UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

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

DEFENDANTS' MOTION TO DISMISS

Defendants United States of America, United States Department of Justice, Loretta E. Lynch, in her official capacity as United States Attorney General, and Vanita Gupta, in her official capacity as Principal Deputy Assistant Attorney General (collectively "Defendants"), hereby respectfully move this Court to dismiss Plaintiffs' complaint for declaratory relief pursuant to Federal Rule of Civil Procedure 12(b)(1). A supporting memorandum is attached.

Respectfully submitted,

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July 12, 2016

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Defendants.	)	

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

On March 23, 2016, the State of North Carolina enacted North Carolina Session Law 2016-3, House Bill 2 ("H.B. 2"). Part I of H.B. 2 prohibits transgender people who do not possess an amended birth certificate from using the public facilities that match their gender identity. On May 4, 2016, the United States sent letters to Governor Patrick L. McCrory, Secretary of Public Safety Frank L. Perry, and the University of North Carolina, explaining that Part I of H.B. 2 violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* ("Title VII"), Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.* ("Title IX"), and the Violence Against Women Reauthorization Act of 2013, 42 U.S.C. § 13925(b)(13) ("VAWA"). Those letters set a date certain—May 9, 2016—by which the United States

requested a reply; otherwise, the letters stated, the United States would seek judicial intervention to secure compliance with federal law. When that day arrived, Plaintiffs in this case, who knew they were about to be defendants in the United States' enforcement action, filed this lawsuit. Their two declaratory claims in this case are perfect mirror images of their defenses and counterclaims in the United States' pending lawsuit in the Middle District of North Carolina: The United States claims in its enforcement action that H.B. 2 violates Title VII, Title IX, and VAWA; conversely, Plaintiffs in this case claim that H.B. 2 *does not* violate Title VII or VAWA, and raise these identical claims as defenses and counterclaims in the United States' enforcement action. The only difference is that this declaratory action raises only a subset of the issues raised in the United States' enforcement action, which names additional defendants, seeks injunctive relief, and asserts that Part I of H.B. 2 violates Title IX. In addition, the other defendants in the enforcement action have raised defenses and counterclaims beyond the two declaratory claims in this case.

The Court should exercise its discretion to dismiss Plaintiffs' declaratory claims. This is a textbook case for doing so. Plaintiffs rushed to the courthouse on the eve of an enforcement action against them. Their declaratory claims assert nothing more than their anticipated defenses, which they have also raised—both as defenses and as counterclaims—in the enforcement action. And their declaratory claims raise only a *subset* of the issues in the United States' enforcement action, threatening a piecemeal resolution of the underlying controversy.

Pre-enforcement actions exist to clarify legal relations that will otherwise remain uncertain, not to give the subjects of enforcement actions a second forum in which to litigate their defenses, on a duplicative parallel track, when those defenses can just as easily be raised—and, here, have already been raised—in the enforcement action itself. Entertaining this lawsuit

would waste litigant and judicial resources, and it would risk inconsistent judgments, because all the parties to this action are also parties to the United States' enforcement action. Sound judicial administration requires that Plaintiffs' Complaint be dismissed.

BACKGROUND

On March 23, 2016, the North Carolina legislature convened a special session for the purpose of enacting H.B. 2. Compl. ¶ 10. Part I of H.B. 2 mandates that "[p]ublic agencies shall require multiple occupancy bathrooms or changing facilities to be designed for and only used by individuals based on their biological sex." 2015 Bill Text NC H.B. 2B, § 1.3 (Mar. 23, 2016), *amending* N.C. Gen. Stat. § 115C-47. The statute defines "biological sex" as "[t]he physical condition of being male or female, which is stated on a person's birth certificate." *Id*. H.B. 2 further defines "public agencies" to include, among other entities, the state executive, judicial, and legislative branches, including the University of North Carolina system. *Id*. H.B. 2 passed both houses of the legislature on March 23, 2016, and Governor McCrory signed it the same day.

Following the enactment of H.B. 2, several North Carolina officials announced their intention to implement Part I. The President of the University of North Carolina issued a Memorandum on April 5, 2016, directing University Chancellors to comply with Part I's restrictions. *See* Margaret Spellings, *Guidance—Compliance with the Public Facilities Privacy & Security Act*, Apr. 5, 2016, Ex. 1.[1] She confirmed that the University would comply with H.B. 2 in a letter dated April 13, 2016. *See* Letter from Margaret Spellings, President, Univ. of N.C., to Vanita Gupta, Assistant Att'y Gen., Apr. 13, 2016, Ex. 2. Likewise, on April 12, 2016, Governor McCrory issued Executive Order 93, which affirmed that "every multiple occupancy restroom, locker room or shower facility located in a cabinet agency must be designated for and

[1] Because this is a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), the Court "may consider evidence outside the pleadings." *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999) (internal quotations marks omitted). All such evidence has been attached as exhibits.

only used by persons based on their biological sex." Patrick L. McCrory, Governor, *To Protect Privacy and Equality*, Exec. Order 93, Apr. 12, 2016, Ex. 3.

In letters dated May 4, 2016, the United States notified Governor McCrory, Secretary Perry, and the University of North Carolina of its determination that, by complying with Part I of H.B. 2, they were not in compliance with Title VII, Title IX, or VAWA. *See* Compl., Introduction, § 14; *see* also Letter from from Vanita Gupta, Principal Deputy Assistant Att'y Gen., to Patrick L. McCrory, Governor, May 4, 2016; Letter from Vanita Gupta, Principal Deputy Assistant Att'y Gen., to Frank L. Perry, Secretary of Public Safety, May 4, 2016; Letter from from Vanita Gupta, Principal Deputy Assistant Att'y Gen., to Margaret Spellings, President, Univ. of N.C., May 4, 2016. The letters requested that the recipients immediately agree not to comply with the provisions of H.B. 2 that violated federal law and retract any statements to the contrary. The letters informed the recipients that the Attorney General may seek judicial intervention to remedy violations of Title VII, Title IX, and VAWA. The letters requested a response by May 9, 2016. *See* Compl. ¶ 14.

PROCEDURAL HISTORY

The morning of May 9, 2016, Plaintiffs filed the instant lawsuit. *See* Complaint, ECF No. 1. Their Complaint seeks declaratory relief only. *See id.* at 4 ¶ 7, 8-9 ¶¶ 24-29. Specifically, they seek (1) a declaration that they are not violating Title VII by complying with Part I of H.B. 2, *id.* at 8 (Count One), and (2) a declaration that they are not violating VAWA by complying with Part I of H.B. 2, *id.* at 8-9 (Count Two); *see also id.* at 9 (Prayer for "Declaratory Relief").

The same day, the United States sued both Plaintiffs in this case, along with the State of North Carolina, the University of North Carolina, and the Board of Governors of the University

of North Carolina, in the Middle District of North Carolina. *See* Complaint, *United States v. North Carolina*, No. 1:16-cv-425 (M.D.N.C. *filed* May 9, 2016). The United States seeks declarations that compliance with Part I of H.B. 2 violates Title VII, Title IX, and VAWA, and an injunction to prevent such compliance. *Id.* at 12-13. Plaintiffs in this case filed their Answer in *United States* on June 2, 2016. *See* Answer, *United States v. North Carolina*, Dkt. No. 32. Their Answer includes a number of defenses, including that H.B. 2's bathroom provision does not violate Title VII, Title IX, or VAWA. *See id.* at 14-15 ("Fourth Defense"). The Answer also asserts two counterclaim for declarations that H.B. 2's bathroom provision does not violate Title VII or VAWA—the same two claims it has pleaded in this case. *See id.* at 21-22; *id.* at 26 ("[C]ounterclaim plaintiffs respectfully request a declaration that they are not violating Title VII by following state law regarding bathroom and changing facility use by state employees."); *id.* at 27 ("[C]ounterclaim plaintiffs respectfully request a declaration that they are not violating VAWA by following state law regarding bathroom and changing facility use."); *id.* at 27-28 ("Prayer for Relief").

After the United States filed its enforcement action, two more lawsuits were filed in this district. *See Berger v. Dep't of Justice*, No. 1:16-cv-844-TDS (M.D.N.C. *filed* May 9, 2016)[2]; *North Carolinians for Privacy v. Dep't of Justice*, No. 1:16-cv-845-TDS (M.D.N.C. *filed* May 10, 2016).[3] On June 29, 2016, the judge to whom those cases were assigned ordered them to be transferred *sua sponte* to the Middle District of North Carolina, where *United States* and a private challenge to H.B. 2, *Carcaño v. McCrory*, No. 1:16-cv-236-TDS (M.D.N.C. *filed* Mar. 28, 2016), were already pending. *See* Order, *North Carolinians for Privacy v. Dep't of Justice*,

[2] *Berger* was originally docketed in the Eastern District of North Carolina as 5:16-cv-240-FL, before being transferred to the Middle District of North Carolina.

[3] *North Carolinians for Privacy* was originally docketed in the Eastern District of North Carolina as 5:16-cv-245-FL, before being transferred to the Middle District of North Carolina.

No. 5:16-cv-245-FL, Dkt. No. 34 (E.D.N.C. June 29, 2016) (ordering transfer). All four cases in the Middle District are now assigned to the same judge.

In *Carcaño*, the plaintiffs filed a motion for preliminary injunction on May 16, 2016. *See* Dkt. No. 21. That motion was fully briefed as of July 5, 2016. *See* Dkt. No. 81 (UNC's Surreply). In *United States*, the United States filed a motion for preliminary injunction on July 6, 2016. *See* Dkt. No. 74. The judge in *Carcaño*, *United States*, *Berger*, and *North Carolinians for Privacy* has not yet scheduled a hearing date for the two preliminary injunctions, but at a status conference on July 1, 2016, he indicated that the hearing would likely take place in either July or September.

STANDARD OF REVIEW

The United States moves to dismiss under Rule 12(b)(1), which provide for dismissal based on a "lack of subject matter jurisdiction." Fed. R. Civ. P. 12(b)(1). "The nonmovant has the burden to allege and prove such jurisdiction." *North Jefferson Square Associates, L.P. v. Virginia Housing Dev. Auth.*, 94 F. Supp. 2d 709, 714 (E.D. Va. 2000) (citing *Adams v. Bain*, 800 F.2d 393, 396 (4th Cir. 1986)).

> [F]or a district court to have jurisdiction to issue a declaratory judgment, two conditions must be satisfied. First, the dispute must be a "case or controversy" within the confines of Article III of the United States Constitution—the "constitutional" inquiry. Second, the trial court, in its discretion, must be satisfied that declaratory relief is appropriate—the "prudential" inquiry.

White v. Nat'l Union Fire Ins. Co. of Pittsburgh, 913 F.2d 165, 167 (4th Cir. 1990). Even when the first jurisdictional requirement is satisfied, "district courts are under no compulsion to exercise jurisdiction over declaratory judgment action[s]." *New Wellingon Fin. Corp. v. Flagship Resort Dev. Corp.*, 416 F.3d 290, 296 (4th Cir. 2005) (quotation marks omitted). And while "district courts have great latitude in determining whether to assert jurisdiction over

declaratory judgment actions," they must exercise that discretion within the "outer boundaries" delineated by the court of appeals. *Aetna Cas. & Sur. Co. v. Ind-Com Elec. Co.*, 139 F.3d 419, 422 (4th Cir. 1998) (per curiam).

ARGUMENT

The Court should exercise its discretion to dismiss Plaintiffs' Complaint for declaratory relief, because Plaintiffs' claims are exact duplicates of their defenses to the United States' enforcement action, they reflect an improper "race to the courthouse," they would promote inefficient piecemeal resolution of the issues in this controversy, and they run the risk of creating inconsistent judgments. The Declaratory Judgment Act provides that "[i]n a case of actual controversy within its jurisdiction, . . . any court of the United States . . . *may* declare the rights and other legal relations of any interest party seeking such declaration." 28 U.S.C. § 2201(a) (emphasis added). "Since its inception, the Declaratory Judgment Act has been understood to confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants." *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286 (1995); *see id.* at 287 (holding that a district court may "decline to hear a declaratory judgment suit at the outset" if doing so would be "a wasteful expenditure of judicial resources").

The Fourth Circuit and other courts of appeals have laid out several principles for guiding that discretion. A declaratory action "should not be used to deprive the real plaintiff of the choice of forum or to determine merely the 'validity of a defense' which would be asserted and could be determined in another action." *J.B. Hunt Transport, Inc. v. Innis*, 985 F.2d 553 (Table), at *2 (4th Cir. 1993); *see also Morgan Drexen, Inc. v. Consumer Fin. Protection Bureau*, 785 F.3d 684, 697 (D.C. Cir. 2015) ("The anticipation of defenses is not ordinarily a proper use of the declaratory judgment procedure. It deprives the plaintiff of his traditional choice of forum

and timing, and it provokes a disorderly race to the courthouse.") (quotation marks omitted). Instead, declaratory relief is appropriate where it "(1) will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *Aetna*, 139 F.3d at 422. Declaratory relief serves those purposes when it is used to resolve a question that will not be fully resolved by a pending coercive action.[4] But "it is well settled that '[a] court may . . . in its discretion dismiss a declaratory judgment or injunctive suit if the same issue is pending in litigation elsewhere.'" *Morgan Drexen*, 785 F.3d at 694 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 155 (1967)).

Because the United States' enforcement action subsumes all the issues in Plaintiffs' Complaint and goes well beyond them, the instant lawsuit fails every applicable factor for determining whether to entertain a declaratory judgment action.

A. Plaintiffs' Claims Are Exact Duplicates of Their Defenses in the Pending Enforcement Action

Both of Plaintiffs' declaratory claims are the same as their defenses to the United States' enforcement action. The United States claims that by enforcing H.B. 2, Plaintiffs are violating Title VII and VAWA. *See* Complaint, *United States v. North Carolina*, at 11-13. Plaintiffs here claim that by enforcing H.B. 2, they are *not* violating Title VII or VAWA. *See* Compl. 8-9. In *United States*, Governor McCrory and Secretary Perry have asserted the same two arguments, as both defenses and counterclaims, along with several other defenses. *See* Answer, *United States v. North Carolina*, Dkt. No. 32, at 14-15, 21-22, 26-28. Resolving the United States' claims for injunctive and declaratory relief will thus necessarily resolve Plaintiffs' claims for mirror-image declaratory relief that they seek in this case.

[4] A "coercive action," in this sense, means a lawsuit seeking monetary or injunctive relief, as opposed to purely declaratory relief.

In such circumstances, there is no clarifying purpose to be served by entertaining a wholly duplicative declaratory action. Just the opposite: adjudicating a party's defenses in two separate lawsuits is a waste of litigant and judicial resources. It also risks inconsistent rulings, which may impose incompatible duties on the parties. The Fourth Circuit has consistently held that declaratory relief is inappropriate where "all of the legal issues between the parties are subsumed within the second action, which was filed by [the declaratory judgment defendant] and remains pending in the district court. Avoiding piecemeal litigation provides a strong reason for declining to declare rights and relationships." *Settlers Crossing, LLC v. U.S. Home Corp.*, 383 Fed. App'x 286, 288 (4th Cir. 2010). The Fourth Circuit has further explained that "it makes no sense as a matter of judicial economy for a federal court to entertain a declaratory action when the result would be to try a controversy by piecemeal." *Id.* This is because "[i]t hardly husbands scarce judicial resources to allow separate suits stemming from the same overall controversy and involving overlapping issues to proceed simultaneously on parallel tracks." *Mitcheson v. Harris*, 955 F.2d 235, 239 (4th Cir. 1992).[5]

This factor supports dismissal of Plaintiffs' declaratory claims. *See, e.g.*, *Wilton*, 515 U.S. at 288 (explaining that district courts may dismiss a complaint when "a declaratory judgment will serve no useful purpose"); *Pitrolo v. Cty. of Buncombe*, 589 Fed. App'x 619, 629-

[5] In the related contexts of transfer and consolidation, this Court, as well as other courts in this Circuit, have repeatedly recognized that duplicative litigation wastes the parties' and the courts' resources, and raises the specter of inconsistent judgments. *See, e.g.*, ECF No. 36 ("These cases include common factual and legal issues and the risk of inconsistent judgment outweighs any potential prejudice to the parties."); *Arnold v. Eastern Air Lines, Inc.*, 681 F.2d 186, 193 (4th Cir. 1982) (explaining that, in deciding consolidation, a district court must weigh "the risk of inconsistent adjudications of common factual and legal issues" and "the burden on parties, witnesses and available judicial resources posed by multiple lawsuits"); *United States ex rel. Advance Concrete, LLC v. T.H.R. Enterprises, Inc.*, 2016 WL 3002408, at *5 (E.D. Va. May 19, 2016) ("Because that case involves similar issues and parties, the Court finds that the interests of judicial economy and the avoidance of inconsistent judgments tilt in favor of transfer."); *Convergence Technologies, LLC v. Microloops Corp.*, 711 F. Supp. 2d 626, 642-43 (E.D. Va. 2010) ("To permit a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts leads to the wastefulness of time, energy, and money that § 1404(a) was designed to prevent.") (quoting *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19, 26 (1960)).

30 (4th Cir. 2014) (affirming refusal to entertain declaratory action for the sole reason that it would serve no clarifying purpose). There is no reason to let Plaintiffs litigate their defenses twice. "Numerous courts have refused to grant declaratory relief to a party who has come to the court only to assert an anticipated defense." *Gribin v. Hammer Galleries*, 793 F. Supp. 233, 235 (C.D. Cal. 1992); *see id.* at 235-26 (collecting such cases from the Fourth, Fifth, Seventh, and D.C. Circuits). This Court should too.

B. Plaintiffs' Declaratory Claims Raise Only a Subset of the Issues Raised in the Pending Enforcement Action

"In deciding whether to entertain a declaratory judgment action, a federal court should analyze whether its resolution of the declaratory action will settle all aspects of the legal controversy." *Mitcheson*, 955 F.2d at 239. This factor also weighs heavily in favor of dismissing Plaintiffs' complaint. In its enforcement action, the United States asserts that H.B. 2 violates three statutes: Title VII, VAWA, and Title IX. But in this declaratory action, Plaintiffs only seek declarations as to two: Title VII and VAWA. In *United States*, Plaintiffs have sought those same two declarations as counterclaims, along with a number of additional defenses not presented here. *See* Answer, *United States v. North Carolina*, Dkt. No. 32, at 13-21. Moreover, the enforcement action includes additional defendants—the State of North Carolina, the University of North Carolina, and the Board of Governors of the University of North Carolina—whose defenses will not be presented in the instant lawsuit. Finally, the United States has sought an injunction against compliance with Part I of H.B. 2, which cannot be resolved in Plaintiffs' declaratory lawsuit. Plaintiffs' claims thus would not resolve "all aspects of the legal controversy" between the United States and North Carolina. *Id.*

As the Fourth Circuit has put it, "it makes no sense as a matter of judicial economy for a federal court to entertain a declaratory action when the result would be . . . to try particular issues

without settling the entire controversy." *Settlers Crossing*, 383 Fed. App'x at 288 (quoting *Mitcheson*, 955 F.2d at 239). In *American National Property and Causalty Co. v. Skiles*, 5 Fed. App'x 206 (4th Cir. 2001), the Fourth Circuit affirmed dismissal of a declaratory action on the ground that the "action would resolve only part of the controversy, because" the pending coercive action "contains two defendants and a number of issues not present in the [declaratory] action." *Id.* at 208; *see also Allied-General Nuclear Svcs. v. Commonwealth Edison Co.*, 675 F.2d 610, 611-12 (4th Cir. 1982) (affirming dismissal where "a declaratory judgment might not settle the entire controversy"). Other circuits have uniformly held that avoiding piecemeal litigation presents a strong reason not to entertain an unnecessary declaratory action. *Sherwin-Williams Co. v. Holmes Cty.*, 343 F.3d 383, 390 n.2 (5th Cir. 2003) (summarizing every circuit's list of factors); *see, e.g.*, *Reifer v. Westport Insurance Corp.*, 751 F.3d 129, 141 (3d Cir. 2014) ("[F]ederal courts should decline jurisdiction where doing so would promote judicial economy by avoiding duplicative and piecemeal litigation.") (quotation marks omitted); *Sherwin-Williams Co.*, 343 F.3d at 391 ("A federal district court should avoid duplicative or piecemeal litigation where possible."). Accordingly, because resolution of Plaintiffs' two claims for declaratory relief will not resolve all aspects of the controversy between the parties, dismissal is appropriate.

C. Plaintiffs' Lawsuit Constitutes Impermissible Procedural Fencing

The Fourth Circuit has been equally clear that a declaratory action should not be entertained when it is the product of an unseemly race to the courthouse. "It has long been established that courts look with disfavor upon races to the courthouse . . . . Such procedural fencing is a factor that counsels against exercising jurisdiction over a declaratory judgment action." *Learning Network, Inc. v. Discovery Comm'cs*, 11 Fed. App'x 297, 301 (4th Cir. 2001); *see also Morgan Drexen, Inc. v. Consumer Fin. Protection Bureau*, 785 F.3d 684, 697-98 (D.C.

Cir. 2015) (affirming that a declaratory judgment plaintiff had engaged in "procedural fencing" when it filed its anticipated defenses "on the eve of enforcement").

This is exactly what Plaintiffs did in this case. Knowing that an enforcement action was imminent, they rushed into court to assert two of their anticipated defenses as declaratory claims. Plaintiffs acknowledge as much. *See* Compl. ¶¶ 14-17. That is not an appropriate occasion for declaratory relief. Declaratory judgments are meant to obviate the prospect of ongoing uncertainty. *See Aetna*, 139 F.3d at 422. They are not meant to allow parties to file anticipated defenses hours before they know they will be sued. This Court should follow the Fourth Circuit's clear instruction to dismiss such cases, lest other plaintiffs engage in similar procedural fencing. "Courts should not become unwitting or hapless partners in that unseemly tribal rite." *Rowan Companies, Inc. v. Blanton,* 764 F. Supp. 1090, 1092 (E.D. La. 1991).

Nor does the fact that Plaintiffs filed their Complaint hours before the United States make declaratory relief any more appropriate. "[T]he real question for the court is not which action was commenced first but which will most fully serve the needs and convenience of the parties and provide a comprehensive solution of the general conflict." *Morgan Drexen*, 785 F.3d at 697 (quoting 10B Charles Alan Wright, et al., Federal Practice and Procedure, § 2758, at 530-31 (3d ed. 2013)) (dismissing declaratory claims after an enforcement action was filed one month later); *see also AmSouth Bank v. Dale*, 386 F.3d 763, 786 (6th Cir. 2004) ("Normally, when a putative tortfeasor sues an injured party for a declaration of nonliability, courts will decline to hear the action in favor of a *subsequently*-filed coercive action by the 'natural plaintiff.'") (emphasis added); *Tempco Elec. Heater Corp. v. Omega Engineering, Inc.*, 819 F.2d 746, 749-50 (7th Cir. 1987) (upholding dismissal of declaratory action after enforcement action was subsequently

filed, explaining that, because of the now-pending enforcement action, "a declaratory judgment would serve no useful purpose").

Accordingly, the first-to-file rule has no purchase in this context. At the outset, the first lawsuit against Governor McCrory concerning the validity of H.B. 2—*Carcaño*—was filed weeks before *McCrory*, and the United States' enforcement action was filed on the very same day as *McCrory*. Regardless, "[t]he most basic aspect of the first to file rule is that it is discretionary." *Alltrade, Inc. v. Uniweld Products, Inc.*, 946 F.2d 622, 628 (9th Cir. 1991). Courts frequently decline to defer to the first-filed action, not only when that action merely asserts anticipated defenses, but also when subsequent actions have progressed further than the first-filed action. *See, e.g., Wenzel v. Knight*, 2015 WL 222179, at *6 (E.D. Va. Jan. 14, 2015) (departing from first-filed rule); *Samsung Electronics Co., Ltd. v. Rambus, Inc.*, 386 F. Supp. 2d 708, 724 (E.D. Va. 2005) ("[E]xceptions to the [first-filed] rule are common 'when justice or expediency requires.'") (quoting *Genentech, Inc. v. Eli Lilly and Co.*, 998 F.2d 931, 937 (Fed. Cir. 1993)); *Affinity Memory & Micro, Inc. v. K&Q Enter., Inc.*, 20 F. Supp. 2d 948, 954 (E.D. Va. 1998) ("[T]he first-filed rule is not to be applied mechanically; for example, courts have declined to defer to the first-filed action when little if anything has been done to advance that action for trial."). Here, the other four of five cases pertaining to H.B. 2 are in the Middle District of North Carolina, two of those cases have preliminary injunction motions filed, and one of those preliminary injunctions is fully briefed. Both justice and expediency warrant dismissal of Plaintiffs' declaratory judgment action in this Court, which merely asserts two of the defenses raised by Plaintiffs in the Middle District cases.

D. Plaintiffs Will Suffer No Prejudice from Having to Litigate Their Defenses in One Court Only

Plaintiffs have a perfectly adequate venue in which to litigate their defenses to the United States' enforcement action: the enforcement action itself. In fact, in their Answer in *United States*, they have done just that. *See* Answer, *United States v. North Carolina*, Dkt. No. 32, at 14-15, 21-22, 26-28. They do not need a second venue in which to adjudicate the exact same questions. As numerous courts have recognized, a party in Plaintiffs' situation "almost by definition [has] an adequate remedy in a court, that is, the remedy of opposing the Attorney General's motions in the court in which he files his papers." *NAACP v. Meese*, 615 F. Supp. 200, 203 (D.D.C. 1985); *see Parke, Davis & Co. v. Califano*, 564 F.2d 1200, 1206 (6th Cir. 1977) ("[P]ending enforcement actions provided an opportunity for a full hearing before a court.").

CONCLUSION

For the foregoing reasons, the Complaint should be dismissed.

Respectfully submitted,

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MEMORANDUM

TO: Chancellors

FROM: Margaret Spellings

DATE: April 5, 2016

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

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

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

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

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

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

Answer: University institutions must require every multiple-occupancy bathroom and changing facility to be designated for and used only by persons based on their biological sex.

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

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

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

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

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

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

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

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

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

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

7. What is the effective date of the Act?

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

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

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

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

Attachment

GENERAL ASSEMBLY OF NORTH CAROLINA
SECOND EXTRA SESSION 2016

HOUSE BILL 2
RATIFIED BILL

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

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

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

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

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

The General Assembly of North Carolina enacts:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"Article 81.

"Single-Sex Multiple Occupancy Bathroom and Changing Facilities.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PART III. PROTECTION OF RIGHTS IN EMPLOYMENT AND PUBLIC ACCOMMODATIONS

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

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

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

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

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

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

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

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

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

"Article 49B.

"Equal Access to Public Accommodations.

"**§ 143-422.10. Short title.**

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

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

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

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

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

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

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

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

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

PART IV. SEVERABILITY

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

PART V. EFFECTIVE DATE

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

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

s/ Daniel J. Forest
President of the Senate

s/ Tim Moore
Speaker of the House of Representatives

_____
Pat McCrory
Governor

Approved _____.m. this _____ day of _____, 2016

EXHIBIT 3

LETTER FROM MARGARET SPELLINGS, PRESIDENT, UNIV. OF N.C., TO SHAHEENA AHMAD SIMONS, ACTING CHIEF, U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., EDUC. OPPORTUNITIES SECTION 3 (APR. 13, 2016)

UNIVERSITY OF
NORTH CAROLINA

PO Box 2688
Chapel Hill, NC 27515-2688

Thomas C. Shanahan
Senior Vice President and General Counsel
Phone: 919-962-4588
Fax: 919-962-0477
Email: tcshanahan@northcarolina.edu

April 13, 2016

VIA ELECTRONIC AND U.S. MAIL: shaheena.simons@usdoj.gov

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

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

Dear Acting Chief Simons:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The University did not request that H.B. 2 be considered or adopted; however, the University is specifically covered by H.B. 2 and is required as a public agency to comply with its applicable portions, including the provisions related to multiple-occupancy bathrooms and changing facilities. The Fourth Circuit has not yet determined whether discrimination based on "sex" includes discrimination based on "gender identity," and U.S. Supreme Court and Fourth Circuit case law is clear that state legislative enactments are presumptively valid and constitutional until an appropriate court determines otherwise.

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

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

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

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

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

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

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

Sincerely,

Thomas C. Shanahan

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

Enclosures (5):

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

State of North Carolina

PAT McCRORY

GOVERNOR

April 12, 2016

EXECUTIVE ORDER NO. 93

TO PROTECT PRIVACY AND EQUALITY

WHEREAS, North Carolina's rich legacy of inclusiveness, diversity and hospitality makes North Carolina a global destination for jobs, business, tourists and talent;

WHEREAS, it is the policy of the Executive Branch that government services be provided equally to all people;

WHEREAS, N.C. Gen. Stat. § 160A-499.2 permits municipalities to adopt ordinances prohibiting discrimination in housing and real estate transactions, and any municipality may expand such ordinance consistent with the federal Fair Housing Act;

WHEREAS, N.C. Gen. Stat. § 143-422.2(c) permits local governments or other political subdivisions of the State to set their own employment policies applicable to their own personnel;

WHEREAS, North Carolina law allows private businesses and nonprofit employers to establish their own non-discrimination employment policies;

WHEREAS, N.C. Gen. Stat. § 143-128.2 requires each city, county or other local public entity to adopt goals for participation by minority businesses and to make good faith efforts to recruit minority participation in line with those goals;

WHEREAS, North Carolina law allows a private business or nonprofit to set their own restroom, locker room or shower policies;

WHEREAS, our citizens have basic common-sense expectations of privacy in our restrooms, locker rooms and shower facilities for children, women and men;

WHEREAS, to protect expectations of privacy in restrooms, locker rooms and shower facilities in public buildings, including our schools, the State of North Carolina maintains these facilities on the basis of biological sex;

WHEREAS, State agencies and local governments are allowed to make reasonable accommodations in restrooms, locker rooms and shower facilities due to special individual circumstances;

NOW, THEREFORE, pursuant to the authority vested in me as Governor by the Constitution and laws of the State of North Carolina, **IT IS ORDERED**:

Section 1. Public Services

In the provision of government services and in the administration of programs, including, but not limited to public safety, health and welfare, public agencies shall serve all people equally, consistent with the mission and requirements of the service or program.

Section 2. Equal Employment Opportunity Policy for State Employees

I hereby affirm that the State of North Carolina is committed to administering and implementing all State human resources policies, practices and programs fairly and equitably, without unlawful discrimination, harassment or retaliation on the basis of race, religion, color, national origin, sex, sexual orientation, gender identity, age, political affiliation, genetic information, or disability.

I also affirm that private businesses, nonprofit employers and local governments may establish their own non-discrimination employment policies.

Section 3. Restroom Accommodations

In North Carolina, private businesses can set their own rules for their own restroom, locker room and shower facilities, free from government interference.

Under current law, every multiple occupancy restroom, locker room or shower facility located in a cabinet agency must be designated for and only used by persons based on their biological sex. Agencies may make reasonable accommodations upon a person's request due to special circumstances.

Therefore, when readily available and when practicable in the best judgment of the agency, all cabinet agencies shall provide a reasonable accommodation of a single occupancy restroom, locker room or shower facility upon request due to special circumstances.

All council of state agencies, cities, counties, the University of North Carolina System and the North Carolina Community College System are invited and encouraged to make a similar accommodation when practicable.

Section 4. State Buildings and Facilities Leased to Private Entities

The Department of Administration shall interpret the application of N.C. Gen. Stat. § 143-760 as follows:

> When a private entity leases State real property and the property in the lessee's exclusive possession includes multiple occupancy restrooms, locker rooms or other like facilities, the private entity will control the signage and use of these facilities.

All council of state agencies, cities, counties, the University of North Carolina System and the North Carolina Community College System are invited and encouraged to adopt a similar interpretation of N.C. Gen. Stat. § 143-760.

Section 5. Human Relations Commission

Pursuant to N.C. Gen. Stat. § 143B-391, the Human Relations Commission in the Department of Administration shall promote equality and opportunity for all citizens.

The Human Relations Commission shall work with local government officials to study problems and promote understanding, respect and goodwill among all citizens in all communities in North Carolina.

The Human Relations Commission shall receive, investigate and conciliate fair housing, employment discrimination and public accommodations complaints.

The Human Relations Commission shall submit an annual report by April 1st to the Governor detailing the number of complaints received, the number of investigations completed, and the number of conciliations in the preceding calendar year. This report shall also describe any education and outreach efforts made by the Commission in that same calendar year.

Section 6. State Cause of Action for Wrongful Discharge

I support and encourage the General Assembly to take all necessary steps to restore a State cause of action for wrongful discharge based on unlawful employment discrimination.

Section 7. State or Federal Law

Nothing in this section shall be interpreted as an abrogation of any requirements otherwise imposed by applicable federal or state laws or regulations.

IN WITNESS WHEREOF, I have hereunto signed my name and affixed the Great Seal of the State of North Carolina at the Capitol in the City of Raleigh, this twelfth day of April in the year of our Lord two thousand and sixteen.

Pat McCrory
Governor

ATTEST:

Rodney S. Maddox
Deputy Elaine F. Marshall
Secretary of State