

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

JOAQUÍN CARCAÑO, *et al.*,

Plaintiffs,

v.

ROY A. COOPER, III, *et al.*,

Defendants,

and

PHIL BERGER, *et al.*,

Intervenor-Defendants.

No. 1:16-cv-00236-TDS-JEP

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS'
MOTION FOR LEAVE TO FILE DECLARATION OF ERICKA MYERS**

Plaintiffs Joaquín Carcaño, Payton Grey McGarry, Hunter Schafer, Quinton Harper, Angela Gilmore, Madeline Goss, and American Civil Liberties Union of North Carolina (collectively, “Plaintiffs”), respectfully submit the following memorandum of law in support of Plaintiffs’ motion for leave to file a declaration of Ericka Myers.

PERTINENT FACTUAL BACKGROUND

On September 7, 2017, Plaintiffs Joaquín Carcaño, Payton Grey McGarry, Angela Gilmore, Madeline Goss, Quinton Harper, and American Civil Liberties Union of North Carolina filed a Fourth Amended Complaint seeking declaratory and injunctive relief and nominal damages, alleging that House Bill 142, codified as Session Law 2017-4 (“H.B.

142”) violates the Due Process and Equal Protection Clauses of the United States Constitution, as well as Title IX and Title VII. In the event that the Court finds one or more provisions of H.B. 142 unlawful and that H.B. 142’s repeal of H.B. 2 is not severable from H.B. 142’s unlawful provisions, Plaintiffs also continue to allege that H.B. 2 violates constitutional and federal statutory law.¹

Plaintiffs specifically allege that Section 2 of H.B. 142 is unconstitutionally vague, violates substantive due process, discriminates against Plaintiffs based on sex and transgender status in violation of the Equal Protection Clause, and violates the bans on sex discrimination codified in Title IX and Title VII. The inherent lack of clarity in H.B. 142, coupled with statements by elected officials indicating that transgender individuals will be subject to criminal prosecution if they use the “wrong” public facility, deters transgender individuals from using public facilities that match their gender identity. Transgender individuals fear using the restroom that does not match their gender identity; if a transgender man were to use the women’s restroom, for example, he would also fear arrest in those circumstances, because he is likely to be generally perceived by others to be a non-transgender man. The law therefore operates to deter transgender individuals from using public facilities altogether.

On October 18, 2017, after substantial good faith negotiation, Plaintiffs and the Executive Branch Defendants jointly moved for entry of a consent decree that would resolve Plaintiffs’ claims with respect to Executive Branch Defendants. Several days

¹ Plaintiffs Carcaño, McGarry, and Schafer also seek nominal damages for violations of their Title IX and Title VII rights, as applicable, under both H.B. 2 and H.B. 142.

later, on October 23, 2017, UNC Defendants and Legislative Intervenors filed separate Motions to Dismiss (D.E. 221, 222), which in part challenged Plaintiffs' standing to challenge H.B. 142. Plaintiffs filed an Opposition on December 1, 2017 (D.E. 233) and the UNC Defendants and Legislative Intervenors filed Replies on December 15 (D.E. 234, 235).

On January 25, 2018, Plaintiffs were contacted by Ericka Myers. Declaration of Ericka Myers ("Myers Decl.") ¶ 18. Myers is a member of the ACLU of North Carolina. *Id.* ¶ 2. Myers' daughter is a second grade student attending a public elementary school in the New Hanover County School District in North Carolina. *Id.* ¶¶ 3, 17. Her daughter is transgender, has been diagnosed with gender dysphoria, and as part of her treatment lives as a female in all aspects of her life. *Id.* ¶¶ 4-6. Despite having a letter from her daughter's treating clinician indicating that her daughter should be allowed to live in accordance with her gender identity, the school bars Myers' daughter from using the girls' restroom because she is transgender. *Id.* ¶ 7. In August 2017, Myers contacted school teachers and the school principal to discuss their treatment of her daughter. *Id.* ¶ 9. School officials informed Myers that it is illegal in North Carolina for the school to permit her daughter to use the girls' restroom. *Id.* In follow-up conversations, school officials told Myers that H.B. 142 permits schools to take this position. *Id.*

The school told Myers' daughter she could use the nurse's restroom or the restroom in the teachers' lounge. *Id.* ¶ 10. She uses neither, because she feels humiliated and singled out as different for being the only student forced to use those restrooms. *Id.* When she has used the boys' restroom, she has been confronted by other students who

told her she was not supposed to be there. *Id.* ¶ 11. These incidents caused Myers’ daughter to ask again whether she could use the girls’ restroom, only to be told by teachers that the administration has interpreted H.B. 142 to mean that it is illegal for them to let her use the girls’ restroom. *Id.* ¶¶ 12, 17. She continues to use the boys’ restroom while at school, exposing her to hostility, anxiety, and humiliation. *Id.* ¶¶ 13, 15. Myers has noticed that her daughter often holds her urine throughout the school day, and uses the restroom as soon as she gets home. *Id.* ¶ 14. On occasion, Myers’ daughter has had an accident in the car on the way home. *Id.* Myers’ daughter’s use of the girls’ restrooms at school is an essential part of her physical and emotional well-being, and is part of her prescribed medical treatment, yet she has refrained from using the girls’ restroom out of fear and concern that she or her mother will be punished for doing so. *Id.* ¶¶ 15-16.

ARGUMENT

I. This Court May Consider Evidence Outside the Pleadings to Evaluate Plaintiffs’ Standing.

When standing is raised as a basis to dismiss, the court “may consider evidence outside the pleadings without converting the proceeding to one for summary judgment.” *White Tail Park, Inc. v. Stroube*, 413 F.3d 451, 459 (4th Cir. 2005) (internal quotation marks and citation omitted). This includes affidavits or declarations filed after a motion to dismiss. *See, e.g., Nat’l Alliance for Accessibility, Inc. v. Rite Aid of N.C., Inc.*, No. 10-932, 2011 WL 4499294, *5 n.5 (M.D.N.C. Sept. 27, 2011) (citing *White Tail Park* as “Fourth Circuit authority which appears to permit the use of such affidavits [to bolster standing]”) (report and recommendation by Auld, M.J. later adopted by Schroeder, J.).

Here, although Plaintiffs' standing is already adequately demonstrated by the allegations discussed and cited in Plaintiffs' Opposition to the Motions to Dismiss, the Court may consider Ericka Myers' declaration as additional evidence that Plaintiffs have standing to challenge H.B. 142.

II. Ericka Myers' Declaration Provides Additional Evidence of Plaintiffs' Standing.

To establish standing, a Plaintiff must show: (1) an "injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized ... and (b) actual or imminent, not conjectural or hypothetical"; (2) "a causal connection between the injury and the conduct complained of"; and (3) that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (internal citations and quotation marks omitted).

Plaintiffs' Opposition catalogs the concrete harms experienced by Plaintiffs and other transgender North Carolinians. Ericka Myers' declaration provides additional evidence of non-hypothetical, non-conjectural injury. Myers' daughter experiences many of the same harms described in Plaintiffs' Opposition to the Motions to Dismiss. *Compare* Myers Decl. ¶¶ 10, 13 (describing anxiety and distress associated with restroom use), 14, 15 (describing efforts to reduce restroom use in order to avoid getting in trouble) *with* FAC ¶¶ 67, 70, 75, 76-80 (describing significant anxiety caused by threats of possible prosecution for trespass for using the "wrong" restroom), 112-118, 149-154, 167-168 (describing efforts to avoid restroom use).

Myers' declaration also describes facts that independently confirm Plaintiffs' standing. School officials at Myers' daughter's school have expressly prohibited her daughter from using the girls' restroom and have pointed to H.B. 142 as the basis for that prohibition. Myers Decl. ¶¶ 9, 12, 17. These facts provide an additional basis to reject the Legislative Intervenors' argument that "injury by uncertainty" does not establish standing. Intervenors Br. at 7, D.E. 225. Since August 2017, the school district has enforced H.B. 142 in a manner that excludes Myers' daughter from the restroom corresponding to her gender identity. Moreover, as these facts demonstrate, Myers' daughter's injury is traceable to H.B. 142, and an order invalidating the statute would redress her injuries. Therefore, the Court should consider these additional facts when resolving the question of Plaintiffs' standing to challenge H.B. 142.

* * *

CONCLUSION

For the reasons stated herein, Plaintiffs respectfully request that the Court grant leave to file the attached Declaration of Ericka Myers.

Dated: February 16, 2018

Respectfully submitted,

/s/ Christopher A. Brook

Christopher A. Brook (NC Bar No. 33838)

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CERTIFICATE OF WORD COUNT

This brief complies with Local Rule 7.3(d) because, excluding the parts of the brief exempted by Rule 7.3(d) (cover page, caption, signature lines, and certificates of counsel), this brief contains 1,396 words.

Dated: February 16, 2018

/s/ Christopher A. Brook

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I, Christopher A. Brook, hereby certify that on February 16, 2018, I electronically filed the foregoing PLAINTIFFS' MOTION FOR LEAVE TO FILE DECLARATION OF ERICKA MYERS, as well as Plaintiffs' Memorandum of Law in support and the attached declaration, 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

Counsel for Plaintiffs

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DECLARATION OF ERICKA MYERS

I, Ericka Myers, declare as follows:

1. I am a resident of Wilmington, North Carolina. I am over eighteen (18) years of age, and if called as a witness, could and would testify competently to the matters set forth below.
2. I am a member of the American Civil Liberties Union (“ACLU”) of North Carolina.
3. I am the mother and legal guardian of an eight-year-old girl. My daughter is in second grade and attends elementary school in the New Hanover County School District in North Carolina.
4. My daughter is transgender. While she was assigned the sex male at birth, she has known from a young age that she is a girl.

5. My daughter has been diagnosed with gender dysphoria by two treating clinicians, the first in August 2017.
6. As part of her treatment for gender dysphoria, my daughter's treating clinicians recommend that she live as female in all aspects of her life. In accordance with this medical treatment, she dresses in female clothes, uses a female name and pronouns, and uses women's restrooms when we are out in public places.
7. My daughter's elementary school bars my daughter from using the girls' restrooms because she is transgender, despite a letter from her treating clinician that appropriate treatment for her gender dysphoria requires being allowed to live in accordance with her gender identity, including when accessing single sex facilities.
8. Because she is barred from using the girls' restroom, when my daughter has to go to the bathroom, she uses the boys' restrooms at school.
9. In August 2017, I met with two of my daughter's teachers and the school principal to discuss their treatment of my daughter. The principal informed me that that my daughter is not allowed to use the girls' restroom because it is illegal in our state for her to do so. When I pushed back, the principal called back a couple hours later to say she had consulted with an assistant superintendent, who said H.B. 142 permits schools to take this position.
10. The principal then told my daughter that she could use the nurse's restroom or the restroom in the teacher's lounge. The nurse's room is very far from my daughter's classes. She does not use either of these restrooms because she feels humiliated and singled out as different when she is the only student forced to use them.

11. One day in October of 2017, my daughter came home from school very upset. She told me that several older boys confronted her in the boys' restroom, and told her she was not supposed to be in there because she is a girl. This was particularly upsetting to her because she knew she did not belong in the boys' restroom but it was the only option the school made available to her at that time.
12. After this incident, my daughter asked her teacher if she can use the girls' restroom, but again teachers have reiterated that it is illegal for them to let her do so, because this is the administration's interpretation of H.B. 142.
13. My daughter continues to use the boys' restroom and has continued to experience hostility, anxiety, and humiliation. Boys rightly perceive her as a girl and tell her to get out because she is in the wrong place. For her safety, she has told them she was a boy, which causes her a terrible amount of distress, since she is a girl and has struggled to be recognized as her true self.
14. I have noticed that my daughter often holds her urine throughout the school day, and uses the restroom as soon as she gets home. On occasion, she has had an accident in the car on the way home.
15. This message from my daughter's teachers and administrators has caused her a great deal of fear and anxiety. She has both the social desire and medical need to use female restrooms in public places, but is worried that she or I will get in trouble because her school has told her that it is illegal.
16. My daughter's use of the girls' restrooms is essential to her physical and emotional well-being, and is part of the prescribed medical treatment for her gender dysphoria.

17. My daughter's North Carolina public elementary school continues to rely on H.B. 142 as the reason they do not allow my daughter to use the girls' restroom like all the other girls in her class.

18. I first contacted the ACLU on January 25, 2018, about this matter.

I declare under penalty of perjury under the laws of the United States that to the best of my knowledge, information, and belief, the foregoing is true and correct.

Executed on:

February 15, 2018

By:


ERICKA MYERS