UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

JOAQUÌN CARCAÑO, *et al.*, *Plaintiffs*, v. ROY A. COOPER, *et al.*, *Defendants*, v. PHIL BERGER, *et al.*, *Intervenor-Defendants*	No. 1:16-cv-00236-TDS-JEP **REPLY IN SUPPORT OF INTERVENOR-DEFENDANTS' MOTION TO DISMISS FOURTH AMENDED COMPLAINT**

As Intervenor-Defendants explained in their Memorandum supporting their Motion to Dismiss ("Mem."), Doc. 225, Plaintiffs' complaint should be dismissed for multiple reasons. Plaintiffs' Opposition ("Opp.") fails to engage with Intervenor-Defendants' arguments, and makes several concessions that underscore the weaknesses in the Fourth Amended Complaint. Plaintiffs have no basis to pursue this case after the repeal of HB 2 and their claims should be dismissed.

ARGUMENT

I. The Complaint Should be Dismissed for Lack of Subject Matter Jurisdiction.

Plaintiffs expressly waive any argument that they can "challeng[e] the absence of affirmative nondiscrimination protections based on gender identity," Opp. at 11 n.5, or use this litigation to "seek[] enactment and administration of non-discrimination polices that do not currently exist," Opp. at 42. Those concessions leave Plaintiffs with two theories of supposedly justiciable injury: alleged "uncertainty" about applicable law, and HB 142's

changes to North Carolina political processes. Neither bears the weight that Plaintiffs place on it.

A. Plaintiffs lack a justiciable claim based on alleged uncertainty.

Plaintiffs' first theory is that they can challenge HB 142 because it "deliberately creates uncertainty about whether transgender individuals can use government restrooms[.]" Opp. at 11 n.5. But Plaintiffs provide no basis to distinguish HB 142's alleged "creation" of uncertainty from any uncertainty that existed all along, and which they concede could not be challenged in court. *Id.* At any rate, "uncertainty" about the law, standing alone, has never been considered an actionable injury. The authorities Plaintiffs rely on, Opp. at 10–11, do not support or even mention that novel proposition. *See, e.g.*, *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 153–55 (2010) (holding only that foreseeable effects "readily attributable" to government deregulation may create standing); *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 302 (1979) (holding only that regulated parties can bring pre-enforcement challenges "when fear of criminal prosecution under an allegedly unconstitutional statute is not imaginary or wholly speculative"). None of those authorities remotely supports standing based merely on a legislature's decision not to enact a particular rule, particularly where the only statute challenged places no demands on private conduct, has no enforcement mechanism, and carries no penalties.

Given that uncertainty alone cannot create standing in the first place, it cannot matter whether (or why) the legislature chose not to clarify existing law as Plaintiffs would prefer. Opp. at 4 (claiming General Assembly "intentionally codified statewide ambiguity" about

restroom access).[1] And any new changes Plaintiffs have made in their conduct in light of HB 142's supposed perpetuation of uncertainty, Opp. at 9–10, are no more than the sort of self-inflicted injuries that fail to establish standing under *Clapper v. Amnesty International USA*. *See* 568 U.S. 398, 416 (2013) ("[R]espondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending.").

Even assuming HB 142 is susceptible to pre-enforcement challenge, Plaintiffs face the additional problem that enjoining HB 142 would not bring them the relief they seek. *See* Mem. at 8–10 (discussing Plaintiffs' failure to establish traceability and redressability). Plaintiffs double down on their argument that HB 142 itself is the root of their alleged injuries, claiming that "Plaintiffs' inability to access government restrooms without fear of exclusion and prosecution is a direct result of HB142, and an order invalidating the statute would redress those injuries." Opp. at 13. But that is obviously mistaken: even if HB 142 were enjoined, there would *still* be no State or local law expressly protecting Plaintiffs from gender-identity discrimination, or guaranteeing them access to facilities matching their gender identity, unless third parties took independent action. Plaintiffs do not demand any

[1] Nor do Plaintiffs plausibly allege invidious intent in the first place. They rely on personal statements by six legislators out of more than 100 who voted for HB 142 in overwhelming bipartisan majorities, *compare* Compl. at ¶ 246, *with* Mem. at 1 & n.1, plus a more recent statement by former Governor McCrory, who had no role in HB 142 because he lost re-election to now-Governor Cooper before the law was passed, Opp. at 6. Plaintiffs also repeatedly object to the General Assembly's decision not to pass a "clean" repeal of HB 2, Opp. at 3, 9, 16, 19, 39, even though a simple repeal of HB 2 would have left exactly the same "uncertainty" that Plaintiffs object to now. Plaintiffs' assertions of invidious intent are thus no more than an invitation for this Court to second-guess a complex bipartisan compromise and hand Plaintiffs the one-sided victory that the legislative process did not deliver. That is a political inquiry beyond the normal functions of an Article III court.

such action in this case, Opp. at 42, and they "do not suggest they would have standing to bring … a challenge" demanding creation of new substantive rules. *Id.* at 11 n.5. Whether any government entity would enact such a law in the absence of HB 142 — and how executive branch officials and local prosecutors would exercise their discretion differently, Opp. at 13 — is a matter of speculation, insufficient as a basis for this Court's jurisdiction.

Plaintiffs try to make up that jurisdictional deficiency in two ways. First, they assert that enjoining HB 142 would "prevent officials … from *claiming* that transgender individuals are barred from public facilities." Opp. at 13 (emphasis added). That is both untrue (because HB 142 neither enacts nor overrules any particular access policy) and irrelevant (because Plaintiffs cite no authority for the proposition that mere personal statements about the law by legislators can create standing). Second, they assert that enjoining HB 142 would "restore local governments' ability to clarify that transgender people may use government restrooms corresponding to their gender identity," Opp. at 14. That is yet another guess about hypothetical future legislation that may be enacted at an unspecified time by unknown jurisdictions. The traceability and redressability problems are, as Intervenor-Defendants showed, "insurmountable." Mem. at 8.

In addition, even if pure uncertainty were justiciable on pled facts like these, this case is not ripe. Far from finding ripeness based on a litigant's "reasonable fear regarding the possible future application of an ambiguous statute," Opp. at 20, Plaintiffs' own cases require a "a credible fear of prosecution under" HB 142, which Plaintiffs lack. *See Educ. Media Co. at Va. Tech., Inc. v. Swecker*, 602 F.3d 583, 587 n.1 (4th Cir. 2010) (quotes omitted); Opp. at 20. Plaintiffs may feel "deterr[ed]" from conduct by HB 142, but HB 142

certainly does not "require" them to act differently. Opp. at 20. Moreover, HB 142's allegedly "deliberate ambiguity and public statements by … state officials" do not give rise to a ripe dispute for much the same reasons that they do not confer standing, *see* Opp. at 22, and a legal dispute over application of trespass law to transgender individuals could involve innumerable private actors and government officials — perhaps including Plaintiffs and Defendants, but perhaps not. *Id.* In light of Plaintiffs' failure to identify any legal harm arising from alleged uncertainty, adjudication should await a ripe dispute.

B. Plaintiffs lack a justiciable claim based on changes in North Carolina's political processes.

Plaintiffs' alternative theory is that they have standing to challenge HB 142's centralization of decision making on certain issues in the General Assembly. Plaintiffs insist they have a "legally protected interest in their equal right to petition their *local* governments for non-discrimination protection," Opp. at 17 (emphasis added), but they cite no authority for that proposition. Thus, although Plaintiffs certainly have a right to advocate their preferred policies, they lack any legal interest in doing so in one state government forum as opposed to another. The General Assembly's decision to centralize authority thus does not injure Plaintiffs in any way that this Court has jurisdiction to review. Mem. at 5–6. The harm to Plaintiffs, if any, is purely political.

Plaintiffs also suggest the problem is that HB 142 creates an "*unequal barrier* to seeking protection." Opp. at 19. But there is nothing "unequal" about HB 142, which repealed HB 2, returned state substantive law to the *status quo ante*, and forced individuals on all sides of the debate — Plaintiffs and HB 2 proponents alike — to seek preferred

policies in the same forum, by the same processes.[2] Plaintiffs' right to pursue policies on equal terms with others distinguishes this case from *Northeast Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 666 (1993), where a statute categorically burdened the plaintiffs in competing for city contracts; from *Romer v. Evans*, 517 U.S. 620 (1996); and from political-process doctrine cases such as *Schuette v. BAMN*, 134 S. Ct. 1623 (2014).

II. Plaintiffs' Allegations Fail to State a Claim.

A. Plaintiffs fail to state a substantive due process claim (Count I).

Plaintiffs' Opposition confirms that they lack any real theory of how HB 142 denies them due process. Plaintiffs mainly claim that HB 142 "creates uncertainty concerning which, if any, government restrooms transgender people can use, thereby exposing transgender people to potential civil and criminal penalties[.]" Opp. at 26. But any such uncertainty, assuming it exists, could have nothing to do with HB 142. Putative uncertainty regarding how restroom access interacts with a person's internal gender identity pre-existed HB 142 and will still exist if HB 142 were enjoined. It follows that any lack of clarity on

[2] Plaintiffs accuse Intervenor-Defendants of "conveniently overlook[ing] the fact that Charlotte repealed its ordinance specifically in exchange for a promised 'clean repeal' of HB2—which never occurred." Opp. at 19 (citing Compl. ¶¶ 8, 179). It is unclear why Plaintiffs attach so much importance to that allegation, unless they mean to ask this Court to referee a dispute about political deals between North Carolina government entities. Plaintiffs also misrepresent their own pleadings, which do not mention an agreed-upon exchange but rather show that Charlotte first repealed its original ordinance contingent on repeal of HB 2, *see* Compl. ¶¶ 227–28, and then later *unconditionally* "repealed the Charlotte Ordinance in its entirety," *id.* ¶ 233. Ultimately, too, the existence of a deal over the Charlotte Ordinance is beside the point: one way or another, Charlotte repealed its ordinance, and Plaintiffs do not even allege that it will re-enact such an ordinance again. *See* Mem. at 9 (citing Compl. ¶¶ 81, 170, 190)).

that matter has no legal connection to HB 142 — meaning HB 142 cannot itself be void for vagueness.

Plaintiffs appear to claim that HB 142 is problematic because of disparate enforcement concerns. Plaintiffs concede, however, that because HB 142 "has no clear enforcement mechanism," Opp. at 29, any hypothetical disparity would depend on "enforcement of *other* laws," *id.* (emphasis added), none of which Plaintiffs challenge. Moreover, although Plaintiffs insist that state agencies have been "regulating" restroom access in violation of HB 142 by providing separate male and female facilities, Opp. at 4–5, 14, 25, 28, 35, 37, 38, 40 — a stilted, atextual reading of the law — Plaintiffs expressly refrain from challenging the institution of sex-separated restrooms, Opp. at 5 n.1, and seek no particular statewide policy on restroom access, Opp. at 11 n.5, 42. Plaintiffs' challenge to HB 142 thus does not implicate alleged enforcement harms either. All this confirms that Plaintiffs fail to state a due process claim against HB 142.

B. Plaintiffs fail to state an equal protection claim (Count II).

As Intervenor-Defendants originally explained, an equal protection claim requires one of two things: a classification, or discriminatory intent. Mem. at 13 (citing *United States v. Johnson*, 122 F. Supp. 3d 272, 349 (M.D.N.C. 2015)). Plaintiffs still do not allege that HB 142 classifies anyone. Plaintiffs' equal protection claim thus rests entirely on the theory that HB 142 was passed with discriminatory intent.

Yet Plaintiffs' only evidence for intent consists of isolated statements by a few legislators and former Governor McCrory, who signed HB 2 but had nothing to do with enacting HB 142. *See supra* at 3 n.1. Even Plaintiffs admit that "these statements may be

of 'limited value' when determining the legislature's intent in passing HB142[.]" Opp. at 27 n.16 (emphasis omitted). Plaintiffs' account of HB 142's origins (including the Charlotte Ordinance, HB 2, and passage of the current law) is only an aggressively tendentious reading of ordinary democratic give-and-take that courts have no jurisdiction to question. Even if those facts were "merely consistent" with intentional discrimination — which Intervenor-Defendants emphatically deny — no such inference is plausible. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.") (quotes omitted); *see also, e.g.*, *Yates v. Mun. Mortg. & Equity, LLC*, 744 F.3d 874, 901 (4th Cir. 2014). That leaves Plaintiffs without any well-pled basis to allege discriminatory intent, outside of HB 142's text.

As Intervenor-Defendants have always made clear, the text of HB 142 is scrupulously evenhanded: HB 2 is repealed, the *status quo ante* is restored, and *all* sides of the HB 2 debate are compelled to pursue their policy preferences in the General Assembly. That does not discriminate against Plaintiffs any more than it discriminates against disappointed proponents of HB 2; rather, it reflects a bipartisan political compromise bringing advantages and disadvantages for everyone. And if HB 142 violates equal protection for permitting sex-separated restrooms without specifying a rule for transgender individuals, Opp. at 37, then the absence of legislation is itself an equal protection violation — a theory that Plaintiffs have expressly waived. Opp. at 11 n.5, 42. Plaintiffs cannot translate mere political disappointments into an equal protection claim.

C. Plaintiffs fail to state Title IX and Title VII claims (Counts VI and VII).

Plaintiffs' Title IX and VII claims rest on the theory that discrimination on the basis of transgender status is discrimination on the basis of sex. Opp. at 30. But that premise is doubly false. *First*, and most obviously, HB 142 does not discriminate. No discriminatory classification, intent, or effect appears in its text or history; Plaintiffs' statutory claims thus fall with their equal protection claims. *See supra* at 7–8; Mem. at 18.

Second, even if HB 142 did discriminate against Plaintiffs (and it does not), Plaintiffs cannot avoid the fact that when Title IX and Title VII were enacted more than 40 years ago, the term "sex" referred to differences in physiology linked to male-female dimorphism and reproduction. Mem. at 19; *see Sandifer v. U.S. Steel Corp*., 134 S. Ct. 870, 876 (2014) (statutory terms should be "interpreted as taking their ordinary, contemporary, common meaning" as of "the era of [the statute's] enactment"). In contrast, Plaintiffs claim that the separate concepts of "transgender" and "gender identity" refer to the "fundamental, internal sense" of being part of one sex or another. Compl. at ¶ 44. "Sex" discrimination is prohibited under Title IX and Title VII; "transgender" discrimination is not.

Plaintiffs try to bridge the gap between their claims and the statutory text by claiming that discrimination linked to transgender status is a form of sex stereotyping prohibited by *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Opp. at 31. But that theory is hard to understand on its own terms and, in any event, would have no application here. In an ordinary system of sex-separated facilities, all people with particular physiological characteristics (determinative of "sex" according to the statutes' original meaning) are treated in the same way. No reference is necessary to anyone's "internal

sense" of gender identity, Compl. at ¶ 44, expressions of sex identification, behavior, or anything else.

Plaintiffs' position only makes sense under the assumption that physiological characteristics are *themselves* a stereotype about sex. Opp. at 31 (claiming that "unlike other men, Mr. Carcaño was designated a different sex at birth, and thus does not conform to the stereotypes associated with men"). Under that theory, "sex" is determined exclusively by gender identity. That, in turn, begs the underlying question of what Title IX or Title VII originally meant, and it finds no purchase in the text or history of either. Plaintiffs' sex stereotyping theory thus provides no escape from the statutes' meaning.

III. Plaintiffs Waive Relief That Would Have Violated the 10th Amendment.

Plaintiffs do not dispute that the Tenth Amendment prohibits this Court from requiring North Carolina officials to enact and administer access and non-discrimination policies that do not now exist under state or local law. Opp. at 41–42; *see* Mem. at 21. Instead, they run away from their prior demands for that form of relief, now saying that they do *not* "seek[] enactment and administration of non-discrimination polic[i]es that do not currently exist." Opp. at 42. That reflects a substantial concession as compared to the relief Plaintiffs demanded in their Complaint, *see* Compl. at 102, and it resolves the Tenth Amendment concerns Intervenor-Defendants had raised.

In so doing, however, Plaintiffs effectively concede they are not seeking any remedy that would correct the harms they allege. Without "enactment and administration of non-discrimination polic[i]es that do not currently exist," *see* Opp. at 42, enjoining HB 142 will make no practical difference to any legal right Plaintiffs might plausibly claim. By

resolving their claims' Tenth Amendment infirmities, in short, Plaintiffs underscore their lack of standing and failure to state claims upon which relief can be granted.

IV. Plaintiffs' Challenges to HB 2 are Unripe.

Finally, Plaintiffs insist that their challenges to HB 2 — which HB 142 undisputedly repealed — are ripe. They do not disagree that any claims regarding HB 2 depend on the Court answering a whole host of preliminary questions. Rather, they claim that this case will *require* the Court to answer those questions, and that the Court therefore might as well proceed to address HB 2. Opp. at 42 ("The predicate questions Intervenors contend must be addressed are all questions presented *in this very case*."). But Plaintiffs present no real reason why that should be the case. At the very least, even if HB 142 were enjoined, the question whether HB 2 springs back to life will not be presented until some North Carolina official tries to apply it. Such an event is much too far down the road to be ripe today.

CONCLUSION

For the foregoing reasons, Intervenor-Defendants respectfully ask the Court to dismiss Plaintiffs' Fourth Amended Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this date I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all CM/ECF participating attorneys.

This the 15th day of December, 2017.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with Local Rule 7.3(d)(1) because it contains 3,050 words, as determined by the word-count function of Microsoft Word.

This the 15th day of December, 2017.

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