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

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| JOAQUÍN CARCAÑO, *et al.*,<br><br>*Plaintiffs*,<br>v.<br><br>PATRICK MCCRORY, in his official capacity as Governor of North Carolina, *et al.*,<br><br>*Defendants*. | Case No. 1:16-cv-00236 |

**REPLY IN SUPPORT OF UNC DEFENDANTS' MOTION TO STAY PROCEEDINGS**

This Court should stay proceedings against the University of North Carolina, its Board of Governors, and the Chairman of the Board (collectively the "UNC Defendants") in this case until resolution of *G.G. v. Gloucester County School Board* and *United States v. North Carolina*. The Supreme Court will soon decide whether to review *G.G.*, and its decision in that case would likely control Plaintiffs' Title IX claim and provide useful guidance on Plaintiffs' constitutional claims. In addition, the issues presented in this case largely overlap with the issues already before this Court in *United States v. North Carolina*. A stay would advance the interests of justice by conserving judicial resources and avoiding potentially unnecessary litigation expenses. At the same time, a stay would not cause any substantial hardship to the Plaintiffs, since they face no threat that the UNC Defendants will enforce the challenged statute against them in the meantime.

## I. A STAY WOULD ADVANCE THE INTERESTS OF JUSTICE

A district court has inherent power to stay proceedings in order to promote "economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. American Co.*, 299 U.S. 248, 254 (1936). There are two grounds for exercising that power here.

First, a district court may stay proceedings "while awaiting guidance" from a higher court, including "the Supreme Court," "in a case that could decide relevant issues." *Hickey v. Baxter*, No. 87-2028, 1987 WL 39020, at *1 (4th Cir. Nov. 19, 1987). Contrary to Plaintiffs' assertion that such stays are appropriate only "in rare circumstances" (Plfs' Resp. 2, ECF No. 67), courts frequently stay proceedings in order to await a decision from a higher court.[1] For example, courts often stay proceedings in order to await the Supreme Court's disposition of a writ of certiorari.[2] Here, Plaintiffs correctly note that, after the UNC Defendants filed their motion for a stay, the Fourth Circuit denied en banc rehearing in *G.G. v. Gloucester County School Board*. That is not the end of the matter, however, because "the School Board intends to file a petition for writ of certiorari"

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[1] *See, e.g.*, *Hickey*, 1987 WL 39020, at *1; *Mey v. Got Warranty, Inc.*, No. 15-101, 2016 WL 1122092, at *3 (N.D.W. Va. Mar. 22, 2016); *Harris v. Rainey*, No. 13-77, 2014 WL 1292803, at *2 (W.D. Va. Mar. 31, 2014); *Gross v. Pfizer, Inc.*, No. 10-110, 2011 WL 4005266, at *1 (D. Md. Sep. 7, 2011); *Salvatore v. Microbilt Corp.*, No. 14-1848, 2015 WL 5008856, at *2 (M.D. Pa. Aug. 20 2015); *Anker v. Wesley*, 670 F. Supp. 2d 339, 349 (D. Del. 2009); *Minor v. FedEx*, No. 09-1375, 2009 WL 1955816, at *1 (N.D. Cal. Jul. 6, 2009).

[2] *See, e.g.*, *Santos v. Frederick Couynty Bd. of Comm'rs*, No. 09-2978, 2015 WL 5083346, at *3 (D. Md. Aug. 26, 2015); *McGee v. Cole*, 66 F. Supp. 3d 747, 760 (S.D.W. Va. 2014); *Ctr. For Individual Freedom, Inc. v. Tennant*, 849 F. Supp. 2d 659, 670 (S.D.W. Va. 2011), *rev'd in part on other grounds*, 706 F.3d 270 (4th Cir. 2013).

before the Supreme Court. *G.G. v. Gloucester County Sch. Bd.*, No. 15-2056 (4th Cir.), Appellee's Mot. for Stay of Mandate 2, ECF No. 91. This petition has a high probability of being granted. The petition raises a "momentous" question, and a member of the panel that decided the case expressly "urge[d] the parties to seek Supreme Court review." *G.G. v. Gloucester County Sch. Bd.*, — F.3d —, 2016 WL 30080263, at *1 (Niemeyer, J., dissenting from denial of reh'g). The Supreme Court's resolution of *G.G.* would likely control Plaintiffs' Title IX claim and provide guidance about their constitutional claims, making a stay appropriate.

Second, a district court may stay proceedings "to avoid duplicative litigation" in federal court. *Great American Ins. Co. v. Gross*, 468 F.3d 199, 206 (4th Cir. 2006) (citing *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180 (1952)). Here, the issues in this case largely duplicate the issues in *United States v. North Carolina*, No. 16-425. To be sure, as Plaintiffs correctly point out (Plfs' Resp. 6), the parties and issues in the two cases are not identical. But the Supreme Court has expressly rejected "the suggestion that before proceedings in one suit may be stayed . . . , the parties to the two causes must be shown to be the same and the issues identical." *Landis*, 299 U.S. at 254. Requiring perfect overlap would undercut the court's "power to coordinate the business of the court efficiently and sensibly." *Id.* at 255.

The interests of justice favor staying this case on each of the above two grounds. As the UNC Defendants explained in their opening brief, proceeding with this litigation would frustrate the interest in judicial economy (UNC Defts' Mem. 13, ECF No. 39)—an

interest that is being increasingly taxed by the multiple overlapping suits over H.B.2 pending before North Carolina's federal district courts. A stay would ensure that this Court does not "expen[d] needless time and resources" grappling with legal questions that the Supreme Court or the parallel litigation in this Court may answer soon anyway. *Mey*, 2016 WL 1122092, at *3. A stay would also "promote a more orderly course of justice" by "streamlin[ing] proceedings" in this Court. *Salvatore*, 2015 WL 5008856, at *2. For example, since the UNC Defendants enjoy sovereign immunity from Plaintiffs' constitutional claims (*see* UNC Defts' Br. in Resp. to Mot. for Prelim. Inj. 29–34, ECF No. 50), a Supreme Court holding that resolves Plaintiffs' Title IX claim may allow the UNC Defendants to drop out of this case entirely.

In addition, contrary to Plaintiffs' suggestion that litigation would not cause any "hardship or inequity" (Plfs' Resp. 2), proceeding with this case would inflict serious hardship upon the UNC Defendants. Litigation costs money. The UNC Defendants "would be prejudiced considerably should they continue to expend substantial resources in litigation only for the Supreme Court to [resolve the contested issues in short order]." *Mey*, 2016 WL 1122092, at *3; *see also Salvatore*, 2015 WL 5008856, at *2 (considering litigation expenses when deciding whether to grant a stay); *Minor*, 2009 WL 1955816, at *1 (same). Indeed, because prevailing plaintiffs often may claim attorney's fees in § 1983 and Title IX cases (42 U.S.C. § 1988(b)), allowing the case to proceed could force the UNC Defendants to bear not just *one* but (potentially) *two* sets of ultimately unnecessary litigation expenses. (This last point distinguishes this case from *United*

*States v. North Carolina*, No. 16-425. The Department of Justice, unlike Plaintiffs in this case, has no right to seek fee-shifting under § 1988(b).) Moreover, requiring the UNC Defendants to participate in this litigation at this juncture unnecessarily takes them away from their principal focus and statutory purpose of educating students.

All in all, the costs of refusing to stay this case—for the court and the defendants—are substantial. The interest in avoiding these costs amply justify a stay. Plaintiffs are wrong to suggest that there is something improper about "compell[ing]" them to "stand aside" while litigants in another case "settl[e] the rule of law that will define [their] rights." Plfs Resp. 2. As the cases cited above show, courts *often* ask litigants to "stand aside" temporarily while a higher court settles the governing rule of law. Moreover, because the American Civil Liberties Union—one of the organizations representing Plaintiffs here and the parent of Plaintiff ACLU-North Carolina—also represents G.G., it "will not be forced to 'stand aside,'" but will instead "have a voice in the debate pending [at the Supreme Court]." *Harris*, 2014 WL 1292803, at *2.

## II. A STAY WOULD NOT CAUSE PLAINTIFFS SUBSTANTIAL HARM

Plaintiffs claim that a stay would cause them substantial harm by forcing them to endure the Public Facilities Privacy and Security Act while their claims remain on hold. As an initial matter, even if Plaintiffs' assertion of harm were accurate, it would not justify a stay. In *Harris v. Rainey*, the district court stayed proceedings on a challenge to a state's refusal to recognize same-sex marriage in order to await the Fourth Circuit's resolution of another case raising the same issue. 2014 WL 1292803, at *2. Likewise, in

*McGee v. Cole*, the district court stayed proceedings on a challenge to a state's refusal to recognize same-sex marriage in order to await the Supreme Court's disposition of a petition for writ of certiorari raising the same issue (even though, at that time, there was no circuit conflict). 66 F. Supp. 3d at 760. If the harm of being denied the fundamental right to marry did not require denying a stay there, then the harms asserted by Plaintiffs cannot justify denying a stay here—especially when Plaintiffs themselves appear to treat the marriage cases and this case as analogous (Plfs' Resp. 12).

But regardless, Plaintiffs' assertion of harm is inaccurate. The UNC Defendants have no intention of taking enforcement action against transgender people who use bathrooms consistent with their gender identities. The UNC Defendants have consistently maintained this position in public announcements, correspondence with the Department of Justice, and filings in this litigation. *See* UNC Defts' Mem. 13–18; UNC Defts' Br. in Resp. to Mot. for Prelim. Inj. 8–23. Plaintiffs attempt to overcome these assurances, but their attempts miss the mark.

*First*, Plaintiffs assert that President Spellings and other University officials have confirmed that the UNC Defendants will comply with the Act. In particular, Plaintiffs emphasize that President Spellings' Guidance Memorandum "directs each school to take action to 'fully meet their obligations under the Act.'" Plfs' Resp. 9; *see also id.* at 10 ("[The] memorandum directed all UNC schools to *fully meet their obligations* under the Act"). But Plaintiffs take the quoted statement out of context. The memorandum actually explains that "University institutions *should take the following actions to fully*

*meet their obligations* under the Act": (1) "Designate and label multiple-occupancy bathrooms and changing facilities for single-sex use with signage," (2) "Provide notice of the Act to campus constituencies as appropriate," and (3) "Consider assembling and making information available about the locations of designated single-occupancy bathrooms and changing facilities on campus." Guidance Memorandum 2 (emphasis added), ECF No. 38-5. The memorandum and subsequent statements explaining it confirm that "meeting the University's obligations under the Act" does not entail taking *any* enforcement action because "[t]he Act does not contain provisions concerning enforcement." *Id.*; *see also* Spellings April 11 Statement, ECF No. 50-2 ("The guidance we issued . . . caution[s] that the law does not address enforcement and confers no authority for the University . . . to undertake enforcement actions"). Plaintiffs cannot complain about the University's decision to "comply" with the Act by taking three steps—and only three steps—that cause Plaintiffs no harm.

Contrary to Plaintiffs' protestations (Plfs' Resp. 8–10), the University's position about what it must do to comply with the Act does not contradict the Act's text. To be sure, the Act states that "[p]ublic agencies shall require every multiple occupancy bathroom or changing facility to be used by people on the basis of 'biological sex.'" N.C. Gen. Stat. § 143-760(b). Yet the Act conspicuously omits any mention of enforcement or of imposing criminal or civil penalties on those who use bathrooms corresponding to the opposite biological sex—a reality that the Act's supporters and opponents both

acknowledge.[3] Against this backdrop, the UNC Defendants have properly concluded that the University can comply with the Act simply by maintaining existing bathroom signage, without taking any enforcement action of any kind against transgender people who use bathrooms consistent with their gender identity. And regardless, it does not matter for present purposes whether the UNC Defendants' interpretation of the Act is correct (which it is). Even if it that interpretation were wrong, the UNC Defendants' decision not to enforce the Act means that *the UNC Defendants* are not imposing any injury on Plaintiffs.

*Second*, Plaintiffs claim that "schools have . . . sent campus-wide emails regarding compliance with [the Act], which Plaintiffs have personally received." Plfs' Resp. 9. The emails on which Plaintiffs rely, however, *confirm* that the UNC Defendants have no intention of taking enforcement action. One of the two emails, sent to the campus community at UNC-Chapel Hill, states: "We have been asked how the University intends to 'enforce' this provision of the law. As noted in [President Spellings'] memorandum, the law does not contain any provisions concerning enforcement." Folt Email, ECF No. 67-5. As a result, "**all of UNC-Chapel Hill's relevant policies remain in effect.**" *Id.* (emphasis in original). The other email, sent to the campus community at UNC-

[3] *See, e.g.*, Dedrick Russell, *Are There Any Teeth to House Bill 2?* (Mar. 31, 2016), http://www.wbtv.com/story/31615248/are-there-any-teeth-to-house-bill-2 (reporting that Representative Dan Bishop, the "[c]o-sponsor of House Bill 2," stated: "There are no enforcement provisions or penalties in House Bill 2"); Samantha Michaels, *We Asked Cops How They Plan to Enforce North Carolina's Bathroom Law* (Apr. 7, 2016), http://www.motherjones.com/politics/2016/04/north-carolina-lgbt-bathrooms-hb2-enforcement (reporting that Representative Rodney Moore, "a Democrat who voted against the measure," said: "There is absolutely no way to enforce this law, as it relates to the enforcement of the bathroom provisions").

Greensboro, conveys the same message: "The law does not confer authority to the University or any other public agency to undertake enforcement actions." Gilliam Email, ECF No. 67-11. These assurances that the Act has neither changed University policies nor prompted enforcement action—assurances that "Plaintiffs personally received" (Plfs' Resp. 9)—defeat any fears of enforcement by the UNC Defendants.

*Third*, Plaintiffs say that the University could enforce the Act through its code of conduct, "which expressly requires compliance with state law." Plfs' Resp. 13. Not true. The Act provides that "*public agencies shall* require every multiple occupancy bathroom or changing facility to be designated for and only used by persons based on their biological sex." N.C. Gen. Stat. § 143-760(b). The phrase "public agencies shall" makes clear that the Act regulates public agencies, not individuals. The Act's requirement—that bathrooms be "designated" a particular way—confirms as much. Bathrooms are "designated" as men-only or women-only by the agency that operates them, not by their users. The Act is thus a directive to institutions like the University of North Carolina, not a directive to transgender people who want to use bathrooms consistent with their gender identity.

Although Plaintiffs find these arguments "surpris[ing]" (Plfs' Resp. 12), the Supreme Court has explained that the basic distinction between a law that is "directed to . . . agents of the State" and one that is "addressed to . . . private citizens" is "dictated by common sense" (*Printz v. United States*, 521 U.S. 898, 930 (1997)). Indeed, the Court drew precisely this distinction in *Department of Homeland Security v. Maclean*, 135 S. Ct.

913 (2015), in the course of interpreting a law that provided that a federal agency "shall prescribe regulations prohibiting the disclosure of [certain] information" (49 U.S.C. § 114(3)(1)(C)). The Court explained that, because the statute at issue there directs an agency "to 'prescribe regulations,'" it does not itself "create a prohibition" applicable to individuals. In the same way, because the Act at issue in this case directs public agencies to adopt "require[ments]," it does not itself create a prohibition applicable to individuals.

*Finally*, Plaintiffs retreat to the argument that "the UNC Defendants need not barricade restroom doors or physically remove Plaintiffs from restrooms for there to be . . . harms." Plfs' Resp. 11. It is true that "barricad[ing] restroom doors" before transgender people enter is not the only way to enforce a bathroom-access restriction; imposing penalties upon transgender people after they enter would be another way to do so. But here, the UNC Defendants do not engage in *either* type of action. Indeed, nowhere in their brief or exhibits do Plaintiffs provide a single example of the UNC Defendants taking any kind of enforcement step whatsoever.

Plaintiffs' claim of hardship thus comes down to the claim that the challenged statute exists and that the UNC Defendants have advised campus communities about its existence and its contents. But a plaintiff's abstract distress at the government's conduct "is not [even] an injury sufficient to confer standing" (*Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982)), let alone a hardship sufficient to warrant denying a stay.

Dated: July 8, 2016

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on July 8, 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notice of electronic filing to all registered parties.

Dated: July 8, 2016

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