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

JOAQUÍN CARCAÑO, *et al.*,

Plaintiffs,

v.

ROY A. COOPER, III, in his official capacity as Governor of North Carolina, *et al.*,

Defendants.

Case No. 1:16-cv-236

UNC DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS THE FOURTH AMENDED COMPLAINT

INTRODUCTION

For over a year, the University of North Carolina has been caught in the middle of a dispute it did not create. Now, after the controversy that originally prompted this lawsuit has passed, Plaintiffs seek to press new claims holding the University responsible for a statute it had no hand in enacting. The Court should dismiss those claims and allow the University to return to its crucial work of educating the students of North Carolina.

Plaintiffs brought this case to challenge House Bill 2 ("HB 2"), a North Carolina statute calling for separating multiple-occupancy restrooms by biological sex. They claimed that it violated federal guidance calling for separating such restrooms by gender identity instead. They also claimed that the statute clashed with the interpretation of Title IX adopted in *G.G. v. Gloucester County School Board*, 822 F.3d 709 (4th Cir. 2016). But now, the General Assembly has repealed HB 2, the Federal Government has withdrawn its guidance, and the Fourth Circuit has vacated its decision in *G.G.* As a result, this lawsuit should end.

Yet, in their Fourth Amended Complaint, Plaintiffs now claim that House Bill 142 ("HB 142"), the statute that repealed HB 2, violates federal law, because it allegedly creates uncertainty over whether transgender people

may use multiple-occupancy restrooms consistent with their gender identity. They also press nominal-damages claims with regard to HB 2.

Plaintiffs have no basis for drawing the University and President Margaret Spellings ("UNC Defendants") into their challenge to HB 142. The UNC Defendants did not draft or enact HB 142; thus, they are not responsible for any alleged uncertainty in its meaning, nor is there anything the UNC Defendants could do to eliminate this alleged uncertainty. Further, the UNC Defendants have taken no action that even arguably violates the Constitution, Title IX, or Title VII; they have never punished or threatened to punish any transgender student or employee for using a bathroom consistent with his or her gender identity. Plaintiffs' claims against the UNC Defendants should therefore be dismissed in their entirety.

NATURE OF THE MATTER

This lawsuit is about the validity of North Carolina House Bills 142 and 2.

STATEMENT OF FACTS

1. The University of North Carolina comprises sixteen constituent institutions of higher education and one constituent high school. N.C. Gen. Stat. § 116-4. The University's President, Margaret Spellings, executes the University's policies subject to the direction and control of the University's

Board of Governors. Spellings Decl. ¶ 2 (ECF No. 38-1). These policies include a prohibition on "unlawful discrimination against any person on the basis of . . . sex, sexual orientation, [or] gender identity." *The Code of the Board of Governors of the University of North Carolina* § 103 (2001) (ECF No. 46-3).

2. On March 23, 2016, the North Carolina General Assembly enacted HB 2. HB 2 provided 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." It also allowed public agencies to "provid[e] accommodations such as single occupancy bathroom or changing facilities upon a person's request due to special circumstances." *Id.* § 143-760(c).

3. On March 28, 2016, Plaintiffs (who include a group of transgender individuals and the American Civil Liberties Union of North Carolina) filed this lawsuit to challenge HB 2. On August 26, 2016, this Court issued a preliminary injunction prohibiting the UNC Defendants from enforcing HB 2. *See* Memorandum Opinion (ECF No. 127).

4. On March 30, 2017, the North Carolina General Assembly enacted HB 142. This statute expressly repeals HB 2. It also provides:

> State agencies, boards, offices, departments, institutions, branches of government, including The University of North Carolina and the North Carolina Community College System, and political subdivisions of the State, including local boards of education, are preempted from regulation of access to multiple occupancy restrooms, showers, or changing facilities, except in accordance with an act of the General Assembly.

5. After HB 142's enactment, the Department of Justice dismissed its parallel litigation challenging HB 2. *See* Notice of Voluntary Dismissal, *United States v. North Carolina*, No. 16-425 (ECF No. 245). In addition, this Court vacated its preliminary injunction prohibiting the UNC Defendants from enforcing HB 2. *See* Order Lifting Injunction (ECF No. 204).

6. After HB 142's enactment, Plaintiffs filed a Fourth Amended Complaint. (ECF No. 210.) This complaint raises four sets of claims against the UNC Defendants:

- Claims against President Spellings under § 1983 on the ground that HB 142 violates the Due Process and Equal Protection Clauses of the United States Constitution. (Counts I and IIA.)
- Claims against the University on the ground that HB 142 violates Titles IX and VII. (Counts VI and VII.)
- Claims against President Spellings under § 1983 on the ground that HB 2 violates the Due Process and Equal Protection Clauses (asserted only in the event the Court invalidates provisions of HB 142, holds that the repeal of HB 2 is not severable from those provisions, and thereby revives HB 2). (Counts III, IV, and V.)
- Claims for nominal damages against the University on the ground that the now-repealed HB 2 violated Titles IX and VII while it was in effect. (Counts VI and VII; *see* Compl. ¶ 18.)

QUESTIONS PRESENTED

1. Whether the Court should dismiss Plaintiffs' claims challenging HB 142 because:

    a. Plaintiffs lack standing to sue the UNC Defendants over HB 142;

    b. Plaintiffs' claims concerning HB 142 are unripe;

    c. Plaintiffs' constitutional claims against President Spellings violate sovereign immunity, exceed the bounds of § 1983, and lack legal merit; and

    d. Plaintiffs' statutory claims against the University lack legal merit.

2. Whether the Court should dismiss Plaintiffs' claims challenging HB 2 because the claims lack legal merit.

ARGUMENT

I. THE COURT SHOULD DISMISS THE CLAIMS CHALLENGING HB 142

A. Plaintiffs Lack Article III Standing To Pursue Any Of Their Claims Against The UNC Defendants Challenging HB 142

The Court should dismiss all of Plaintiffs' claims against the UNC Defendants challenging HB 142 because Plaintiffs lack Article III standing to bring those claims. To establish standing, a plaintiff must show that (1) he has suffered an "injury in fact", *i.e.*, an "invasion" of a judicially cognizable interest that is "concrete and particularized" as well as "actual or imminent," (2) the injury is "fairly traceable to the challenged action of the defendant," and (3) it is "likely" that "the injury will be redressed by a favorable decision."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992). Plaintiffs cannot do so here.

When Plaintiffs first brought this lawsuit, they claimed standing on the ground that HB 2 directed the University to deny them access to restrooms consistent with their gender identity. That theory does not work in connection with HB 142, as HB 142 does not contain a provision prohibiting transgender people from using restrooms consistent with their gender identity; does not contain a provision directing the University to adopt such a prohibition; and the University has not adopted such a prohibition. In fact, the University *cannot* adopt such a prohibition, because HB 142 preempts it from regulating access to multiple-occupancy restrooms. The only pertinent University policy *prohibits* discrimination on the basis of gender identity. *Supra* 3.

The Fourth Amended Complaint therefore appears to advance two new theories of standing. First, Plaintiffs claim that HB 142's meaning is unclear, and that this "uncertainty" injures them by discouraging them from using restrooms consistent with their gender identity. Compl. ¶¶ 80, 118, 154, 167. Second, they suggest that they fear arrest and prosecution under state trespass laws if they use multiple-occupancy restrooms. *Id.* ¶ 16. Neither theory establishes that Plaintiffs have standing to bring the claims they have

brought (challenges to HB 142) against the defendants they have sued (the University and President Spellings).

1. The Alleged Uncertainty About The Meaning Of HB 142 Does Not Establish Standing

Plaintiffs first suggest that alleged uncertainty over the meaning of HB 142, by itself, gives them standing to bring this lawsuit. That theory fails for four separate reasons: (1) Plaintiffs face no such uncertainty, (2) uncertainty about the meaning of this law is not an injury in fact, (3) the alleged uncertainty is not traceable to the UNC Defendants, and (4) relief against the UNC Defendants would not redress the uncertainty.

First, Plaintiffs face no significant uncertainty about the meaning of HB 142. North Carolina law grants "the Attorney General" the power and duty to opine on the meaning of state statutes. N.C. Gen. Stat. § 114-2(5). And the Attorney General has made it clear that, in his view, HB 142 "must be interpreted to mean" that government agencies may not "promulgate any regulation which prevents transgender people from using public facilities in accordance with their gender identity." Proposed Consent Decree at 3 (ECF No. 216-1).

Second, any uncertainty about the meaning of HB 142 would not amount to an injury in fact. A harm is an injury in fact only if it is

particularized—only if it invades the plaintiff's "own legal rights and interests." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Satisfying this requirement is "substantially more difficult" when, as here, the "asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*"—when "the plaintiff is not himself the object of the government action or inaction he challenges." *Lujan*, 504 U.S. at 562.

The "objects" of HB 142 are government entities, not individuals. The statute speaks to "state agencies, … including The University of North Carolina and the North Carolina Community College System, and political subdivisions of the State"; it does not speak to transgender people. It prohibits the entities to which it speaks from engaging in the "regulation" of access to restrooms; it says nothing at all about whether transgender people may use particular restrooms. HB 142, in short, is a law about what the University may do, not a law about what Plaintiffs may do.

That dooms Plaintiffs' efforts to show standing, because uncertainty in a law about the University's powers does not harm Plaintiffs' interests. Put simply, Plaintiffs have no personal stake in the extent of the University's powers, much less a personal stake in the clarity with which HB 142 has delineated the extent of the University's powers. They therefore lack standing to sue.

Third, the asserted uncertainty about the meaning of HB 142 in any event is not "fairly traceable" to the actions of the UNC Defendants. *Lujan*, 504 U.S. at 560. The University and President Spellings neither drafted, proposed, voted on, passed, enacted, signed, nor ratified HB 142. Nor do they have the legal power to "clarify" it. Rather, they are regulated by HB 142. Since they are not responsible for any purported uncertainty in the statute, they are not proper defendants in a lawsuit challenging these alleged uncertainties.

Finally, relief against the UNC Defendants would not "redress" any uncertainty in the meaning of HB 142. *Lujan*, 504 U.S. at 568. As noted, North Carolina law grants the Attorney General the sole power and duty to opine on the meaning of state statutes. N.C. Gen. Stat. § 114–2(5). It does not grant the University and its President independent authority to determine the meaning of those statutes. As a result, there is nothing that the UNC Defendants could do (and nothing that a court could properly order them to do) to remove any alleged uncertainty over HB 142's meaning or any alleged uncertainty about Plaintiffs' ability to use particular restrooms. That, again, confirms that standing cannot rest on the alleged uncertainty in the meaning of HB 142.

2. Anxiety About Application Of State Trespass Laws Does Not Establish Standing

Plaintiffs also appear to contend that they have standing because they fear arrest and prosecution under state trespass laws for using multiple-occupancy bathrooms. But this theory of standing, too, must fail, because (1) this case challenges HB 142, not the trespass laws, (2) there is no basis for fearing enforcement of the trespass laws, (3) any injuries caused by the potential enforcement of the trespass laws would not be traceable to the UNC Defendants, and (4) relief against the UNC Defendants would not redress anxiety over the application of the trespass laws.

First, Plaintiffs cannot establish standing to challenge one law (HB 142) by alleging that they fear enforcement of different laws (the trespass laws). A plaintiff has standing to bring a claim only if "the challenged action" causes the harm complained of. *Lujan*, 504 U.S. at 560. In this case, Plaintiffs have challenged HB 142; they have not challenged state trespass laws. Any alleged injuries caused by the enforcement of trespass laws are thus beside the point.

Second, there is in any event no basis for fearing enforcement of the trespass laws. The Governor, Attorney General, and other executive-branch officers are responsible for enforcing the state's criminal laws. N.C. Const.

art. III, § 1. These officials have stated that, in their view, transgender people are not "subject … to prosecution" for using restrooms consistent with their gender identity. Proposed Consent Decree at 3 (ECF No. 216-1).

Third, any injuries caused by the enforcement of the trespass laws would not be traceable to the UNC Defendants. State law-enforcement authorities are responsible for enforcing the state's criminal laws; the UNC Defendants are not. N.C. Const. art. III, § 1; N.C. Gen. Stat. § 7A-60. Anxiety over the application of those trespass laws thus cannot justify drawing the UNC Defendants into this lawsuit.

Fourth, relief against the UNC Defendants would not redress anxiety over arrests and prosecutions under HB 142. *Lujan*, 504 U.S. at 568. The UNC Defendants lack the legal authority to tell district attorneys and other law-enforcement officials which acts merit arrest and prosecution. Even if the court ordered the UNC Defendants not to enforce state trespass laws, law enforcement officials would still have the independent power to enforce them—meaning that any alleged anxiety over arrests and prosecutions would remain. That, again, confirms that Plaintiffs lack standing.

3. This Court's Preliminary-Injunction Order Confirms That Plaintiffs Lack Standing

This Court's previous order granting Plaintiffs a preliminary injunction against the enforcement of HB 2 confirms that Plaintiffs now lack standing to challenge HB 142.

In concluding that Plaintiffs' challenge to HB 2 was justiciable, this Court began with the premise that the University "must" "comply with state law," and that University officials have "no legal authority" to "openly def[y]" the law." Op. 26. State law (specifically, HB 2) in turn required the University to "deny" transgender people "permission" to use restrooms consistent with their gender identity. *Id.* Moreover, in light of the University's obligation to enforce state law, this Court "presum[ed]" that, under HB 2, administrators would "discipline or punish students" for using bathrooms consistent with their gender identity. Op. 19. That meant that Plaintiffs faced a concrete injury.

This same line of reasoning establishes that Plaintiffs now lack standing to challenge HB 142. Now, as then, the University "must" "comply with state law," and University officials have "no legal authority" to "openly def[y]" the law." Op. 26. This time, however, instead of *requiring* the University to deny transgender people access to particular bathrooms, state

law *prohibits* the University from regulating access to bathrooms in the first place. That makes all the difference: It means that the University has no choice but to *refrain* from issuing regulations excluding transgender people from particular bathrooms. Moreover, this Court must presume that school administrators will *not* "discipline or punish" students for using bathrooms of their choice. Plaintiffs thus no longer face a concrete injury from any action that the UNC Defendants might take under state law.

Just as this Court held that the state-law requirement to deny access to bathrooms made Plaintiffs' challenge to HB 2 justiciable, so too it should hold that the state-law requirement to refrain from regulating access to bathrooms makes Plaintiffs' challenge to HB 142 non-justiciable.

B. All Of Plaintiffs' Claims Against The UNC Defendants Challenging HB 142 Are Also Unripe

The Court should also dismiss Plaintiffs' claims against the UNC Defendants because the claims are not "ripe for judicial review." *Nat'l Park Hospitality Ass'n v. Dept. of Interior*, 538 U.S. 803, 808 (2003). To determine whether a case is ripe, "courts must balance the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Franks v. Ross*, 313 F.3d 184, 194 (4th Cir. 2002). The plaintiff

bears the burden of proving ripeness. *Miller v. Brown*, 462 F.3d 312, 319 (4th Cir. 2006). Plaintiffs cannot fulfill that burden here.

To start, a pre-enforcement challenge to a law is unfit for judicial review if the meaning of the law has not yet been "crystallized." *Regional Mgmt. Corp. v. Legal Services Corp.*, 186 F.3d 457, 465 (4th Cir. 1999). By deciding a challenge to a law while the meaning of the law still remains unclear, a court engages in "too remote and abstract an inquiry for the proper exercise of the judicial function." *Renne v. Geary*, 501 U.S. 312, 323 (1991). In addition, "postponing consideration" "has the advantage of permitting the state courts further opportunity to construe [the statute], and perhaps in the process to materially alter the question to be decided" by the federal court. *Id.*

For example, in *Renne v. Geary*, the Supreme Court held that a challenge to an unclear state law was unfit for review because the "state court" had not yet had an opportunity to "give further definition to [the law's] operative language." *Id.* In *Telco Communications, Inc. v. Carbaugh*, 885 F.2d 1225, 1234–35 (4th Cir. 1989), the Fourth Circuit similarly held that a challenge to an unclear state statute was not ripe, reasoning that "[j]urisdiction should only be exercised when the case tenders the underlying constitutional issues in clean-cut and concrete form" and that "permit[ting] state courts to construe this state statute may prove useful."

Likewise, here, Plaintiffs assert that HB 142's meaning is unclear. Yet they have not given state courts the opportunity to resolve this alleged uncertainty. For example, they have not yet asked state courts to interpret HB 142. It would be premature to adjudicate a claim that the statute is unclear before the appropriate state authorities have had a chance to clarify it.

Denying review would also cause little hardship. Hardship "is measured by the immediacy of the threat … of enforcement." *Miller*, 462 F.3d at 319. Here, the UNC Defendants have made no threat of enforcement at all, much less an immediate one; they have never suggested that they plan to punish students or employees for using bathrooms consistent with their gender identity.

In short, Plaintiffs cannot show either fitness for review or hardship in the absence of review. Their claims against the UNC Defendants are thus unripe for review.

C. Plaintiffs' Constitutional Claims Against President Spellings Violate Sovereign Immunity, Exceed The Scope Of § 1983, And Lack Legal Merit

There are three further reasons to dismiss Plaintiffs' § 1983 claims, brought against President Spellings, that HB 142 violates the Due Process

and Equal Protection Clauses. The claims violate sovereign immunity; they exceed the bounds of § 1983; and they lack legal merit.

1. The Constitutional Claims Violate State Sovereign Immunity

The Constitution presupposes that states and their officers are immune from being sued without their consent. In order to overcome state sovereign immunity and to sue a state officer over the constitutionality of a state law, a plaintiff must satisfy two prerequisites. *See Ex parte Young*, 209 U.S. 123, 156 (1908). First, he must show that the state officer in question has a "specific duty to enforce the challenged statut[e]." *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 331 (4th Cir. 2001). Second, he must show that the state officer has "personally" "enforced, threatened to enforce, or advised other agencies to enforce" the challenged law against the plaintiff. *McBurney v. Cuccinelli*, 616 F.3d 393, 402 (4th Cir. 2010).

Here, Plaintiffs satisfy neither prerequisite and, as a result, President Spellings is entitled to sovereign immunity. In the first place, President Spellings does not have a "specific duty to enforce" HB 142. HB 142 imposes no such duty (nor could it, since it preempts University authority) and Plaintiffs have not identified any other state law that does so. In the second place, President Spellings in any event has not threatened to take

enforcement action under HB 142, and Plaintiffs do not allege that she has. (*See* Compl. ¶ 29.) In fact, it would be hard to imagine what such enforcement action would even look like, since (again) HB 142 regulates state entities rather than transgender individuals.

2. The Constitutional Claims Exceed The Bounds Of § 1983

Plaintiffs' constitutional claims also exceed the bounds of § 1983. A defendant is liable under § 1983 only for his own actions, not for the actions of other public officials. A plaintiff bringing a lawsuit under § 1983 must thus show that the defendant's "own individual actions" violated the Constitution. *Doe v. Rosa*, 795 F.3d 429, 439 n.7 (4th Cir. 2015). Plaintiffs cannot make that showing with respect to President Spellings.

Plaintiffs claim that HB 142 violates the Due Process Clause because its language is vague, and violates the Equal Protection Clause because the legislators who enacted it were motivated by animus toward transgender people. Compl. ¶¶ 302–325. But President Spellings neither drafted nor voted on HB 142. There is, moreover, no allegation that she personally showed animus toward transgender people; any such allegation would be implausible in light of the President's and the University's repeated insistence that discrimination on the basis of gender identity violates university policy.

President Spellings, in short, is not personally responsible for the alleged flaws in HB 142. She therefore cannot be sued under § 1983 for the General Assembly's decision to enact that statute.

3. The Constitutional Claims Lack Legal Merit

Plaintiffs' constitutional claims in all events lack legal merit.

Due Process. Plaintiffs claim that HB 142 is "void for vagueness" and (relatedly) that the "legal uncertainty" that it creates violates "substantive due process." Compl. ¶¶ 302–312. This claim should fail.

As an initial matter, Plaintiffs may not challenge HB 142's alleged vagueness because HB 142 does not regulate them. It is well established that (outside the First Amendment context) a vagueness challenge must rest on the application of the law to the plaintiff's own conduct; a plaintiff "cannot complain of the vagueness of the law as applied to the conduct of others." *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982);. HB 142, however, regulates government entities and the University; it does not regulate Plaintiffs' conduct at all. *Supra* 8. Plaintiffs therefore may not bring a vagueness challenge against the statute.

In addition, HB 142 is not impermissibly vague. A law violates the vagueness doctrine only if it is so indefinite "that men of common intelligence must necessarily guess at its meaning." *Winters v. New York*, 333 U.S. 507,

518 (1948). But there is no need to guess at HB 142's meaning: The law says that state government entities "are preempted from regulation of access to multiple occupancy restrooms." N.C. Gen. Stat. § 143-760. This provision is a routine field-preemption clause. It means the same thing as any other field-preemption clause: It allocates power over a given subject (here, regulation of access to multiple-occupancy restrooms) to one government entity (the General Assembly) rather than to other government entities (executive agencies, local governments, and the University). A clause preempting particular government entities from regulating particular activities is not vague.

Equal Protection. Plaintiffs also claim that HB 142 violates the Equal Protection Clause. But a law violates the Equal Protection Clause only if either (1) the law on its face makes invidious "classifications" or (2) the law "reflects a … discriminatory purpose." *Washington v. Davis*, 426 U.S. 229, 239, 242 (1976). Plaintiffs do not suggest that HB 142 classifies people on the basis of sex, gender identity, or any other characteristic. Nor does a law that allocates the power to regulate bathrooms to one governmental entity rather than another reflect a discriminatory purpose.

Plaintiffs claim that HB 142 violates the Equal Protection Clause because the legislators who voted for it were "motivated by an intent to treat

transgender people differently, and worse, than other people." Compl. ¶ 320. In other words, Plaintiffs contend that, regardless of whether HB 142 promotes a legitimate purpose such as statewide consistency, the "actual motivations" of the legislators render the statute invalid. *Id.* ¶ 322. This theory, however, is contrary to controlling precedent.

The Supreme Court has held that "the legitimate purposes" of a law are "not open to impeachment by evidence that the [legislators] were actually motivated by [impermissible] considerations." *Washington*, 426 U.S. at 242. The Fourth Circuit, too, "specifically reject[s] an inquiry into [legislative] motive in an equal protection claim." *South Carolina Educ. Ass'n v. Campbell*, 883 F.3d 1251, 1263 n.14 (4th Cir. 1989). As a result, the subjective motives of the members of the General Assembly who voted for HB 142 have no bearing on the statute's constitutionality.

Plaintiffs also claim that HB 142 violates the Equal Protection Clause by restructuring the "political process" to take the power to regulate restrooms away from state-government entities and to transfer that power to the General Assembly. Compl. ¶ 323. Yet again, Plaintiffs' theory is directly contrary to controlling precedent: In *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623 (2014), the Supreme Court held that the Equal Protection Clause permits a state to deny state universities the power

to engage in affirmative action. Just as the Equal Protection Clause allows a state to reallocate from one government entity to another the power to regulate university admissions, so too it allows a state to reallocate from one government entity to another the power to regulate access to restrooms.

D. Plaintiffs' Statutory Claims Against The University Concerning HB 142 Lack Legal Merit

Finally, Plaintiffs' claims concerning HB 142, brought under Title IX and Title VII, fail because the claims lack legal merit. Titles IX and VII, as enacted by Congress, prohibit sex discrimination, not gender-identity discrimination. The University in any event has engaged in neither sex discrimination nor gender-identity discrimination.

1. Titles IX and VII prohibit sex discrimination, but not gender-identity discrimination

Title IX provides that no person "shall, on the basis of *sex*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (emphasis added). Title VII makes it unlawful for an employer "to discriminate against any individual" with respect to employment "because of such individual's ... *sex*." 42 U.S.C. § 2000e-(a) (emphasis added). Under the Supreme Court's and Fourth

Circuit's current precedents, this statutory language does not encompass discrimination on the basis of gender identity.

First, the word "sex," as Congress used it in Titles IX and VII, does not encompass gender identity. The meaning of a statute turns on its "original meaning"—in other words, on the meaning of the statutory language time of the statute's enactment. *Whitfield v. United States*, 135 S. Ct. 785, 788 (2015). When Congress enacted Title VII in 1964 and Title IX in 1972, dictionaries defined "sex" to mean "either of two divisions, designated *male* and *female*," "by which organisms are classified according to their reproductive functions." *American Heritage Dictionary of the English Language* (1st ed. 1969). Thus, at the time of the enactment of Titles IX and VII, "sex" discrimination did not include gender-identity discrimination.

Second, Congress has explicitly distinguished between sex (or gender) and gender identity. For example, Congress has separately punished hate crimes motivated by "gender" and hate crimes motivated by "gender identity" (18 U.S.C. § 249(a)(2)); separately required reporting of campus crimes motivated by "gender" and campus crimes motivated by "gender identity" (20 U.S.C. § 1092(f)); and separately prohibited recipients of Violence Against Women Act funding from discriminating on the basis of "sex" and "gender identity" (42 U.S.C. § 13925(b)(13)). Congress's decision to include "gender

identity" in these other statutes, but to exclude "gender identity" in Titles IX and VII, shows that Congress did not intend to prohibit gender-identity discrimination when it enacted Titles IX and VII.

Finally, the Fourth Circuit has explained that "Title VII does not afford a cause of action for discrimination based upon sexual orientation," and that "Title VII's prohibition of 'sex' discrimination applies only to discrimination on the basis of gender and should not be judicially extended to include [discrimination on the basis of] homosexuality." *Wrightson v. Pizza Hut of America, Inc.*, 99 F.3d 138, 143 (4th Cir. 1996); *see also Murray v. N.C. Dep't of Pub. Safety*, 611 Fed. App'x 166, 166 n* (4th Cir. 2015) (*per curiam*) (same); *Dawkins v. Richmond Cty. Schs.*, 2012 WL 1580455, at *4 (M.D.N.C. May 4, 2012) (same). Under the reasoning in this caselaw, Title VII's prohibition upon sex discrimination applies "only" to discrimination on the basis of gender, and does not include gender identity. The same goes for Title IX, which uses the same key word ("sex") as Title VII. *See Kirby v. N.C. State Univ.*, 2015 WL 1036946, at *5 (E.D.N.C. Mar. 10, 2015).

To be sure, there are arguments for extending these civil-rights laws to prohibit discrimination against transgender people. Indeed, the University itself prohibits such discrimination as a matter of its internal policies. *Supra* __. The question for this Court, however, is what Titles IX and VII *do* prohibit

under current law, not what they *should* prohibit. For the reasons just discussed, these laws currently prohibit only discrimination on the basis of biological sex, not discrimination on the basis of gender identity. Whether the laws should be extended further is a matter for Congress rather than the courts.

2. The University Has Engaged In Neither Sex Discrimination Nor Gender-Identity Discrimination

In all events, Plaintiffs' claims against the University for alleged discrimination pursuant to HB 142 must fail because they have failed to allege facts showing that the University has engaged in discrimination on the basis of sex (or, for that matter, discrimination on the basis of gender identity). Title IX prohibits only "intentional sex discrimination." *Jackson v. Birmingham Bd. of Ed.*, 544 U.S. 167, 173 (2005). Moreover, while Title VII prohibits both "intentional discrimination" and, in some instances, practices that have a "disparate impact" on protected groups, *Ricci v. DeStefano*, 557 U.S. 557 (2009), Plaintiffs here rely only on a theory of intentional discrimination, and make no reference to disparate impact. The Complaint, however, fails to allege facts showing that the University acted with intent to discriminate on the basis of either sex or gender identity.

According to the Complaint, the University has simply complied with its obligations under state law. HB 142 forbids the University from regulating access to multiple-occupancy restrooms. That is a neutral rule; it prohibits all restroom-access regulations, regardless of whether the regulations favor transgender people, disfavor transgender people, or have nothing to do with transgender people. According to the Complaint, the University has refrained from issuing regulations governing access to multiple-occupancy restrooms. (Compl. ¶¶ 391–403.) But that, too, is a neutral practice. The practice simply reflects the University's undoubted obligation to comply with state law; as this Court has already pointed out, University officials have "no legal authority" to "openly def[y]" the law." Op. 26. Nothing in the Complaint suggests that the University's failure to promulgate its own bathroom-access regulations instead reflects the University's hostility toward either sex or, for that matter, to any particular gender identity. Since Plaintiffs cannot establish that the University is acting with intent to discriminate on the basis of sex (or gender identity), they have no claim under Titles IX and VII.

II. THE COURT SHOULD DISMISS PLAINTIFFS' CLAIMS CHALLENGING HB 2

Separately, Plaintiffs bring a set of claims challenging HB 2, even though that statute has already been repealed. As with HB 142, Plaintiffs

bring their constitutional claims challenging HB 2 against President Spellings, and their statutory claims challenging HB 2 against the University. The Court should, again, dismiss each of these claims.

A. The Court Need Not Consider The Constitutional Challenges To HB 2 Brought Against President Spellings

Invoking § 1983, Plaintiffs have sued President Spellings on the ground that HB 2 violates the Due Process and Equal Protection Clauses. Plaintiffs state, however, that they bring these constitutional challenges only "in the event that this Court finds that (1) one or more provisions of H.B. 142 violate the U.S. Constitution or federal law and (2) H.B. 142's repeal of H.B. 2 is not severable from such provisions of H.B. 142." Compl. ¶ 18. Neither of these two conditions is satisfied. As a result, the Court need not entertain Plaintiffs' constitutional challenges to HB 2.

First, the challenged provisions of HB 142 do not violate the Constitution or federal law. To the contrary, as set out above, the challenged provisions are constitutional and lawful.

Second, the repeal of HB 2 is in any event severable from the remainder of HB 142. Under North Carolina law, the severability of a valid provision from an invalid provision depends on "the intent of the legislative body which enacted the legislation." *State v. Fredell*, 195 S.E. 2d 300, 302

(N.C. 1973). In ascertaining the intent of the General Assembly, courts presume that the General Assembly would prefer to "save" the constitutional portions of the legislation "if after eliminating the invalid portions, the remaining provisions are operative and sufficient to accomplish their proper purpose." *Id.* Here, the valid provision (the repeal of HB 2) in no way depends on the supposedly invalid provisions (the preemption of restroom-access regulation). The repeal operates meaningfully and sensibly regardless of whether the rest of the statute is upheld or struck down. The repeal of HB 2 is thus severable from the rest of HB 142.

In sum, neither condition for bringing Plaintiffs' constitutional claims has been satisfied: HB 142's provisions are valid, and the repeal of HB 2 is in any event severable from the rest of the statute. It follows that the Court need not entertain Plaintiffs' constitutional challenges to HB 2 brought against President Spellings.

B. There Is No Legal Merit To The Statutory Challenges To HB 2 Brought Against The University

Plaintiffs also sue the University under Titles IX and VII, seeking "nominal damages for the harms caused by H.B. 2's violation of those statutes" for the brief period of time that HB2 was in effect. (Compl. ¶ 18.) These claims, however, lack legal merit.

For one thing, a defendant is liable under Titles IX and VII only for its own conduct and, in some cases, the conduct of its agents. Thus, "a recipient of federal funds may be liable in damages under Title IX only for its own misconduct;" "the recipient itself must … subject persons to discrimination … in order to be liable." *Davis v. Monroe County Board of Education*, 526 U.S. 629, 640–41 (1999). Similarly, an employer is liable under Title VII only for its own actions and, in some circumstances, for the actions of its agents. *Vance v. Ball State University*, 133 S. Ct. 2434, 2439 (2013). The University, however, did not itself enact HB 2. Nor are the legislators who enacted HB 2 the University's agents. Thus, Plaintiffs may not (as their Complaint puts it) seek damages from the University "for the harms caused by H.B. 2's violation of those statutes." They may only seek damages from the University for the harms caused by the University's own actions. Their complaint contains no allegations to support any such claims; they do not suggest that the University in fact enforced HB 2 against any of them.

For another thing, adherence to HB 2 in any event did not violate Titles IX and VII. To begin with Title IX: A federal regulation implementing Title IX expressly permits "separate toilet, locker room, and shower facilities on the basis of sex." 34 C.F.R. § 106.33. The Department of Education once interpreted this regulation to cover only those schools that allow transgender

students to use restrooms consistent with their gender identity (Letter from James A. Ferg-Cadima, Jan. 7, 2015), but the Department has since withdrawn that interpretation (Dept. of Justice & Dept. of Education, Dear Colleague Letter, Feb. 22, 2017). Under the Department's regulations, therefore, HB 2's requirement to separate restrooms on the basis of biological sex was consistent with Title IX.

That leaves Title VII. This Court and the Fourth Circuit have both held that Title VII allows employers to "distinguish men and women on the basis of physiology." Op. 55 (citing *Bauer v. Lynch*, 812 F.3d 340, 350 (4th Cir. 2016)). This Court and the Fourth Circuit have also both held that "acknowledged [physiological] differences between men and women" justify "separate public rest rooms for men and women." Op. 56 (quoting *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993)). Under the Fourth Circuit's precedents and this Court's earlier order, then, adherence to HB 2 did not violate Title VII. Plaintiffs' challenges to HB 2, as asserted against the University, must therefore be dismissed.

CONCLUSION

The Court should dismiss the claims against the UNC Defendants.

Dated: October 23, 2017

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I certify that this brief complies with the word limits of Local Civil Rule 7.3(d) because, excluding the parts exempted by the rule, the brief contains 6,216 words.

Dated: October 23, 2017

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CERTIFICATE OF SERVICE

I certify that on October 23, 2017, 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: October 23, 2017

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