UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

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

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Plaintiffs Patrick L. McCrory, in his official capacity as Governor of the State of North Carolina ("Governor McCrory"), and Frank Perry, in his official capacity as Secretary, North Carolina Department of Public Safety ("Secretary Perry"), (collectively "plaintiffs") hereby respectfully respond in opposition to the motion to dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure filed by defendants the United States of America, the United States Department of Justice, Loretta E. Lynch, and Vanita Gupta (collectively "defendants") (D.E. #48.)

NATURE OF THE CASE

Plaintiffs filed this declaratory judgment action pursuant to 28 U.S.C. § 2201 et seq., the Federal Declaratory Judgment Act, and Rule 57 of the Federal Rules of Civil Procedure on May 9, 2016. The parties' dispute arises from implementation of North Carolina's Public Facilities Privacy and Security Act, N.C. Session Law 2016-3 ("the Act"). This law concerns use of bathroom and changing facilities based on biological sex. Plaintiffs also seek injunctive relief. Plaintiffs seek a judgment from this Court holding that they are not in violation of either Title VII of the Civil Rights Act of 1964 ("Title VII") or the Violence Against Women Reauthorization Act of 2013 ("VAWA") as a result of their compliance with and enforcement of the Act.

Several hours after plaintiffs filed this action on May 9, the United States of America, acting through the United States Department of Justice, filed an action in the United States District Court for the Middle District of North Carolina also related to the validity of the Act. See United States of America v. State of North Carolina et al., Case No. 1:16-cv-00425-TDS-JEP (M.D.N.C.). Named as defendants in that action are the State of North Carolina, Governor Pat McCrory, the North Carolina Department of Public Safety, the University of North Carolina, and the Board of Governors of the University of North Carolina.

STATEMENT OF RELEVANT FACTS

The North Carolina General Assembly enacted the Public Facilities Privacy and Security Act ("the Act") on March 23, 2016. (D.E. #1: Pls.' Compl. ¶ 10.) The Act created common sense bodily privacy protections for, among others, state employees, by instructing public agencies to require multiple occupancy bathroom or changing facilities to be designated for and only used by persons based on their biological sex. (Id.) Biological sex is the physical condition

of being male or female, and the Act notes that such condition is "stated on a person's birth certificate." (Id.) The Act also allows accommodations based on special circumstances. (Id.)

On April 12, 2016, Governor McCrory issued "Executive Order 93 to Protect Privacy and Equality" ("EO 93"), which expanded discrimination protections to state employees on the bases of sexual orientation and gender identity, among others. (Id. ¶ 11.) EO 93 also affirmed North Carolina law that cabinet agencies should require multiple occupancy bathroom or changing facilities to be designated for and only used by persons based on their biological sex. (Id.) Governor McCrory's executive order likewise reaffirmed North Carolina law that agencies may make a reasonable accommodation upon request due to special circumstances and directed all agencies to make a reasonable accommodation of a single occupancy restroom, locker room, or shower facility when readily available and when practicable. (Id.) Accordingly, under North Carolina law, state employees are required to use the bathroom and changing facilities assigned to persons of their same biological sex, regardless of gender identity or transgender status. (Id. ¶ 17.) As such, North Carolina does not treat transgender employees differently from non-transgender employees. (Id.)

Additionally, at the urging of Governor McCrory, the General Assembly recently passed legislation amending the Act. S.L. 2016-99, H.B. 169 (N.C. 2016). This amendment restores the right of employees to bring a claim for common law wrongful termination in violation of the state public policy set forth in N.C. Gen. Stat. § 143-422.2,[1] a right that had previously been

[1] Section 143-422.2(a)-(b), which is used to support a claim for wrongful termination in violation of state public policy, reads as follows:

> (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, sex or handicap by employers which regularly employ 15 or more employees.

abrogated by one specific provision of the Act as originally passed. Id. § 1.(a). Governor McCrory signed this amendment into law on July 18, 2016.

ARGUMENT

I. THIS COURT HAS ALREADY DECIDED THAT THE EASTERN DISTRICT OF NORTH CAROLINA IS A PROPER FORUM FOR THIS LITIGATION.

Just last month, this Court exercised its discretion to deny a motion to transfer the action to the United States District Court for the Middle District of North Carolina. In so doing, the Court clearly explained that "[w]here [as here] the same parties have filed similar litigation in separate federal fora, doctrines of federal comity dictate that the matter should proceed in the court where the action was first filed . . . ." Order (D.E. #34) at 2 (quoting Nutrition & Fitness, Inc. v. Blue Stuff, Inc., 264 F. Supp. 2d 357, 360 (W.D.N.C. 2003) and citing Allied-Gen. Nuclear Services v. Commonwealth Edison Co., 675 F.2d 610, 611 (4th Cir. 1982)). This Court further explained:

> There is no question that venue is proper here. *See* 28 U.S.C. § 1391(e). Further, this district is the site of the state capitol and where the legislature and governor reside and act. The nexus for the United States' suit in the Middle District is the inclusion of the University of North Carolina as a defendant and a claim involving Title IX. In point of fact, however, any ruling on House Bill 2's compliance with Title IX would affect the entire University of North Carolina system and its institutions across the state, and that action could have been properly filed in this district as well. There is no congestion of this Court's docket or other impediment to proceeding in this district. For these reasons, the Court is not persuaded that transfer of this action is warranted.

Id. at 2-3.

> (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.

Despite the Court's very clear findings in support of its ruling retaining jurisdiction over this action, defendants have now filed a motion seeking effectively the same relief as was previously denied—that is, to terminate proceedings in this Court in deference to the litigation pending in the Middle District of North Carolina. Though the motion to change venue was filed by plaintiffs, defendants affirmatively permitted plaintiffs to state that defendants did not oppose the motion. (D.E. #9: Pls.' Unopposed Mot. to Transfer Venue Pursuant to 28 U.S.C. § 1404(a) ¶ 9.) Nevertheless, neither defendants' motion nor their fourteen-page supporting memorandum discusses this Court's prior order, appearing to instead proceed as if the Court had not already carefully considered whether it should handle this matter. Because defendants fail to offer the Court any valid reason to revisit its prior order regarding retention of this case, their motion to dismiss should be denied.

II. DEFENDANTS' ERRONEOUSLY ASSERT THAT PLAINTIFFS SHOULD NOT HAVE SOUGHT JUDICIAL RELIEF FROM THIS COURT TO RESOLVE THE PARTIES' DISPUTE.

"It is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803). In accordance with this fundamental principle of American jurisprudence, plaintiffs filed the instant action on the morning of May 9, 2016, seeking a proper judicial determination of whether the Act violated Title VII or VAWA. Plaintiffs made this decision because too much time and effort had been spent by the Act's opponents (including defendants) attempting to litigate the law's validity in the press rather than in a court of law. See, e.g., Jim Morrill, US Justice Department: HB2 violates Civil Rights Act, Charlotte Obs., (May 4, 2016), available at http://www.charlotteobserver.com/news/politics-government/article75601912.html (attached hereto as Exhibit A). Now defendants hurl invectives at plaintiffs and their counsel decrying

their decision to seek judicial relief as an act of "procedural fencing," going so far to label the filing of this action "unseemly." (Mem. in Supp. of Defs.' Mot. to Dismiss ("Defs.' Br.") 11-12.)

A. Defendants Are Engaging In The Very Forum Shopping They Purport To Oppose.

Apparently—according to defendants—*only they* should have been able to choose the forum for deciding this lawsuit. Therefore, they ask this Court to defer to their admittedly *later-filed* action in the Middle District. Of course, defendants knew full well that this action had been filed when they filed their own lawsuit. They could have sued Governor McCrory and Secretary Perry in the Eastern District, or they could have simply asserted their claims as counterclaims in this action, adding third-parties as necessary. See Fed. R. Civ. P. 13-14. Indeed, as already noted by this Court, they could have sued all of the defendants named in the Middle District litigation in this Court. Order at 3 ("[A]ny ruling on House Bill 2's compliance with Title IX would affect the entire University of North Carolina system and its institutions across the state, and that action could have been properly filed in this district as well."); see 28 U.S.C. § 1391(c). Nonetheless, defendants opted for a more complicated path by filing in the Middle District.

Exactly why the federal government's decision to file in the Middle District is not precisely the kind of "procedural fencing" and "forum shopping" defendants purport to abhor is left entirely unexplained by the present motion. Defendants do not, for example, point to any witness for whom venue in the Middle District would be more convenient or any party over whom they could not obtain jurisdiction in this Court. Plainly, while defendants' rhetoric strives for the moral high ground, they are in reality asking this Court to approve of procedural fencing and forum shopping—so long, of course, as the procedural fencing and forum shopping are engaged in by the federal government. Ultimately, though, this Court's own prior order explains

very succinctly why the Eastern District is a proper and suitable venue for litigating this dispute. See Order at 2-3 ("[T]his district is the site of the state capitol and where the legislature and governor reside and act.").

B. Defendants Ask This Court To Ignore The Fourth Circuit's "First-Filed" Rule.

Furthermore, defendants go to great lengths to argue that the Fourth Circuit has directed district courts to disregard the so-called "first-filed rule" where one party can establish certain "special circumstances" along the lines of "procedural fencing." (See Defs.' Br. at 12.) Unfortunately for defendants, their position is not actually supported by the Fourth Circuit case law they cite. In particular, while they point to language in Learning Network, Inc. v. Discovery Communications, Incorporated, they neglect to mention that in that opinion the court of appeals also said that "[t]he Fourth Circuit has not stated explicitly that special circumstances may warrant an exception to the first-filed rule," and the court declined to recognize such an exception in that case. 11 F. App'x 297, 301 n.2 (4th Cir. 2001). Contrary to defendants' assertions, the Fourth Circuit directs district courts to give priority to the first federal lawsuit filed unless the other party can establish "a balance of convenience in favor of the second action." Ellicott Mach. Corp. v. Modern Welding Co., Inc., 502 F.2d 178, 180 n.2 (4th Cir. 1974) (quoting Mattel, Inc. v. Louis Marx & Co., 353 F.2d 421, 423 (2d Cir. 1965)); see also Allied-Gen. Nuclear Servs. v. Commonwealth Edison Co., 675 F.2d 610, 611 (4th Cir. 1982) ("Ordinarily, when multiple suits are filed in different Federal courts upon the same factual issues, the first or prior action is permitted to proceed to the exclusion of another subsequently filed."). Here, of course, defendants do not argue that a balance of convenience warrants abating this action in favor of the action pending in the Middle District. Similarly, though defendants characterize plaintiffs' lawsuit in the Eastern District as "piecemeal" litigation that will not

resolve all of the issues presented by the action in the Middle District, defendants are the parties responsible for the action in the Middle District. They drafted the claims, named the defendants, and filed the case. It defies logic to say that plaintiffs must be divested of their rights under the first-filed rule on the basis of unilateral decisions taken by defendants, especially when defendants have offered no reason for not simply asserting their claims in this action or at least filing a companion case in the Eastern District.

Defendants also wrongly assert that plaintiffs' complaint impermissibly seeks to obtain a ruling of "nonliability" or a ruling on what are in fact merely defenses. This is not a case of a party simply seeking to have a court pass on the validity of its *prior* actions. See, e.g., Adirondack Cookie Co. Inc. v. Monaco Baking Co. 871 F. Supp. 2d 86, 94 (N.D.N.Y. 2012) (distinguishing permissible uses of the Declaratory Judgment Act to adjudicate nonliability as to future actions from the impermissible use of the statute to adjudicate past actions). To the contrary, the purpose of the present litigation is to inform plaintiffs of whether they may continue to enforce a particular state statute—relief that would, by its very nature, be prospective and would have settled the question between the parties. Cf. Luckenbach Steamship Co. v. United States, 312 F.2d 545, 548 (2d Cir. 1963) ("The purpose of the declaratory remedy is to avoid accrual of avoidable damages[.]") (internal quotation marks and citation omitted). The federal government's claims in the Middle District simply present the mirror image of this same question and likewise seek prospective relief.[2] As such, defendants can claim no special entitlement to institute the proceedings between the parties.

[2] Defendants can call their Middle District suit an "enforcement action" as much as they like, but any judicial ruling on the merits there would have the same result as a similar such ruling from this Court.

C. Defendants Fail To Provide Evidence That Their Lawsuit Was "Imminent."

Defendants also allege that plaintiffs filed this action "[k]nowing that an enforcement action was imminent" and suggest that it was filed "hours before" plaintiffs knew they would be sued. (Defs.' Br. 12.) Defendants provide no evidence for this assertion. In point of fact, it is contradicted by defendant Lynch's own prior public statements. As indicated by defendants, May 9 was the deadline given by defendants for plaintiffs to certify that they would disobey the Act, a duly enacted state law. In a press conference given in the middle of the afternoon on May 9, after both actions had been filed, defendant Lynch stated:

> "*An extension was requested by North Carolina and was under active consideration*. But instead of replying to our offer or providing a certification, this morning, the state of North Carolina and its governor chose to respond by suing the Department of Justice. *As a result of their decisions, we are now moving forward*."

See Loretta E. Lynch, "Attorney General Loretta E. Lynch Delivers Remarks at Press Conference Announcing Complaint Against the State of North Carolina to Stop Discrimination Against Transgender Individuals" (May 9, 2016), available at https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-press-conference-announcing-complaint (emphasis added) (attached hereto as Exhibit B). If defendants are now saying that these public statements about this "active consideration" of a request for an extension and the reasons for their filing suit on May 9 were inaccurate or misrepresent the Department's true position, then they should admit as much. But, they cannot ask this Court to make factual findings about what action was truly "imminent" without providing actual evidence to the Court.

D. Defendants' Claims Of Progress In The Middle District Case Are Misleading.

Finally, it bears noting that, while defendants appear to suggest that the Middle District action has made substantial progress, all they can truly point to are their *own unilateral decisions* about what to file and when. Specifically, answers have been filed in the Middle District case (but not this one) simply because the federal government is granted more time to file a responsive pleading under the Federal Rules of Civil Procedure. See Fed. R. Civ. P. 12(a)(2)-(3) (granting the federal government and its employees 60 days, rather than 21 days, after service to answer a complaint). Then, when the time came for defendants to respond in this case, they filed a motion to dismiss under Rule 12(b)(1) rather than an answer. Notably, in spite of making unambiguous extrajudicial statements about the correctness of their new interpretations of Title VII and VAWA, defendants did not also move to dismiss under Rule 12(b)(6) for failure to state a claim.

Moreover, while the federal government filed a motion for preliminary injunction in the Middle District, they did not do so until July 6—almost two months after initiating the case—and the Court hearing that matter has now stated that it will not entertain the government's preliminary injunction motion until late October or early November. See D.E. #86 in United States of America v. State of North Carolina et al., Case No. 1:16-cv-00425-TDS-JEP (M.D.N.C.) at 3-4 ("[T]he court deems it appropriate to exercise its discretion pursuant to Federal Rule of Civil Procedure 65(a)(2) to advance the trial on the merits of all claims, defenses, and counterclaims in the United States' action to be consolidated with the hearing on the United States' motion for preliminary injunction . . . Accordingly, trial in all four HB2 cases will take place in late October or early November 2016[.]") (attached hereto as Exhibit C). Thus, the alleged progress in the Middle District is, in truth, illusory.

What defendants really seek is a rule of law holding that the federal government may threaten a state with all manner of sanctions, and a court will only be permitted to decide whether the government's interpretation of the law is valid at a time and place of the federal government's choosing. Congress has never written such a provision into Title VII, VAWA, or the Declaratory Judgment Act, and no court has ever before articulated such a sweeping rule. Because defendants have failed to offer any persuasive reason that their forum shopping in this case should be the basis for this Court to enshrine this new rule into the law, their motion to dismiss should be denied.

CONCLUSION

WHEREFORE, plaintiffs respectfully ask that defendants' motion to dismiss be denied.

Respectfully submitted, this the 22nd day of July, 2016.

BOWERS LAW OFFICE LLC

By: /s/ Karl S. Bowers, Jr.
Karl S. Bowers, Jr.*
Federal Bar #7716
P.O. Box 50549
Columbia, SC 29250
Telephone: (803) 260-4124
E-mail: butch@butchbowers.com
*appearing pursuant to Local Rule 83.1(e)
Counsel for Governor Patrick L. McCrory and Secretary Frank Perry

MCGLINCHEY STAFFORD

By: /s/ Robert N. Driscoll
Robert N. Driscoll*
1275 Pennsylvania Avenue NW
Suite 420
Washington, DC 20004
Telephone: (202) 802-9950
Facsimile: (202) 403-3870
E-mail: rdriscoll@mcglinchey.com

*appearing pursuant to Local Rule 83.1(e)
Counsel for Governor Patrick L. McCrory

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

MILLBERG GORDON STEWART PLLC

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

CERTIFICATE OF SERVICE

I hereby certify that, on this date, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all CM/ECF participating attorneys, and that a copy was sent via First Class U.S. Mail to Mr. Steven-Glenn Johnson at the below address in accordance with Rule 5 of the Federal Rules of Civil Procedure.

SERVED VIA U.S. MAIL:
Steven-Glenn Johnson
208 Nydegg Road
New Bern, NC 28562

This the 22nd day of July, 2016.

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

EHXIBIT A

POLITICS & GOVERNMENT MAY 4, 2016 3:31 PM

US Justice Department: HB2 violates Civil Rights Act

HIGHLIGHTS

Ruling could ultimately lead to the loss of billions in federal education money

Republicans call it 'overreach' by the Obama administration

Department gives lawmakers until Monday to 'remedy' the situation

Governor responds to questions about HB2 3:46





1 of 2


BY JIM MORRILL
jmorrill@charlotteobserver.com

RALEIGH — U.S. Justice Department officials repudiated North Carolina's House Bill 2 on Wednesday, telling Gov. Pat McCrory that the law violates the U.S. Civil Rights Act and Title IX – a finding that could jeopardize billions in federal education funding.

The department gave state officials until Monday to respond "by confirming that the State will not comply with or implement HB2."

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

[READ MORE: Who has spoken for, against NC's House Bill 2]

The letter says HB2, which pre-empted Charlotte's anti-discrimination ordinance, violates Title IX, which bars discrimination in education based on sex, and Title VII of the Civil Rights Act, which bans employment discrimination.

If the finding is upheld, North Carolina could lose federal education funding. During the current school year, state public schools received $861 million. In 2014-2015, the University of North Carolina system got $1.4 billion.

The Republican-controlled General Assembly passed HB2 in March in response to Charlotte's extension of its anti-discrimination ordinance. That ordinance would have allowed transgender people to use the bathroom of the gender with which they identify and would have extended anti-discrimination protections to LGBT residents. HB2 pre-empted that ordinance and requires people to use bathrooms in government buildings that match what's on their birth certificate.

The law sparked a national firestorm. Amid calls for boycotts of the state, at least two companies announced plans not to relocate or expand in North Carolina. The NBA is considering moving its 2017 All-Star Game from Charlotte.

[Read: DOJ letter to Gov. Pat McCrory on HB2]

[Read: DOJ letter to UNC on HB2]

Speaking to business leaders Wednesday night, McCrory called the letter "something we've never seen regarding Washington overreach in my lifetime."

"This is no longer just a N.C. issue. This impacts every state, every university and almost every employee in the United States of America," he said. "All those will have to comply with new definitions of requirements by the federal government regarding restrooms, locker rooms and shower facilities in both the private and public sector."

GOP lawmakers also criticized the Justice Department - and President Barack Obama.

House Speaker Tim Moore, who said the GOP leaders are consulting attorneys about a response, called the letter "a huge overreach (by) the federal government."

"It looks an awful lot like politics to me," Moore, a Kings Mountain Republican, told reporters. "I guess President Obama, in his final months in office, has decided to take up this ultra-liberal agenda."

Senate President Pro Tem Phil Berger called the ruling "a gross overreach." And Lt. Gov. Dan Forest blasted the Obama administration.

"To use our children and their educational futures as pawns to advance an agenda that will ultimately open those same children up to exploitation at the hands of sexual predators is, by far, the sickest example of the depths the ... administration will stoop to (to) 'fundamentally transform our nation,' " he said.

The North Carolina Values Coalition issued a statement saying HB2 is in full compliance with federal law. "The DOJ should be ashamed of itself for bullying North Carolinians, compromising the privacy and safety of our citizens, and spreading lies about what the clear language of Title IX and Title VII state," it said.

But opponents of HB2 applauded the Justice Department finding.

"The letter confirms what we've already known - that HB2 is deeply discriminatory, violates federal civil rights law, and needs to be repealed as soon as possible," said Rep. Chris Sgro, a Democrat who is executive director of Equality NC. "We've already lost $500 million in economic impact, and now we are violating federal civil rights law and risking Title IX funding."

Chad Griffin, president of the Human Rights Campaign, the nation's largest gay rights group, commended the Justice Department "for enforcing the rule of law and protecting the rights of North Carolinians."

"We once again urge Gov. McCrory and the state of North Carolina to immediately do the same and fully repeal this harmful bill," he said.

Charlotte Mayor Jennifer Roberts declined to comment.

[READ MORE: Beyoncé, citing North Carolina's HB2, urges support for equality]

[READ MORE: Why Bernadette Peters decided the show will go on in Charlotte, despite HB2]

'Ball in N.C.'s court'

The Justice Department letter came two days after the Equal Employment Opportunity Commission posted a fact sheet reiterating its stance that it's a civil rights violation to deny transgender employees access to a bathroom based on gender identity.

That fact sheet refers to a 2015 decision in which the EEOC ruled that a civilian transgender woman working for the Army had been discriminated against when she was banned from using the common women's restroom and forced to use a single bathroom.

Carl Tobias, a University of Richmond law professor who has followed the HB2 legal issues, said the Justice Department letter was similar to one sent by the federal Education Department in the case of the Virginia transgender teen battling a bathroom ban in the Gloucester County school system.

"They might all be coordinating the federal response," Tobias said.

Tobias said noncompliance could also lead to a lawsuit filed by the Justice Department on the employment discrimination issue.

He said the letter puts "the ball in North Carolina's court."

An election issue

In a statement, new UNC System President Margaret Spellings, who took office in March, said, "We take this determination seriously and will be conferring with the Governor's Office, legislative leaders, and counsel about next steps and will respond to the Department by its May 9 deadline."

Already a political issue in an election year, HB2 rose to the top with Wednesday's letter.

"Enough is enough," said Democratic Attorney General Roy Cooper, McCrory's gubernatorial opponent. "It's time for the governor to put our schools and economy first and work to repeal this devastating law."

Democratic U.S. Senate candidate Deborah Ross called on Republican U.S. Sen. Richard Burr to "work to put an end to this law."

In the Justice Department letter, Vanita Gupta, the Justice Department's top civil rights lawyer, said, "HB 2 ... is facially discriminatory against transgender employees on the basis of sex because it treats transgender employees, whose gender identity does not match their biological sex, as defined by HB2, differently from similarly situated non transgender employees."

[O-pinion: The governor bashes The Boss – and gets it wrong]

She went on to say the department "concluded that ... the state is engaged in a pattern or practice of resistance to the full enjoyment of Title VII rights by employees of public agencies..."

STAFF WRITERS ELY PORTILLO AND STEVE HARRISON AND (RALEIGH) NEWS & OBSERVER REPORTERS ANNE BLYTHE, COLIN CAMPBELL AND CRAIG JARVIS CONTRIBUTED.

HB2: A timeline for North Carolina's controversial law

North Carolina's legislature recently passed a law that prevents transgender people from using bathrooms corresponding to the gender with which they identify. The law — House Bill 2 (HB2) — has incited a state-wide civil liberties battle. Here is the time

Ali Rizvi and Nicole L. Cvetnic / McClatchy

RELATED CONTENT

- Governor responds to questions about HB2
- Anti-HB2 videos try to humanize issue

EHXIBIT B

JUSTICE NEWS

Attorney General Loretta E. Lynch Delivers Remarks at Press Conference Announcing Complaint Against the State of North Carolina to Stop Discrimination Against Transgender Individuals

Washington, DC, United States ~ Monday, May 9, 2016

Remarks as prepared for delivery

Good afternoon and thank you all for being here. Today, I'm joined by [Vanita] Gupta, head of the Civil Rights Division at the Department of Justice. We are here to announce a significant law enforcement action regarding North Carolina's Public Facilities Privacy & Security Act, also known as House Bill 2.

The North Carolina General Assembly passed House Bill 2 in special session on March 23 of this year. The bill sought to strike down an anti-discrimination provision in a recently-passed Charlotte, North Carolina, ordinance, as well as to require transgender people in public agencies to use the bathrooms consistent with their sex as noted at birth, rather than the bathrooms that fit their gender identity. The bill was signed into law that same day. In so doing, the legislature and the governor placed North Carolina in direct opposition to federal laws prohibiting discrimination on the basis of sex and gender identity. More to the point, they created state-sponsored discrimination against transgender individuals, who simply seek to engage in the most private of functions in a place of safety and security – a right taken for granted by most of us.

Last week, our Civil Rights Division notified state officials that House Bill 2 violates federal civil rights laws. We asked that they certify by the end of the day today that they would not comply with or implement House Bill 2's restriction on restroom access. An extension was requested by North Carolina and was under active consideration. But instead of replying to our offer or providing a certification, this morning, the state of North Carolina and its governor chose to respond by suing the Department of Justice. As a result of their decisions, we are now moving forward.

Today, we are filing a federal civil rights lawsuit against the state of North Carolina, Governor Pat McCrory, the North Carolina Department of Public Safety and the University of North Carolina. We are seeking a court order declaring House Bill 2's restroom restriction impermissibly discriminatory, as well as a statewide bar on its enforcement. While the lawsuit currently seeks declaratory relief, I want to note that we retain the option of curtailing federal funding to the North Carolina Department of Public Safety and the University of North Carolina as this case proceeds.

This action is about a great deal more than just bathrooms. This is about the dignity and respect we accord our fellow citizens and the laws that we, as a people and as a country, have enacted to protect them – indeed, to protect all of us. And it's about the founding ideals that have led this country – haltingly but inexorably – in the direction of fairness, inclusion and equality for all Americans.

This is not the first time that we have seen discriminatory responses to historic moments of progress for our nation. We saw it in the Jim Crow laws that followed the Emancipation Proclamation. We saw it in fierce and widespread resistance to Brown v. Board of Education. And we saw it in the proliferation of state bans on same-sex unions intended to stifle any hope that gay and lesbian Americans might one day be afforded the right to marry. That right, of course, is now recognized as a guarantee embedded in our Constitution, and in the wake of that historic triumph, we have seen bill after bill in state after state taking aim at the LGBT community. Some of these responses reflect a recognizably human fear of the unknown, and a discomfort with the uncertainty of change. But this is not a time to act out of fear. This is a time to summon our national virtues of inclusivity, diversity, compassion and open-mindedness. What we must not do – what we must never do – is turn on our neighbors, our family members, our fellow Americans, for something they cannot control, and deny what makes them human. This is why none of us can stand by when a state enters the business of legislating identity and insists that a person pretend to be something they are not, or

invents a problem that doesn't exist as a pretext for discrimination and harassment.

Let me speak now to the people of the great state, the beautiful state, my state of North Carolina. You've been told that this law protects vulnerable populations from harm – but that just is not the case. Instead, what this law does is inflict further indignity on a population that has already suffered far more than its fair share. This law provides no benefit to society – all it does is harm innocent Americans.

Instead of turning away from our neighbors, our friends, our colleagues, let us instead learn from our history and avoid repeating the mistakes of our past. Let us reflect on the obvious but often neglected lesson that state-sanctioned discrimination never looks good in hindsight. It was not so very long ago that states, including North Carolina, had signs above restrooms, water fountains and on public accommodations keeping people out based upon a distinction without a difference. We have moved beyond those dark days, but not without pain and suffering and an ongoing fight to keep moving forward. Let us write a different story this time. Let us not act out of fear and misunderstanding, but out of the values of inclusion, diversity and regard for all that make our country great.

Let me also speak directly to the transgender community itself. Some of you have lived freely for decades. Others of you are still wondering how you can possibly live the lives you were born to lead. But no matter how isolated or scared you may feel today, the Department of Justice and the entire Obama Administration wants you to know that we see you; we stand with you; and we will do everything we can to protect you going forward. Please know that history is on your side. This country was founded on a promise of equal rights for all, and we have always managed to move closer to that promise, little by little, one day at a time. It may not be easy – but we'll get there together.

I want to thank my colleagues in the Civil Rights Division who have devoted many hours to this case so far, and who will devote many more to seeing it through. At this time, I'd like to turn things over to Vanita Gupta, whose determined leadership on this and so many other issues has been essential to the Justice Department's work.

Topic:
Civil Rights

Office of the Attorney General

Speaker:
Meet the Attorney General

Updated May 9, 2016

EHXIBIT C

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

JOAQUIN CARCAÑO, et al., Plaintiffs, v. PATRICK McCRORY, in his official capacity as Governor of North Carolina, et al., 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, Intervenor-Defendants.	1:16CV236
UNITED STATES OF AMERICA, Plaintiff, v. STATE OF NORTH CAROLINA, et al., 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, Intervenor-Defendants.	1:16CV425

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, Plaintiffs, v. UNITED STATES DEPARTMENT OF JUSTICE, et al., Defendants.	)	1:16CV844
NORTH CAROLINIANS FOR PRIVACY, an unincorporated nonprofit association, Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, et al., Defendants.	)	1:16CV845

ORDER

On July 13, 2016, the court held a telephonic conference with the parties, proposed intervenors, and amici in these four related cases regarding North Carolina's Public Facilities Privacy & Security Act, 2016 N.C. Sess. Laws 3, commonly known as House Bill 2, cases 1:16CV236, 1:16CV425, 1:16CV844, and 1:16CV845 (collectively, the "HB2 cases"). The purpose of this order is to finalize and memorialize the decisions reached by the court after consultation with the parties during the telephonic conference. As a matter of convenience only, the court enters this order captioned in all four cases.

Having fully considered the various positions of all interested participants,

IT IS ORDERED as follows:

1. The parties in case 1:16CV236 shall appear before the court on Monday, August 1, 2016, at 10:00 a.m. in Courtroom number 1 of the Hiram H. Ward Federal Building, Winston-Salem, North Carolina, for a hearing on the Carcaño plaintiffs' motion for preliminary injunction (Doc. 21 in case 1:16CV236) and the UNC Defendants' motion to stay proceedings against them (Doc. 38 in case 1:16CV236). Upon request of the United States and without objection, counsel for the United States may participate in the hearing. No party has indicated a desire to offer evidence at the hearing, so the court anticipates that it will be limited to oral argument on the record as submitted.

2. Although the Carcaño plaintiffs' motion for preliminary injunction is ready for consideration, the United States only recently filed its motion for preliminary injunction, and briefing on it is not scheduled to be complete until early August. Moreover, Defendants have argued that they should be entitled to conduct discovery prior to that motion being heard such that the court would not likely reach consideration of the motion until mid-September 2016 at the earliest. All parties have indicated an ability to be ready for a trial on the merits in these cases by late October or November 2016. So as not to delay consideration of the Carcaño plaintiffs' motion for preliminary injunction but in order to timely reach the issues raised by the United States' motion while avoiding multiple, piecemeal considerations of the overlapping and closely-related issues in these cases,

the court deems it appropriate to exercise its discretion pursuant to Federal Rule of Civil Procedure 65(a)(2) to advance the trial on the merits of all claims, defenses, and counterclaims in the United States' action to be consolidated with the hearing on the United States' motion for preliminary injunction (Doc. 73 in case 1:16CV425). See Citizens Concerned for Separation of Church and State v. City & Cty. of Denver, 628 F.2d 1289, 1298-99 (10th Cir. 1980) (observing that Rule 65(a)(2) was "designed to efficiently expedite final disposition of an injunctive action" and generally allows the court to save "considerable time at trial"); 11A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2950 (3d ed.); see also Singleton v. Anson Cty. Bd. of Ed., 387 F.2d 349, 350 (4th Cir. 1967) (per curiam) (approving of the trial court's decision to avoid "piecemeal vindication of civil rights by way of preliminary injunction"). Accordingly, trial in all four HB2 cases will take place in late October or early November 2016, depending on the pretrial schedule to be determined by the United States Magistrate Judge after consultation with the parties. This schedule will permit the court to expeditiously address the claims and defenses in the United States' action, as well as those in the related HB2 cases, without undue prejudice to the parties while providing for a timely resolution of the cases based on a complete record following a full trial on the merits. To that end, the Magistrate Judge may exercise her discretion to consolidate the HB2 cases for discovery to the extent warranted by the efficient administration of justice. The court will decide at a later time whether consolidation for trial, and under what conditions, is appropriate.

3. To effectuate a complete and final resolution of all of issues and claims in these cases as soon as practicable, the United States Magistrate Judge shall promptly meet with all parties, proposed intervenors, and amici in the HB2 cases to set a combined schedule for discovery that renders these HB2 cases ready for trial by late October or November 2016.

4. In an effort to simplify these cases, the parties shall meet and confer to determine whether they can reach consensus to eliminate the overlapping claims of (1) intervenors Senator Berger and Representative Moore that appear both as counterclaims in cases 1:16CV236 and 1:16CV425 and also by way of complaint in the separate action for declaratory judgment in case 1:16CV844, and (2) North Carolinians for Privacy's pending motion to intervene in the United States' case (Doc. 58 in case 1:16CV425) and North Carolinians for Privacy's separate declaratory judgment action in case 1:16CV845. The parties shall file a short joint notice with the court identifying any agreements reached and explaining their respective positions no later than 5:00 p.m. on July 22, 2016.

/s/ Thomas D. Schroeder
United States District Judge

July 14, 2016