

**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' AND EXECUTIVE BRANCH DEFENDANTS'
SUPPLEMENTAL JOINT MOTION FOR ENTRY OF A CONSENT DECREE**

NOW COME Plaintiffs Joaquín Carcaño, Payton Grey McGarry, Hunter Schafer, Quinton Harper, Angela Gilmore, Madeline Goss, and American Civil Liberties Union of North Carolina (collectively, “Plaintiffs”); and Defendants Roy A. Cooper III, Joshua Stein, Machel Sanders, Mandy K. Cohen, and James H. Trogdon III (collectively, “Executive Branch Defendants”) (Plaintiffs and Executive Branch Defendants are collectively referred to herein as “the Parties”), by and through their attorneys, and move the Court pursuant to Local Rule 7.1 for entry of a Consent Judgment and Decree, filed concurrently with this motion. In support thereof the Parties state as follows:

1. On September 7, 2017, Plaintiffs filed their Fourth Amended Complaint, seeking declaratory and injunctive relief and nominal damages (D.E. 210), alleging that Plaintiffs are entitled to relief from this Court for violations of their rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution, pursuant to 42 U.S.C. § 1983; Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*; and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*

2. After Plaintiffs moved the Court, with consent of all parties, to file their Fourth Amended Complaint, Plaintiffs and the Executive Branch Defendants engaged in substantial good faith negotiations about a potential settlement of Plaintiffs' claims against the Executive Branch Defendants.

3. Following those negotiations, on October 18, 2017, the Parties requested that the Court enter a Consent Judgment and Decree, filed concurrently with a joint motion, to resolve all of Plaintiffs' claims against the Executive Branch Defendants. The Court additionally permitted the Executive Branch Defendants to answer or file other responsive pleadings to the Plaintiffs' Fourth Amended Complaint, if applicable, 30 days after the court's disposition of the joint motion for entry of a consent decree. (D.E. 226).

4. In the interim, Intervenor-Defendants and the UNC Defendants in this proceeding filed motions to dismiss the Fourth Amended Complaint. (D.E. 221, 222). The Court determined to "defer consideration of the proposed consent decree until the various Defendants' pending challenges to the court's jurisdiction are resolved" (D.E.

226), and extended the time to file responses to the original Joint Motion for Entry of a Consent Decree until after the Court's disposition of the motions to dismiss. (D.E. 228).

5. On September 30, 2018, the Court granted in part and denied in part the Intervenor-Defendants' and the UNC Defendants' motions to dismiss. (D.E. 248). In its order, the Court ordered the parties to submit additional briefing concerning the Joint Motion for Entry of a Consent Decree. (*Id.*).

6. Following the Court's order resolving the Intervenor-Defendants' and the UNC Defendants' motions to dismiss, and informed by that decision, Plaintiffs and the Executive Branch Defendants again engaged in extensive negotiations concerning the possibility of modifying a consent decree to settle all of Plaintiffs' claims against the Executive Branch Defendants.

7. On December 21, 2018, Plaintiffs and the Executive Branch Defendants filed a Joint Motion for Entry of a Consent Decree, which was the culmination of those negotiations. (D.E. 264). Intervenor-Defendants opposed that motion. (D.E. 271).

8. On May 17, 2019, the Court held a hearing on the Joint Motion for Entry of a Consent Decree and thereafter ordered the parties to "meet and confer and file a proposed consent decree addressing the court's and parties' concerns expressed during the hearing." (D.E. 286 at 1-2).

9. All parties have engaged in further negotiation in accordance with the Court's order and with the goal of addressing concerns raised by the Court and by the Intervenor-Defendants. Those negotiations resulted in Plaintiffs and the Executive Branch Defendants agreeing to revise the proposed Consent Judgment and Decree, a redline of

which has been filed contemporaneously with this motion. Intervenors continue to object to entry of the revised proposed Consent Judgment and Decree. The UNC Defendants take no position as to this motion.

10. The modified proposed Consent Decree provides that, with respect to public facilities that are subject to the Executive Branch Defendants' control or supervision, Plaintiffs and Executive Branch Defendants agree that nothing in House Bill 142, codified as Session Law 2017-4 ("H.B. 142"), can be construed to prevent transgender people from lawfully using public facilities in accordance with their gender identity. *See* Consent Judgment and Decree at 5 ¶ 1.

11. The modified proposed Consent Decree also permanently enjoins the Executive Branch Defendants, in their official capacities, and all successors, officers, and employees, from taking certain specified actions under Section 2 of H.B. 142. *See* Consent Judgment and Decree at 6 ¶ 2.

13. Pursuant to the modified proposed Consent Decree, the Parties agree to each bear their own fees, expenses, and costs with respect to all claims raised by Plaintiffs against the Executive Branch Defendants, and all remaining claims Plaintiffs allege against the Executive Branch Defendants in this action would be dismissed with prejudice. *See* Consent Judgment and Decree at 6 ¶¶ 4-5.

14. In support of this motion, the Parties submit respective memoranda of law, addressing the Court's concerns and how the modified proposed Consent Decree resolves them.

WHEREFORE, for the foregoing reasons, and for those set forth in the Parties' earlier briefing and supplemental supporting memoranda of law, the Parties respectfully move the Court to enter the Consent Judgment and Decree, filed concurrently with this joint motion, as a full and final resolution of Plaintiffs' claims against the Executive Branch Defendants.

Dated: May 31, 2019

Respectfully submitted,

/s/ Irena Como

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*Appearing by special appearance pursuant to L.R. 83.1(d).

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CERTIFICATE OF SERVICE

I, Irena Como, hereby certify that on May 31, 2018, I electronically filed the foregoing PLAINTIFFS' AND EXECUTIVE BRANCH DEFENDANTS' SUPPLEMENTAL JOINT MOTION FOR ENTRY OF A CONSENT DECREE, as well as Plaintiffs' Memorandum of Law in support of the Consent Judgment and Decree, Proposed Consent Judgment and Decree, and a redline of that Proposed Consent Judgment and Decree identifying all changes made 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/ Irena Como

Counsel for Plaintiffs

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*Intervenor-
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CONSENT JUDGMENT AND DECREE

1. Whereas on March 28, 2016, Plaintiffs Joaquín Carcaño, Payton Grey McGarry, Angela Gilmore, the American Civil Liberties Union of North Carolina (“ACLU-NC”), and Equality North Carolina filed a complaint challenging House Bill 2 (Session Law 2016-3, hereafter referred to as “H.B. 2”) and seeking relief from Defendants Patrick McCrory, in his official capacity as Governor of North Carolina; Roy A. Cooper III, in his official capacity as Attorney General of North Carolina; the University of North Carolina; the Board of Governors of the University of North Carolina; and W. Louis Bissette, Jr., in his official capacity as Chairman of the Board of Governors of the University of North Carolina.

2. Whereas Phil Berger, in his official capacity as President Pro Tempore of the North Carolina Senate; and Tim Moore, in his official capacity as Speaker of the North

Carolina House of Representatives, sought and were granted permissive intervention in this action on June 6, 2016.

3. Whereas Roy A. Cooper, III took office as Governor of North Carolina on January 1, 2017, and was automatically substituted as a defendant for Governor McCrory in his official capacity as Governor of North Carolina pursuant to Federal Rule of Civil Procedure 25(d).

4. Whereas on March 30, 2017, the North Carolina General Assembly enacted, and Governor Cooper signed, House Bill 142, codified as Session Law 2017-4 (“H.B. 142”). H.B. 142, incorporated herein as “Exhibit A,” rescinded H.B. 2’s provisions limiting transgender individuals’ use of public facilities. The term “public facilities” as used throughout this Consent Decree refers to multiple occupancy restrooms, showers, or changing facilities as referenced in N.C.G.S. § 143-760 and sect. 2 of H.B. 142.

5. Whereas on July 21, 2017, Plaintiffs Joaquín Carcaño, Payton Grey McGarry, Hunter Schafer, Madeline Goss, Angela Gilmore, Quinton Harper, and ACLU-NC (“Plaintiffs”) filed a Fourth Amended Complaint challenging Sections 2, 3, and 4 of H.B. 142 and seeking relief from Defendants Roy A. Cooper, III, in his official capacity as Governor of North Carolina; the University of North Carolina; Margaret Spellings, in her official capacity as President of the University of North Carolina; Josh Stein, in his official capacity as Attorney General of North Carolina; Machel Sanders, in her official capacity as Secretary of the North Carolina Department of Administration; Mandy K. Cohen, in her official capacity as Secretary of the North Carolina Department of Health and Human

Services; and, James H. Trogon III, in his official capacity as Secretary of the North Carolina Department of Transportation.

6. Whereas Governor Cooper, Attorney General Stein, Secretary Sanders, Secretary Cohen, and Secretary Trogon (“Executive Branch Defendants”) believe that continued litigation over the meaning and enforcement of H.B. 142 will result in the unnecessary expenditure of State resources, and is contrary to the best interests of the State of North Carolina.

7. Whereas Executive Branch Defendants do not waive any protections offered to them through federal or state law, and do not make any representation regarding the merits of Plaintiffs’ claims or potential defenses which could be raised in court.

8. Whereas Plaintiffs and the Executive Branch Defendants (collectively referred to as “the Consent Parties”) believe that a resolution of the matter at this time and in the manner encompassed by the terms of this Consent Decree serves the best interests of the State and its citizens.

9. Whereas the Consent Parties agree that this Consent Decree promotes judicial economy, protects the limited resources of the Consent Parties, and resolves Plaintiffs’ claims against the Executive Branch Defendants.

10. Whereas the Consent Parties agree that Section 2 of H.B. 142 must be interpreted to mean that no executive agency, officer, employee, or agent thereof, may promulgate any regulation which prevents transgender people from using public facilities in accordance with their gender identity.

11. Whereas the Consent Parties further agree that any interpretation or application of Section 2 of H.B. 142 that bars, prohibits, blocks, deters, or impedes transgender people from using public facilities in accordance with their gender identity or subjects transgender people to arrest, prosecution, or criminal sanctions for doing so, raises serious federal-law concerns, including concerns over constitutional guarantees of equal protection and due process, as well as other applicable federal statutes.

12. Whereas the Court held that “Nothing in the language of Section 2 can be construed to prevent transgender individuals from using the restrooms that align with their gender identity[.]” ECF 248 at 49.

13. Whereas the Consent Parties wish to record the interpretation of H.B. 142 set forth in this Consent Decree, and thereby effect a binding and enforceable resolution of the claims by Plaintiffs against the Executive Branch Defendants with respect to H.B. 142.

14. Whereas the Consent Parties therefore consent to entry of the following final and binding judgment as dispositive of all claims raised by Plaintiffs against the Executive Branch Defendants with respect to H.B. 142.

15. Whereas Plaintiffs agree to a waiver of any entitlement to damages, fees, including attorneys’ fees, expenses, and costs against the Executive Branch Defendants, with respect to any and all claims raised by Plaintiffs in this action.

16. Whereas Plaintiffs further agree that dismissal of any and all remaining claims stemming from H.B. 2 and H.B. 142, against the Executive Branch Defendants is appropriate, and therefore request a dismissal of all remaining claims against the Executive

Branch Defendants with prejudice following the formal approval of the Consent Decree by the presiding District Court Judge.

17. Whereas the Consent Parties intend the following Consent Decree to clarify that nothing in H.B. 142 can be construed to prevent any person from lawfully using a public facility under Executive Branch control that accords with such person's gender identity, and to be binding for purposes of issue preclusion and claim preclusion in all future actions, including through non-mutual offensive collateral estoppel.

ACCORDINGLY, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

1. With respect to public facilities that are subject to Executive Branch Defendants' control or supervision, the Consent Parties agree that nothing in Section 2 of H.B. 142 can be construed by the Executive Branch Defendants to prevent transgender people from lawfully using public facilities in accordance with their gender identity. The Executive Branch Defendants as used in this paragraph shall include their successors, officers, and employees. This Order does not preclude any of the Parties from challenging or acting in accordance with future legislation.

2. The Executive Branch Defendants, in their official capacities, and all successors, officers, and employees are hereby permanently enjoined from applying Section 2 of H.B. 142 to bar, prohibit, block, deter, or impede any transgender individuals from using public facilities under any Executive Branch Defendant's control or supervision, in accordance with the transgender individual's gender identity. Under the authority granted by the General Statutes existing as of December 21, 2018, and

notwithstanding N.C.G.S. § 114-11.6, the Executive Branch Defendants are enjoined from prosecuting an individual under Section 2 of H.B. 142 for using public facilities under the control or supervision of the Executive Branch, when such otherwise lawful use conforms with the individual's gender identity.

3. The Consent Parties shall each bear their own fees, expenses, and costs with respect to all claims raised by Plaintiffs against the Executive Branch Defendants.

4. All remaining claims filed by Plaintiffs against the Executive Branch Defendants in this action are hereby dismissed with prejudice.

IT IS SO ORDERED:

Dated: _____

The Honorable Thomas D. Schroeder
United States District Judge

/s/ Irena Como

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1. Whereas on March 28, 2016, Plaintiffs Joaquín Carcaño, Payton Grey McGarry, Angela Gilmore, the American Civil Liberties Union of North Carolina (“ACLU-NC”), and Equality North Carolina filed a complaint challenging House Bill 2 (Session Law 2016-3, hereafter referred to as “H.B. 2”) and seeking relief from Defendants Patrick McCrory, in his official capacity as Governor of North Carolina; Roy A. Cooper III, in his official capacity as Attorney General of North Carolina; the University of North Carolina; the Board of Governors of the University of North Carolina; and W. Louis Bissette, Jr., in his official capacity as Chairman of the Board of Governors of the University of North Carolina.

2. Whereas Phil Berger, in his official capacity as President Pro Tempore of the North Carolina Senate; and Tim Moore, in his official capacity as Speaker of the North

Carolina House of Representatives, sought and were granted permissive intervention in this action on June 6, 2016.

3. Whereas Roy A. Cooper, III took office as Governor of North Carolina on January 1, 2017, and was automatically substituted as a defendant for Governor McCrory in his official capacity as Governor of North Carolina pursuant to Federal Rule of Civil Procedure 25(d).

4. Whereas on March 30, 2017, the North Carolina General Assembly enacted, and Governor Cooper signed, House Bill 142, codified as Session Law 2017-4 (“H.B. 142”). H.B. 142, incorporated herein as “Exhibit A,” rescinded H.B. 2’s provisions limiting transgender individuals’ use of public facilities. The term “public facilities” as used throughout this Consent Decree refers to ~~the types of~~[multiple occupancy restrooms, showers, or changing](#) facilities ~~identified~~[as referenced](#) in N.C.G.S. § 143-760 and sect. 2 of H.B. 142.

5. Whereas on July 21, 2017, Plaintiffs Joaquín Carcaño, Payton Grey McGarry, Hunter Schafer, Madeline Goss, Angela Gilmore, Quinton Harper, and ACLU-NC (“Plaintiffs”) filed a Fourth Amended Complaint challenging Sections 2, 3, and 4 of H.B. 142 and seeking relief from Defendants Roy A. Cooper, III, in his official capacity as Governor of North Carolina; the University of North Carolina; Margaret Spellings, in her official capacity as President of the University of North Carolina; Josh Stein, in his official capacity as Attorney General of North Carolina; Machel Sanders, in her official capacity as Secretary of the North Carolina Department of Administration; Mandy K. Cohen, in her official capacity as Secretary of the North Carolina Department of Health and Human

Services; and, James H. Trogon III, in his official capacity as Secretary of the North Carolina Department of Transportation.

6. Whereas Governor Cooper, Attorney General Stein, Secretary Sanders, Secretary Cohen, and Secretary Trogon (“Executive Branch Defendants”) believe that continued litigation over the meaning and enforcement of H.B. 142 will result in the unnecessary expenditure of State resources, and is contrary to the best interests of the State of North Carolina.

7. Whereas Executive Branch Defendants do not waive any protections offered to them through federal or state law, and do not make any representation regarding the merits of Plaintiffs’ claims or potential defenses which could be raised in court.

8. Whereas Plaintiffs and the Executive Branch Defendants (collectively referred to as “the Consent Parties”) believe that a resolution of the matter at this time and in the manner encompassed by the terms of this Consent Decree serves the best interests of the State and its citizens.

9. Whereas the Consent Parties agree that this Consent Decree promotes judicial economy, protects the limited resources of the Consent Parties, and resolves Plaintiffs’ claims against the Executive Branch Defendants.

10. Whereas the Consent Parties agree that Section 2 of H.B. 142 must be interpreted to mean that no executive agency, officer, employee, or agent thereof, may promulgate any regulation which prevents transgender people from using public facilities in accordance with their gender identity.

11. Whereas the Consent Parties further agree that any interpretation or application of Section 2 of H.B. 142 that bars, prohibits, blocks, deters, or impedes transgender people from using public facilities in accordance with their gender identity or subjects transgender people to arrest, prosecution, or criminal sanctions for doing so, raises serious federal-law concerns, including concerns over constitutional guarantees of equal protection and due process, as well as other applicable federal statutes.

12. Whereas the Court held that “Nothing in the language of Section 2 can be construed to prevent transgender individuals from using the restrooms that align with their gender identity[.]” ECF 248 at 49.

~~13. Whereas Section 3 of H.B. 142 states that “no local government in this State may enact or amend an ordinance regulating private employment practices or regulating public accommodations” and the Court concluded that Plaintiffs have plausibly pleaded that Section 3 of H.B. 142 “impacts them disproportionately[.]” ECF 248 at 50.~~

~~14.~~13. Whereas the Consent Parties wish to record the interpretation of H.B. 142 set forth in this Consent Decree, and thereby effect a binding and enforceable resolution of the claims by Plaintiffs against the Executive Branch Defendants with respect to H.B. 142.

~~15.~~14. Whereas the Consent Parties therefore consent to entry of the following final and binding judgment as dispositive of all claims raised by Plaintiffs against the Executive Branch Defendants with respect to H.B. 142.

~~16.~~15. Whereas Plaintiffs agree to a waiver of any entitlement to damages, fees, including attorneys’ fees, expenses, and costs against the Executive Branch Defendants, with respect to any and all claims raised by Plaintiffs in this action.

~~17.~~16. Whereas Plaintiffs further agree that dismissal of any and all remaining claims stemming from H.B. 2 and H.B. 142, against the Executive Branch Defendants is appropriate, and therefore request a dismissal of all remaining claims against the Executive Branch Defendants with prejudice following the formal approval of the Consent Decree by the presiding District Court Judge.

~~18.~~17. Whereas the Consent Parties intend the following Consent Decree to clarify that nothing in H.B. 142 can be construed to prevent any person from lawfully using a public facility under Executive Branch control that accords with such person's gender identity, and to be binding for purposes of issue preclusion and claim preclusion in all future actions, including through non-mutual offensive collateral estoppel.

~~19.—Whereas the Consent Parties intend the following Consent Decree to clarify that their interpretation is that nothing in Section 3 of H.B. 142 prohibits any local government in the State of North Carolina from interpreting other existing laws to protect against discrimination on the basis of sexual orientation or gender identity or expression.~~

ACCORDINGLY, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

1. With respect to public facilities that are subject to Executive Branch Defendants' control or supervision, the Consent Parties agree that nothing in Section 2 of H.B. 142 can be construed by the Executive Branch Defendants to prevent transgender people from lawfully using public facilities in accordance with their gender identity. The Executive Branch Defendants as used in this paragraph shall include their successors,

officers, and employees. This Order does not preclude any of the Parties from challenging or acting in accordance with future legislation.

~~2.~~ 2.—The Executive Branch Defendants, in their official capacities, and all successors, officers, and employees are hereby permanently enjoined from ~~enforcing~~applying Section 2 of H.B. 142 to bar, prohibit, block, deter, or impede any transgender individuals from using public facilities under any Executive Branch Defendant’s control or supervision, in accordance with the transgender individual’s gender identity. Under the authority granted by the General Statutes existing as of December 21, 2018, and notwithstanding N.C.G.S. § 114-11.6, the Executive Branch Defendants are enjoined from prosecuting an individual ~~who uses~~under Section 2 of H.B. 142 for using public facilities under the control or supervision of the Executive Branch, when such otherwise lawful use conforms with the individual’s gender identity,~~and is otherwise lawful.~~

~~3.2.~~ 3.2. ~~The Executive Branch Defendants, in their official capacities, and their successors, officers, and employees are hereby permanently enjoined from enforcing Section 3 of H.B. 142 to restrict any local government from interpreting other existing laws as protecting against discrimination on the basis of sexual orientation, gender identity or gender expression.~~

~~4.3.~~ 4.3. The Consent Parties shall each bear their own fees, expenses, and costs with respect to all claims raised by Plaintiffs against the Executive Branch Defendants.

~~5.4.~~ 5.4. All remaining claims filed by Plaintiffs against the Executive Branch Defendants in this action are hereby dismissed with prejudice.

IT IS SO ORDERED:

Dated: _____

The Honorable Thomas D. Schroeder
United States District Judge

~~/s/ Christopher A. Brook~~
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