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

UNITED STATES OF AMERICA, Plaintiff, v. STATE OF NORTH CAROLINA; PATRICK MCCRORY, in his official capacity as Governor of North Carolina; NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY; UNIVERSITY OF NORTH CAROLINA; and BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA, Defendants, PHIL BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate; TIM MOORE, in his official capacity as Speaker of the North Carolina House of Representatives, Intervenor-Defendants.	Case No. 1:16-cv-00425-TDS-JEP

INTERVENOR-DEFENDANTS' ANSWER AND COUNTERCLAIMS

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**Appearing Under Local Civil Rule 83.1(d)*

INTRODUCTION

1. When people find themselves in the intimate settings of public bathrooms, locker rooms, or showers, they expect to encounter only other people of the same biological sex. Until very recently, that simple expectation of bodily privacy and safety would have been taken for granted. Yet when North Carolina sought to protect that common-sense expectation in law—by enacting the "Public Facilities Privacy and Security Act" (the "Act"), commonly known as HB2—a torrent of vicious criticism was unleashed against the State, its officials, and its citizens. The abuse has now reached its apex with this abusive "enforcement" action by the United States Department of Justice (the "Department"). Because an adverse judgment in this case would have a dramatically negative impact on North Carolina—including potentially eliminating more than two billion dollars in federal education funding—the leaders of both chambers of the North Carolina General Assembly have intervened in this action.

2. The Department's complaint makes clear that, unlike the people of North Carolina, the Department believes the only valid approach to the sensitive and emerging issue of gender dysphoria is to allow *anyone* to use *any* communal public bathroom, locker room, or shower based solely on that person's self-declared "gender identity." Never mind that the Department's policy will inevitably lead to women and girls in public changing facilities seeing unclothed individuals who, whatever their gender identity, still have fully functional male genitals. Never mind that the Department's policy, on its face, demands that North Carolina allow biologically male prison inmates

who identify as females to take showers with female inmates—which, besides being absurd and dangerous, also violates the Department's *own* federal prison regulations. Apparently, the Department believes these obvious social costs are outweighed by the policy's purported psychological benefits to persons of conflicted gender identity.

3. The people of North Carolina came to a different and far more sensible conclusion, one they enacted in the law at issue in this case. Despite being grossly mischaracterized in the media, the Act does not reflect hostility towards those whose gender identity differs from their biological sex. To the contrary, the Act allows a flexible system of single-occupancy facilities for persons who do not wish to use public facilities designated for their biological sex. The Act also leaves in place provisions allowing a person to obtain a sex-change operation, make a corresponding change to their birth certificate, and then use the facilities consistent with their new anatomy. And the Act allows *private* businesses and other entities to determine their own bathroom policies—including, if they wish, policies closer to the Department's views.

4. But the Act also reflects concern and compassion for the many North Carolina residents—especially girls and women—who do not wish to be in close proximity to persons with genitals characteristic of the opposite sex when using public restrooms, locker rooms, and showers. Those people reasonably believe that a policy allowing people of the opposite biological sex into those spaces would be an assault on *their* dignity, privacy, and safety, and an affront to the legitimate and longstanding privacy expectations of all North Carolinians. That is why, in *publicly* owned facilities,

the Act simply requires that everyone—regardless of their "gender identity"—use the facilities that correspond to their current anatomy.

5. In short, the Act is not, as it has been mischaracterized in the press, an "anti-transgender" law. It is, rather, a law that promotes both privacy and safety, while accommodating the legitimate interests of persons with conflicts between their biological sex and gender identities.

6. Nor does the act remotely violate the three federal civil rights statutes—Title VII, Title IX, and the Violence Against Women Act—cited by the Department. Indeed, the Department's interpretations of all three statutes rest on the implausible premise that a privacy policy expressly designed to *avoid* making distinctions based on gender identity—by relying on anatomy instead—nonetheless "facially" discriminates on the basis of gender identity. That is nonsensical.

7. The Department's suit, moreover, represents an assault on the whole system of single-sex bathrooms that, precisely because of privacy concerns, has long been an accepted part of our Nation's social compact. As a legal matter, if a biologically male individual can access a women's bathroom based on a claim of "gender identity," then *any* male can gain access on the same kind of claim, regardless of whether they "identify" as male or female: If discrimination based on "gender identity" is unlawful when the person seeking access identifies as a female, then it must be equally unlawful when that person identifies as a male.

8. Most troubling, the Department's suit is nothing more than an assault on the fundamental legal and social understanding of what distinguishes men from women. Under North Carolina's view—embedded throughout its law, as it has been in every society since human beings began to consider the matter—whether one is a man or a woman, and entitled to be treated as such, is an objective inquiry, driven by verifiable aspects of anatomy and genetics. But under the Department's view, this traditional way of looking at gender and sex is itself a product of rank bigotry. In the Department's view, "sex" is the equivalent of "gender," and both are merely a passing psychological construct, the product of a five-factor balancing test with one factor, one's subjective "gender identity," given determinative weight. It is astonishing that the United States Department of Justice believes it can overturn the most basic cornerstone of human reality—the difference between "male" and "female"—based on its own unsupported assertions in a legal pleading. In any event, Intervenors believe that the Department's avant-garde view is absurd, and its implementation would wreak havoc on North Carolina law in countless areas, including state employment law, fair housing law, and family law.

9. Finally, the Department's claim that the Act violates these civil rights laws also represents an all-out assault, not only on the sovereign right of North Carolinians to determine their own policies regarding basic expectations of bodily privacy and security, but on the right of every other State and local government to do the same. It is a stunning and radical act of executive overreach, and this Court should reject it root and branch.

INTERESTS OF INTERVENORS

10. For their part, Intervenors have a broad and comprehensive legal interest in defending the Act. They are the highest leaders of the General Assembly, the Legislative Branch of the North Carolina government, which is directly subject to the requirements of the Act, would be directly subject to the Department's proposed legal requirements under Title VII if the Department prevailed, and is not subject to the authority of the Governor or the other defendants here.

11. In addition, the General Assembly has primary responsibility for the organization and financing of North Carolina public schools, N.C. Const. Art. IX, § 2; the organization of public educational districts, *id.* Art IX, § 4; and the maintenance and financing of North Carolina's higher education system including UNC and "the other public institutions of higher education," *id*. Art. IX, §§ 8, 9; *id*. Art. V, § 12. The General Assembly also oversees the establishment and operation of state correctional facilities. *Id*. Art. XI, § 3.

12. Finally, as the sole body in North Carolina with the authority to enact laws, *id*. Art. II, § 1, the General Assembly alone can modify the requirements of state employment and anti-discrimination laws, as well as appropriate funds necessary to safeguard the state budget, *id.* Art. V, § 7.

ANSWER IN INTERVENTION

13. In response to paragraph 1 of the Department's complaint, Intervenors admit that the Department filed the complaint in this case. With respect to the rest of the

paragraph, the Act speaks for itself. However, to the extent a response is required, Intervenors deny the remainder of paragraph 1.

14. Paragraphs 2-6 contains legal conclusions, which Intervenors need not respond to. Intervenors thus deny the allegations of paragraph 2-6.

15. Intervenors admit that, as paragraph 7 alleges, Patrick McCrory is the Governor of North Carolina. The text of the North Carolina Constitution speaks for itself. Except as admitted and stated herein, Intervenors deny the allegations of paragraph 7.

16. As to paragraph 8, Intervenors admit that the Department of Public Safety is an agency of the State of North Carolina responsible for public safety, corrections and emergency management. The Department's statements regarding 42 U.S.C. § 2000e(a) and 42 U.S.C. § 2000e(b) are legal conclusions, which Intervenors need not respond to. Intervenors lack sufficient information to respond to the rest of the paragraph, and therefore deny the paragraph except as admitted.

17. As to paragraph 9, Intervenors admit that the University of North Carolina is a public, multi-campus university that is organized under, and exists pursuant to, the laws of the State of North Carolina. The Department's statements regarding 42 U.S.C. § 2000e(a) and 42 U.S.C. § 2000e(b) are legal conclusions, which Intervenors need not respond to. Intervenors lack sufficient information to respond to the rest of the paragraph, and therefore deny the paragraph except as admitted.

18. As to paragraph 10, Intervenors admit that the Board of Governors of the University of North Carolina is charged with the general control, supervision, and governance of the University of North Carolina. The remainder of paragraph 10 contains legal conclusions, which Intervenors need not respond to and therefore deny the paragraph except as admitted.

19. Intervenors admit that Margaret Spellings is the President of the University of North Carolina (UNC).

20. Intervenors admit that the Act was enacted by the General Assembly on March 23, 2016. Except as already specified, Intervenors deny the allegations of paragraph 11.

21. The Act speaks for itself and no response is required. However, to the extent a response is required, Intervenors deny paragraph 12.

22. Intervenors deny paragraph 13.

23. Paragraphs 14-16 purport to quote and/or cite statements made by various political officials. Intervenors lack sufficient information to verify whether the statements were made as alleged and, if so, in what context. However, to the extent a response is required, Intervenors deny paragraphs 14-16.

24. Intervenors admit paragraph 17.

25. Paragraphs 18 and 19 purport to quote and/or cite statements allegedly made by various political officials. Intervenors lack sufficient information to verify

whether the statements were made as alleged and, if so, in what context. However, to the extent a response is required, Intervenors deny paragraphs 18 and 19.

26. Paragraph 20 purports to quote a statement made by UNC's President, Margaret Spellings. Intervenors lack sufficient information to verify whether the statement was made as alleged and, if so, in what context. Except as stated, Intervenors deny paragraph 20.

27. Intervenors have no personal knowledge of the facts alleged in paragraphs 21 and 22, and thus deny them.

28. Paragraph 23 purports to quote a statement made by UNC's President, Margaret Spellings. Intervenors lack sufficient information to verify whether the statement was made as alleged and, if so, in what context. Except as stated, Intervenors deny paragraph 23.

29. Intervenors admit that Executive Order 93 was released by Governor McCrory on April 12, 2016. The Executive Order's text speaks for itself. Except as stated, Intervenors deny paragraph 24.

30. Paragraphs 25-27 contain legal conclusions, which intervenors need not respond to. However, to the extent a response is required, Intervenors deny paragraphs 25-27.

31. Based on information and belief, Intervenors admit the Department sent the letters referenced in paragraph 28. The content of the letters speaks for itself. Except as stated, Intervenors deny paragraph 28.

32. Intervenors have no personal knowledge of the facts alleged in paragraph 29, and thus deny them.

33. Intervenors deny paragraphs 30 to 42. Most fundamentally, Intervenors deny that "sex" is a characteristic of human beings that is "assigned" to anyone at birth or at any other time. To the contrary, "sex" is the objective reality of being a biological male or a biological female, based on verifiable anatomical characteristics. Moreover, the state's designation of one's "sex" on a birth certificate is based on those verifiable anatomical characteristics. Finally, Intervenors deny that a person's "internal sense of being male or female" (par. 31) has any relevance, in law or logic, to one's "sex."

34. Except as otherwise specified, Intervenors deny paragraphs 43 to 52. Moreover, paragraphs 44, 47 and 50 interpret the Act, which speaks for itself.

ANSWER TO COUNT I: TITLE VII CLAIM

35. Intervenors deny the allegations in the Department's Title VII claim contained in paragraphs 53 and 54, which fail to state a claim on which relief can be granted. For several reasons, the Department's determination that, by complying with the Act, the defendants have engaged in a "pattern or practice" of "sex" discrimination in violation of Title VII is wrong as a matter of both law and proper procedure. This will be established in greater detail (with appropriate citations) in briefing on the merits. But following are a few of the salient reasons.

36. First, at the threshold, the Department's foundational premise that the Act discriminates against "transgender" employees is patently incorrect. On the face of the

Act, a person's ability to use a particular multi-occupancy bathroom, locker room or shower facility depends, *not* on the person's gender identity, but on the person's "biological sex"—as determined by the person's birth certificate. *See* HB2 §§ 1.2, 1.3. Accordingly, the face of the Act refutes any notion that it discriminates on the basis of gender identity and, hence, against "transgender" employees. Moreover, although a "separate but equal" approach is clearly inappropriate with respect to racial classifications, separating the sexes based on legitimate physical and anatomical characteristics has always been viewed as consistent with Title VII and other non-discrimination statutes – especially in the context of bathrooms, locker rooms and showers.

37. Moreover, North Carolina law expressly allows citizens to obtain sex change operations, and then change the sex listed on their birth certificates. *See* N.C. Gen. Stat. Ann. § 130A-118. Thus, for example, a person who was a male at birth but who "identifies" as female has the ability to gain access to women's bathrooms if (s)he so chooses. Accordingly, there simply is no discrimination in the Act against "transgender" employees. To the contrary, North Carolina law expressly accommodates those persons who have obtained sex change operations and accordingly altered the sex listed on their birth certificates.

38. Second, and more fundamentally, the Department is incorrect in contending that Title VII's prohibition on discrimination on the basis of "sex" extends to discrimination on the basis of "gender *identity*" or even sexual orientation. Although that

position has recently (and controversially) been adopted by the current Equal Employment Opportunity Commission for claims brought before that agency, the same position has been uniformly rejected by every federal circuit court to consider it, and by virtually all of the district courts as well. Nor is there any indication in Title VII's language or legislative history of any purpose on Congress's part to reach alleged discrimination on the basis of gender identity.

39. Third, because Congress's decision to extend Title VII to the states rested solely upon Section 5 of the Fourteenth Amendment, any requirements imposed on the states under the guise of that statute must be directed at preventing or remedying violations of the federal Constitution, and must be both "congruent with and proportional" to that goal. Yet the Department could not possibly contend that people with a gender identity different from their biological sex are a protected class, much less that extending Title VII to laws such as the Act is congruent and proportional to the goal of preventing *unconstitutional* discrimination against members of that class. Accordingly, given that it is grounded solely in the Fourteenth Amendment, Title VII cannot constitutionally be applied to the Act or similar laws, and therefore cannot constitutionally be construed in the manner the Department contends.

40. Fourth, in any event, the federal government lacks the constitutional authority to preempt the States' efforts to protect the privacy and safety of residents using State-owned bathroom, locker room and shower facilities. Providing such protection in State-owned facilities falls squarely within the police power protected from federal

encroachment by the enumerated powers doctrine and recognized in the Tenth Amendment. And the use of such facilities by people who "identify" with a gender other than their biological sex cannot possibly have an impact on interstate commerce sufficient to justify federal regulation under Article I. Indeed, the Department's determination under Title VII constitutes an improper attempt to commandeer State-owned property in pursuit of a (dubious) federal policy. For that reason too Title VII cannot constitutionally be construed in the manner the Department contends.

41. Finally, even if the Act could hypothetically violate Title VII (properly construed) in *some* of its possible applications, it cannot possibly be unlawful in all of its possible applications, and for that reason cannot be facially unlawful. For example, even under the Department's interpretation of Title VII, the Act would be lawful when applied to prevent a known male sexual predator from falsely claiming to "identify" as female so that he can enter a women's bathroom and prey upon a little girl whom he has seen enter alone. Surely the Department's interpretation of Title VII would not require that people making knowingly false claims of gender identity (and claims that are known to authorities to be false) be allowed to enter a bathroom or shower designated for people of the opposite sex. Because the Act prevents entry into facilities designated for people of the opposite sex by those making knowingly false claims of gender identity in addition to those making genuine claims of gender identity, the Act clearly is not unlawful in *all* of its applications, and therefore is not unlawful on its face.

AFFIRMATIVE DEFENSE: UNCONSTITUTIONALITY OF TITLE VII AS INTERPRETED BY THE DEPARTMENT

42. Alternatively, if the Department has correctly interpreted Title VII, that statute as applied here violates the federal Constitution.

43. Multiple provisions of the federal Constitution make clear that, if the federal government is to impose new legal requirements on the States, those requirements must be imposed by or at the behest of Congress, not by the Executive or Judicial Branches acting on their own. Those provisions include but are not limited to the "vesting" clause of Article I Section 1, the bicameralism and presentment clauses of Article I Section 7, the "take care" clause of Article II Section 3, and the "appropriate legislation" provision of Section 5 of the Fourteenth Amendment.

44. The requirement that the Department's suit seeks to impose upon North Carolina—i.e., a requirement of open "access" to all state-owned "sex-segregated … facilities consistent with gender identity"—is a new legal requirement. For reasons explained above, that requirement—which would logically extend to every other State and virtually all private employers as well—is simply not found in Title VII. The Department's attempt to impose that requirement on North Carolina on its own is therefore a usurpation of Congress's exclusive authority under Article I of the Constitution, which provides that "all legislative powers herein granted shall be vested in … Congress." Such action is also a violation of the President's obligation under Article II Section 3 to "take care that the laws be *faithfully* executed."

45. Several provisions of the federal Constitution also make clear that the States remain independent sovereigns in the federal system, that they joined the Union with their sovereignty—including their traditional police power—intact, and that the federal government is one of limited, enumerated powers. Those provisions include but are not limited to Article I section 8, and section 1 of the Thirteenth, Fourteenth and Fifteenth Amendments—all of which together delineate specific and limited subjects on which Congress may legislate—and the Tenth Amendment, which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

46. Aside from racial discrimination, none of those provisions authorizes any arm of the federal government to impose requirements for "access" to state-owned bathrooms, locker rooms or shower facilities, much less authorizes the federal government to regulate the manner in which the states seek to protect the privacy and safety of those using such state-owned facilities. Certainly nothing in the Constitution authorizes any arm of the federal government to impose regulations governing access to such facilities on the basis of "gender identity"—a concept unknown to those who wrote and ratified the relevant provisions of the federal Constitution.

47. The Act, by contrast, seeks to vindicate the right to sexual and reproductive privacy protected by the Fifth and Fourteenth Amendments, as well as the right of parents to direct the upbringing of their children, also protected by the Fifth and Fourteenth

Amendments. And the Act does so in a manner that is well within the States' traditional police power.

48. Because the federal government lacks the constitutional authority to regulate North Carolina's (and the other States') efforts to protect the privacy and safety of those who use state-owned bath, locker room and shower facilities, the Department's attempt to impose the "access" requirement at issue here represents a usurpation of the States' authority over such facilities.

AFFIRMATIVE DEFENSE: VIOLATION OF THE APA

49. For all these reasons, the Department's determination that North Carolina and its officials must grant access to sex-segregated multiple-occupancy restrooms, locker rooms, and shower facilities consistent with a person's self-proclaimed "gender identity" is also both "contrary to law" and "arbitrary and capricious" within the meaning of the Administrative Procedure Act. Furthermore, the Department violated the APA and the due process rights of the Intervenors and the State by reaching its determination without any advance notice or opportunity to be heard.

50. For all these reasons, the Department's determination that North Carolina and its officials must grant access to sex-segregated multiple-occupancy restrooms, locker rooms, and shower facilities consistent with a person's self-proclaimed "gender identity" is both "contrary to law" and "arbitrary and capricious" within the meaning of the APA. Furthermore, the Department violated the APA and the due process rights of

the Intervenors and the State by reaching its determination without any advance notice or opportunity to be heard.

ANSWER TO COUNT II: TITLE IX CLAIM

51. Intervenors deny the allegations in the Department's Title IX claim contained in paragraph 55, which fail to state a claim on which relief can be granted.

52. For several reasons, the Department's determination that the Act facially violates Title IX is wrong as a matter of both law and proper procedure. This will be established in greater detail (with appropriate citations) in briefing on the merits. But following are a few of the salient reasons.

53. First, at the threshold, the Department's foundational premise that the Act discriminates against "transgender" persons is patently incorrect. On the face of the Act, a person's ability to use a particular multi-occupancy bathroom, locker room or shower facility depends, *not* on the person's gender identity, but on the person's "biological sex"—as determined by the person's birth certificate. *See* HB2 §§ 1.2, 1.3. Accordingly, the face of the Act refutes any notion that it discriminates on the basis of gender identity and, hence, against "transgender" persons. Moreover, although a "separate but equal" approach is clearly inappropriate with respect to racial classifications, separating the sexes based on legitimate physical and anatomical characteristics has always been viewed as consistent with Title IX and other non-discrimination statutes – especially in the context of bathrooms, locker rooms and showers.

54. This conclusion is particularly evident with respect to Title IX, which both by statute and regulation expressly authorizes the provision of facilities or programs segregated by sex, provided each is comparable for males and females. *See, e.g.,* 20 U.S.C. § 1686 (allowing educational institutions to "maintain[ ] separate living facilities for the different sexes"); 34 C.F.R. § 106.32 (allowing funding recipients to "provide separate housing on the basis of sex," provide those facilities are "[p]roportionate in quantity" and "comparable in quality and cost"); 34 C.F.R. § 106.34 (allowing "separation of students by sex" within physical education classes and certain sports "the purpose or major activity of which involves bodily contact"). Most pertinent here, longstanding Title IX regulations issued by the Department of Education in 1975, and reaffirmed in 1980, expressly allow recipients of federal funding to "provide separate toilet, locker room, and shower facilities on the basis of sex," provided that the facilities provided for "students of one sex" are "comparable" to the facilities provided for "students of the other sex." 34 C.F.R. § 106.33.

55. In light of that, the Department is plainly wrong to conclude that, by complying with the Act, the Intervenors are thereby "discriminating on the basis of sex" in contravention of Title IX. By requiring public multiple-occupancy bathrooms, locker rooms, and showers to be segregated by "biological" sex, the Act has done nothing remotely out of line with the clear statutory and regulatory directives in Title IX. To the contrary, the Act is *authorized* by the most directly applicable Title IX regulation, which

allows sex-segregated "toilet[s], locker room[s], and shower facilities." 34 C.F.R. § 106.33.

56. Second, and more fundamentally, the Department is incorrect in contending that Title IX's prohibition on discrimination on the basis of "sex" extends to discrimination on the basis of "gender identity." There is no indication in Title IX's language or legislative history of any purpose on Congress's part to reach alleged discrimination on the basis of gender identity. Furthermore, that view has been uniformly rejected by every federal circuit court to consider it, and by virtually all of the district courts as well. The court cases on which the Department apparently relies deal with sex and gender *stereotyping,* not gender identity or sexual orientation per se, and are therefore not controlling on the questions here.

57. Third, the Department cannot justify its erroneous reading of Title IX by relying on a recent Department of Education "opinion letter" suggesting that Title IX's prohibition on "sex" discrimination extends to discrimination based on "gender identity." *See* Letter from James A. Ferg-Cadima, Acting Deputy Assistant Secretary for Policy, Office for Civil Rights, U.S. Dep't of Education (Jan. 7, 2015). Even assuming the Fourth Circuit was correct in determining recently that a mere "opinion letter" merits deference, *see G.G. v. Gloucester County School Board*, 2016 U.S. App. LEXIS 7026 (4th Cir. Jan. 27, 2016), the Department nonetheless cannot prevail here because the opinion letter is plainly erroneous, inconsistent with Title IX and its regulations, and would render Title IX unconstitutional. *See id.*, 2016 U.S. App. LEXIS at 23 (explaining that agency

interpretation of Title IX regulation merits deference under *Auer v. Robbins*, 519 U.S. 452 (1997), unless interpretation is "plainly erroneous or inconsistent with the regulation or statute"); *id.* at 32 (observing that there was "no constitutional challenge to the regulation or agency interpretation").

58. The opinion letter's notion that "sex" discrimination encompasses "gender identity" discrimination is plainly erroneous and inconsistent with both Title IX and its implementing regulations. Among other things, it would render incoherent Title IX's longstanding and express allowance of sex-segregated facilities and programs. More fundamentally, the opinion letter's interpretation would render Title IX unconstitutional: as explained below, it would require States to violate persons' constitutional rights to bodily privacy and parents' constitutional rights to direct the education and upbringing of their children; it would violate the Spending Clause and the Tenth Amendment by conditioning States' receipt of federal funds on a novel requirement that no State could have reasonably foreseen; and it would violate the constitutional separation of powers by purporting to enact new legislation outside the constraints of Article I of the Constitution.

59. Moreover, *Gloucester* does not purport to decide the actual question posed by the Department's action—namely, whether Title IX *itself* is facially violated if a State limits public multiple-occupancy restrooms, changing facilities, and showers to persons of the same biological sex (while permitting a system for accommodating persons with conflicting gender identities through single-occupancy facilities). *Gloucester* did not reach that issue (and, indeed, had nothing to do with changing facilities or showers at all),

but decided only that a Department of Education opinion letter purporting to interpret an implementing regulation under Title IX merits *Auer* deference, absent a showing that the letter is plainly erroneous, inconsistent with Title IX, or unconstitutional. *Gloucester* remanded for further proceedings on the Title IX issue, leaving open the ultimate question of whether Title IX facially permits a State to require public multiple-occupancy restrooms, changing facilities, and showers to be segregated by biological sex (while permitting a system for accommodating persons with conflicting gender identities through single-occupancy facilities).

60. In addition, the Fourth Circuit's *Gloucester* opinion is incorrect. An agency can impose new obligations or prohibitions on regulated parties only through notice-and-comment rulemaking—not through a unilateral "opinion letter." Thus, the Department cannot rely on the "opinion letter" to re-cast Title IX's prohibition on "sex" discrimination as a prohibition on "gender identity" discrimination. Instead, the Department can only rely on the plain meaning of Title IX and its implementing regulations, which for decades have unambiguously permitted sex-segregated restrooms, changing rooms, and shower facilities.

61. Fourth, the federal government lacks the constitutional authority to deploy the Department's novel reading of Title IX to preempt the States' efforts to protect the privacy and safety of residents using public bathroom, locker room and shower facilities. Indeed, the Department's reading of Title IX would *compel* States to violate persons' constitutional rights to bodily privacy and parents' constitutional rights to direct the

education and upbringing of their children with respect to matters of sexuality. The Department's reading of Title IX would therefore infringe the States' Tenth Amendment authority to provide for their citizens' privacy and well-being, and would additionally constitute an unconstitutional commandeering of state property and lawmaking processes. For those reasons, too, Title IX cannot constitutionally be construed in the manner the Department contends.

62. Fifth, the Department's novel reading of Title IX to encompass "gender identity" discrimination would make Title IX run afoul of the Spending Clause and the Tenth Amendment. The conditions the federal government attaches to the States' receipt of federal funds must be clear and unambiguous, so that States may make an informed choice about whether to accept the funds. No State could have reasonably foreseen that a condition on accepting federal funds prohibiting "sex" discrimination would somehow evolve through unilateral agency action into a prohibition on "gender identity" discrimination—particularly when Title IX's longstanding regulations expressly allow States to maintain sex-segregated restrooms, locker rooms, and shower facilities. Furthermore, by exposing the State to a potentially catastrophic loss of federal funding if the State did not acquiesce in the agency's novel reading of Title IX, the Department would violate the Tenth Amendment.

63. Finally, even if the Act could hypothetically violate Title IX (properly construed) in *some* of its possible applications, it cannot possibly be unlawful under Title IX in all of its possible applications, and for that reason cannot be facially unlawful. For

example, even under the Department's interpretation of Title IX, the Act would be lawful when applied to prevent a known male sexual predator from falsely claiming to "identify" as female so that he can enter a women's bathroom and prey upon a little girl whom he has seen enter alone. Surely the Department's interpretation of Title IX would not require that people making knowingly false claims of gender identity (and claims that are known to authorities to be false) be allowed to enter a bathroom or shower designated for people of the opposite gender. Because the Act prevents entry into facilities designated for people of the opposite sex by those making knowingly false claims of gender identity in addition to those making genuine claims of gender identity, the Act clearly is not unlawful in *all* of its applications, even under the Department's interpretation of Title IX, and therefore is not unlawful on its face.

AFFIRMATIVE DEFENSE: UNCONSTITUTIONALITY OF DOJ'S STATUTORY INTERPRETATION

64. For the same reasons as explained with respect to Title VII above, the DOJ's interpretation of Title IX is unconstitutional.

65. Relatedly, the Constitution's federalism guarantees constrain the federal government's ability to place conditions on the States' receipt of federal funds through legislation under the Spending Clause of Article I. The federal government must make its conditions on receipt of federal funds clear and unambiguous, so that States may make an informed decision about whether to accept the funds and the resulting diminution in their sovereign authority. Furthermore, the federal government may not attach conditions to

the receipt or retention of federal funding that effective coerce the States into accepting the conditions.

66. Based on those settled principles, the Department's attempt to impose novel and unforeseeable interpretation of Title IX on North Carolina constitutes a violation of the Spending Clause and the Tenth Amendment. When North Carolina officials and agencies accepted the conditions originally attached to federal funding under those statutes, they could not have foreseen the radical change in those conditions represented by the Department's recent determination letters. Furthermore, by deeming North Carolina in violation of its novel reinterpretation of Title IX and VAWA, the Department has attempted to coerce North Carolina into complying with the Department's illegal demand, in violation of the Tenth Amendment.

AFFIRMATIVE DEFENSE: VIOLATION OF THE APA

67. For all these reasons, the Department's determination that North Carolina and its officials must grant access to sex-segregated multiple-occupancy restrooms, locker rooms, and shower facilities consistent with a person's self-professed "gender identity" is also both "contrary to law" and "arbitrary and capricious" within the meaning of the Administrative Procedure Act. Furthermore, the Department violated the APA and the due process rights of the Intervenors and the State by reaching its determination without any advance notice or opportunity to be heard.

ANSWER TO COUNT III: VIOLENCE AGAINST WOMEN ACT CLAIM

68. Intervenors deny the allegations in the Department's Violence Against Women Act claim contained in paragraph 56, which fail to state a claim on which relief can be granted.

69. For several reasons, the Department's assertion that the Act facially violates VAWA is wrong as a matter of both law and proper procedure. This will be established in greater detail (with appropriate citations) in briefing on the merits. But following are a few of the salient reasons.

70. First, at the threshold, the Department's premise that the Act "discriminates" on the basis of "gender identity" is patently incorrect. On the face of the Act, a person's ability to use a particular multi-occupancy bathroom, locker room or shower facility depends, *not* on the person's gender identity, but on the person's "biological sex"—as determined by the person's birth certificate. *See* HB2 §§ 1.2, 1.3. Moreover, although a "separate but equal" approach is clearly inappropriate with respect to racial classifications, separating the sexes based on legitimate physical and anatomical characteristics has always been viewed as consistent with VAWA and other non-discrimination statutes – especially in the context of bathrooms, locker rooms and showers.

71. Second, VAWA itself dispels any notion that the Act facially violates VAWA's grant conditions. VAWA explicitly allows funding recipients to consider an individual's sex in establishing sex-segregated or sex-specific programming. While

VAWA does prohibit discrimination in funded programs on the basis of "sex" and "gender identity," 42 U.S.C. § 13925(b)(13)(A), the statute contains an "exception" that allows funded programs to consider an individual's sex "[i]f sex-segregation or sex-specific programming is necessary to the essential operation of a program." *Id.* § 13925(b)(13)(B). A program grantee satisfies VAWA requirements in such cases "by providing comparable services to individuals who cannot be provided with the sex-segregated or sex-specific programming." *Id.*

72. In light of VAWA's explicit safe-harbor for sex-segregated and sex-specific programs, the Department is plainly wrong to assert that, by complying with the Act, defendants are "in violation of VAWA" By requiring public multiple-occupancy bathrooms, locker rooms, and showers in North Carolina correctional facilities or universities to be segregated by "biological" sex, the Act has done nothing remotely out of line with the clear grant conditions in VAWA. To the contrary, the Act is *authorized* by the most directly applicable VAWA grant condition, which allows grantees to consider an individual's sex where, as here, "sex segregation or sex-specific programming is necessary to the essential operation of a program." *Id.* For reasons explained elsewhere, and as a matter of common sense, sex segregation in multi-user bathrooms, locker rooms and shower facilities is "necessary to the essential operation" of such facilities.

73. Third, the fact that the alleged VAWA violation in this case includes North Carolina prison inmates make the Department's conclusion astonishing. Thus, by the

plain terms of its allegations, the Department has concluded that any North Carolina correctional facility receiving any VAWA funding must allow prison inmates to access restrooms and changing facilities (as well as showers, which the Department fails to mention) consistent with their "gender identity" or else be deemed in violation of VAWA.

74. There is no authority to support the Department's reading of VAWA's grant condition, and for good reason—the consequences of the Department's position would fly in the face of every sensible notion of prison management, security, and safety. North Carolina correctional facilities would be required to allow any biologically male prison inmate whose *self-expressed* "gender identity" is female to use communal bathrooms, changing facilities, and showers with biologically female prison inmates—and vice-versa. The mere statement of that conclusion is sufficient to refute it.

75. Fourth, the Department's assertion that North Carolina correctional facilities violate VAWA by refusing to allow "gender identity" to determine inmate use of communal restrooms, changing facilities, and showers contradicts the Department's own prison regulations. In regulations entitled "Prison Rape Elimination Act National Standards," the Department requires that, in deciding whether to assign "a transgender or intersex inmate" to a male or female prison facility, or in making other "housing and programming assignments" for such inmates, the agency "shall consider *on a case-by-case basis* whether a placement would ensure the inmate's health and safety, and whether the placement would present management or security problems." 28 C.F.R. § 115.42(c)

(emphasis added). Furthermore, the Department's regulations also require that "[t]ransgender and intersex inmates shall be given the opportunity to shower *separately* from other inmates." *Id.* § 115.42(f) (emphasis added). Neither of those regulations would survive the Department's current view of VAWA, as expressed in its allegations in this action, which would now require inmates to be allowed access restrooms, changing facilities, and showers consistent with their self-professed "gender identity," quite apart from any case-by-case assessment of whether such access would impact prison security or imperil the inmate's safety.

76. Fifth, if the Department's conclusion regarding VAWA were correct, then VAWA would be unconstitutional on numerous grounds. It would violate the Tenth Amendment by invading the State's basic constitutional authority to provide for order and safety in its correctional facilities and in its universities. It would violate the Spending Clause by placing a condition on the receipt of federal funds that no State could have remotely anticipated when receiving the funds—especially in light of the Department's own regulations. For similar reasons, the Department's new position would violate the Tenth Amendment by coercing North Carolina to alter the basic structure of its correctional facilities and universities or else lose large amounts of federal funding. It would also require North Carolina to violate its own citizens' constitutional rights to bodily privacy and safety and expose prisoners to dangerous conditions in violation of the Eighth Amendment.

77. Finally, even if the Act could hypothetically violate VAWA (properly construed) in *some* of its possible applications, it cannot possibly be unlawful in all of its possible applications, and for that reason cannot be facially unlawful. For example, even under the Department's interpretation of VAWA, the Act would be lawful when applied to prevent biologically male prisoner from falsely claiming to "identify" as female so that he can enter a communal bathroom, changing facility, or shower in order to victimize biologically female prisoners. Surely the Department's interpretation of VAWA would not require that people making knowingly false claims of gender identity (and claims that are known to authorities to be false) be allowed to enter a bathroom or shower designated for people of the opposite sex. Because the Act prevents entry into facilities designated for people of the opposite sex by those making knowingly false claims of gender identity in addition to those making genuine claims of gender identity, the Act clearly is not unlawful in *all* of its applications, even under the Department's apparent view of VAWA, and therefore is not unlawful on its face.

AFFIRMATIVE DEFENSE: UNCONSTITUTIONALITY OF DOJ'S STATUTORY INTERPRETATION

78. For the same reasons as explained with respect to Title VII and Title IX above, the DOJ's interpretation of VAWA is unconstitutional.

AFFIRMATIVE DEFENSE: VIOLATION OF THE APA

79. For all these reasons, the Department's determination that North Carolina and its officials must grant access to sex-segregated multiple-occupancy restrooms, locker rooms, and shower facilities consistent with a person's self-professed "gender

identity" is also both "contrary to law" and "arbitrary and capricious" within the meaning of the Administrative Procedure Act. Furthermore, the Department violated the APA and the due process rights of the Intervenors and the State by reaching its determination without any advance notice or opportunity to be heard.

COUNTER-CLAIMS

ADDITIONAL FACTUAL ALLEGATIONS PERTINENT TO INTERVENORS' COUNTERCLAIMS

80. Intervenors reallege all matters alleged in paragraphs 1 through 79 and incorporate them herein.

81. As relevant here, the Act requires that a "multiple occupancy restroom or changing facility" operated by any "public agency" in North Carolina be "designated for and only used by persons based on their biological sex." HB2, § 1.3(B). "Biological sex" is defined as "[t]he physical condition of being male or female, which is stated on a person's birth certificate." *Id.* § 1.3(A)(1). A "multiple occupancy restroom or changing facility" is defined as "[a] facility designed or designated to be used by more than one person at a time where persons may be in various states of undress in the presence of other persons" and "may include, but is not limited to, a restroom, locker room, changing room, or shower room." *Id.* § 1.3(A)(3). A "public agency" includes executive branch agencies; the legislative and judicial branches; political subdivisions; local and municipal governments; all state agencies, boards, offices and departments under the direction and control of a member of the council of state; and local boards of education. *Id.* § 1.3(4)(A)-(H); § 1.2.

82. The Act, however, does not apply to any "single occupancy bathroom or changing facility," which is defined as "[a] facility designed or designated to be used by only one person at a time where persons may be in various states of undress," and includes "a single stall restroom designated as unisex or for use based on biological sex." *Id.* § 1.3(A)(5); § 1.2(A)(3).

83. In fact, the Act expressly allows public agencies to "provid[e] accommodations such as single occupancy bathroom or changing facilities upon a person's request due to special circumstances[.]" *Id.* § 1.3(C); *see also id.* § 1.2(C) (providing that "[n]othing in this section shall prohibit local boards of education from providing accommodations such as single occupancy bathrooms or changing facilities or controlled use of faulty facilities upon a request due to special circumstances").

84. On April 12, 2016, Governor McCrory issued Executive Order No. 93, entitled "To Protect Privacy and Equality." Among other things, the Order (1) affirmed that "private businesses can set their own rules for their own restroom, locker room and shower facilities"; (2) confirmed that multiple-occupancy restroom, locker rooms, and shower facilities in cabinet agencies must comply with the Act; but (3) emphasized that "all cabinet agencies shall provide a reasonable accommodation of a single occupancy restroom, locker room or shower facility upon request due to special circumstances," and encouraged all "council of state agencies, cities, counties, the University of North Carolina System and the North Carolina Community College System" to make similar accommodations where practicable.

85. Prior to this suit's commencement, defendants received letters threatening this suit unless they voluntarily complied with the demands to change their bathroom policies to match the Department's view of what Title VII, Title IX, and VAWA require. The letters contained numerous legal conclusions, many of which were repeated in the complaint here. In particular, the letters claimed that the Supreme Court's holding that discrimination on the basis of sex includes discrimination on sex stereotypes necessarily implies that discrimination on the basis of gender identity is illegal under Title VII and Title IX.

86. The Department's assertions that the Act facially violates Title VII, Title IX, and VAWA place Intervenors and the State of North Carolina in an intolerable position that threatens to disrupt the integrity of its public agencies, the financial stability of its universities and school systems, and, most profoundly, the ability of its public officials to provide for the common good of North Carolina citizens.

87. On the one hand, if Intervenors and other legislators in the North Carolina General Assembly and the State's public agencies and officials resist the Department's demands and continue implementing the will of the citizenry as expressed in the Act, the State's school systems could lose hundreds of millions of dollars of federal education funds. Such a loss would not only impair the teaching and research mission of UNC, but would also affect K-12 education throughout the State. Local schools would likely be forced to curtail programs, fire teachers and increase class sizes—all to the detriment of the State's hundreds of thousands of schoolchildren. All this because the federal

government, if the Department carries out its threat, would refuse to return to the people of North Carolina federal tax dollars that those very people have paid into the federal treasury.

88. Similarly, the Department's demands carry a threat to cut off over $100 million in annual federal funding currently provided to the State's Department of Public Safety. Here again, these are funds that North Carolina citizens have already paid into the federal treasury in the form of tax payments. Yet the Department's Determination Letters implicitly threaten to withhold those funds—which could lead to more crowding of North Carolina's prisons, reduced numbers of prisons guards, and thus an increased risk of crime both inside and outside those prisons.

89. On the other hand, if Intervenors and other legislators in the North Carolina General Assembly, or any of the State's public agencies and officials, capitulate to the Department's demands, this would subject the people of North Carolina to the very risks the Act was designed to prevent. As previously explained, the Department demands that the State allow *anyone* to use *any* public bathroom, locker room or shower based solely on that person's self-declared gender "identity." Such a policy would necessarily lead to partially or fully unclothed women and girls coming into close proximity and visual contact with individuals who, whatever their gender identity, nonetheless display male sex organs.

90. Such a policy would also create an opportunity for sexual predators of any sexual orientation to abuse the policy to facilitate their predation. And in so doing, such a

policy would violate settled, legitimate expectations of privacy and safety that have long prevailed in the State. Indeed, under the Department's legal theory, a biological male found in a woman's restroom has a legal right to be there if he merely *claims* to "self-identify" as female. And a police officer summoned to remove such a person in a public restroom, locker room, or shower would have no practical way to determine quickly whether the person is acting in bad faith.

91. Before long, moreover, such a policy would likely provoke a public outcry demanding that single-sex facilities be abandoned altogether and replaced with single-user bathroom, shower and locker facilities. That in turn would likely force the Intervenors and other members of the General Assembly to authorize funding to retrofit countless public buildings, at a taxpayer cost of hundreds of millions if not billions of dollars.

92. In the prison setting, the consequences of capitulation to the Department's demands would be equally if not more stark. The Department's demand with respect to prisons is not limited to prison employees, but extends to inmates as well. If, as the Department apparently insists, prison officials cannot "discriminate" based on anatomy in granting access to bath, locker and shower facilities, then they cannot, for example, exclude biological males from female bath and shower facilities. And that inability would create an obvious risk of more sexual assaults and increased voluntary sexual activity—thereby leading to more prison pregnancies and sexually transmitted diseases. These effects would likewise impose massive additional costs on the State's prison

system—costs that would require further action by Intervenors and other members of the General Assembly.

93. Nor would the effects of a capitulation be limited to *publicly* owned bath, locker-room and shower facilities. If as the Department contends, Title VII requires that anyone be allowed to use any such facility based on their asserted sexual orientation, that rule necessarily applies to private as well as public employers and, indeed, businesses generally. There is only one Title VII standard. And if the Department succeeds in imposing its view of Title VII on the State itself, it will be only a short step to imposing that view on virtually every owner of bath, locker and shower facilities throughout the State and, indeed, throughout the Nation.

94. Because this suit relies on a view of sex and gender inconsistent with North Carolina's history and tradition, implementation of that view would require extensive changes to North Carolina law on a variety of subjects, including state employment law, fair housing law, family law and many others. These are all matters within Intervenors' responsibility as leaders of the General Assembly. And no one is as well situated to explain and elaborate these issues as the Court wrestles with the Department's proposed brave new world.

95. In all these ways, if North Carolina and its public agencies and officials, including Intervenors, were to capitulate to the Department's demands, they would violate the trust of the North Carolina citizenry to protect their privacy and safety.

COUNTER-CLAIM ONE: TITLE VII

96. Intervenors reallege all matters alleged in paragraphs 1 through 95 and incorporate them herein. For all of the reasons explained there, among others, the Department's determination that the Act facially violates Title VII is wrong as a matter of both law and proper procedure. Alternatively, under the Department's interpretation, Title VII violates the federal Constitution. Alternatively, the Department's decision to impose that interpretation on North Carolina and other states violates the APA.

97. Intervenors are entitled to a declaratory judgment establishing each of these points.

COUNTER-CLAIM TWO: TITLE IX

98. Intervenors reallege all matters alleged in paragraphs 1 through 97 and incorporate them herein. For all of the reasons explained there, among others, the Department's determination that the Act facially violates Title IX is wrong as a matter of both law and proper procedure. Alternatively, under the Department's interpretation, Title IX violates the federal Constitution. Alternatively, the Department's decision to impose that interpretation on North Carolina and other states violates the APA.

99. Intervenors are entitled to a declaratory judgment establishing each of these points.

COUNTER-CLAIM THREE: VAWA

100. Intervenors reallege all matters alleged in paragraphs 1 through 99 and incorporate them herein. For all of the reasons explained there, among others, the

Department's determination that the Act facially violates VAWA is wrong as a matter of both law and proper procedure. Alternatively, under the Department's interpretation, Title VII violates the federal Constitution. Alternatively, the Department's decision to impose that interpretation on North Carolina and other states violates the APA.

101. Intervenors are entitled to a declaratory judgment establishing each of these points.

COUNTER-CLAIM FOUR: APA VIOLATION

102. Intervenors reallege all matters alleged in paragraphs 1 through 101 and incorporate them herein. For all of the reasons explained there, among others, the Department's decision to impose on North Carolina and its people the requirement that individuals be allowed access to publicly owned bathrooms on the basis of their subjective gender identity rather than on the basis of their objective biology violates the APA.

103. Intervenors are entitled to a declaratory judgment establishing each of these points.

COUNTER-CLAIM FIVE: SEPARATION OF POWERS VIOLATION

104. Intervenors reallege all matters alleged in paragraphs 1 through 103 and incorporate them herein.

105. Multiple provisions of the federal Constitution make clear that, if the federal government is to impose new legal requirements on the States, those requirements must be imposed by or at the behest of Congress, not by the Executive Branch acting on

its own. Those provisions include but are not limited to the "vesting" clause of Article I Section 1, the bicameralism and presentment clauses of Article I Section 7, the "take care" clause of Article II Section 3, and the "appropriate legislation" provision of Section 5 of the Fourteenth Amendment.

106. The requirement that the Department's determination seeks to impose upon North Carolina—i.e., a requirement of open "access" to all state-owned "sex-segregated … facilities consistent with gender identity" (McCrory Determination Letter at 1)—is a new legal requirement. For reasons explained above, that requirement—which would logically extend to every other State and virtually all private employers as well—is simply not found in Title VII, Title IX or VAWA. The Department's attempt to impose that requirement on North Carolina on its own is therefore a usurpation of Congress's exclusive authority under Article I of the Constitution, which provides that "all legislative powers herein granted shall be vested in … Congress." Such action is also a violation of the President's obligation under Article II Section 3 to "take care that the laws be *faithfully* executed."

107. For all these reasons, the Department's determination that North Carolina and its officials must grant "access to sex-segregated restrooms and other [similar] facilities consistent with gender *identity*" is also both "contrary to law" and "arbitrary and capricious" within the meaning of the APA. Furthermore, the Department violated the APA and the due process rights of the Intervenors and the State by reaching its determination without any advance notice or opportunity to be heard.

108. Intervenors are entitled to a declaratory judgment establishing each of these points.

COUNTER-CLAIM SIX: FEDERALISM VIOLATION

109. Intervenors reallege all matters alleged in paragraphs 1 through 108 and incorporate them herein.

110. Several provisions of the federal Constitution also make clear that the States remain independent sovereigns in the federal system, that they joined the Union with their sovereignty—including their traditional police power—intact, and that the federal government is one of limited, enumerated powers. Those provisions include but are not limited to Article I section 8, and section 1 of the Thirteenth, Fourteenth and Fifteenth Amendments—all of which together delineate specific and limited subjects on which Congress may legislate—and the Tenth Amendment, which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Aside from racial discrimination, none of those provisions authorizes any arm of the federal government to impose requirements for "access" to state-owned bathrooms, locker rooms or shower facilities, much less authorizes the federal government to regulate the manner in which the states seek to protect the privacy and safety of those using such state-owned facilities. Certainly nothing in the Constitution authorizes any arm of the federal government to impose regulations governing access to such facilities on the basis of "gender identity"—

a concept unknown to those who wrote and ratified the relevant provisions of the federal Constitution.

111. The Act, by contrast, seeks to vindicate the right to sexual and reproductive privacy protected by the Fifth and Fourteenth Amendments, as well as the right of parents to direct the upbringing of their children, also protected by the Fifth and Fourteenth Amendments. And the Act does so in a manner that is well within the States' traditional police power.

112. Because the federal government lacks the constitutional authority to regulate North Carolina's (and the other States') efforts to protect the privacy and safety of those who use state-owned bath, locker room and shower facilities, the Department's attempt to impose the "access" requirement at issue here represents a usurpation of the States' authority over such facilities.

113. Relatedly, the Constitution's federalism guarantees constrain the federal government's ability to place conditions on the States' receipt of federal funds through legislation under the Spending Clause of Article I. The federal government must make its conditions on receipt of federal funds clear and unambiguous, so that States may make an informed decision about whether to accept the funds and the resulting diminution in their sovereign authority. Furthermore, the federal government may not attach conditions to the receipt or retention of federal funding that effective coerce the States into accepting the conditions.

114. Based on those settled principles, the Department's attempt to impose novel and unforeseeable interpretations of Title IX and VAWA on North Carolina constitutes a violation of the Spending Clause and the Tenth Amendment. When North Carolina officials and agencies accepted the conditions originally attached to federal funding under those statutes, they could not have foreseen the radical change in those conditions represented by the Department's recent determination letters. Furthermore, by deeming North Carolina in violation of its novel reinterpretation of Title IX and VAWA, the Department has attempted to coerce North Carolina into complying with the Department's illegal demand, in violation of the Tenth Amendment.

115. For all these reasons, the Department's determination that North Carolina and its officials must grant access to sex-segregated multiple-occupancy restrooms, locker rooms, and shower facilities consistent with a person's self-professed "gender identity" is also both "contrary to law" and "arbitrary and capricious" within the meaning of the APA. Furthermore, the Department violated the APA and the due process rights of the Intervenors and the State by reaching its determination without any advance notice or opportunity to be heard.

116. Intervenors are entitled to a declaratory judgment establishing each of these points.

PRAYER FOR RELIEF

For the foregoing reasons, Intervenors request that the Court dismiss the Department's claims. Intervenors further request that the Court enter a final judgment in Intervenors' favor declaring Intervenors' rights as follows:

a) A final judgment declaring that the Act does not facially violate Title VII;

b) A final judgment declaring that the Act does not facially violate Title IX;

c) A final judgment declaring that the Act does not facially violate VAWA;

d) A final judgment declaring that the Department's attempt to enforce its erroneous interpretation of those federal statutes against North Carolina violates section 706 of the Administrative Procedure Act;

e) A final judgment declaring that the Department's attempt to enforce its erroneous interpretation of those federal statutes against North Carolina violates the separation of powers required by the United States Constitution;

f) A final judgment declaring that the Department's attempt to enforce its erroneous interpretation of those federal statutes against North Carolina violates the Tenth Amendment to and other federalism provisions in the United States Constitution;

g) An award of attorneys' fees and costs; and

h) Any other relief to which Intervenors are entitled.

REQUEST FOR JURY TRIAL

Intervenors hereby request a trial by jury in this matter.

Respectfully submitted,

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June 30, 2016

CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2016, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

/s/ S. Kyle Duncan
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