UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

JOAQUÍN CARCAÑO, *et al.*, *Plaintiffs*, v. ROY A. COOPER, III, *et al.*, *Defendants*, and PHIL BERGER, *et al.*, *Intervenor-Defendants.*	No. 1:16-cv-00236-TDS-JEP

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' AND EXECUTIVE BRANCH DEFENDANTS' JOINT MOTION FOR ENTRY OF A CONSENT DECREE

Plaintiffs Joaquín Carcaño, Payton Grey McGarry, Hunter Schafer, Quinton Harper, Angela Gilmore, Madeline Goss, and American Civil Liberties Union of North Carolina (collectively, "Plaintiffs"), respectfully submit the following memorandum of law in support of the joint motion for entry of a consent decree submitted by Plaintiffs and Defendants Roy A. Cooper III, Joshua Stein, Machelle Sanders, Mandy K. Cohen, and James H. Trogdon III (collectively, "Executive Branch Defendants") (collectively referred to herein as "the Parties").

PERTINENT FACTUAL BACKGROUND

On March 28, 2016, Plaintiffs Joaquín Carcaño, Payton Grey McGarry, Angela Gilmore, American Civil Liberties Union of North Carolina, and Equality North Carolina initiated this action. Until recently, this action challenged North Carolina House Bill 2 ("H.B. 2"), a North Carolina statute mandating that school boards and executive branch agencies require that all multiple occupancy bathroom or changing facilities be designed for and used only by persons based on their "biological sex"—which H.B. 2 defined as the sex stated on a person's birth certificate. Plaintiffs challenged that law on multiple grounds, alleging that H.B. 2 deprived them of equal access to government facilities in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment, Title IX of the Education Amendments of 1972, and Title VII of the Civil Rights Act of 1964. *See, e.g.*, Compl., ECF No. 1; Third Am. Compl., ECF No. 183. This Court previously granted Plaintiffs' motion for a preliminary injunction in part, and enjoined H.B. 2 as violating Title IX.[1] *See Carcaño v. McCrory*, 203 F. Supp. 3d 615 (M.D.N.C. 2016).

On March 30, 2017, H.B. 2 was repealed by and replaced with North Carolina House Bill 142 ("H.B. 142"). H.B. 142 was not a clean repeal of H.B. 2, however. While H.B. 142 rescinded provisions of H.B. 2 limiting transgender individuals' use of

[1] The Court relied extensively on the Fourth Circuit's decision in *G.G. v. Gloucester County School Board*, which has since been vacated by the Supreme Court in light of the Department of Education's rescission of previously issued guidance concerning the scope and interpretation of Title IX, upon which the Fourth Circuit had relied. This case was stayed pending the Supreme Court's consideration of *G.G.*, and this Court has since vacated the preliminary injunction in light of the Supreme Court's action.

multiple occupancy bathroom or changing facilities, it simultaneously added a provision to state law withdrawing the authority of state agencies, institutions, branches of government, and political subdivisions to regulate access to multiple occupancy restrooms, showers, or changing facilities (hereinafter referred to as "public facilities"). Specifically, Section 2 of H.B. 142 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.

N.C. Sess. Laws 2017-4, § 2, (March 30, 2017) (codified at N.C. Gen. Stat. § 143-760).[2]

Yet, no current "act of the General Assembly" explicitly regulates access to multiple occupancy restrooms, showers, or changing facilities. The intentional lack of clear state law on the subject of whether, under H.B. 142, transgender individuals can access public facilities in public buildings has made transgender individuals uniquely vulnerable to persistent fear, uncertainty, and discrimination.

In fact, several lawmakers have stated in the press and through social media that H.B. 142 has retained H.B. 2's ban on transgender individuals using restrooms and multiple occupancy facilities in accordance with their gender identity. *See* Fourth

[2] Section 3 of H.B. 142 also reenacted a ban on local government anti-discrimination ordinances, which had been a part of H.B. 2, and Section 4 provides that the ban will remain in place until December 1, 2020. *See* N.C. Sess. Laws 2017-4, §§ 3-4. Plaintiffs' Fourth Amended Complaint also challenges Sections 3 and 4 of H.B. 142 under the Equal Protection Clause. If approved, under the terms of the proposed consent decree Plaintiffs agree to dismiss their challenges to Sections 3 and 4.

Amended Complaint ¶ 246, ECF No. 210 ("FAC"). And lawmakers did more than simply read H.B. 142 as retaining H.B. 2's restroom ban: many emphasized the criminal consequences that would follow if a transgender individual used a multiple occupancy facility consistent with his or her gender identity. In contrast to these statements, however, Governor Cooper has agreed in this litigation that, as a result of the replacement of H.B. 2, "there is no state law barring the use of multiple occupancy bathroom facilities in accordance with gender identity." Stipulation of Voluntary Dismissal at 3, *Carcaño v. Cooper*, No. 16-1989 (4th Cir. Apr. 20, 2017), ECF No. 114.

On September 7, 2017, Plaintiffs filed a Fourth Amended Complaint, seeking declaratory and injunctive relief and nominal damages, alleging that H.B. 142 violates the Due Process and Equal Protection Clauses of the United States Constitution, as well as Title IX and Title VII. In the event that the Court finds one or more provisions of H.B. 142 unlawful and that H.B. 142's repeal of H.B. 2 is not severable from H.B. 142's unlawful provisions, Plaintiffs also continue to allege that H.B. 2 violates constitutional and federal statutory law.[3] Specific to Section 2 of H.B. 142, Plaintiffs allege that Section 2 is void as unconstitutionally vague, violates substantive due process, discriminates against Plaintiffs based on sex and transgender status in violation of the Equal Protection Clause, and violates the bans on sex discrimination codified in Title IX and Title VII. The inherent lack of clarity in H.B. 142, coupled with statements by elected officials indicating that transgender individuals will be subject to criminal

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

prosecution when using the "wrong" public facility, deter transgender individuals from using public facilities that match their gender identity. Transgender individuals fear using the restroom that does not match their gender identity; if a transgender man were to use the women's restroom, for example, he would also fear arrest in those circumstances, because he is likely to be generally perceived by others to be a non-transgender man. The law therefore operates to deter transgender individuals from using public facilities altogether.

Since Plaintiffs filed their Fourth Amended Complaint, the Parties have engaged in good faith discussions concerning a potential settlement of this action. The proposed consent decree and the joint motion represent the culmination of those discussions.

TERMS OF THE PROPOSED CONSENT DECREE

The proposed consent decree would order, adjudge and decree that:

> 1. Under H.B. 142, and with respect to public facilities that are subject to Executive Branch Defendants' control or supervision, transgender people are not prevented from the use of public facilities in accordance with their gender identity. The Executive Branch Defendants as used in this paragraph shall include their successors, officers, and employees. This Order does not preclude any of the Parties from challenging or acting in accordance with future legislation.
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> 2. The Executive Branch Defendants, in their official capacities, and all successors, officers, and employees are hereby permanently enjoined from enforcing Section 2 of H.B. 142 to bar, prohibit, block, deter, or impede any transgender individuals from using public facilities under any Executive Branch Defendant's control or supervision, in accordance with the transgender individual's gender identity. Under the authority granted by the General Statutes existing as of October 18, 2017, and notwithstanding N.C.G.S. § 114-11.6, the Executive Branch Defendants are enjoined from prosecuting an individual who uses public facilities under the control or supervision of the Executive Branch, when such use conforms with the individual's gender identity, and is otherwise lawful.

See Consent Judgment and Decree at 5.

No North Carolina state law expressly bars the use of multiple occupancy restroom facilities in accordance with an individual's gender identity. The Parties agree that, in order to avoid serious constitutional and statutory concerns, Section 2 of H.B. 142 must be interpreted as set forth in the proposed consent decree. *See id.* ¶ 10. The Parties similarly agree that any alternative interpretation of Section 2 that bars, prohibits, blocks, deters, or impedes transgender people from using public facilities in accordance with their gender identity or subjects transgender people to arrest, prosecution, or criminal sanctions for doing so raises serious federal law concerns. *See id.* ¶ 11.

Accordingly, the consent decree would resolve Plaintiffs' claims against the Executive Branch Defendants concerning Section 2 of H.B. 142 in this action by entering—with the agreement of the Parties and the Court—a clearly constitutional interpretation of Section 2, and avoiding an alternative interpretation that would pose serious constitutional and federal law concerns. Plaintiffs agree to dismiss their remaining claims against the Executive Branch Defendants, and the consent decree provides that the Parties to the decree shall bear their own fees, expenses, and costs, including attorneys' fees.

ARGUMENT

I. Legal Standard for Entry of a Consent Decree.

A consent decree "has elements of both judgment and contract" and "is subject to judicial approval and oversight generally not present in other private settlements."

Szaller v. Am. Nat'l Red Cross, 293 F.3d 148, 152 (4th Cir. 2002) (internal quotation marks and citation omitted). Thus, before approving entry of a consent decree, the district court has a duty to "satisfy itself that the agreement 'is fair, adequate, and reasonable' and 'is not illegal, a product of collusion, or against the public interest.'" *United States v. North Carolina*, 180 F.3d 574, 581 (4th Cir. 1999) (quoting *United States v. Colorado*, 937 F.2d 505, 509 (10th Cir. 1991)). Put otherwise, "[d]istrict courts should approve consent decrees so long as they are not unconstitutional, unlawful, unreasonable, or contrary to public policy." *Stovall v. City of Cocoa*, 117 F.3d 1238, 1240 (11th Cir. 1997). "[I]n considering whether to enter a proposed consent decree, a district court should be guided by the general principle that settlements are encouraged." *North Carolina*, 180 F.3d at 581.

To assess the consent decree's fairness, adequacy, and reasonableness, the Court must consider "the strength of the plaintiff's case." *Id.* Because that determination is made before trial, however, the district court is "not require[d] … to conduct 'a trial or a rehearsal of the trial.'" *Id.* (quoting *Flinn v. FMC Corp.*, 528 F.2d 1169, 1172-73 (4th Cir. 1975)). Indeed, "it is precisely the desire to avoid a protracted examination of the parties' legal rights that underlies entry of consent decrees." *Bragg v. Robertson*, 83 F. Supp. 2d 713, 717 (S.D.W. Va. 2000), *aff'd sub nom. Bragg v. W. Va. Coal Ass'n*, 248 F.3d 275 (4th Cir. 2001). As a result, the district court need only "judge the fairness of a proposed compromise by weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement." *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981). The court can avoid "decid[ing] the merits of

the case or resolv[ing] unsettled legal questions." *Id.*; *see Citizens for a Better Env't v. Gorsuch*, 718 F.2d 1117, 1126 (D.C. Cir. 1983) (affirming entry of consent decree and explaining that "[t]he court's duty … is fundamentally different from its duty in trying a case on the merits"); *United States v. City of Jackson*, 519 F.2d 1147, 1151 (5th Cir. 1975) ("Although the court must approve a consent decree, in so doing it does not inquire into the precise legal rights of the respective parties, but only assures itself that there has been valid consent by the concerned parties and that the terms of the decree are not unlawful, unreasonable, or inequitable.").

A court should also give significant weight to the public benefits that flow from early settlement. "Both the parties and the general public benefit from the saving of time and money that results from the voluntary settlement of litigation." *Bragg*, 83 F. Supp. 2d at 717. Finally, the court should consider "the extent of discovery that has taken place, the stage of the proceedings, the want of collusion in the settlement and the experience of plaintiffs' counsel who negotiated the settlement." *North Carolina*, 180 F.3d at 581 (internal quotation marks omitted).

II. The Proposed Consent Decree is Fair, Adequate, and Reasonable.

Weighing Plaintiffs' likelihood of success on the merits against the form and scope of relief offered in the consent decree, Plaintiffs and the Executive Branch Defendants agree that the proposed consent decree is fair, adequate, reasonable, and in the public interest.

The proposed consent decree is in the public interest because it provides clarity for transgender people who live in or visit North Carolina, and benefits the citizens of North

Carolina, generally, by preventing the continued and unnecessary use of public resources to litigate this case. By adopting a constitutional interpretation of the statute, the proposed consent decree also avoids the necessity of this Court striking down an enactment by the state's legislature. The scope of this relief is fair and adequate in light of the serious federal law concerns Plaintiffs' claims raise, namely that H.B. 142 is unconstitutionally vague and deters or prohibits transgender individuals from accessing multiple occupancy restrooms in accordance with their gender identity, violating the Due Process and Equal Protection Clauses.

A. The Proposed Consent Decree is in the Public Interest.

The proposed consent decree is in the public interest. It provides clarity for transgender people who live in or visit North Carolina. Adopting the proposed construction of H.B. 142 avoids continuing harm to transgender individuals in the form of deterrence from using public facilities in accordance with their gender identity and the uncertainty of whether their use of public facilities could result in criminal prosecution. The consent decree avoids subjecting transgender individuals to unequal and illegal treatment.

The citizens of North Carolina, generally, also benefit from the consent decree. Resolving this matter without protracted litigation and by definitively adopting an interpretation of the statute that avoids serious constitutional law concerns avoids the continued and unnecessary use of public resources to litigate this case. It is "precisely the desire to avoid a protracted examination of the parties' legal rights which underlies consent decrees," and "[n]ot only the parties, but the general public as well, benefit from

the saving of time and money that results from the voluntary settlement of litigation." *Gorsuch*, 718 F.2d at 1126. Continued litigation necessarily involves continuing risk to the state. *See United States v. Armour & Co.*, 402 U.S. 673, 681 (1971) (explaining that in entering consent decrees "parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation").

Moreover, the Executive Branch Defendants' assessment of these priorities is entitled to a measure of deference from this Court. *Cf. Bragg*, 83 F. Supp. 2d at 717 ("[W]here a government agency charged with protecting the public interest has pulled the laboring oar in constructing the proposed settlement, a reviewing court may appropriately accord substantial weight to the agency's expertise and public interest responsibility." (internal quotation marks and citation omitted)). And by adopting a constitutional construction of H.B. 142, the proposed consent decree avoids the necessity of this Court striking down an enactment by the state's legislature—an outcome likewise in the public interest. *See Ward v. Dixie Nat'l Life Ins. Co.*, 595 F.3d 164, 177 (4th Cir. 2010) ("[T]he doctrine of constitutional avoidance attempts to give effect to legislative intent, not to subvert it, since it is premised on the reasonable notion that legislatures do not intend an interpretation which raises serious constitutional doubts." (internal quotation marks and brackets omitted)).

B. Plaintiffs Have Raised Serious Constitutional Concerns Against Section 2 of H.B. 142.

Both Plaintiffs and the Executive Branch Defendants agree that Plaintiffs have raised "serious federal-law concerns, including concerns over constitutional guarantees of

equal protection and due process." Consent Judgment and Decree ¶ 11. The proposed consent decree is therefore also fair, adequate, and reasonable in light of the serious claims Plaintiffs raise.[4]

1. Plaintiffs Raise a Serious Claim that H.B. 142 is Unconstitutionally Vague and Violates Due Process.

First, in alleging that H.B. 142 prevents transgender individuals in North Carolina from knowing what activity might subject them to potential criminal or civil penalty, Plaintiffs assert a serious claim that H.B. 142 is unconstitutionally vague.

A basic requirement of due process is that "an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The Constitution "insist[s] that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly" because vague laws "may trap the innocent by not providing fair warning." *Id.* This constitutional requirement applies to civil and criminal laws alike. *See A.B. Small Co. v. Am. Sugar Refining Co.*, 267 U.S. 233, 239 (1925); *Dickson v. Sitterson*, 280 F. Supp. 486, 498 (M.D.N.C. 1968) ("While the question of vagueness has most frequently arisen in criminal prosecutions, it has been applied in a variety of other situations where the obedience to a rule or standard has been exacted."); *accord Horn v. Burns & Rose*, 536 F.2d 251, 254 (8th Cir. 1976). A statute is unconstitutionally vague if it "fails to provide

[4] This memorandum discusses only those claims asserted against the Executive Branch Defendants and related to H.B. 142. The joint motion in no way constitutes a forfeiture of any of Plaintiffs' arguments or claims against the remaining defendants or any arguments or claims related to H.B. 2.

a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement."[5] *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (internal quotation marks omitted).

Plaintiffs raise serious arguments that H.B. 142 fails to provide any guidance to transgender individuals on what conduct may subject them to criminal or other penalties when engaging in a necessary and basic function of everyday life. H.B. 142 prohibits any regulation of restroom use by local governments, school boards, public universities, and other state agencies or branches of government "except in accordance with an act of the General Assembly." N.C. Gen. Stat. § 143-760. No "act of the General Assembly" currently provides clarity about what multi-occupancy single-sex facilities transgender individuals may use. On its face, H.B. 142 does not regulate such public facility use.[6]

[5] The Supreme Court has "expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). As explained below, H.B. 142's vagueness potentially exposes transgender individuals in North Carolina to criminal penalties under the state's trespassing law, implicating the Court's traditional vagueness test applied to criminal prohibitions. But even under a more forgiving vagueness standard, Plaintiffs raise serious arguments that the vacuum left in the absence of a definitive state law regulating transgender individuals' use of restrooms—coupled with the General Assembly's failure to provide greater clarity and the statements by members and leaders of the General Assembly that H.B. 142 retains H.B. 2's ban on restroom use by transgender people—creates a reality for transgender individuals that is "so vague and indefinite as really to be no rule or standard at all." *A.B. Small Co.*, 267 U.S. at 239.

[6] Indeed, because the plain language of H.B. 142 goes so far as to bar public entities from all "regulation of access to multiple occupancy restrooms, showers, or changing facilities," under the statute's plain language even maintaining separate men's and women's rooms or the posting of any signs restricting use of the facilities to "men" or "women" would appear to be unlawful. Upon information and belief, however, neither

And H.B. 142 prevents government agencies, school boards, localities, and other government entities from providing any clarity for transgender individuals. In short, H.B. 142 intentionally leaves transgender people in limbo about whether and where they may legally use public facilities in public buildings. That intentional vagueness and the consequent risk of prosecution or other harm violates the Constitution.

Coupled with this inherent lack of clarity, several legislators have asserted, after passage of H.B. 142, that second degree trespass charges could be brought against transgender individuals who use multiple occupancy facilities consistent with their gender identity. *See* FAC ¶ 246. Speaker Moore noted that H.B. 142 "preserve[s] the authority of North Carolina criminal law on trespassing, indecent exposure, and peeping," FAC ¶ 246. State Senator Britt stated that "[t]here is already a law on the books, if you go into a restroom other than that of your biological gender, it is second-decree trespassing." FAC ¶ 246. And State Representative Chuck McGrady maintained that the "state's criminal laws are applicable, specially [sic] criminal provisions like second degree trespassing, indecent exposure and/or peeping." FAC ¶ 246.

North Carolina's second degree trespassing statute provides that a person "commits the offense of second degree trespass if, without authorization, he enters or remains on the premises of another … [a]fter he has been notified not to enter or remain there by the owner, by a person in charge of the premises, by a lawful occupant, or by another authorized person." N.C. Gen. Stat. § 14-159.13(a). North Carolina courts have

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the state government nor any operator of a state government building in North Carolina is currently enforcing H.B. 142 to that effect.

applied the statute to public restroom and locker room use. In affirming a high school student's second degree trespass charge for entering the girls' locker room, the North Carolina Court of Appeals has held that a sign demarking the "'Girl's Locker Room' was reasonably likely to give [the male student] notice that he was not authorized to go into the girls' locker room." *In re S.M.S.*, 675 S.E.2d 44, 46 (N.C. Ct. App. 2009).

H.B. 142's lack of clarity causes considerable fear and uncertainty for transgender people. The interpretation of H.B. 142 urged by these legislators, and the second degree trespass statute's reference to entry "without authorization," raises the specter of arrest and prosecution if transgender individuals use the restrooms that accord with their gender identity. The same is true if transgender individuals were to attempt to use the restroom that *does not* match their gender identity. Because transgender individuals present and typically are perceived by others as the sex that matches their gender identity, their use of a restroom designated for the gender of their assigned sex at birth also poses the risk of arrest. Neither H.B. 142 nor any other law of the General Assembly clarifies which restroom transgender individuals can use.

Plaintiffs therefore assert a serious claim that the legal vacuum created by H.B. 142 fails to provide transgender individuals "fair notice of what is prohibited." *Fox Television*, 567 U.S. at 253 (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)). By the same measure, the law is likely "so standardless that it authorizes or encourages seriously discriminatory enforcement.'"[7] *Id.* (quoting *Williams*, 553 U.S. at

[7] "A statute can be impermissibly vague for either of [these] two independent reasons." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). Thus, it is sufficient for Plaintiffs to show

304). Transgender individuals are deterred from using the restroom consistent with their gender identity—or indeed any government-controlled restroom—and H.B. 142's deliberate uncertainty effectively maintains H.B. 2's ban and encourages discrimination by both government and private entities.

2. Plaintiffs Raise Serious Claims that, if Interpreted to Deter or Prohibit Transgender Individuals' Use of Restrooms Consistent with Their Gender Identity, Section 2 of H.B. 142 Violates the Equal Protection Clause.

Plaintiffs also press serious arguments that Section 2 of H.B. 142, if interpreted to deter or prohibit transgender individuals from using public facilities consistent with their gender identity, would constitute sex discrimination under the Equal Protection Clause subject to heightened scrutiny.[8] As a significant number of circuits have held, differential

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that the law fails to provide fair notice. But, Plaintiffs also present a serious claim that the law's lack of any clarity fails to provide any guidance for enforcement, rendering it subject to arbitrary and discriminatory enforcement. For this same reason, Plaintiffs also allege a serious substantive due process claim that the state of legal uncertainty created by H.B. 142 renders H.B. 142 arbitrary and capricious and results in arbitrary and capricious treatment with respect to access to restrooms and other public facilities that is not narrowly tailored or the least restrictive alternative for promoting a compelling state interest, nor even rationally related to any legitimate state interest. *See, e.g.*, *Mora v. City of Gaithersburg*, 519 F.3d 216, 230 (4th Cir. 2008) (explaining that "touchstone of substantive due process is protection of the individual against arbitrary action of government" (internal quotation marks and brackets omitted)).

[8] In addition to this ground, Plaintiffs maintain that discrimination against transgender individuals bears the indicia of a suspect classification and requires application of strict scrutiny, which H.B. 142 also fails. Plaintiffs asserted Equal Protection claims on alternative grounds, including that Section 2 of H.B. 142 was enacted for the purpose of disadvantaging transgender people and based on animus against transgender people, and imposes a more burdensome political process upon transgender people than non-transgender people. Plaintiffs' agreement to join the joint motion in no way constitutes a forfeiture of any of Plaintiffs' arguments or claims, should this claim proceed.

treatment of transgender persons because they are transgender is discrimination on the basis of sex.[9] *See, e.g.*, *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1049 (7th Cir. 2017), *petition for cert. filed*, 86 U.S.L.W. 3089 (U.S. Aug. 25, 2017) (No. 17-301); *Glenn v. Brumby*, 663 F.3d 1312, 1316-19 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 573-75 (6th Cir. 2004); *Schwenk v. Hartford*, 204 F.3d 1187, 1201-03 (9th Cir. 2000). In particular, and although not the only rationale that supports the conclusion,[10] discrimination against transgender individuals rests on sex stereotypes and gender-based assumptions—assumptions that the Supreme Court has recognized constitute discrimination on the basis of sex. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (concluding that Title VII was "intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex

[9] Although some of these cases also involved Title IX or Title VII claims, courts rely on a common body of law to analyze discrimination claims. *See, e.g.*, *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (applying Title VII case law to equal protection claim). Thus, this body of caselaw remains persuasive in determine what constitutes sex discrimination.

[10] Discrimination against transgender individuals constitutes sex discrimination in at least two other ways. *See* Pls.' Mem. Supp. Mot. Prelim. Inj. at 18-26, ECF No. 22. First, discrimination based on gender identity and transgender status is itself discrimination based on sex because it treats people differently if their gender identity is inconsistent with their birth-assigned sex. Line-drawing based on the sex-related characteristics of gender identity and assigned birth sex inherently discriminates based on sex. *See, e.g.*, *Schwenk*, 204 F.3d at 1201-02; *Fabian v. Hosp. Cent. Conn.*, 172 F. Supp. 3d 509, 526-27 (D. Conn. 2016). Second, discrimination based on gender transition is necessarily based on sex, just as discrimination based on religious conversion is necessarily based on religion. *Fabian*, 172 F. Supp. 3d at 527. If the government attempts to define the proper terms of gender transition, or to write into law what it means to be a "real" man or a "real" woman, such a law discriminates based on sex.

stereotypes").[11] A transgender individual, by definition, "does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth." *Whitaker*, 858 F.3d at 1048; *accord Glenn*, 663 F.3d at 1316. If interpreted to deter or prohibit transgender individuals' access to public facilities consistent with their gender identity, H.B. 142 would single out those individuals precisely because they do not conform to traditional assumptions about sex—namely that one's gender identity matches one's sex as identified at birth. And singling out transgender individuals and restraining them from engaging in one of life's most basic and essential bodily functions—using the restroom—is "sex stereotyping" in its most elemental form. *See Price Waterhouse*, 490 U.S. at 251.

Where heightened scrutiny applies, the state must show that "the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *United States v. Virginia*, 518 U.S. 515, 533 (1996). The "burden of justification is demanding and it rests entirely on the State." *Id.* To evaluate the state's justification, it is not sufficient for a court to consider the treatment of all men and women in the abstract. If a policy that purports to treat "all boys and girls the same" treats transgender individuals differently because they "fail to conform to sex-based stereotypes associated with their assigned sex at birth," the state must justify that specific distinction. *Whitaker*, 858 F.3d

[11] Although *Price Waterhouse* was a plurality opinion, two justices concurring in the judgment also concluded that the plaintiff had adequately alleged a violation of Title VII. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 259 (1989) (White, J., concurring); *id.* at 272-73 (O'Connor, J., concurring); *see also Whitaker*, 858 F.3d at 1047 (recognizing same).

at 1051. "The proper focus of the constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2451 (2015) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 894 (1992) (plurality)).

The state will be unable to demonstrate that H.B. 142 survives heightened—or indeed any—level of scrutiny. In its decision granting in part Plaintiffs' motion for a preliminary injunction enjoining H.B. 2, this Court already rejected public safety as a valid justification for H.B. 2, finding that the state had offered no evidence that there had been any complaints or safety concerns regarding the use of multiple occupancy facilities by transgender individuals prior to H.B. 2's passage. *See Carcaño*, 203 F. Supp. 3d at 638-39. Plaintiffs therefore assert substantial arguments that H.B. 142 similarly may not be able to be justified on these same grounds.

Privacy interests will not suffice to justify the law. The same absence of complaints or public concerns shows that the law fails to further any substantial interest in privacy. A transgender individual's presence in a restroom "provides no more of a risk to other [persons'] privacy rights than the presence of an overly curious [person] of the same biological sex" or "for that matter, any other [person] who uses the bathroom at the same time." *Whitaker*, 858 F.3d at 1052; *see also Doe ex rel. Doe v. Boyertown Area Sch. Dist.*, No. 17-1249, 2017 WL 3675418, at *52-58 (E.D. Pa. Aug. 25, 2017), *appeal docketed*, No. 17-3113 (3d Cir. Sept. 28, 2017). "Common sense tells us that the communal restroom is a place where individuals act in a discreet manner to protect their

privacy and those who have true privacy concerns are able to utilize a stall." *Whitaker*, 858 F.3d at 1052.

Therefore, to the extent H.B. 142 deters or prohibits transgender people in North Carolina from accessing multiple occupancy facilities consistent with their gender identity, Plaintiffs raise serious claims that the law cannot survive heighted scrutiny.

C. Applying the Constitutional Avoidance Canon and Adopting a Narrow Construction of H.B. 142 Will Avoid These Constitutional Violations.

As Plaintiffs' claims demonstrate, there are substantial arguments that H.B. 142 is unconstitutionally vague, and that interpreting H.B. 142 to deter or prohibit transgender individuals from using single-sex multi-occupancy facilities would pose constitutional problems. It is a basic and long-standing tenet of statutory construction that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [a court's] duty is to adopt the latter." *Jones v. United States*, 529 U.S. 848, 857 (2000) (quoting *United States ex rel. Att'y Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909)). The application of this principle, in fact, is an act of legislative deference; "[T]he doctrine of constitutional avoidance attempts to give effect to legislative intent, not to subvert it, since it is premised on the reasonable notion that legislatures do not intend an interpretation which raises serious constitutional doubts." *Ward*, 595 F.3d at 177 (internal quotation marks and brackets omitted).

Federal courts apply this canon with equal force to rescue state statutes from constitutional infirmities. *See, e.g.*, *Frisby v. Schultz*, 487 U.S. 474, 482-83 (1988)

(applying canon to Wisconsin picketing ordinance); *Ward*, 595 F.3d at 177 (construing statute enacted by South Carolina legislature to apply only prospectively, in part to avoid constitutional concerns). The Fourth Circuit has instructed that courts should apply to a state statute "the statutory construction rules applied by the state's highest court," including the canon of constitutional avoidance. *In re DNA Ex Post Facto Issues*, 561 F.3d 294, 300 (4th Cir. 2009) (considering South Carolina statute under that canon). And North Carolina has expressly adopted the canon. *See, e.g.*, *Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs*, 681 S.E.2d 278, 282 (N.C. 2009) ("[W]here one of two reasonable constructions will raise a serious constitutional question, the construction which avoids this question should be adopted." (internal quotation marks omitted)).

The proposed consent decree relies on the canon of constitutional avoidance to resolve Plaintiffs' serious claims concerning Section 2 of H.B. 142. The Parties agree that H.B. 142 "must be interpreted to mean that no executive agency, or officer, employee or agent thereof, may promulgate any regulation which prevents transgender people from using public facilities in accordance with their gender identity, nor subject transgender people to prosecution pursuant to N.C.G.S. § 114-11.6," and that a contrary interpretation or application that would bar, prohibit, block, or impede transgender people from doing so raises serious federal law concerns. Consent Judgment and Decree ¶¶ 10-11. Accordingly, the proposed consent decree provides that under H.B. 142 transgender people are not prevented from using public facilities under the Executive Branch Defendants' control or supervision, in accordance with their gender identity. *Id.* at 5. The Executive Branch Defendants are also "permanently enjoined from enforcing Section

2 of H.B. 142 to bar, prohibit, block, deter, or impede any transgender individuals from using public facilities under any Executive Branch Defendant's control or supervision, in accordance with the transgender individual's gender identity," and from "prosecuting an individual who uses public facilities under the control or supervision of the Executive Branch, when such use conforms with the individual's gender identity, and is otherwise lawful." *Id.*

In light of Plaintiffs' serious claims, this resolution is fair, adequate, and reasonable. Constitutional vagueness claims, in particular, are frequently resolved with resort to the canon of constitutional avoidance. It has "long been" the Supreme Court's practice, "before striking a federal statute as impermissibly vague, to consider whether the prescription is amenable to a limiting construction." *Skilling v. United States*, 561 U.S. 358, 405 (2010); *see also Schleifer ex rel. Schleifer v. City of Charlottesville*, 159 F.3d 843, 853 (4th Cir. 1998) (explaining that striking down laws as facially void for vagueness is "a far more aggressive use of judicial power than striking down a discrete and particularized application of it,"). Interpreting H.B. 142 to avoid constitutional doubt clarifies that the law poses no obstacle to transgender individuals' ability to use multiple occupancy facilities consistent with their gender identity—and remedies any vagueness or unlawful discrimination against transgender individuals.

III. The Proposed Consent Decree is the Product of Good-Faith Negotiation Between the Parties.

The proposed consent decree was the subject of substantial negotiation among the Parties. The nature and extent of those negotiations provide the Court with additional

assurance that the proposed consent decree is fair, adequate, and reasonable. The Parties discussed the possibility of settlement and the terms of the proposed consent decree over the course of twelve weeks. All parties were represented by experienced counsel, and the ultimate proposal is the culmination of good-faith, arms-length negotiation.

Plaintiffs initially proposed a resolution of this case to the Executive Branch Defendants and all other parties, and held an initial telephone conference with all parties on July 28, 2017, and a follow-up telephone conference on August 8, 2017. Thereafter, the Plaintiffs and Executive Branch Defendants engaged in thorough discussions over a period of weeks to come to a mutually agreeable proposal. During those discussions, Plaintiffs have agreed, contingent on approval of the consent decree, to dismiss their remaining challenges to Sections 3 and 4 of H.B. 142 against the Executive Branch Defendants, and also to forego seeking damages, costs, expenses, and attorneys' fees.

The Parties' positions are based on an informed assessment of the merits of Plaintiffs' case. The Fourth Amended Complaint, although filed recently, was not filed on a blank slate. Rather, the prior litigation concerning now-replaced H.B. 2 informed the strength of the Plaintiffs' arguments regarding the potential constitutional and federal statutory infirmities of H.B. 142.

* * *

CONCLUSION

For the reasons stated herein, Plaintiffs respectfully request that the Court enter the proposed consent decree.

Dated: October 18, 2017

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

This brief complies with Local Rule 7.3(d) because, excluding the parts of the brief exempted by Rule 7.3(d) (cover page, caption, signature lines, and certificates of counsel), this brief contains 6,237 words.

Dated: October 18, 2017

/s/ Christopher A. Brook

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I, Christopher A. Brook, hereby certify that on October 18, 2017, I electronically filed the foregoing PLAINTIFFS' AND EXECUTIVE BRANCH DEFENDANTS' JOINT MOTION FOR ENTRY OF A CONSENT DECREE, as well as Plaintiffs' Memorandum of Law in support and the Consent Judgment and Decree, using the CM/ECF system, and have verified that such filing was sent electronically using the CM/ECF system to all parties who have appeared with an email address of record.

/s/ Christopher A. Brook

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