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

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

UNC DEFENDANTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

At the Court's direction, the University of North Carolina, the Board of Governors, and Chairman Bissette (collectively UNC Defendants) submit this Supplemental Brief to address whether Plaintiffs could still assert Title IX claims if the UNC Defendants were dismissed from this case. The answer is yes. First, well established law allows Plaintiffs to bring a Title IX claim directly against the State of North Carolina. Second, and relatedly, Plaintiffs could bring Title IX claims on the basis of Title IX funds received by several North Carolina agencies other than the University, either against the State or against those agencies. Under the circumstances presented in this case, therefore, the UNC Defendants are not necessary to resolve the question whether the Public Facilities Privacy and Security Act (Act) is consistent with Title IX.

I. PLAINTIFFS MAY BRING TITLE IX CLAIMS AGAINST THE STATE OF NORTH CAROLINA

The law is quite clear that a plaintiff may bring a Title IX claim against the State itself on the basis of Title IX funds received by state agencies. Consequently, both the *Carcaño* Plaintiffs in this case and the United States in *United States v. North Carolina*, No. 16-425 could pursue Title IX claims against the State of North Carolina directly.

Congress expressly authorized plaintiffs to bring Title IX claims against States in the Civil Rights Remedies Equalization Amendment of 1986. 42 U.S.C. § 2000d-7. The Equalization Amendment provides that "[a] State shall not be immune . . . from suit in Federal court for a violation of . . . title IX." *Id.* § 2000d-7(a)(1). The Amendment adds that "remedies both at law and in equity" are available "[i]n a suit against a State for a violation of [Title IX]" "to the same extent as such remedies are available . . . in [a] suit against any public or private entity other than a State." *Id.* § 2000d-7(a)(2). These provisions explicitly recognize that a plaintiff may bring a Title IX claim against the State itself (and not just against the public entity that receives federal funding). *See Parents for Quality Educ. With Integration, Inc. v. Ft. Wayne Cmty. Schs. Corp.*, 662 F. Supp. 1475, 1481 (N.D. Ind. 1987) ("The express language [of § 2000d-7] clearly illustrates that a State *or* its agencies may be sued") (emphasis added); *AMAE v. California*, 836 F. Supp. 1534, 1542 (N.D. Cal. 1993) ("Section 2000d-7 quite clearly provides that a state *may* be a defendant"), *rev'd on other grounds*, 195 F.3d 465 (9th Cir. 1999).

In light of this clear statutory text, courts routinely adjudicate Title IX claims against States on the basis of the receipt of Title IX funds by state agencies. For instance,

in *Preston v. Virginia*, No. 91-2020, 1991 WL 156224, at *1 (4th Cir. Aug. 18, 1991), the Fourth Circuit reviewed a Title IX claim against the Commonwealth of Virginia for discrimination at a Virginia community college. Similarly, in *Hooper v. North Carolina*, No. 04-14, 2006 WL 2850596, at *7 (M.D.N.C. Oct. 3, 2006), this Court reviewed a Title IX claim against (among other defendants) the State of North Carolina for alleged discrimination at the University of North Carolina. Likewise, in *Alegria v. Texas*, No. 06-212, 2007 WL 2688446, at *10–*16 (S.D. Tex. Sep. 11, 2007), the Court reviewed a Title IX claim against the State of Texas for discrimination in an educational program operated by a corrections agency. These cases confirm that, in addition to the state agency that receives federal funds, the State is also a proper defendant in a Title IX case.

Cases interpreting Title VI—a counterpart of Title IX that deals with race rather than sex discrimination—confirm this conclusion. Those cases are relevant here because "Title IX was patterned after Title VI" (*Cannon v. Univ. of Chicago*, 441 U.S. 677, 694 (1979)), because courts "interpre[t] Title IX consistently with Title VI" (*Barnes v. Gorman*, 536 U.S. 181, 185 (2002)), and because the Equalization Amendment of 1986 applies to both statutes (*see* 42 U.S.C. § 2000d-7). A "long line of cases" reflects a "consistent understanding . . . that a state may be sued under Title VI, at least where the state is the entity responsible for the [alleged] Title VI violation." *AMAE*, 836 F. Supp. at 1540. For example, the Ninth Circuit has recognized that "a State may . . . be the proper defendant under a Title VI suit." *AMAE v. California*, 195 F.3d 465, 479 n.14 (9th Cir. 1999), *rev'd in part on other grounds*, 231 F.3d 572 (9th Cir. 2000) (*en banc*). Similarly,

the Southern District of Georgia has held that "Plaintiffs may sue the state under Title VI." Numerous other courts have similarly entertained Title VI claims against States. *Board of Pub. Ed. v. Georgia*, No. 490-101, 1990 WL 608208, at *6 n.7 (S.D. Ga. Sep. 24, 1990); *see also Georgia State Conf. of Brs. of NAACP v. Georgia*, 775 F.2d 1403, 1407 (11th Cir. 1985) (Title VI claim against State of Georgia); *Queets Band of Indians v. Washington*, 765 F.2d 1399, 1404 n. 2 (9th Cir. 1985) (Title VI claim against State of Washington), *vacated as moot*, 783 F.2d 154 (9th Cir. 1986); *Knight v. Alabama*, 787 F.Supp. 1030, 1049 (N.D. Ala. 1991) (Title VI claim against State of Alabama), *aff'd in part and rev'd in part on other grounds*, 14 F.3d 1534 (11th Cir. 1994). These cases leave no doubt that a State is a proper defendant in a Title VI case—and, by extension, in a Title IX case.

To be sure, "only the funding recipient can be liable under Title IX" (*Jennings v. UNC-Chapel Hill*, 240 F. Supp. 2d 492, 509 (M.D.N.C. 2002)), but both the State itself and the state agency that receives federal funding count as "recipients." Title IX covers both "direct" and "indirect" recipients of federal funds (*Grove City College v. Bell*, 465 U.S. 555, 564 (1984)), and "the state 'receives' federal funds . . . through its agencies" (*Board of Pub. Ed.*, 1990 WL 6089208, at *6 n.7). In addition, federal Title IX regulations define "recipient" to include "any State . . . or any instrumentality of a State . . . to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives such assistance." 34 C.F.R. § 106.2(i). Because the State itself and the state agency that

receives federal funds both qualify as "recipients" of federal money, the State itself is also subject to lawsuits under Title IX.

Under these principles, it is clear that Plaintiffs' Title IX claims could proceed against the State of North Carolina, without the participation of the UNC Defendants as named parties, on the basis of receipt of Title IX funds by its state agencies. And under the Equalization Amendment, Plaintiffs could obtain remedies in a lawsuit against the State "to the same extent as such remedies are available . . . in [a] suit against any public or private entity other than a State." 42 U.S.C. § 2000d-7(a)(2).

II. PLAINTIFFS MAY BRING TITLE IX CLAIMS ON THE BASIS OF FUNDS RECEIVED BY OTHER STATE AGENCIES

There are several state agencies other than the University of North Carolina that receive Title IX funds—including, for example, the Community Colleges System Office, the Department of Administration, the Department of Health and Human Services, and the Department of Public Instruction. As a result, a Title IX suit could be brought against the State (or any of these agencies) on the basis of the receipt of such Title IX funds.

To elaborate, Title IX applies to "any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681. Numerous public agencies in North Carolina operate federally funded education programs or activities that may be covered by Title IX. For example, the North Carolina Community Colleges System Office (which oversees the state community college system) received $17,427,797 from the United States Department of Education for "Adult Education — Basic Grants to States" for the fiscal year ending on June 30, 2015. State of North Carolina Single Audit Report

for the Year Ended June 30, 2015, at 250.[1] The North Carolina Department of Health and Human Services received (in addition to other funds) $12,106,928 from the United States Department of Education for "Special Education — Grants for Infants and Families." *Id.* at 252. The North Carolina Department of Administration received $264,221 from the United States Department of Education for "TRIO — Talent Search." *Id.* at 249. And the North Carolina Department of Public Instruction received almost $1.5 billion from the Federal Government last year, including numerous grants from the Department of Education. *Id.* at 256–57. There are undoubtedly other agencies—which other parties, such as the United States, may be in a better position to identify—that also receive Title IX funds. *See also* Legislative Fiscal Note to H.B. 946, General Assembly of N.C., Sess. 2015, at 2 (North Carolina Community College System may receive in excess of $33 million in Title IX funds); *id.* (Department of Public Instruction may receive in excess of $1.4 billion in Title IX funds).[2]

Plaintiffs could bring Title IX claims against the State of North Carolina on the basis of funds received by these agencies. Alternatively, Plaintiffs could bring Title IX claims directly against these agencies. In particular, the Community Colleges System Office, Department of Administration, and Department of Health and Human Services form part of the Executive Branch of North Carolina and fall under the jurisdiction of the Governor (*see* N.C. Gen. Stat. § 143B-6) and thus could be represented by the

[1] http://www.ncauditor.net/EPSWeb/Reports/Financial/FSA-2015-8730.pdf
[2] http://ncleg.net/Sessions/2015/FiscalNotes/House/PDF/HFN0946v1r1.pdf

Governor's current legal counsel (as the Department of Public Safety already is in *United States v. North Carolina*).[3]

III. THE UNC DEFENDANTS ARE UNNECESSARY FOR RESOLUTION OF TITLE IX CLAIMS IN THIS LITIGATION

In light of the foregoing, the UNC Defendants are not necessary to resolve the legal issues that have been raised in the three related lawsuits currently before this Court—*Carcaño v. McCrory*, No. 16-236; *United States v. North Carolina*, No. 16-425; and *North Carolinians for Privacy v. U.S. Department of Justice*, No. 16-845. This Court can thus resolve the Title IX issue as well as the other issues without requiring participation of the UNC Defendants. And there are several reasons why it makes sense to proceed in this fashion.

First, proceeding in this fashion would respect the limits on judicial power established by Article III. As the UNC Defendants have explained, a challenge to a statute is justiciable and ripe only if the defendant enforces or threatens to enforce the statute. Indeed, even if the defendant has unquestioned authority to enforce a statute, the

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[3] Although the Act at issue here treats the University as an executive-branch agency for purposes of that Act (*see* N.C. Gen. Stat. § 143-760(a)(2)), the University is not a part of the executive branch under North Carolina law. The University's establishment is grounded in Article IX of the State Constitution (which addresses education), rather than in Article III (which addresses the executive branch). In addition, state law defines the University of North Carolina as a body corporate and politic rather than as an executive department. *See* N.C. Gen. Stat. § 116-3 (defining the University as a body politic and corporate); *id.* § 143B-6 (omitting the University from the list of executive departments). Moreover, the University has historically been considered a part of the legislative rather than the executive branch under North Carolina law. *See University v. Maultsby*, 43 N.C. 257, 263 (N.C. 1852) ("[T]he University is a public institution and body politic . . . subject to legislative control").

defendant's failure to exercise that enforcement authority renders the challenge non-justiciable and unripe. *See Poe v. Ullman*, 367 U.S. 497 (1961); *Doe v. Duling*, 782 F.2d 1202 (4th Cir. 1986); *Rock for Life-UMBC v. Hrabowski*, 411 Fed. Appx. 541 (4th Cir. 2010); *Lopez v. Candaele*, 630 F.3d 775 (9th Cir. 2010). Here, the UNC Defendants have not enforced or threatened to enforce the Act. They have never responded to a transgender person's use of a bathroom consistent with his or her gender identity by stopping the person from entering the bathroom, by removing the person from the bathroom, by taking disciplinary action, by filing a police report, by seeking civil or criminal punishment, or by imposing any other concrete harm. Nor have they threatened to do so. As to the UNC Defendants, therefore, there is no ongoing or imminent action for this Court to enjoin, and no proper case or controversy for this Court to adjudicate.

Second, wholly apart from the strictures of Article III, proceeding without the UNC Defendants would streamline proceedings at every stage of this litigation. There would be one party fewer making and responding to discovery requests, one party fewer attending depositions, one party fewer posing interrogatories, one party fewer participating in pretrial conferences, and one party fewer conducting trial, questioning witnesses, and submitting briefs. This simplification would save the remaining parties and the Court both time (which is useful if the case is to proceed on an expedited schedule) and resources.

Third, dropping the UNC Defendants from these cases would narrow the range of issues that the parties must argue and that the Court must consider. In their submissions

so far, the State, Governor, Department of Public Safety, and Legislative Intervenors have principally made substantive arguments defending the validity of the Act under the Constitution and the numerous federal statutes invoked by the *Carcaño* Plaintiffs and the United States. The UNC Defendants, in contrast, have principally made different, procedural arguments concerning standing, constitutional ripeness, prudential ripeness, sovereign immunity, and the existence of a cause of action for the United States to enforce Title IX. As things stand, the Court and the parties will have to address *both* the merits issues *and* the procedural issues at each stage of the litigation—in briefing, at the preliminary-injunction hearing, at trial, and later on appeal. In contrast, if the case proceeded without the UNC Defendants, the Court and the parties could concentrate on the merits without spending time and resources on these procedural matters.

Finally, dropping the UNC Defendants from this lawsuit would promote the public interest. It would spare the taxpayers of North Carolina, who must already pay the legal bills incurred by the State, Governor, Department of Public Safety, and Legislative Intervenors, from incurring additional legal expenses for the UNC Defendants. And perhaps more importantly, it would enable the University to focus on its core mission of educating its students, while other parties carry on the important work of resolving the complex issues raised by the three related lawsuits pending before this Court.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 5, 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: August 5, 2016

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