UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

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

SECOND JOINT SUPPLEMENTAL BRIEF OF *CARCAÑO* PLAINTIFFS AND THE UNITED STATES

Pursuant to this Court's request at the August 4, 2016 scheduling conference and its text order of the same date, the *Carcaño* Plaintiffs (hereinafter, the "Plaintiffs") and the United States respectfully address the Court's question regarding the effect of the Supreme Court's stay in *Gloucester County School Board v. G.G. ex rel. Grimm*, No. 16A52, 2016 WL 4131636 (U.S. Aug. 3, 2016), on this litigation, and associated cases. Pursuant to the Court's order requiring a single filing from each side, the United States joins Part I of the *Carcaño* Plaintiffs' brief to address this question. As explained below, the Supreme Court's stay should not affect the proceedings in this case, and *G.G.* remains the binding law that governs this Court's determination of the pending motions for

preliminary injunction. The Court also requested supplemental briefing on the scope of injunctive relief as to the *Carcaño* Plaintiffs' Title IX and constitutional claims. Plaintiffs have identified ample authority to find that this Court is empowered to grant preliminary injunctive relief that is broader than the individually named Plaintiffs, as described in Part II, below. The United States does not join Part II of this brief, which deals with issues pertaining the scope of injunction in the *Carcaño* Plaintiffs' case.

I. The Stay in *G.G.* Does Not Affect This Court's Authority to Grant A Preliminary Injunction Against H.B. 2.

A. The Fourth Circuit's Opinion in *G.G.* Remains the Law Governing this Court's Determinations as to Plaintiffs' Title IX Claims.

The Fourth Circuit's holding in *G.G. ex rel. Grimm v. Gloucester County School Board*, 822 F.3d 709, 723 (4th Cir. 2016), continues to bind this Court's determinations regarding Plaintiffs' Title IX claims, notwithstanding the stay of the mandate. The Fourth Circuit has clearly held that "'[a] decision of a panel of [the Fourth Circuit] becomes the law of the circuit and is binding . . . unless it is overruled by a subsequent en banc opinion of [the Fourth Circuit] or a superseding contrary decision of the Supreme Court.'" *United States v. Collins*, 415 F.3d 304, 311 (4th Cir. 2005) (quoting *Etheridge v. Norfolk & W. Ry. Co.*, 9 F.3d 1087, 1090 (4th Cir. 1993)). A decision by the Fourth Circuit or the Supreme Court to stay the mandate thus does not affect the precedential or binding effect of a Fourth Circuit decision. *See also Friel Prosthetics, Inc. v. Bank of America*, 2005 WL 348263, at *1 n. 4 (D. Md. Feb. 9 2004) (a stay of the Fourth Circuit's mandate "does not prevent the Fourth Circuit decision from having precedential

value and binding authority on the undersigned in the matter *sub judice*"); *Martin v. Singletary*, 965 F.2d 944, 945 n.1 (11th Cir. 1992) (noting that "[t]he stay of the mandate . . . in no way affects the duty of this panel and the courts in this circuit to apply now the precedent established"); *McClellan v. Young*, 421 F.2d 690, 691 (6th Cir. 1970) (per curiam) (pending Supreme Court proceeding no reason to delay adjudication in district court); *S.E.C. v. Amerindo Inv. Advisors, Inc*., 2014 WL 405339, at *4 (S.D.N.Y. Feb. 3, 2014).[1]

The rule that the circuit court's opinion remains in place pending actual reversal makes particular sense in light of the relatively generous standard for granting stays in the Supreme Court, which is not based on a determination that the Court ultimately *will* decide to hear the case, nor is it based on a determination that the Court *will* decide to reverse (if certiorari is granted). Indeed, among other things, a stay may be granted where there is "a *reasonable probability* that four Justices will consider the issue sufficiently meritorious to grant certiorari" and "a *fair prospect* that a majority of the Court will vote to reverse the judgment below." *Hollingsworth v. Perry*, 558 U.S. 183,

[1] The Federal Rules of Appellate Procedure ("FRAP") also support this conclusion, by clearly distinguishing between the issuance of an opinion and judgment, and the issuance of a mandate. Rule 36(a) of the FRAP requires that a "judgment is entered when it is noted on the docket," which must be prepared "after receiving the court's opinion," but Rule 41(b) expressly notes that the mandate will issue *after* the entry of judgment. Moreover, although the Fourth Circuit's local rules expressly state that "[g]ranting of rehearing en banc vacates the previous panel judgment and opinion," 4th Cir. L.R. 35(c), the Fourth Circuit's local rules governing the issuance of the mandate do not contain a similar provision suspending a panel judgment and opinion if a mandate is stayed. *See* 4th Cir. L.R. 41. Nor do the rules of the Supreme Court contain any such provision.

189 (2010) (per curiam) (emphases added). Consistent with this lenient standard, the Court has on repeated occasions granted a stay, only to eventually *deny* petitions for certiorari. *See, e.g.*, *Herbert v. Kitchen*, 134 S. Ct. 893 (2014) (granting stay of district court's permanent injunction pending Tenth Circuit proceedings); *cert. denied*, 135 S. Ct. 265 (2014); *Philip Morris USA Inc. v. Jackson*, 561 U.S. ____, 131 S. Ct. 1 (2010) (Scalia, J., in chambers) (granting stay), *cert. denied*, 2011 U.S. LEXIS 4834 (U.S. June 27, 2011); *Mori v. Int'l B'hood of Boilermakers*, 454 U.S. 1301 (1981) (Rehnquist, J., in chambers) (granting stay), *cert. denied*, 454 U.S. 1147 (1982); *San Antonio Conservation Soc'y v. Texas*, 404 U.S. 939 (1970) (granting stay), *cert. denied*, 400 U.S. 968 (1970). Any contrary rule allowing for disturbance of a circuit court's opinion pending actual reversal would invite this Court and others to engage in undue speculation as to whether the Justices will grant review in a particular case and, if they do, how they would rule on the merits.

In the particular case of *G.G.*, any inference about the ultimate outcome of the case on the merits based on the Supreme Court's stay is especially unmerited, given Justice Breyer's statement that he provided the necessary fifth vote for the stay only "as a courtesy." *Gloucester County School Board v. G.G. ex rel. Grimm*, No. 16A52, 2016 WL 4131636, at *1 (U.S. Aug. 3, 2016) (Breyer, J., concurring) (citing Justice Breyer's dissent in *Medellin v. Texas*, 554 U.S. 759, 765 (2008), in which he expressed his disappointment that "no Member of the majority has proved willing to provide a courtesy vote for a stay" in a death penalty case).

In short, the Fourth Circuit's holding in *G.G.* continues to bind this Court's determinations regarding Plaintiffs' Title IX claims.

B. There is No Cause to Stay or Postpone These Proceedings.

There is also no basis to delay consideration of the *Carcaño* Plaintiffs' preliminary injunction motion, postpone the current discovery schedule, or postpone the trial date simply because the Supreme Court has decided to preserve the *status quo* prior to the Court of Appeals ruling in *G.G.* pending disposition of an eventual petition for certiorari. In particular, if this Court were to grant a preliminary injunction, the defendants would need to file a motion if they wished to stay the effect of that injunction; but that issue is not before the Court.

The Supreme Court has made clear that "[o]nly in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both." *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936). "[I]f there is even a fair possibility that the stay . . . will work damage to someone else," then the proponent of a stay "must make out a clear case of hardship or inequity in being required to go forward." *Id.*

The parties defending H.B. 2 (collectively, "Defendants") can offer *no* explanation of what hardship or inequity they face in proceeding with this case at this time. This is particularly so given that the *Carcaño* Plaintiffs' constitutional claims—specifically, their equal protection and due process claims as to Part I of House Bill 2, and their equal protection claims as to the preemption provision in House Bill 2—are not presented for

the Supreme Court's review in *G.G.*[2] These constitutional claims would persist in this case no matter any possible, ultimate determination by the Supreme Court of the appropriateness of preliminary injunctive relief in *G.G.*, and would require the same type and amount of discovery as to the state's motives in passing House Bill 2, the validity of its asserted interests (including the presence or absence of any legislative record to support those interests), and the hardship that House Bill 2 works on tens of thousands of transgender North Carolinians. The same is true for the United States' claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*. ("Title VII"); and the Violence Against Women Act, 42 U.S.C. § 13925(b)(13) ("VAWA"), neither of which are at issue in *G.G.* Nor, as a practical matter, is there any impediment to proceeding with discovery or trial in this case, since the rule of law that this Court must apply is already clear. *See supra* Part I.A.

To the contrary, the real hardship of any delay would be faced by transgender North Carolinians like Plaintiffs Carcaño, McGarry, H.S., and members of the ACLU of North Carolina ("ACLU-NC") who are forced by House Bill 2 to choose between three harmful options: (1) attempt to avoid the restrooms in the places they live, work, and study—an option that will often prove impractical if not impossible, and can cause

[2] *See* Petitioner's Application for Recall and Stay of the U.S. Fourth Circuit's Mandate Pending Petition for Certiorari ("G.G. Stay App.") at 4, *Gloucester County School Board v. G.G. ex rel. Grimm*, No. 16A52, 2016 WL 4131636 (U.S. Aug. 3, 2016) (questions presented focusing solely on Title IX claims), *available at* https://www.aclu.org/sites/default/files/field_document/petitioners_application_for_recall_and_stay_of_fourth_circtuits_mandate_pending_petition_for_certiorari.pdf.

serious psychological and physical harm; (2) disclose their transgender status to others in and around the restrooms that they use—which may cause psychological distress and lead to harassment and violence; or (3) violate both their school policy and state law, risking not only harassment and violence, but also disciplinary or other legal consequence. *See* Mot. for Preliminary Injunction, ECF No. 22 at 40-41; *see also Glenside W. Corp. v. Exxon Co., U.S.A.*, 761 F. Supp. 1118, 1133 (D.N.J. 1991) ("Courts have granted injunctive relief where the applicant for such relief shows he or she may be subjected to violence without injunctive relief."). Moreover, every day that H.B. 2 is not enjoined, Plaintiffs and other transgender individuals suffer the dignitary harm of being declared different and less valuable by Defendants. *See Baskin v. Bogan*, 12 F. Supp. 3d 1137, 1140 (S.D. Ind. 2014) (holding that dignitary harms constitute irreparable injuries).

Indeed, as a practical matter, any stay of this case pending the outcome of proceedings in *G.G.* in the Supreme Court could be of potentially significant length. The petition for certiorari in *G.G.* has yet to be filed; even if the Court were to grant certiorari and consider the case this Term, the case may not be decided until approximately June 2017. Further, were the Supreme Court to affirm the Fourth Circuit's decision through the vote of an equally divided Court, the school district might seek rehearing on the case based on the prospect that a ninth Justice will be confirmed, *see* Stephen M. Shapiro et al., *Supreme Court Practice* § 15.6(a), at 838 (10th ed. 2013) (noting that "rehearing petitions have been granted in the past where the prior decision was by an equally divided Court and it appeared likely that upon reargument a majority one way or the other might

be mustered"), which might put off any disposition until the following Supreme Court Term.[3] Plaintiffs and the rest of the more than 44,000 transgender individuals in North Carolina should not be required to endure the harms from House Bill 2 unabated for such an indefinite, lengthy period of time.[4]

C. The Supreme Court's Stay Does Not Otherwise Affect the Equities in Granting a Preliminary Injunction.

Finally, the Supreme Court's decision to grant a stay in *G.G.* is not probative as to this Court's balancing of the equities relevant to the pending motion for preliminary injunction.

As an initial matter, the Supreme Court's standard for granting a stay does not match the standard that this Court must consider in deciding whether to issue a preliminary injunction—particularly where the deciding vote for the stay was expressly cast "as a courtesy." *Gloucester*, 2016 WL 4131636, at *1. Further, as the Supreme Court noted in *Nken v. Holder*, the determination as to whether to grant a stay in any particular case "is dependent upon the circumstances of the particular case." 556 U.S.

[3] Further, although Plaintiffs reject the notion that the Supreme Court's vote as to the stay should be seen as indicating that the grant of certiorari is a foregone conclusion or somehow signaling the Supreme Court's ultimate disposition, they note that a majority of the Court did not vote to grant a stay on the merits because Justice Breyer indicated that he voted to grant the stay "as a courtesy." *Gloucester*, 2016 WL 4131636, at *1.

[4] Notably, any ruling granting such an indefinite delay without resolving Plaintiffs' motion for a preliminary injunction would have the effect of denying it, and thus would be immediately appealable as such a denial. *See Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981) (holding that 28 U.S.C. § 1292(a)(1) "provide[s] appellate jurisdiction over orders that . . . have the practical effect of . . . denying injunctions and have serious, perhaps irreparable, consequences") (internal quotation marks omitted).

418, 433 (2009). And there are differences between this case and G.G. pertaining to the nature and scale of the alleged hardship for the parties. In particular the equities in this case are even more striking for the Plaintiff parties. First, the scope of the policy at issue in this case is not limited to only one student, or even the school context, but rather extends to *every* public facility within the State's control. Second, as mentioned above, the claims at issue in this case involve harms that the *Carcaño* Plaintiffs have asserted are of a constitutional magnitude, as well as claims by the United States under Title VII and VAWA, that were simply not before the Supreme Court in *G.G.*, a case which is limited to Title IX. And finally, and perhaps most significantly, as to the pending motions for preliminary injunction, the State in this case has effectively conceded that, as a factual matter, there was no problem with the *status quo* that Plaintiffs seek to restore. *See* Tr. of Aug. 1, 2016 Hearing on Plaintiffs' Motion for Preliminary Injunction (ECF No. 103) at 66:4-9 (counsel for the State noting that he was "not aware of any problem" with transgender individuals using restrooms consistent with their gender identity).

In short, there is no impediment to this Court entering the preliminary injunction requested by Plaintiffs in this matter.

II. The Court Can and Should Afford Broad Relief To The More Than 44,000 Transgender North Carolinians Harmed By H.B. 2.

As the Court observed during its August 1, 2016 hearing, more than 44,000 adults

in North Carolina are transgender[5]—not including the hundreds, if not thousands, of transgender youth who suffer daily under Part I of H.B. 2. Because the harms that transgender people suffer throughout the state are no less severe than those inflicted upon the *Carcaño* Plaintiffs, ECF Nos. 22-4, 22-8, 22-9, 73-1, and because broad relief is necessary for the *Carcaño* Plaintiffs themselves to obtain complete relief, Plaintiffs urge the Court to enjoin enforcement of Part I of H.B. 2.

A. Facial Invalidation of Part I of H.B. 2 is an Appropriate Remedy.

A Title IX ruling is critical, but not sufficient, to provide complete preliminary relief to Plaintiffs and the tens of thousands of other transgender people who use public facilities in North Carolina. Plaintiffs and other transgender individuals routinely depend upon access to sex-specific facilities in a variety of non-school settings beyond the reach of Title IX. *See, e.g.*, ECF No. 22-4 ¶¶ 26, 28 (describing Mr. Carcaño's use of non-school facilities). H.B. 2 must therefore also be enjoined on constitutional grounds, as violating the right to equal protection, privacy, and medical autonomy. *Cf. Carnes v. Tennessee Secondary School Athletic Ass'n*, 415 F. Supp. 2d 569, 569, 572 (E.D. Tenn. 1976) (granting preliminary injunction against education board, athletic association, and various school officials in a case alleging both Title IX and constitutional claims).

[5] Andrew R. Flores, et al., *Williams Institute: How many adults identify as transgender in the US?* (2016) (filed in *United States v. State of North Carolina*, No. 1:16-cv-00425-TDS-JEP at ECF No. 74-1).

Because Plaintiffs have shown a strong likelihood of success that Part I of H.B. 2 is facially unconstitutional, it must be enjoined. As the Supreme Court affirmed earlier this year, "if the arguments and evidence show that a statutory provision is unconstitutional on its face, an injunction prohibiting its enforcement is 'proper.'" *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2307 (2016). In that case, abortion providers brought an as-applied constitutional challenge to an admitting-privileges requirement on behalf of physicians at only two specific facilities that performed abortion care. *Id.* at 2301. However, the Supreme Court agreed that facial relief was the appropriate remedy, given that the requirement created a substantial obstacle to obtaining an abortion for a large portion of those affected by it. *Id.* at 2307 (noting that a court can "award[] facial relief as the appropriate remedy for [] as-applied claims"), 2313, & 2320.

The Fourth Circuit has affirmed the validity of facial relief on multiple occasions where the circumstances warranted such relief. *See, e.g.*, *Bostic v. Schaefer*, 760 F.3d 352, 369 (4th Cir. 2014) (holding that Virginia's ban on marriage for same-sex couples was facially invalid under the due process clause); *MacDonald v. Moose*, 710 F.3d 154, 166 (4th Cir. 2013) (holding that a sodomy law was facially invalid, even though the law had been applied to conduct involving an adult and a minor); *N. Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 290 (4th Cir. 2008) (holding that aspects of campaign

finance law were facially invalid under the First Amendment and noting that narrower means existed for achieving regulatory objectives).[6]

Here, Plaintiffs' constitutional challenge is both facial and as-applied. ECF No. 9 at ¶ 184. Because H.B. 2's banishment of transgender people from public facilities is invalid across the board, this Court has the authority to afford facial relief protecting all transgender people whom H.B. 2 would otherwise bar from facilities consistent with their gender identity. *G.G.*'s reasoning also supports the propriety of facial relief. Although the Fourth Circuit did not have occasion to decide the facial validity of the school board policy under plaintiff's constitutional claim, it "doubt[ed] that G.G.'s use of the communal restroom . . . or for that matter *any individual's appropriate use*" would lead to the harms imagined by the school board. *G.G.*, 822 F.3d at 723 (emphasis added). Just as the school board's policy was unlawful as to a single transgender individual, H.B. 2's replication of a similar policy on a statewide scale is also unlawful as to thousands of transgender individuals it affects.

H.B. 2 imposes a blanket prohibition against the use of sex-specific facilities by transgender individuals like Plaintiffs, thereby shutting them out of public life. It is thus

[6] *See also Stuart v. Huff*, 834 F. Supp. 2d 424, 437 (M.D.N.C. 2011) (enjoining defendants from enforcing statutory section in its entirety based on likelihood of success on First Amendment claims); *Waste Mgmt. Holdings, Inc. v. Gilmore*, 64 F. Supp. 2d 523, 537 (E.D. Va. 1999) (broadly enjoining defendants "from enforcing the challenged legislation pending the resolution of this matter," where the legislation placed certain restrictions on waste disposal); *Roe v. Patton*, No. 2:15-CV-00253-DB, 2015 WL 4476734, at *4 (D. Utah July 22, 2015) (preliminarily enjoining discrimination under Utah statutes against any married same-sex couple seeking accurate birth certificates for their children, not merely the plaintiffs).

a rare breed of law—one whose "sheer breadth is [] discontinuous with the reasons offered for it" and which "has the peculiar property of imposing a broad and undifferentiated disability" on a single group—and it is precisely the type of exceptional law for which the remedy of facial invalidation exists. *Romer v. Evans*, 517 U.S. 620, 632 (1996).

B. Adequate Relief for the Named Plaintiffs Requires a Broad Injunction.

During the August 1, 2016 hearing before this Court, counsel for Governor McCrory suggested for the first time in this case that preliminary relief can only be granted to the individual *Carcaño* Plaintiffs.[7] Even setting aside this Court's authority to grant facial relief on constitutional claims as discussed above, that argument is incorrect. First, broad relief must be provided when necessary to ensure complete relief for the named plaintiffs. Second, ACLU-NC and its transgender members are entitled to relief on their constitutional claims, and Governor McCrory has the authority to ensure compliance with a broad injunction covering a wide range of public facilities.

On the first point, *Bailey v. Patterson*, 323 F.2d 201, 205 (5th Cir. 1963)—a leading case in this area—is particularly instructive. In *Bailey*, African-American plaintiffs challenged state and local Mississippi laws segregating various transportation

[7] Having failed to raise this argument in their opposition briefs, all Defendants have waived it. Plaintiffs also note that while ACLU-NC and its members are not currently a party to Plaintiffs' Title IX claim, Plaintiffs will seek to file an amended complaint making the ACLU-NC a Title IX plaintiff before the August 15, 2016 deadline in the case scheduling order. ECF No. 96 at 5. Plaintiffs hope to resolve this while their preliminary injunction is pending, although it is also not a necessary predicate for this Court's authority to grant broad relief for the reasons explained herein.

carriers. *Id.* at 202-03. In granting broad relief, *Bailey* held it was irrelevant whether the suit had been brought as a class action, because the plaintiffs' claims for access to desegregated facilities "require[d] that the decree run to the benefit not only of appellants but also for all persons similarly situated." *Id.* at 206; *see also id.* ("By the very nature of the controversy, the attack is on the unconstitutional practice of racial discrimination. Once that is found to exist, the Court must order that it be discontinued." (quotation omitted)).[8]

The same is true of the preliminary relief sought here. Plaintiffs seek access to public facilities that do not separate them from others and that do not have signs on the restroom doors that effectively say, "Men, But Not Transgender Men." Only an injunction enjoining Part I of H.B. 2 can remove those signs. The fact that Plaintiffs have an ongoing need to access a variety of facilities means that effective relief cannot issue if it is limited to certain buildings, geographic locations, or individuals. *See, e.g.*, ECF No. 22-4 ¶¶ 26, 28 (as part of his job, Mr. Carcaño has an ongoing need to visit the North

[8] Courts have recognized *Bailey*'s application to preliminary relief as well. *See, e.g.*, *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994) (relying on *Bailey* to uphold nationwide preliminary injunction where "appropriate relief" for the plaintiffs "necessarily implicates nationwide relief"); *Planned Parenthood Se., Inc. v. Bentley*, 141 F. Supp. 3d 1207, 1227 (M.D. Ala. 2015) (relying on *Bailey* to provide broad preliminary relief). Policies that are unlawful "on their face" would be wholly invalidated after a successful trial, and "nonparties w[ould] receive no broader relief from the preliminary injunction . . . than they would be entitled to after such a judgment." *Nat'l Org. For Reform of Marijuana Laws (NORML) v. Mullen*, 608 F. Supp. 945, 964 (N.D. Cal. 1985); *see also Planned Parenthood*, 141 F. Supp. 3d at 1228 (for a law held unconstitutional, state actors "have the obligation to cease denying benefits not just to the named plaintiffs but also to all other qualified members of the group," making broad preliminary relief no greater than that available after trial) (quote omitted).

Carolina Department of Health and Human Services, and he has relied on rest stops when traveling through the state to Atlanta and Washington D.C.).

Nor would an order falling short of a clear directive enjoining Part I of H.B. 2 across the state be sufficient to ensure Plaintiffs are not questioned or harassed by others. A limited injunction would propagate extraordinary confusion as to both Plaintiffs' rights and the rights of others, and put Plaintiffs in the position of having to carry and potentially present the Court's injunction to anyone questioning their use of sex-specific facilities—defeating the purpose of allowing safe, private access to such facilities in the first place. *Cf. NORML*, 608 F. Supp. at 964 (where others cannot easily "distinguish the parties from the nonparties, or [] appropriately and timely limit their behavior if they do," broad preliminary relief is appropriate to avoid putting plaintiffs "at significant risk for repeated rights violations," which would render "the preliminary injunction remedy . . . meaningless").

Second, any adequate injunction as to Plaintiff ACLU-NC would need to cover the range of facilities used by its transgender members. As set forth in the Declaration of Sarah Preston, Acting Executive Director of Plaintiff ACLU-NC, there are approximately 9,000 current members of ACLU-NC located throughout the state of North Carolina. ECF No. 22-15 ¶ 3. Plaintiff ACLU-NC has received dozens of intakes via telephone and its website from transgender North Carolinians or parents of transgender young people living in North Carolina harmed by H.B. 2, including parents of students in the K-12 public school system. *Id.* ¶ 10. In fact, the passage of H.B. 2 resulted in more intake

contacts to Plaintiff ACLU-NC from and reported harm to North Carolinians than any other piece of legislation in the past nine years. *Id.* ¶ 33. Current and future members of Plaintiff ACLU-NC should be protected from discrimination in all public spaces in which they live, and in order to do that, Part I of H.B. 2 must be enjoined throughout the state and in all aspects of public life.

Moreover, Governor McCrory has the authority to ensure compliance with an injunction reaching a wide range of public facilities. H.B. 2 expressly designates that executive branch agencies include any agencies, board, offices, departments, and institutions of the executive branch.[9] N.C. Gen. Stat. § 143-760. Additionally, Governor McCrory's Executive Order 93 directed cabinet agencies to designate and ensure that facilities are "only used by persons based on their biological sex." ECF No. 23-24.

Finally, Governor McCrory and the Intervenor-Defendants should be enjoined not only from enforcing Part I of H.B. 2 but also from interfering with any other relief that this Court orders. An injunction against such interference is particularly appropriate in light of Defendants' positions on the record with respect to schools. Governor McCrory has asserted on the record that UNC and other schools must follow H.B. 2 and that they have no authority to disregard it. *See* Transcript of Status Conference, at 11:25-12:19,

[9] See North Carolina State Government Agencies, *available at* https://www.sosnc.gov/kidspg/agency.htm (listing agencies under the executive branch). H.B. 2 also designates UNC and the North Carolina Community College System as executive branch agencies, N.C. Gen. Stat. § 143-760, although as discussed in Plaintiffs' supplemental brief filed on August 5, 2016, UNC is an appropriate defendant as a recipient of federal funds under Title IX.

United States v. State of North Carolina, No. 1:16-cv-00425-TDS-JEP (June 23, 2016) (stating that UNC and other schools such as the Charlotte-Mecklenburg school system are "bound by the provisions of H.B. 2," and "cannot unilaterally avoid enforcing or complying with H.B. 2"); *id.* (stating that the "Governor can't simply say we're not going to enforce a particular law"). The Intervenor-Defendants have taken a similar position. *See* Transcript of Preliminary Injunction Hearing at 114:17-19 (stating that, if government entities fail to comply with H.B. 2, "that's a problem we all need to deal with at the state level in terms of state government") (August 1, 2016).

While Governor McCrory and the Intervenor-Defendants are not recipients of federal financial assistance under Title IX, ECF Nos. 106 at 2-5 and 107 at 2-6, the Court can and should enjoin them from interfering with schools' compliance with Title IX. These defendants are properly before the Court, and thus can be enjoined from interfering with any relief this Court orders in school settings. *Cf. Missouri v. Jenkins*, 495 U.S. 33, 51 (1990) ("one of the most important considerations governing the exercise of equitable power is a proper respect for the integrity and function of local government institutions. Especially is this true where, as here, those institutions are ready, willing, and—but for the operation of state law curtailing their powers—able to remedy the deprivation of constitutional rights themselves."). Parties also cannot nullify the effect of an injunction by having non-parties carry out prohibited acts, Fed. R. Civ. P. 65(d)(2)(C), and they cannot aid and abet others' Title IX violations. *Cf. Yellow Springs Exempted Village Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n*, 647 F.2d 651, 656 (6th Cir. 1981)

(holding that an injunction against an athletic association was proper, even though association was not a recipient of federal financial assistance, based on its issuance of rules regulating schools that "operate to prevent compliance with Title IX").

Conclusion

For all of the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion for preliminary injunction, including by finding a likelihood of success on their facial challenge to Part I of H.B. 2 and enjoining all Defendants from enforcing it.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Christopher A. Brook, hereby certify that on August 8, 2016, I electronically filed the foregoing JOINT SECOND SUPPLEMENTAL BRIEF OF CARCAÑO PLAINTIFFS AND THE UNITED STATES, using the CM/ECF system, and have verified that such filing was sent electronically using the CM/ECF system to all parties who have appeared with an email address of record.

/s/ Christopher A. Brook
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