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

UNITED STATES OF AMERICA, *Plaintiff*, v. STATE OF NORTH CAROLINA, *et al.*, *Defendants*.	Case No. 1:16-cv-00425

UNC DEFENDANTS' BRIEF IN RESPONSE TO THE UNITED STATES' MOTION FOR PRELIMINARY INJUNCTION

The University of North Carolina's mission is straightforward yet vital: to educate its students and serve the needs of the State of North Carolina through teaching, research, and service. Although the United States recognizes this important mission, it has nonetheless sued the University and engaged the institution in a high-stakes political dispute regarding a state statute that neither the University nor the Board of Governors (collectively UNC Defendants) enacted. There is no basis for drawing the University into this conflict between state law (which calls for separating bathrooms on the basis of biological sex) and federal guidance as articulated by the United States (which calls for separating bathrooms on the basis of gender identity). Forcing the University to participate in this lawsuit is unnecessary and distracts it from its educational mission.

Although the UNC Defendants have neither enforced nor threatened to enforce the Act's provisions, and the University's President has declared that she has no intent to take any action to enforce the Act because it has no enforcement provisions, the United

States nevertheless seeks a preliminary injunction prohibiting the UNC Defendants from "complying with or enforcing" the Act. Mot. for Prelim. Inj. 2, ECF No. 73. The absence of actual or threatened enforcement, however, precludes the United States from satisfying any of the prerequisites for a preliminary injunction (for example, it negates the existence of a justiciable controversy). The Court should therefore deny the Motion for Preliminary Injunction as to the UNC Defendants.

STATEMENT OF FACTS

1. The University of North Carolina, a public university "dedicated to the service of North Carolina and its people," is comprised of sixteen constituent institutions of higher education and one constituent high school. N.C. Gen. Stat. §§ 116-1, 116-4. The Board of Governors is responsible for "the general determination, control, supervision, management and governance of all affairs" of the University. *Id.* § 116-11(2). President Margaret Spellings executes the University's policies subject to the Board's direction and control. Spellings Decl. ¶ 2, ECF No. 46-1. These policies include a prohibition on "unlawful discrimination" on the basis of "sex, sexual orientation, [or] gender identity." *The Code of the Bd. of Governors of the Univ. of N.C.* § 103 (2001), ECF No. 46-3.

2. On March 23, 2016, the North Carolina General Assembly enacted the Public Facilities Privacy and Security Act. Section 1.3 of the Act states that public agencies, including the University, "shall require every multiple occupancy bathroom or changing facility to be designated for and only used by persons based on their biological sex" as "stated on [the] person's birth certificate." N.C. Gen. Stat. § 143-760(a)–(b). Section 1.3

also allows public agencies to "provid[e] accommodations such as single occupancy bathroom or changing facilities upon a person's request." *Id.* § 143-760(c). The Act contains no enforcement provisions and establishes no civil or criminal penalties.

3. The University has repeatedly made plain that the Act gives it no enforcement authority and that it has no plans to enforce the Act. Specifically:

a. On April 5, President Spellings sent a Guidance Memorandum to chancellors of University institutions. Guidance Mem., ECF No. 46-5. The memorandum addresses the question: "What are the University's obligations under the Act relating to bathrooms and changing facilities?" *Id.* It answers: "University institutions must require every multiple-occupancy bathroom and changing facility to be designated for and used only by persons based on their biological sex." *Id.* It later adds: "[T]he University is required to fulfill its obligations under the law unless or until [a] court directs otherwise." *Id.* at 2.

The Guidance Memorandum then explains that University institutions "fully meet their obligations under the Act" by taking three steps: (1) "[d]esignat[ing] and label[ing] multiple-occupancy bathrooms and changing facilities for single-sex use with signage," (2) "[p]rovid[ing] notice of the Act to campus constituencies as appropriate," and (3) "[c]onsider[ing] assembling and making information available about the locations of designated single-occupancy bathrooms and changing facilities on campus." *Id.* at 1–2. It adds that University institutions "already designate and label multiple-occupancy bathrooms and changing facilities for single-sex use with signage" and thus need only "maintain these [existing] designations and signage." *Id.* at 2.

Finally, the Guidance Memorandum emphasizes that "[t]he Act does not contain provisions concerning enforcement." *Id.* It adds that "[t]he Act does not require University institutions to change their nondiscrimination policies," that "those policies should remain in effect," and that "constituent institutions must continue to operate in accordance with [those] policies and must take prompt and appropriate action to prevent and address any instances of harassment and discrimination." *Id.* at 1–2.

b. About one week later, President Spellings issued a supplement to the Guidance Memorandum. Spellings April 11 Statement, ECF No. 46-8. She reiterated that the memorandum "simply states what the General Assembly and Governor passed into law," that campuses already label bathrooms for men and women, and that the Act "confers no authority . . . to undertake enforcement actions." *Id.* She also reemphasized that the University maintains its "commitment to diversity [and] inclusion," "will not change existing non-discrimination policies," and "will not tolerate any sort of harassing or discriminatory behavior on the basis of gender identity or sexual orientation." *Id.*

c. Finally, President Spellings has submitted a sworn declaration confirming that the University "has not threatened to enforce the Act's requirement that the University require individuals to use the restroom or changing facility that corresponds with their biological sex." Spellings Decl. ¶ 13. She further swore that she had "no intent to exercise [her] authority to promulgate any guidelines or regulations that require that transgender students use the restrooms consistent with their biological sex." *Id.* ¶ 16. She also swore that, "[i]f any transgender student or employee does complain that they

have been forced to use a restroom inconsistent with their gender identity, [she] will ensure that the complaint is investigated to determine whether there has been a violation of the University nondiscrimination policy and applicable law." *Id.* ¶ 15.

4. Despite these public statements, the United States sued the University and its Board of Governors, asserting claims under (1) Title VII of the Civil Rights Act of 1964 (Title VII), (2) Title IX of the Education Amendments of 1972 (Title IX), and (3) the Violence Against Women Reauthorization Act of 2013 (VAWA). Compl. ¶¶ 54–56. The United States moved for a preliminary injunction prohibiting the UNC Defendants from "complying with or implementing Section 1.3 of [the Act]." Mot. for Prelim. Inj. 2.

ARGUMENT

A plaintiff seeking a preliminary injunction must establish that he "is likely to succeed on the merits," that he faces "irreparable harm," that "the balance of equities tips in his favor," and that "an injunction is in the public interest." *Winter v. NRDC*, 555 U.S. 7, 20 (2008). The plaintiff "must" satisfy "[a]ll four requirements." *Cantley v. W. Va. Reg'l Jail & Corr. Facility Auth.*, 771 F.3d 201, 207 (4th Cir. 2014). Further, the terms of any injunction must be "precis[e]" (*Pashby v. Delia*, 709 F.3d 307, 331 (4th Cir. 2013)), "properly tailored to the wrong" (*Hayes v. N. State Law Enforcement Officers Ass'n*, 10 F.3d 207, 217 (4th Cir. 1993)), and compatible with "considerations of federalism" (*Huffman v. Pursue, Ltd.*, 420 U.S. 602, 604 (1975)). Here, the United States has not satisfied *any* of the four prerequisites for a preliminary injunction, and the injunction it seeks is neither precise nor properly tailored nor compatible with federalism.

I. THE UNITED STATES IS UNLIKELY TO SUCCEED ON THE MERITS AGAINST THE UNC DEFENDANTS

A party seeking preliminary relief "must demonstrate" "a likelihood of success on the merits.'" *Munaf v. Geren*, 553 U.S. 674, 690 (2008). The United States has not done so here. First, its claims are neither justiciable nor ripe, since the UNC Defendants neither enforce nor threaten to enforce the Act. Second, the UNC Defendants do not engage in unlawful discrimination, again since they neither enforce nor threaten to enforce the Act. Last, the United States lacks a cause of action to bring its Title IX claim.

A. The Claims Against The UNC Defendants Are Neither Justiciable Nor Ripe

The presence of a jurisdictional obstacle, or even a "difficult question as to jurisdiction," shows that a plaintiff is "unlikely" to succeed on the merits "due to potential impediments to even reaching the merits." *Id.* at 690. The United States faces an insurmountable jurisdictional obstacle here.

1. The United States cannot establish the credible threat of enforcement that Article III requires

A challenge to a statute qualifies as a case or controversy only if the defendant enforces the statute or makes a "credible threat" to enforce the statute. *SBA List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014); *Doe v. Duling*, 782 F.2d 1202, 1206 (4th Cir. 1986). After all, a plaintiff suffers "actual or imminent" injury—a prerequisite for standing—only if it faces actual or imminent enforcement. *SBA List*, 134 S. Ct. at 2341–42. Further, no "ripe controversy" exists until there is a "live dispute involving the actual or threatened application" of the statute. *Renne v. Geary*, 501 U.S. 312, 320–21 (1991).

The United States cannot show the credible threat of enforcement required by Article III here. Time and again, the University has disclaimed any authority or intention to enforce the Act. *Supra* 3–5. Despite conducting extensive interviews with UNC students and employees and submitting multiple declarations in support of its motion for preliminary injunction, the United States, for its part, has never identified a single incident in which the University responded to a transgender person's use of his or her chosen 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 has the United States explained what, exactly, the UNC Defendants are doing that the United States wants them to stop doing. In short, there is simply no conduct or threatened conduct for this Court to enjoin.

Indeed, the declarations that the United States submitted in support of its motion confirm that there is no credible threat of enforcement here. For example, H.K. (a student at UNC-Asheville) declares that "the President of the University of North Carolina system said that the schools are not enforcing H.B. 2," that "the Title IX Coordinator at [her] school . . . [explained] that the University of North Carolina at Asheville had no plans of enforcing H.B. 2," and that she has "start[ed] using women's restrooms based on the email from the Title IX coordinator." H.K. Decl. ¶¶ 15, 17. Similarly, C.W. (a student at UNC-Greensboro) declares that "representatives from the Chancellor's office . . . acknowledged that they had no enforcement mechanism." C.W. Decl. ¶ 23. Most telling of all, the declarations *never* claim that the University has ever

imposed or threatened to impose any penalty on the declarants (or anyone else) for using a bathroom that is not consistent with the sex listed on one's birth certificate.

The UNC Defendants have developed the foregoing points in greater detail in multiple briefs in both this case and *Carcaño v. McCrory*. *See United States* Br. in Support of Mot. to Dismiss 7–14, ECF No. 99; *Carcaño* Br. in Resp. to Plfs' Mot. for Prelim. Inj. 8–23, ECF No. 50; *Carcaño* Surreply Br. in Opp. to Plfs' Mot. for Prelim. Inj. 2–9, ECF No. 81; *Carcaño* Br. in Support of Mot. to Dismiss 7–14, ECF No. 90. Instead of repeating those arguments here, the UNC Defendants respectfully refer the Court to those briefs—especially to the brief in support of the motion to dismiss this case.

2. Attempts to circumvent the credible-threat requirement fail

In its opening brief supporting its Motion for Preliminary Injunction, the United States makes a series of attempts to establish justiciability and ripeness. All fail.

a. The credible-threat requirement applies to this lawsuit

The United States asserts, without citation, that a plaintiff needs to show a credible threat of enforcement only where the challenged statute is "directed at private behavior," not where (as in this case) the challenged statute is a "directive from the . . . government to a subsidiary institution." U.S. Br. 65, ECF No. 74. There is no basis for this claim. So far as justiciability is concerned, there is no difference between (1) a defendant who takes no enforcement action under a statute that regulates private conduct (2) a defendant who takes no enforcement action under a statute that regulates public agencies. Neither defendant causes anyone an injury, so neither defendant may be sued in federal court.

Indeed, if anything, the United States has it backwards. It is *harder* to show that an individual suffers an injury when the asserted injury arises from "regulation . . . of *someone else*" than when the individual "is himself [the] object of the action . . . at issue." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Thus, the General Assembly's decision to cast the Act as a directive to public agencies rather than a direct regulation of transgender individuals makes it harder, not easier, to show justiciability.

The United States also claims, in a footnote, that the credible-threat requirement applies only to lawsuits brought by "private plaintiff[s]." U.S. Br. 65, n.29. This too is wrong. The United States, no less than private parties, must comply with ordinary standing and ripeness requirements. *United States v. Windsor*, 133 S. Ct. 2675, 2685–86 (2013); *United States v. California*, 332 U.S. 19, 24 (1947). The sole case cited by the United States, *United States v. Cent. Carolina Bank & Trust Co.*, 431 F.2d 972, 975 (4th Cir. 1970), does not prove otherwise. In that case (which never even discusses the credible-threat requirement), there was plainly a credible threat that a golf course would enforce a discriminatory policy of excluding non-whites; in fact, it was undisputed that the golf course was doing precisely that. *Id.* at 973. In this case, by contrast, the UNC Defendants are neither enforcing nor threatening to enforce the challenged statute.

b. The University's actions do not make this lawsuit justiciable

The United States never disputes that the UNC Defendants have taken only three steps in response to the Act: (1) maintaining existing bathroom signage designating bathrooms for use by men or by women, (2) providing factual information about what the

Act says, and (3) providing factual information about the location of single-occupancy bathrooms. The United States asserts, however, that these three actions nevertheless create a case or controversy. It claims that, when viewed alongside President Spellings' statement that the University has an obligation to comply with state law, the University's actions "create an objective expectation of compliance with [the Act]," amount to an "instruct[ion]" about bathroom use, and invite "other persons . . . [to] challenge, oppose, or report" transgender individuals using bathrooms. U.S. Br. 66.

In the first place, the United States is wrong as a factual matter. From the beginning, President Spellings has explained that, so far as the University is concerned, "compliance" with the Act means maintaining existing bathroom signage, providing factual information about the Act, and providing factual information about single-occupancy bathrooms. She has further explained that compliance does not involve *anything more*; to the contrary, University institutions "*fully* meet their obligations under the Act" by taking these three steps. Guidance Mem. 1 (emphasis added).

In light of these explanations, no one could reasonably interpret the University's words or acts as the United States does. No one could "objectively expect" punishment for using particular bathrooms when President Spellings has announced that the Act "confers no authority . . . to undertake enforcement actions." Spellings April 11 Statement. No one could think that the University has issued "instructions" about bathroom use when President Spellings has declared that she has "no intent . . . to promulgate any guidelines or regulations that require that transgender students use the

restrooms consistent with their biological sex." Spellings Decl. ¶ 16. And no one could feel encouraged by the University to challenge transgender people in bathrooms when President Spellings has stated that, "[i]f any transgender student or employee does complain that they have been forced to use a restroom inconsistent with their gender identity," University officials "will ensure that the complaint is investigated to determine whether there has been a violation of the University nondiscrimination policy." *Id.* ¶ 15. Any doubt on these scores is dispelled by the United States' own declarants, who, as explained above, fully understand that the UNC Defendants have taken no action to prevent them from using bathrooms consistent with their gender identity.

In addition, the United States is wrong as a legal matter. *First,* an "expectation of compliance" does not itself establish justiciability. A case or controversy requires more than an abstract expectation of compliance; it requires concrete enforcement action or the threat of concrete enforcement action. For example, in *Poe v. Ullman*, 367 U.S. 497 (1961), a prosecutor encouraged compliance with a contraception statute by announcing that "use of and advice concerning contraceptives would constitute offenses" (*id.* at 500), but the Supreme Court still dismissed a challenge to the statute because there was no "real threat" that the state would actually bring prosecutions to enforce it (*id.* at 507). Similarly, in *Doe*, state police officers encouraged compliance with a cohabitation statute by "specifically stat[ing] that they would investigate complaints of fornication and cohabitation" (782 F.2d at 1205), but the Fourth Circuit still dismissed a challenge to the statute because there was no "real and immediate" 'threat of prosecution" (*id.* at 1206).

Thus, even if the University's actions (which fall far short of the actions in *Poe* and *Doe*) create an abstract expectation of compliance with the Act, there is no real threat that the University will bring disciplinary proceedings to enforce it.

Second, an "instruction" about bathroom use—even if it existed, which it does not—likewise would not establish justiciability. A challenge to a university policy (no less than a challenge to a statute) qualifies as a case or controversy only if the university takes or threatens to take concrete "disciplinary action" against one who violates the policy. *Rock for Life-UMBC v. Hrabowski*, 411 Fed. Appx. 541, 548 (4th Cir. 2010); *see also Lopez v. Candaele*, 630 F.3d 775, 792 (9th Cir. 2010) ("adverse government action based on a violation"). For example, in *Rock for Life*, the Fourth Circuit held that a plaintiff lacked standing to challenge a University's sexual-harassment policy because the plaintiff "ha[d] not faced threatened or actual disciplinary action." 411 Fed. Appx. at 541. So too here, even if the University had issued an instruction concerning bathroom use—which it has not—the United States has failed to show that violators of that (non-existent) instruction face threatened or actual disciplinary action.

Third, the conduct of third parties also would not establish justiciability. An injury confers standing only if it is both "certainly impending" and "fairly traceable to the challenged action." *Clapper v. Amnesty Int'l, USA*, 133 S. Ct. 1138, 1147 (2013). A plaintiff cannot satisfy these requirements by speculating about "unfettered choices made by independent actors." *Id.* at 1150 n.5. For example, in *Allen v. Wright*, 468 U.S. 737, 745 (1984), parents could not establish standing to challenge tax exemptions available to

racially segregated schools by claiming that the exemptions "foster[ed] and encourage[d]" segregation in their children's schools. The claim rested on "speculation" about "independent decisions" by third parties and also failed to establish an injury that "fairly can be traced to the challenged action." *Id.* at 758–59. So also here, the United States cannot establish standing by claiming that third parties might harass transgender people in bathrooms. Any such harassment would, of course, violate the University's policy against discrimination on the basis of gender identity—a policy that the University has emphasized remains in effect. *Supra* 4–5. More importantly, claims about possible harassment rest on speculation about independent decisions by third parties and thus fail to establish injury traceable *to the UNC Defendants' actions*.

c. Declarants' subjective fears do not make this case justiciable

The United States relies on five witnesses (D.B., Alaina Kupec, A.T., H.K., and C.W.) to claim that some people on University campuses are "fearful of enforcement." U.S. Br. 67. Yet such fears, no matter how genuine, do not establish a live controversy.

To begin, it takes "an objective threat" rather than a "subjective fear" to establish justiciability. *Doe*, 782 F.2d at 1206; *see also Clapper*, 133 S. Ct. at 1153 ("subjective fear . . . does not give rise to standing"). For example, in *Doe*, the plaintiffs' "subjective fear of prosecution" did not confer standing, since this "subjective chill" "is 'not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.'" *Doe*, 782 F.2d at 1206 (quoting *Laird v. Tatum*, 408 U.S. 1, 13–14

(1972)). Here, even if the United States has shown a subjective fear of enforcement, it has not shown the objective threat of enforcement that Article III requires.

In addition, a plaintiff may sue only if injury is "*certainly impending*." *Amnesty Int'l*, 133 S. Ct. at 1147. The United States' declarants express, at most, *uncertainty* about possible injury. *See, e.g.*, Kupec Decl. ¶ 12 ("*I am unsure* whether I may use the women's bathroom"); A.T. Decl. ¶ 16 ("*I do not know* what would the university would do . . . I am worried I *might* be charged with trespassing"); H.K. Decl. ¶ 17 ("*I don't know* whether the President . . . will tell my school that they need to start following H.B. 2 . . . [M]y decision to start using women's restrooms . . . *might* have to change") (all emphases added). Thus, even if subjective fears were relevant, the United States still could not carry its burden of establishing certainly impending injury.

d. The claim that the University *could* enforce the Act does not make this case justiciable

Finally, the United States claims that the UNC Defendants *could* interpret the Act to authorize enforcement. U.S. Br. 63–64. This claim, too, fails to establish justiciability. For purposes of justiciability, it simply does not matter whether the UNC Defendants' interpretation of the Act is correct. Justiciability does not turn on whether the defendant *could* or even *should* enforce the challenged statute; it turns on whether the defendant *is* enforcing or threatening to enforce it. Prosecutors *could* have brought charges under the labor statute in *CIO v. McAdory*, 325 U.S. 472 (1945), the cohabitation statute in *Doe*, or the picketing ordinance in *Moore v. Asheville*, 290 F. Supp. 2d 664 (W.D.N.C. 2003), but their failure to exercise the authority to bring such charges meant that challenges to those

laws were not justiciable. In the same way, even assuming that the University has the authority to take disciplinary action under the Act, the University's failure to exercise that supposed authority means that the challenge to this statute is not justiciable.[1]

The United States speculates that "UNC could change this interpretation at any time" (U.S. Br. 64), but such speculation proves nothing. Courts routinely hold that no justiciable controversy exists where the defendant agrees not to enforce the challenged statute—even though, in every such case, the defendant could in theory change his mind after the lawsuit ends. *See, e.g.*, *Poe*, 367 U.S. at 508 ("tacit agreement" not to enforce statute); *CIO*, 325 U.S. at 475 (defendants "agreed not to enforce" statute).

The United States' sole contrary case—*NCRL, Inc. v. Bartlett*, 168 F.3d 705, 711 (4th Cir. 1999)—does not prove otherwise. The Court there explained that, in a "First Amendment" case, "the mere existence" of a statute that "by its terms" prohibits political speech "risks chilling First Amendment rights" and thus causes concrete injury. *Id.* at 710–11. That principle, however, applies only in "cases involving core First Amendment

[1] That said, the UNC Defendants have interpreted the Act properly. The Act conspicuously omits any mention of enforcement or of criminal or civil penalties. The Act's supporters and opponents both acknowledge as much. For example, Representative Dan Bishop, the Act's co-sponsor, has stated: "There are no enforcement provisions or penalties in House Bill 2." 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. Similarly, Representative Rodney Moore, "a Democrat who voted against the measure," has said: "There is absolutely no way to enforce this law." 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. Against this backdrop, the UNC Defendants have properly concluded that the University can comply with the Act simply by maintaining existing bathroom signage, without imposing any disciplinary sanctions or other penalties upon transgender people.

rights"; otherwise, the credible-threat requirement "would be set at naught." *Doe*, 782 F.2d at 1206; *see, e.g.*, *Cooksey v. Futrell*, 721 F.3d 226, 240 (4th Cir. 2013) ("standing [and] ripeness requirements" are "relaxed" in the unique context of "First Amendment cases"). In any event, there *was* a "credible threat of prosecution" in *NCRL*, because the State indicated to the plaintiff that the statute prohibited its speech and because there was no evidence of "any intention of refraining from prosecuting." *Id.* at 711. The State's subsequent disclaimer of enforcement plans was merely "a litigation position." *Id.* 710. Here, by contrast, the UNC Defendants have made it plain from the outset that they have no intention to enforce the Act, and they have in fact never enforced the Act.

B. The UNC Defendants Do Not Engage In Unlawful Discrimination

Quite apart from jurisdictional issues, the United States cannot show a likelihood of success on the merits against the UNC Defendants. A plaintiff bringing a Title VII, Title IX, or VAWA claim must show that *the defendant* engages in unlawful discrimination. "[A]n employer is answerable under Title VII only for 'its own' deeds." *Dunn v. Washington County Hosp.*, 429 F.3d 689, 691 (7th Cir. 2005) (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 753 (1998)). Similarly, a funding recipient is answerable under Title IX (and under the similarly phrased VAWA) "only for its own misconduct." *Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629, 640 (1999).

Further, to prevail on its Title VII and VAWA claims, the United States must show that the UNC Defendants engage in a "pattern or practice" of discrimination. Title VII allows lawsuits by the United States only where the defendant engages "in a pattern

or practice of resistance" to Title VII rights. 42 U.S.C. § 2000e–6(a). Similarly, VAWA allows lawsuits by the United States only where the defendant engages "in a pattern or practice in violation of [VAWA]." *Id.* §§ 3789d(c)(3), 13925(c)(13)(C). Discrimination rises to the level of a "pattern or practice" only if it is the employer's "standard operating procedure"; "the mere occurrence of isolated . . . or sporadic discriminatory acts" does not suffice. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977).

These principles preclude the United States from prevailing against the UNC Defendants. None of the UNC Defendants' "own deeds" (much less their "standard operating procedure") is discriminatory. Maintaining existing bathrooms signs is not discrimination; providing factual information about the Act is not discrimination; providing factual information about the location of single-occupancy bathrooms is not discrimination; and announcing that the University fully satisfies its obligations under the Act by taking the preceding three steps is not discrimination. The United States' claims must fail because it is unable to show that *the UNC Defendants* engage in discrimination, much less that *the UNC Defendants* engage in a pattern or practice of discrimination.

C. The United States Lacks A Cause Of Action To Enforce Title IX

The United States may sue to enforce a federal statute only if it has "statutory authorization" to do so. *United States v. Solomon*, 563 F.2d 1121, 1127 (4th Cir. 1977). As the UNC Defendants explain in the Brief in Support of Motion to Dismiss in this case (Br. 14–17, ECF No. 99), Title IX grants no such authorization. Instead of repeating the argument here, the UNC Defendants respectfully refer the Court to that brief.

II. THE UNITED STATES DOES NOT FACE IRREPARABLE INJURY

Another "basic requisite[e]" of an injunction is "immediate irreparable harm." *O'Shea v. Littleton*, 414 U.S. 488, 502 (1974). There is no irreparable harm here. The UNC Defendants are not enforcing the Act against anyone, so no one faces any harm, irreparable or otherwise, as a result of their actions. *See Watson v. Buck*, 313 U.S. 387, 399–400 (1941) (no "irreparable injury" where there is no "threat to prosecute").

The United States cannot seriously dispute this point, so it asserts instead that no showing of irreparable harm is necessary in civil-rights enforcement actions. That argument is clearly wrong. In this Circuit, a plaintiff must satisfy "[a]ll four requirements" (including showing irreparable harm) to obtain a preliminary injunction. *Cantley*, 771 F.3d at 207. Civil-rights cases are no exception; hence, in *Central Carolina Bank*, a civil-rights case brought by the United States, the Fourth Circuit applied "the *requirement* that irreparable injury be shown." 431 F.2d at 975 (emphasis added). The United States fails to satisfy this requirement here.

III. THE BALANCE OF EQUITIES AND PUBLIC INTEREST DISFAVOR AN INJUNCTION

Finally, a party seeking preliminary relief must show that the balance of equities and public interest tip in its favor. *Winter*, 555 U.S. at 23. The United States cannot do so here for the same reason it cannot show irreparable injury: The UNC Defendants do not threaten to enforce the Act. "The absence of a 'remedy' works no injustice on those who have never suffered so much as the threat of [enforcement]." *Doe*, 782 F.2d at 1207.

Instead, the equities and public interest strongly favor the UNC Defendants. State authorities have a powerful interest "in managing their own affairs," particularly in the field of education. *Milliken v. Bradley*, 433 U.S. 267, 281 (1977). Here, the University—which has seventeen campuses, hundreds of buildings, over 50,000 employees, and more than 225,000 students—has a powerful interest in managing its bathrooms, locker rooms, changing rooms, and showers free from ongoing federal monitoring. That is especially so because the United States' challenge focuses on a statute adopted by the state rather than on any policy or practice adopted by the UNC Defendants. There is, in short, no reason for this Court to intrude, via preliminary injunction, into the University's day-to-day operations.

IV. THE UNITED STATES' REQUESTED INJUNCTION IS VAGUE, OVERBROAD, AND CONTRARY TO PRINCIPLES OF FEDERALISM

The United States requests an "injunction enjoining Defendants from complying with or implementing Section 1.3 [of the Act]." Mot. for Prelim. Inj. 2. The requested injunction, however, is too vague, too broad, and incompatible with federalism.

First, Civil Rule 65(d) requires every injunction to "describe in reasonable detail" "the act or acts restrained or required." An injunction prohibiting "further enforcement" of a law "plainly does not satisfy the important requirements of Rule 65(d)." *Schmidt v. Lessard*, 414 U.S. 473, 474–477 (1974). Similarly, an injunction against "implementing [a policy]" lacks "reasonable detail" and thus "violates Rule 65(d)." *Pashby*, 709 F.3d at 331. The requested injunction against "complying with or implementing" the Act likewise lacks the required specificity—particularly because the parties here dispute what

"compliance" and "implementation" involve (*supra* 9–13). The United States should have explained with more precision which particular acts it wants the Court to enjoin.

Second, an injunction must be "[no] broader than necessary" to remedy the violation. *Hayes*, 10 F.3d at 217. The requested injunction against "complying with and implementing Section 1.3" violates this principle. For example, the UNC Defendants comply with the Act by maintaining existing bathroom signage and providing factual information about the Act, but the United States never explains why the maintenance of signage or the provision of factual information should be enjoined. Similarly, Section 1.3 authorizes "accommodations such as single-occupancy bathrooms," but the United States never explains why the Court should enjoin construction of single-occupancy bathrooms.

Finally, when a party seeks an injunction against a state agency, "considerations of federalism" require courts to "abide by standards of restraint that go well beyond those of private equity jurisprudence." *Huffman*, 420 U.S. at 603–04. Restraint is particularly appropriate in the context of public education, where "local autonomy . . . is a vital national tradition." *Missouri v. Jenkins*, 515 U.S. 70, 99 (1995). "The administration of public schools is a state . . . function rather than a federal judicial function, and so ought not to be subjected to the . . . tutelage of the federal courts." *United States v. Bd. of Sch. Comm'rs*, 128 F.3d 507, 510 (7th Cir. 1997). An injunction against the UNC Defendants, whose actions cause no concrete harm to anyone, would violate these principles.

CONCLUSION

This Court should deny the Motion for Preliminary Injunction.

Dated: July 29, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 29, 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 29, 2016

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