in this, but I think here's the bottom-line which is Melania Trump who I've met a couple of times is somebody who is a mom, who has a traditional role in a traditional family who doesn't like the spotlight and doesn't particularly want to talk publicly about politics. And for that, this Manhattan elite magazine kind of portrayed her as a trophy wife with not much to offer and that he came back to me --

KELLY: That's exactly what the New York Times actually called her, Howie.

KURTZ: Yes.

KELLY: Months ago, the New York Times actually called her a trophy wife and called her a mannequin, given her successful career as a model. I mean, apparently, you know, I just have to wonder whether a piece like this had been written by a woman married to a Democrat with liberal stripes would have been accepted without question by so many.

KURTZ: Well, I don't want to impugn the author's motives but I will say I wonder if it hadn't been written about Donald Trump's wife or somebody who was more part of the political establishment, whether or not this kind of negative and frankly snarky tone would have been allowed to permeate this piece of journalism.

KELLY: Uh-hm. The blind quotes are a problem, and, you know, note to Melania Trump, don't sit for an interview if you can't get the writer to agree not to use blind quotes against you. Because that's dirty pool. There you go. That is free advice. No charge.

KURTZ: Good journalistic advice.

KELLY: She doesn't need my money. All right. Great to see you, Howie.

KURTZ: My pleasure.

KELLY: I could use some of theirs. I mean, who couldn't?

(LAUGHTER)

KELLY: We are continuing to track this breaking news here about the emergency responders at trump Tower. This is not the first time this has happened. I believe this happened a couple of few weeks ago involving one of Trump's sons. Reports of a suspicious substance at Trump Tower here in New York City. We're following it.

Plus, we have new details tonight on what happened when a man in an animal costume showed up at a TV station claiming to have a bomb. That's ahead.

And then Anderson Cooper is here on "The Kelly File" set next talking 2016, the rumors about a possible new job, and the powerful, compelling documentary and book about his famous mother and himself, next.

(BEGIN VIDEO CLIP)

UNIDENTIFIED FEMALE: When you were born, I was sure it was going to be a girl.

ANDERSON COOPER, CNN ANCHOR: You really wanted a girl.

UNIDENTIFIED FEMALE: Oh! I was meant to have daughters.

COOPER: I won't take it personally.

(END VIDEO CLIP)

KELLY: Welcome back to "The Kelly File" and an interview we've been wanting to do for a while. Over the last 12 months of campaign coverage, there have been more than 20 sanctioned political debates, dozens of political town halls and a countless number of candidate interviews. While all the best ones have been on the FOX News Channel and obviously "The Kelly File," one other political journalist has managed to hold his own from time to time. And here are a couple of his more memorable exchanges.

(BEGIN VIDEO CLIP)

DONALD TRUMP, R-PRESIDENTIAL CANDIDATE: I thought it was a nice picture of Heidi. I thought it was fine.

COOPER: Come on.

TRUMP: I didn't start it. I didn't start it.

COOPER: Sir, with all due respect, that's the argument of a five-year-old.

TRUMP: I didn't start it.

COOPER: Yes. The argument of a five-year-old is he started it.

HILLARY CLINTON, D-PRESIDENTIAL CANDIDATE: Look, I made speeches to lots of groups. I told them what I thought. I answered questions.

COOPER: But did you have to be paid $675,000?

CLINTON: Well, I don't know. That's what they offered so --

CRUZ: Let's be clear. How many hours of free media does CNN and Fox and every other station you let them call in and for a year --

COOPER: Well, I've got to say we've asked you for interviews pretty much every day and you've declined every offer on my program.

CRUZ: Well, Anderson, I'm right here.

(END VIDEO CLIP)

KELLY: Joining me tonight for the first time, Anderson Cooper. He's the host of "ANDERSON COOPER 360" on CNN star of the new documentary "Nothing Left Unsaid" and co-author of the New York Times number one bestseller, "The Rainbow Comes and Goes: A Mother and Son on Life, Loss and Love." Great to see you, Anderson.

COOPER: Great to be here. Thanks for having us.

KELLY: Congratulations on the success of the book, number one New York Times.

COOPER: Yes. It debuted at number one. My mom is thrilled.

KELLY: Amazing.

COOPER: Yes. It's incredible. We invited Senator Cruz on last night. Didn't come either.

KELLY: He's coming here on "The Kelly File" tonight.

COOPER: I'm sure. I'm sure.

KELLY: I'll ask him some questions for you.

COOPER: Okay.

KELLY: I watched the documentary. And was riveted and was really moved by it. And my own take on it was, in a way it's a love letter to your mom.

COOPER: Yes.

KELLY: I mean, it's you getting to know her and helping us get to know her. And through that experience we get to know

KELLY: I mean, it's you getting to know her and helping us get to know her. And through that experience we get to know you, too.

COOPER: Yes. You know, my dad died when I was 10, and I always had this fantasy growing up that he'd wrote me a letter and maybe that letter would show up when I turned 18, when I turned 21, he would tell me all about, you know, about his life, and what he wanted for my life. And of course there wasn't any letter. It turns out my mom had the exact same fantasy about her father because her father died when she was 15 months old. And I realized when my mom turned 91, I didn't want to have that fantasy about my mom when she's no longer here. So we started doing this project together of e-mailing each other and just me asking her questions, her asking me questions, and getting to know each other in a new way. And that's what the book is. The book comes and goes. And the documentary is sort of a representation of that as well.

KELLY: She's had such an incredible life. I mean, you go, obviously
Anderson is a Vanderbilt.

COOPER: I consider myself a Cooper.

KELLY: Right. Right. But you've got it in the blood.

COOPER: Yes.

KELLY: And it goes through just how she was obviously born into a very wealthy family and shuffled around. She really didn't have parents. She was pulled from the only real parents she ever knew which was her nanny, her nurse.

COOPER: Right.

KELLY: And, you know, an abusive marriage and tumultuous divorces. And then came the loss of her husband, your dad.

COOPER: Right.

KELLY: And ultimately the loss of her son, your brother.

COOPER: Yes. Yes. My brother committed suicide in front of her when he was 23 and I was 21. But, you know, she has this incredible resilience. And I think that's one of the things that really comes out in the book and the film is that, you know, she has this drive and determination to survive. And she's not a tough person, but she's very strong. And I think there's a big difference. You know, she's incredibly vulnerable but she remains the most optimistic person I know. Despite all the thing that have happened to her, she still thinks the next great love is right around the corner at 92.

KELLY: You...

(CROSSTALK)

COOPER: Which I find the idea is exhausting.

KELLY: But she's known a lot of people.

COOPER: Yes.

KELLY: She's been open about that.

COOPER: Yes. Very open about that.

KELLY: Frank Sinatra among them.

COOPER: Frank Sinatra, Marlon Brando, Howard Hughes.

KELLY: But, yes. I've heard of them. But you also are very, you lay yourself bare in the documentary and in the book. And what's clear in learning more about you is that the death of your brother, in particular, seemed to send you into a spiral for a time.

COOPER: Yes.

KELLY: You were all over the place.

COOPER: It really propelled me into the world, and propelled me, and particularly to start going to combat zones and wars and places -- I was interested in survival and why some people survive, why two brothers growing up in the same family with the same circumstances, one survives and one doesn't.

And I started out of college I made a fake press pass, so I borrow a camera, I just started going to wars by myself and that's how I became a reporter.

KELLY: You were working something out there.

COOPER: I was. I wanted to be around places where the language of loss was spoken. You know, when you're grieving, it sometimes it's not so many people here and talk about that much.

And I found it in an odd way not comforting but understandable to be in places is where life and death was very much an issue. And where I could learn about how to survive.

KELLY: Talk about Carter. He was only a couple of years older than you were.

COOPER: Yes.

KELLY: And his terrible death and you go through it in detail, what happened that day. He seemed to be for the most part all right until -- but like a few months before he started acting out emotionally.

But did you ever wonder, since you also felt OK, do you wonder that what was inside of him that made him make that terrible decision that day is in you?

COOPER: Yes. You know, first of all, with the suicide, that's the thing, you often don't know what was in somebody's head or in their heart. And I in my -- I don't know that it was sort of a decision he made as more of an impulse that he couldn't stop.

But certainly, you know, look, studies have shown that if somebody commits suicide or dies by suicide in a family, you know, their relatives are more likely to -- someone else in the family is more likely to die that way as well.

So, I certainly had those concerns. And, you know, I think part of, you know, when my dad died when I was a kid, you know, I started setting about sort of a course of study on how to survive.

I started taking survival courses in the wilderness. I started, you know, left high school early, I rode in a truck across sub-Saharan Africa. You know, I was doing things just to sort of prepare myself to take care of myself. And I've been, you know,

doing that for a very long time.

KELLY: Do you, obviously you were born into a wealthy family and had a loving mother although the relationship has been complicated. It's gotten great.

COOPER: Yes.

KELLY: Do you feel like looking back on your 48 years so far, it's been a charmed life, it's been a cursed life?

COOPER: Oh, no.

KELLY: Some place in between?

COOPER: I mean, I have a blessed life. I mean, look, you know, yes, I was born into a, you know, a great zip code and into a family with two parents who, you know, gave me a great sense of value in myself. And though, you know, there have been tragedies that have occurred, the death of my dad and my brother, you know, I wouldn't trade my life for anything.

You know, I think I feel just as you probably feel blessed to work in the profession that we work in and to be able to tell other people's stories and learn new stuff every single day, and ride the breaking wave of history and see things for ourselves.

KELLY: You know, I think it's interesting. You lost your dad when you were 10.

COOPER: Right.

KELLY: To heart disease.

COOPER: Right.

KELLY: You know, Savannah Guthrie of NBC News lost her dad when she was 16 years old.

COOPER: I didn't know that.

KELLY: Similar circumstances. I lost my dad to a heart attack when I was 15.

COOPER: I didn't know that either.

KELLY: Don't you think it's interesting that those three kids wound up in prominent positions in television news?

COOPER: Yes. Mary Gordon a writer my mom quotes in the book said, a fatherless girl -- she was talking about herself, but I think it applies to boys as well. A fatherless girl thinks all things possible, and nothing is safe.

And I think for any child when you lose a parent early on it does change the way you see the world. And it does make the world seem a very unsafe place. But also anything is possible.

Good things as well as terrible things. And I think for me certainly, it gave me a sense of anything is possible; there are limitless possibilities if you just work incredibly hard.

KELLY: Do you think we're looking to fill a void that is unfillable?

COOPER: I certainly think I'm never content. And I think it's something -- I realize one of the things in writing this book with my mom and sort of learning about my mom, I realize I'm following a pattern that she followed as well, which is this pattern of having this drive but nothing ever really makes you content.

You know, you want a house and the white picket fence. But when you have it, it's still not enough. And I think that's common for people who have lost at least one parent early on.

KELLY: Let's talk about the election. It's been such a crazy season.

COOPER: You think?

KELLY: Yes.

COOPER: Really?

KELLY: Yes. I saw. I've heard.

COOPER: Yes. Maybe a little crazier for you than for me.

KELLY: What was -- looking back so far, what's the moment that you were involved in that -- I know what mine was. What was your moment that stands out so -- that stands out in your mind looking back on the past 12 months?

COOPER: Oh, wow. Well, look, I think, first of all, that first debate you did, I mean, for everybody who was watching was just a remarkable moment. And, look, I give you great props for, you know, the dignity with which you have handled this and the strength which you have shown and asking completely legitimate questions both in that debate and sense.

KELLY: Thank you. But what do you think, you know, Campbell Brown has an interesting piece out right now.

COOPER: Right.

KELLY: Formerly of CNN.

COOPER: Yes.

KELLY: And NBC News, you know, laying into the media. I've made remarks on this publicly myself about the saturation of Trump coverage. And this is not to say that the media had any obligation to stop any particular candidate. It's just obviously you've heard the criticism.

COOPER: Sure.

KELLY: Of CNN, of Fox, of many other outlets that it's been just saturation.

COOPER: Yes.

KELLY: What do you think of that?

COOPER: Look, I think anytime you have a person who's as compelling as Donald Trump who is a new candidate, who hasn't been involved in the process, you know, there was the same criticism about overcoverage of Hillary Clinton or overcoverage of then-Senator Barack Obama or...

KELLY: Do you think it compares? I mean, the Trump coverage seems to be something special.

COOPER: I don't know. I mean, I haven't seen the direct analysis of it. But I think that Donald Trump is a candidate unlike any we've seen and he's new to the process and so well-known. But also, he did show up for interviews and he did return phone calls.

KELLY: You seriously tell me that you invited Ted Cruz on as much as you invited Trump on?

COOPER: We have invited Ted Cruz -- we had standing invitations out to Ted Cruz all the time. Never once did he sit down for an interview, not until we did -- I did a town hall with him. That's the first time I had ever talked to Ted Cruz.

KELLY: I want to ask you a question. You have an amazing career and you've traveled the globe and you're doing great reporting for CNN. But there is a question about whether you're going to be taking a walk over to go sit next to your friend

reporting for CNN. But there is a question about whether you're going to be taking a walk over to go sit next to your friend Kelly Ripa.

COOPER: I haven't heard that question.

KELLY: On live with now I guess with Kelly and Anderson"? Is that true?

COOPER: Nothing. Nobody has talked to me. I haven't heard about that. I love Kelly Ripa. Everybody know she is a great friend of mine.

KELLY: Is that something you'd be interested in, because you have that fun side. You did a talk show, like you're not always the street news man.

COOPER: Look, I like learning new stuff every single day. But I'm very happy at CNN. I'm not going anywhere. I mean, I love CN, and, look, I mean, I'm always open to new opportunities, as are you, from what I hear.

KELLY: Well, Bill O'Reilly wanted me to ask you because he's hoping you're leaving the 8:00 time slot.

COOPER: I was that right. I was that right. Well, I think he's doing just fine. I don't think he's too worried, but...

KELLY: Thanks so much for being here.

COOPER: Thank you.

KELLY: Good luck with the boo. Good luck with the -- the documentary it's riveting. It's on HBO. It's going to be on CNN as well. Definitely check it out.

COOPER: Thanks so much. I appreciate it.

KELLY: He's a class act.

Well, we have new details tonight on a showdown at a Baltimore TV station where a man disguised in an animal costume was claiming to have a bomb.

Plus, after four weeks of protests over the so-called bathroom law, the governor of North Carolina joins us live tonight to respond to claims that his state has legitimized and legalized discrimination.

(BEGIN VIDEO CLIP)

UNIDENTIFIED MALE: The USA is watching North Carolina, and we don't need Bruce Springsteen to come here and tell us how to operate our country!

UNIDENTIFIED MALE: Government of (Inaudible), this bill does not represent equality for all mankind!

(END VIDEO CLIP)

(COMMERCIAL BREAK)

KELLY: Well, a little over a month ago, North Carolina enacted the so- called 'bathroom law' which critics were quick to call discrimination against transgender people.

Demonstrators descended on the state capitol. Companies like PayPal called off plan expansions. Some celebrities canceled appearances and then politicians weighed in.

In moments, North Carolina Governor Pat McCrory is here to respond to some of these folks. But first, Trace Gallagher is

live in our West Coast newsroom to explain what caused the uproar. Trace?

TRACE GALLAGHER, FOX NEWS CORRESPONDENT: Megyn, when the City of Charlotte passed an ordinance allowing transgender people to use the restrooms and changing rooms of whichever gender they identify with, the State of North Carolina rushed to stop it.

The legislature controlled by republicans was called in special session and in one day HB-2 or the Bathroom Bill passed both houses and was signed by the governor.

Supporters of the law say it prevents men who may be sexual offenders from pretending to be a woman and entering a woman's restroom or changing room. Opponents call HB-2 discriminatory saying, there are no known instances of predators dressing up as women and committed sex crimes.

So far, the state has taken a financial hit from the loss of conventions and concerts like Bruce Springsteen and Pearl Jam. Others stars like Jimmy Buffet who opposes HB-2 decided to perform anyway.

American Airlines and Bank of America want the law repealed and PayPal even canceled a North Carolina expansion project, although PayPal makes no mention of doing business in dozens of countries where homosexuality is illegal in some cases, punishable by death.

In the presidential race, Ted Cruz supports the law, Donald Trump first opposed it, then backtracked. Here's both.

(BEGIN VIDEO CLIP)

TRUMP: I think that local communities and states should make the decision, and I feel very strongly about that. The federal government should not be involved.

CRUZ: If Donald Trump dresses up as Hillary Clinton; he still can't use the girls' restroom.

(END VIDEO CLIP)

GALLAGHER: And because there's of the controversy, some top North Carolina GOP state lawmakers are now proposing to let voters decide if the law lives or dies.

KELLY: Trace, thank you. Joining me now, North Carolina Governor, Pat McCrory. Governor, thank you so much for being here. So, let's start with this.

PAT MCCRORY, NORTH CAROLINA GOVERNOR: Thanks.

KELLY: What was the fear that led to the enactment of this law?

MCCRORY: Let me just correct the introduction story. The Charlotte ordinance was a mandate on all private businesses that have public facilities to require them to allow gender identification as the tool on which restroom an individual should

use.

So, basically what we did in the State of North Carolina was overturn a local mandate on private businesses. I do not want government to be able to tell private businesses what their bathroom policy should be.

I have no desire to be the bathroom police for private business. So, one of the great misinterpretations from the New York Times and the Huffington Post and others, is that we passed a bathroom law on private businesses. It's just the opposite. We reversed the bathroom law.

(CROSSTALK)

KELLY: But with respect to government businesses -- but with respect to government businesses you have passed a law that requires people to use the gender that aligns with their biological gender at birth.

MCCRORY: That's correct. With regards to rest stops on the highway, with regards to universities, with regard to high schools and junior highs and elementary schools, we do require the...

(CROSSTALK)

KELLY: But why? What was the concern specifically? What was the evidence that led you to believe this was a problem?

MCCRORY: It was a -- it was a respect for privacy. It was an expectation of privacy that individuals have, especially our youth have when they go into a locker room, a shower or a restroom. They expect only people of their gender to be there in that shower, locker room or restroom.

KELLY: Let me just ask you about that.

MCCRORY: It's a tradition that we've had for many years.

KELLY: Let's me ask you that. Locker room, let's take locker room and dressing room out of it for now. Let's talk about bathroom for a second.

MCCRORY: That's a part of it, though.

KELLY: I know. But a law can be drafted narrowly or broadly.

MCCRORY: Right.

KELLY: And this one encompasses all three. And so, I want to ask you about bathrooms because I've been in women's bathrooms my whole life. And we don't have the urinal situation. We've got like the stalls.

And we get to go in, we go to do our business and like we don't -- it's not-- we don't see each other. So, why are you concerned about, you know, young girls exposing themselves or seeing somebody else exposed in a woman's bathroom?

MCCRORY: Well, first of all, I can't believe we're talking about this. This is not an issue that I started. This is an issue that the left started, not the right. And it's not just women's bathroom, it's boys' bathrooms.

In fact, the Obama administration now is putting requirements on state -- on federal money given to states that they also have to have this gender identification requirement for our schools. And this case is being tested in Virginia and Illinois. And I just think we...

(CROSSTALK)

KELLY: If you could just get back to my question, though.

MCCRORY: What we ought -- what we ought to do is for those people have these unique gender identification issues, which I empathize with, we ought to allow the schools to make special arrangements for those people.

But to all of a sudden change the basic commonsense rules that we've had in our restrooms at our rest stops, at our schools especially at our universities, this is the way we've been doing it for years. And I think it's common sense.

(CROSSTALK)

KELLY: The schools I know is an issue, too. Because it's children and maybe the parents haven't had that talk yet. But the public restrooms that, you know, are provided in public places, they are maintained by the state, the question that many

public restrooms that, you know, are provided in public places, they are maintained by the state, the question that many have is, what is your fear?

Because as you know, there is a misconception that transgendered are somehow molesters or more -- and they're not. That's not true.

MCCRORY: I don't use that term.

(CROSSTALK)

KELLY: You know, typically, male molesters are heterosexual and if they want to sneak into a bathroom they'll do it. But 90 percent of the cases of molestation happen with someone you know. So, what is the fear about the transgender situation and the bathrooms?

MCCRORY: Mine is not a fear. I'm not doing it -- I don't like the rhetoric that's often used on the right saying what the fear is. It's a basic expectation of privacy that I hear from mom and dads and families that when their daughter or son goes into a facility, a restroom, they expect people of that gender, of that biological sex or gender, to be the only other ones in that.

That's the expectations that we've had for many, many years as both you and I have grown up on.

KELLY: I got to go but I want to ask you a quick question. Can you believe PayPal is pulling under North Carolina, they're scaling back their expansion, even though they do business in Saudi Arabia where you can get killed if you're gay? I mean, hello?

MCCRORY: The selective hypocrisy -- yes, the selective hypocrisy is outrageous by PayPal.

KELLY: Yes.

MCCRORY: When they're doing business and headquartered in Singapore where you get arrested for chewing gum in public, I believe.

KELLY: They do business in Yemen but they don't want to expand business in North Carolina. Yemen is fine.

MCCRORY: Well, I think this is -- this is where the corporate elite have to be very careful about getting involved in politics is that its inconsistent outrage, its selective outrage.

And they might need to examine their own practices in other states which have the exact same rules that North Carolina does. Over 21 other states have the exact same rules that North Carolina does. And many of these businesses do a...

(CROSSTALK)

KELLY: We'll see if Bruce Springsteen cancels his concerts in every single one of those states where Demi Lovato and so on. Governor, it's good to see you.

(CROSSTALK)

MCCRORY: All they did was sort the hard work in men and people of North Carolina. And that's not the right thing to do.

KELLY: You're a standup guy for coming on and talking about it. Thank you, sir.

MCCRORY: Thank you very much.

KELLY: All of us here.

Up next, what we learned tonight about the man who dressed up in an animal outfit, went to a TV station and claimed to

have a bomb.

(COMMERCIAL BREAK)

KELLY: Breaking tonight. We are getting new details at a standoff at a Baltimore TV station involving a man who claimed to have a bomb. Trace Gallagher has the report.

GALLAGHER: Megyn, it began when the suspect stuffed a rag into the gas tank of his vehicle lit it on fire and walked into our Baltimore Fox affiliate dressed in a onesie that resembled either a panda or a hedgehog. We think it's a hedgehog.

He was wearing a surgical mask and sunglasses and had some wires in his jackets that appeared to be an explosive device. The suspect threatened to blow up the building if he wasn't allowed inside, which he was not.

He told the news director he had information on a thumb drive that he wanted to get on the air comparing it to the Panama papers. That's the story of high profile American citizens using offshore accounts to skirt the U.S. tax system.

The news director told him to hand over the thumb drive abut suspect refused and the building was evacuated. Then after a lengthy standup, the man walked out of the station and end to a confrontation with police. He was shot three times. But he's in stable condition.

The device with the wires turned out to be chocolate bars wrapped in aluminum and the hard drive contained videos of the suspect ranting about a government conspiracy. Megyn?

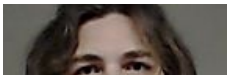
KELLY: Trace, thank you. Don't go away. We'll be right back.

(COMMERCIAL BREAK)

KELLY: I get a lot of -- a lot of feedback about our Ted Cruz interview and about the last segment we did with the governor.

Let us know your thoughts. Go to facebook.com/thekellyfile. Follow me on Twitter @megynkelly. Let me know what you think. Thanks for watching everyone. I'm Megyn Kelly and this is the Kelly File right here. Here's Sean, coming up next.

More from Fox News

Declaration of Luke C. Platzer
June 27, 2016

EXHIBIT E

EDUCATION JUNE 20, 2016 4:58 PM

CMS: Transgender students can choose identity and bathroom

HIGHLIGHTS

Charlotte-Mecklenburg Schools officials say the move is to follow a federal court ruling and is not in defiance of North Carolina's House Bill 2

Monday's training for principals aimed to make it clear: Students choose their own name and gender

Superintendent Ann Clark: 'This is about courage, understanding and compassion'

CMS: We'll honor transgender students' choices 3:03

1 of 2

BY ANN DOSS HELMS
ahelms@charlotteobserver.com

Charlotte-Mecklenburg Schools sent a message to all principals Monday: When school opens in August, transgender students will be called by the name and pronoun they choose. That chosen gender identity will be honored in restrooms, locker rooms, yearbooks and graduation ceremonies, according to a new regulation released Monday.

Superintendent Ann Clark said CMS has been working on the regulation for a year, but the political furor over North Carolina's House Bill 2 left principals and teachers confused and wary.

"You've kind of had to feel your way through this," Myers Park High School Principal Mark Bosco said at a news conference after the training.

[Watch the video CMS used in transgender training]

> **THIS IS REALLY ABOUT OUR CHILDREN AND THEIR SAFE AND JOYFUL PASSAGE.**
> CMS Superintendent Ann Clark

Clark said the goal of the CMS regulation is to allow all students to be safe and comfortable as they pursue an education. Although official transcripts must carry the name and gender on the student's birth certificate, schools will be expected to create class rosters that use the student's preferred identity. All students will have access to increased privacy, such as a screened area in the locker room or a single-stall restroom, on request.

And gender-based activities that have no educational purpose, such as having a girls' and boys' line to go to recess, will be phased out.

> **UNTIL YOU REALLY TAKE SOME TIME TO UNDERSTAND WHAT IT IS TO BE TRANSGENDER, YOU'RE JUST GOING TO MISS SOME THINGS.**
> Myers Park High Principal Mark Bosco

"This is about courage, understanding and compassion," Clark said. "These are our children. These are the community's children."

Clark and CMS attorney George Battle III said the regulation follows the guidance of a federal appeals court ruling and was not designed as an act of defiance against HB2, which, among other things, requires students to use public school restrooms and locker rooms based on the gender on their birth certificates.

[READ MORE: Understanding HB2: North Carolina's newest law solidifies state's role in defining discrimination]

In April, a ruling from the 4th U.S. Circuit Court of Appeals in Richmond, Va., stated that transgender students must be allowed to use restrooms based on the gender they identify with, not the one on their birth certificate.

"That's the law of the land for five states that are in the 4th Circuit, North Carolina being one of those states," Battle said.

Regulations do not require a board vote, but board Chair Mary McCray said members stand unanimously behind the new plan. She plans to send a letter to elected officials representing Mecklenburg County to fill them in.

Clark said a student's transgender status is confidential and the district has no way of tallying how many students fit that description. Experts estimate that only 0.3 percent of the population is transgender, but in a district with about 146,000 students that would come to more than 400 children and teens.

CMS has been dealing with transgender students on a case-by-case basis, starting in elementary schools and running through high school graduations, where there have been cases of the graduate wanting one name and gender used on the diploma and the parents wanting another. If students are 18, as most graduates are, the student's choice will be honored next year, Clark said.

"This is about listening to our students, first and foremost," she said.

Bosco said he has always tried to be sensitive to transgender students, but Monday's training helped him understand how complex gender identity issues can be. "Until you really take some time to understand what it is to be transgender, you're just going to miss some things," he said.

Ann Doss Helms: 704-358-5033, @anndosshelms

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- CMS: We'll honor transgender students' choices

MORE EDUCATION

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June 27, 2016

EXHIBIT F

Non-NC Native Population by County

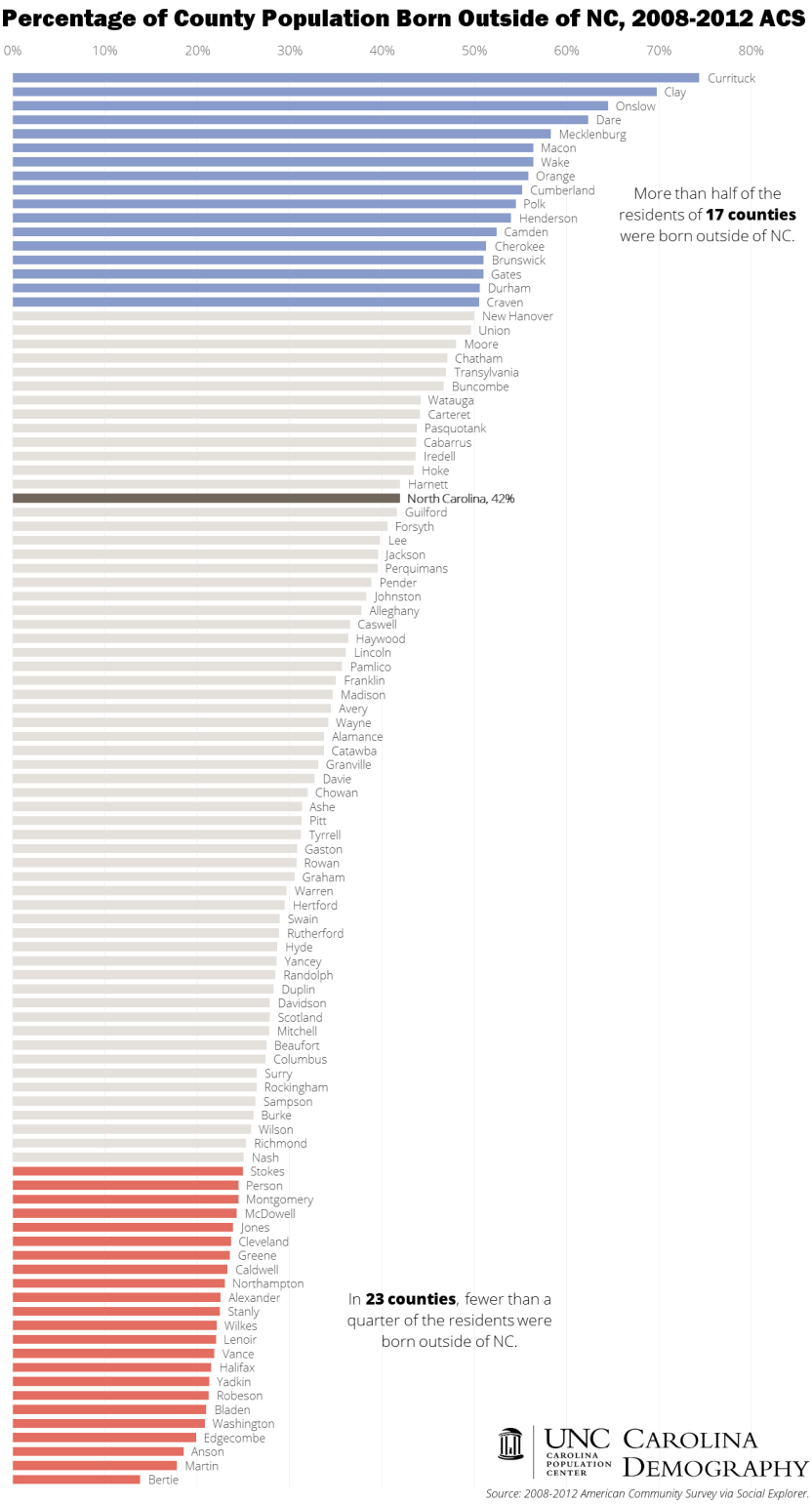
Posted on August 4, 2014 by Rebecca Tippett

> *One hundred years ago, when North Carolina had a population of about 2.5 million people, more than nine out of 10 residents were native Tar Heels. Today's North Carolina, in contrast, approaches a population of 10 million, with more than 4 million residents born in another state or country.*
>
> – Ferrel Guillory and Jessica Kennedy, "Voters born elsewhere make up nearly half of N.C. electorate," NC DataNet

While 42% of North Carolina residents were born outside of the state, this proportion varies dramatically across the state's 100 counties.

In 17 counties, more than half of the residents were born outside of North Carolina. The county with the highest share is Currituck: 74% of all Currituck residents were born in another state or country; its proximity to the Virginia Beach metropolitan area is a likely factor in this high share.

At the other end of the spectrum, there are 23 counties where fewer than 25% of residents were born outside of the state. At 14% non-native born and 86% NC natives, Bertie County has the lowest share of residents born outside of North Carolina.



About Rebecca Tippett

Rebecca Tippett is Director of Carolina Demography at UNC-Chapel Hill's Carolina Population Center.

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