UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

JOAQUÍN CARCAÑO; PAYTON GREY MCGARRY; H.S., by her next friend and mother, KATHRYN SCHAFER; ANGELA GILMORE; KELLY TRENT; BEVERLY NEWELL; and AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA, *Plaintiffs*, v. PATRICK MCCRORY, in his official capacity as Governor of North Carolina; UNIVERSITY OF NORTH CAROLINA; BOARD OF GOVERNORS OF THE UNIVERSITY OF NORTH CAROLINA; and W. LOUIS BISSETTE, JR., in his official capacity as Chairman of the Board of Governors of the University of North Carolina, *Defendants*.	No. 1:16-cv-00236-TDS-JEP

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Pursuant to Federal Rule of Civil Procedure 65(a) and Local Civil Rule 65.1(b), Plaintiffs Joaquín Carcaño; Payton Grey McGarry; H.S., by her next friend and mother, Kathryn Schafer; and American Civil Liberties Union of North Carolina (collectively, "Plaintiffs"), respectfully submit the following memorandum of law in support of their motion for a preliminary injunction enjoining Part I of North Carolina House Bill 2

the City's hearing on the proposed ordinance to threaten that an expansion of non-discrimination protection would "most likely cause immediate state legislative intervention." Ex. F at 2. On February 23, 2016, House Speaker Tim Moore inaccurately characterized the measure as "opening all bathrooms and changing rooms to the general public" and said that the City Council "has gone against all common sense and has created a major public safety issue." Ex. G at 1. Senator David Curtis, commenting on the ordinance's protection for Charlotte's transgender residents, said "I think it's just inappropriate. We have rules in our society and that's just one of the rules in our society. This liberal group is trying to redefine everything about our society. Gender and marriage, just the whole liberal agenda." *Id.* The same day, Speaker Moore announced his intent to "join [his] conservative colleagues and Governor McCrory in exploring legislative intervention to correct this radical course." Ex. H at 1.

Within two days, Speaker Moore was publicly exploring a special session of the legislature to overturn Charlotte's ordinance. Addressing concerns that such a session would cost $42,000 per day, the Speaker responded that "we cannot put a price tag on the safety of women and children." Ex. I at 1. Elaborating further, he explained that "we all learned in kindergarten that guys go to the men's room, and gals go to the women's room. You know, and so why folks think they have to upend that to be politically correct makes no sense." Ex. J at 1.

Before, during, and after the March 23, 2016 special session, legislators were outspoken about their motivation for seeking to overturn Charlotte's ordinance, fixating

The special session, called by three-fifths of the House of Representatives rather than by the Governor (Ex. P; *see also* Ex. Q)—the first time that mechanism had been used in 35 years—began the morning of March 23, even though the leadership of the legislature had not yet released a copy of H.B. 2. Ex. R at 2-3. That morning, before H.B. 2 had been filed, Speaker Moore announced that the committee hearing for the bill would begin five minutes after introduction of the bill and adjournment of the morning session. Ex. S at 1. Lawmakers were given a five-minute break to read the bill after it was publicly introduced for the first time, and it was quickly passed by the committee. Ex. T at 2. After only three hours of debate, the bill passed the House and was referred to the Senate, where, at the time of the vote, all Senate Democrats walked out of the chamber, calling the special session an "affront to democracy" (Ex. U at 2), and noting that the Democratic caucus "ch[o]se not to participate in this farce" (Ex. V at 1). The bill

support of H.B. 2 was not motivated by fear of molesters posing as transgender persons:

identity or sex, which are male. *Id.* Prior to the passage of H.B. 2, Mr. Carcaño used the men's restroom at work and in other public spaces without incident. *Id.* ¶ 15. Since H.B. 2 went into effect, however, Mr. Carcaño has been forced to use a single-occupancy restroom in a remote part of his workplace or to leave work to go to a single-occupancy restroom in another building. *Id.* ¶¶ 20-21.

Because Mr. Carcaño feels humiliated for being singled out and forced to use a separate restroom from his other male coworkers, he often delays or avoids going to the restroom or limits his fluid intake. *Id.* ¶ 21. In addition to using the restroom at UNC-Chapel Hill, Mr. Carcaño has reason to visit offices of the North Carolina Division of Motor Vehicles and Department of Health and Human Services, as well as state courthouses, public airports, and the North Carolina Rest Area system. *Id.* ¶¶ 25-28. He now cannot use the men's restroom in those locations and using the women's restroom there is not an option for him, just as it is not an option for non-transgender men. *Id.* ¶ 22. Mr. Carcaño will continue to experience significant mental and emotional distress and fear of violence and harassment against him as a result of H.B. 2. *Id.* ¶¶ 22, 24.

Payton Grey McGarry is a 20-year-old man and a full-time student at the University of North Carolina at Greensboro ("UNC-Greensboro"). McGarry Decl. ¶¶ 1-2, 6. Mr. McGarry is transgender. *Id.* ¶ 7. The sex he was assigned at birth was female, which is reflected on his birth certificate, but his birth certificate does not match his gender identity or sex, which are male. *Id.* Prior to the passage of H.B. 2, Mr. McGarry

and violence if she were to use the boys' or men's restroom in compliance with this new

harm is to recognize the gender identity of patients with gender dysphoria. Ettner Decl. ¶¶ 15, 23; Adkins Decl. ¶¶ 27, 32.

STATEMENT OF THE QUESTION TO BE ANSWERED

Whether Plaintiffs are entitled to an order preliminarily enjoining Defendants from implementing Part I of House Bill 2, which deprives them of equal access to government facilities and educational programs and activities in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment and Title IX of the Education Amendments of 1972.

ARGUMENT

I. Preliminary Injunction Standard.

The purpose of a preliminary injunction is to "protect the status quo and to prevent irreparable harm during the pendency of a lawsuit ultimately to preserve the court's ability to render a meaningful judgment on the merits." *United States v. South Carolina*, 720 F.3d 518, 524 (4th Cir. 2013) (quotation marks omitted). Plaintiffs seek to enjoin enforcement of Part I of H.B. 2 and restore the state of the law before it was enacted, which was "the last uncontested status between the parties which preceded the controversy." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 236 (4th Cir. 2014) (quotation marks omitted). Such an injunction must be granted if Plaintiffs demonstrate that: (1) they are likely to succeed on the merits; (2) they will likely suffer irreparable harm absent an injunction; (3) the balance of hardships weighs in their favor; and (4) the injunction is in the public interest. *League of Women Voters*, 769

F.3d at 236 (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). Each of those factors weighs strongly in Plaintiffs' favor.

II. Plaintiffs Are Likely to Succeed on Their Title IX Claim.

By complying with H.B. 2 and barring transgender individuals from facilities congruent with their gender identity, Defendant University of North Carolina ("UNC") has violated Title IX, which

Defendant UNC is subject to Title IX's strictures.[2] Both H.B. 2 and the school board policy at issue in *G.G.* mandate identical forms of sex-based discrimination: the exclusion of transgender individuals from facilities congruent with their gender identity, solely because they were assigned a different gender at birth. *G.G.* thus is on "all fours" with the present case and properly resolves Plaintiffs' Title IX claim here.

The Fourth Circuit recognized that, unless an exception applied, the school board's exclusion of G.G., a transgender boy, from the boys' restroom would amount to discrimination "on the basis of sex," and thus focused on whether the school board's exclusion of the plaintiff from the boys' restroom fell within an *exception* to liability under Title IX. *See id.*

The Fourth Circuit held that the exception invoked by the school board to defend its policy—which

deferred treats restrooms and locker rooms identically.

elevator to access the gender-neutral restroom tucked away near building housekeeping). Forcing Plaintiffs to expend additional time simply to find a restroom disrupts their ability to work and learn alongside their colleagues and peers.

More fundamentally, shunting transgender individuals into alternative facilities is stigmatizing and brands them as second-class members of the community, unfit to share communal spaces with others. As a result, transgender individuals may delay or minimize trips to the restroom, which, in turn, leads to increased risk for urinary tract infections, kidney disease, and bladder cancer. *See* Routh Decl. ¶ 16; *cf. G.G.*, 2016 WL

against transgender individuals because, by definition, their birth-assigned sex does not match their gender identity.[4]

A.

663 F.3d 1312, 1316 (11th Cir. 2011) (applying Title VII case law to decide equal protection claim); *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000) (applying Title VII case law in interpreting analogous federal law). *G.G.* therefore also governs this Court's analysis under the Equal Protection Clause.

G.G. held that excluding transgender individuals from restrooms congruent with their gender identity constitutes government action "on the basis of sex." *G.G.*, 2016 WL 1567467 at *4. Because H.B. 2 also excludes transgender individuals from facilities congruent with their gender identity, and because it relies on "biological sex," it is a sex-based classification.[5] And there is no question that "all gender-based classifications today warrant heightened scrutiny." *United States v. Virginia*, 518 U.S. 515, 555 (1996) (internal quotation marks omitted).

2. Discrimination Against Transgender Individuals Is Inherently Discrimination on the Basis of Sex.

Although *G.G.*'s holding is sufficient to resolve the parallel legal issue here of whether H.B. 2's sex-based classification triggers heightened scrutiny, there are multiple independent bases supporting that holding. Modern precedent overwhelmingly holds that discrimination against transgender individuals is discrimination on the basis of "sex," and

therefore must be tested under heightened scrutiny. *See G.G.*, 2016 WL 1567467, at *12, *14 (Davis, J., concurring) (citing cases from the First, Sixth, Ninth, and Eleventh Circuits and noting the "weight of circuit authority" recognizing that "discrimination based on transgender status is already prohibited by the language of federal civil rights statutes, as interpreted by the Supreme Court"); *see generally* Section III.A.1 (discussing common body of law in analyzing equal protection and statutory antidiscrimination claims). This precedent recognizes discrimination against transgender individuals as sex discrimination in at least three ways: (1) discrimination based on sex stereotypes; (2) discrimination based on gender identity and transgender status; and (3) discrimination based on gender transition.

a. Sex Stereotyping

Discrimination against transgender individuals is inherently rooted in sex stereotypes and accordingly triggers heightened scrutiny on that basis. The Supreme Court has "made abundantly clear in past cases that gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 139 n.11 (1994). More than a quarter century ago, the Supreme Court explained in the context of Title VII that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

The plaintiff in *Price Waterhouse* had been denied partnership because of her perceived nonconformity to stereotypes associated with her sex. Her superiors viewed her as "macho" and advised that she should "walk more femininely, talk more

F.3d at 1316; *accord Latta v. Otter*, 771 F.3d 456, 495 n.12 (9th Cir. 2014) ("discrimination on the basis of transgender status is also gender discrimination") (Berzon, J., concurring).

Indeed, many courts have recognized an inextricable link between discrimination against a transgender person as such and discrimination on the basis of gender nonconformity. *See, e.g.*, *Glenn*, 663 F.3d at 1316 ("There is . . . a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms."); *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004) ("discrimination against a plaintiff who is [transgender] – and therefore fails to act and/or identify with his or her [assigned] gender – is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*"); *Schwenk*, 204 F.3d at 1201; *Rumble v. Fairview Health Servs.*, No. 14-cv-2037, 2015 WL 1197415, at *2 (D. Minn. Mar. 16, 2015) ("discrimination based on an individual's transgender status constitutes discrimination based on gender stereotyping"); *Finkle v. Howard Cty.*, 12 F. Supp. 3d 780, 788 (D. Md. 2014) ("any discrimination against transsexuals (as transsexuals) – individuals who, by definition, do not conform to gender stereotypes – is proscribed by Title VII's proscription of discrimination on the basis of sex as interpreted by *Price Waterhouse*"); *cf. Macy v. Holder*, No. 0120120821, 2012 WL 1435995, at *8 (EEOC Apr. 20, 2012) ("[C]onsiderations of gender stereoytpes will inherently be part of what drives discrimination against a transgender[] individual."). Ultimately, it does not matter whether a transgender individual is viewed as "an insufficiently masculine man,

an insufficiently feminine woman, or an inherently gender-nonconforming transsexual," because discrimination on any of these bases is based on sex. *Schroer v. Billington*, 577 F. Supp. 2d 293, 305 (D.D.C. 2008).

H.B. 2 codifies sex stereotypes into law by banishing those whose gender identities do not match their birth-assigned sex from the facilities that others are permitted to use. That exclusion is necessarily based on sex stereotypes. *Lusardi v. McHugh*, No. 0120133395, 2015 WL 1607756, at *9 (EEOC Apr. 1, 2015) (employer's policy banning a transgender woman from the women's facilities was discrimination because of sex).[6] The words of Representative Bishop decrying the efforts of what he called a "small group of far-out progressives" to support "a cross-dresser's liberty to express his gender nonconformity" (Ex. AF at 4) illustrate H.B. 2's grounding in such beliefs about sex.

b. Gender Identity and Transgender Status

Laws distinguishing between transgender men or women and non-transgender men or women are sex discrimination for an additional reason: such laws allow people to be treated consistent with their gender identity *only* if that identity is consistent with their sex assigned at birth. A law that discriminates against people because their birth-assigned sex and gender identity do not match necessarily is discriminating based on sex.

[6] There is no exception to this rule for laws or policies that purport to regulate genital characteristics, as H.B. 2 appears to do. *See Lusardi*, 2015 WL 1607756, at *8-*9 (finding it unlawful to bar a transgender woman from the restroom based on the belief that she was not "truly female" without genital surgery); *see also Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1065-66 (9th Cir. 2002) (explaining that any focus on sex-related anatomy, such as genitalia or breasts, "is inescapably 'because of . . . sex'").

It is no answer that the law treats everyone consistently with their birth-assigned sex. In analyzing whether "sex has been taken into account," *Smith v. Virginia Commonw. Univ.*, 84 F.3d 672, 676 (4th Cir. 1996) (quotation marks omitted), "[w]hat matters" is that "the discrimination is related to . . . sex," *Schwenk*, 204 F.3d at 1202. *Accord Fabian*, 2016 WL 1089178, at *13 (recognizing that whether the discrimination is "related to sex" is the dispositive inquiry) (quotation marks omitted). Here, that is beyond serious dispute. If one's dress, hairstyle, and make-up usage constitute "sex-based considerations"—which *Price Waterhouse* confirms as binding law—then the same necessarily holds true for a mismatch between gender identity (which gives rise to such outward expressions of gender) and birth-assigned sex. 490 U.S. at 242; *City of Salem*, 378 F.3d at 575; *Schroer*, 577 F. Supp. 2d at 306.

As even the *G.G.* dissent acknowledges, the Fourth Circuit has confirmed that "the term 'sex' means a person's gender identity." 2016 WL 1567467, at *15 (Niemeyer, J., dissenting).

women's restroom was unlawful). Instead, gender identity continues to define their sex. So too with transgender individuals: "the individual's sex as male or female is to be generally determined by reference to the [individual]'s gender identity." *G.G.*, 2016 WL 1567467, at *6. In sum, gender identity serves as the core of sex—not genitalia or gonads or any other sex-related characteristic. *Id.*

Precedent makes clear that, when the government draws lines related to whether a person's gender identity aligns with the person's birth-assigned sex, such line-drawing is sex-based and must be tested under heightened scrutiny.

c. Gender Transition

heightened scrutiny, *see Golinski v. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 983 (N.D. Cal. 2012), all four point in favor of heightened scrutiny with respect to laws that classify on the basis of transgender status.

Transgender people have experienced a long history of discrimination, including pervasive discrimination in employment, housing, and access to places of public accommodation or government services.[8] An individual's transgender status also has no relation to a person's ability to contribute to society. Transgender individuals are a discrete minority—it is estimated that they make up a small percentage of the population (Ex. AK at 5-6)—and there can be little dispute that they are relatively powerless politically. Further, an individual's gender identity is not an attribute that they can or should be expected to change. *See* Adkins Decl. ¶¶ 20, 26, 30; Ettner Decl. ¶ 10; *see also Hernandez-Montiel, v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) (gender identity is "so fundamental" to identity that individuals "should not be required to abandon" it).

Recent federal decisions accordingly recognize that discrimination against transgender people must be evaluated under heightened scrutiny. *See Adkins v. City of New York*, No. 14-cv-7519, -- F. Supp. 3d --, 2015 WL 7076956, at *3-4 (S.D.N.Y. Nov. 16, 2015) (finding heightened scrutiny warranted based on four-factor test); *Norsworthy*, 87 F. Supp. 3d at 1119 (same).

[8] *See generally* Exs. AI and AJ; *see also Brocksmith v. United States*, 99 A.3d 690, 698 n.8 (D.C. 2014) ("[t]he hostility and discrimination that transgender individuals face in our society today is well-documented").

B. H.B. 2 Lacks Any Substantial or Even Rational Relationship to an Important Government Interest.

H.B. 2's class-based targeting of Plaintiffs demands meaningful review, as discrimination based on both sex and transgender status. Under heightened scrutiny, "[t]he burden of justification is demanding and it rests entirely on the State." *Virginia*, 518 U.S. at 533. All sex classifications must be evaluated under heightened scrutiny even when they are based on alleged "biological differences" between men and women. *Tuan Anh Nguyen v. INS*

the involuntary exposure of his or her own nude body in certain circumstances. *Id.* But the court disagreed that "the truth of these propositions undermine[d]" its conclusion. *Id.* Instead, it adopted the position of the Department of Education—which the court had determined to be reasonable—that banning transgender individuals from facilities matching their gender identity could not be justified by either "privacy interests or safety concerns." *Id.*

Second, privacy can be preserved without resorting to discrimination against transgender individuals. As a threshold issue, a purported concern for bodily exposure has no footing in the restroom context, given the divided and enclosed nature of restroom stalls

For its part, the government can take steps to enhance "general privacy for all"—such as adding or expanding partitions between urinals in men's restrooms, or adding privacy strips to the doors of stalls in all restrooms—just as the school board did in *G.G.* 2016 WL 1567567, at *2

most countries, transgender individuals face a categorical bar to obtaining corrected birth certificates.[11] Thus, two transgender individuals with precisely the same external genital characteristics would be forced into different restrooms under H.B. 2, only because the places of their birth have different laws about changing birth certificates. That is the epitome of arbitrary line-drawing that is impermissible under even rational basis review.

interests are not affected differently when H.S. uses the women's restroom at school, versus at a coffee shop or shopping mall—because *neither* poses any threat to privacy.

Fourth, and perhaps most importantly, to the extent that H.B. 2 seeks to validate an objection to seeing transgender people—which is to say, to their mere presence—that is not a legitimate government interest that this Court should dignify. Across history, there have been similar claims of "discomfort" about simply sharing spaces with those perceived as different—but the correct answer has never been to indulge that discomfort. "[A]ssertions of emotional discomfort about sharing facilities with transgender individuals" share a common lineage with "similar claims of discomfort in the presence of a minority group, which formed the basis for decades of racial segregation in housing, education, and access to public facilities like restrooms, locker rooms, swimming pools, eating facilities and drinking fountains." *Depôt of Fair Empôt & Hous. v. Am. Pac. Corp.*, No. 34-2013-00151153, Order at 4 (Cal. Super. Ct. Mar. 13, 2014) (Ex. AR); *see also Lusardi*, 2015 WL 1607756, at *9 ("Some co-workers may be . . . embarrassed or even afraid to share a restroom with a transgender co-worker. But . . . co-worker confusion or anxiety cannot justify discriminatory terms and conditions of employment.").

Impermissible prejudice "rises not from malice or hostile animus alone," but can instead be caused by "want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves" and who "might at first seem unsettling to us." *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374-75 (2001) (Kennedy, J., concurring). Even if such beliefs are

born of a “profound and deep conviction[],” *Lawrence v. Texas*, 539 U.S. 558, 571 (2003)

H.B. 2 forces transgender individuals in North Carolina to disclose their transgender status—a highly personal and intimate detail of their lives—to strangers in and around the public facilities that they use. For example, H.B. 2 forces Mr. Carcaño to use the restroom designated for women, but because he is a man and perceived as such, his transgender status and personal medical information is revealed to those around him if he enters the women's restroom in accordance with H.B. 2. When the government forces such a revelation, it takes away from transgender individuals their right to decide when to "come out" as transgender based on personal preferences and on judgments about which disclosures may result in violence and discrimination against them. This information therefore

transgender[] status is private, sensitive personal information" and "is entitled to protection.").

These constitutional privacy interests are heightened by the risks of private violence and discrimination to which transgender persons may become subject upon involuntary disclosure that they are transgender. *See, e.g.*, *Love*, 2015 WL 7180471, at *5 (disclosure of transgender identity to anyone requesting plaintiffs' driver's license—which could not be changed absent gender reassignment/realignment surgery—"create[d] a very real threat to Plaintiffs' personal security and bodily integrity"); *see generally Kallstrom v. City of Columbus*, 136 F.3d 1055, 1062-64 (6th Cir. 1998) (release of names and addresses of undercover police officers and their immediate family members to gang

other facility that corresponds with their gender identity. By tying access to sex-separated facilities to the gender marker listed on one's birth certificate, H.B. 2 fundamentally infringes on Plaintiffs' ability to make life-changing decisions about their own medical care, because the majority of states that permit changing one's birth certificate, including North Carolina, require that transgender people undergo some form of surgical treatment in order to bring the gender marker on their birth certificate into alignment with their gender identity. *See, e.g.*, N.C. Gen. Stat. § 130A-118(b)(4)

V. Plaintiffs Satisfy the Other Preliminary Injunction Factors.

A. An Injunction Is Necessary to Avoid Irreparable Harm.

A preliminary injunction is further warranted by the irreparable nature of the harm that Plaintiffs will endure in the absence of relief from this Court. The constitutional nature of the harms alleged by Plaintiffs—to their fundamental rights to equal protection, privacy

access to the courts, or the ability to use highways or airports (Carcaño Decl. ¶¶ 21-26); or (3) disclose their transgender identity to others in and around the bathrooms that they use—which may cause psychological distress and lead to harassment and violence. As to this third option, once this disclosure takes place, the bell cannot be un-rung, and an award of money damages cannot adequately remedy the harm.

matter of constitutional law and under important statutorily-protected rights to equal educational opportunities under Title IX.

There are not any adequate

C.

Defendant's supervision, direction, or control; and all other persons within the scope of Federal Rule of Civil Procedure 65, from enforcing Part I of H.B. 2.

Dated: May 16, 2016

Respectfully submitted,

/s/ Christopher A. Brook
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