IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. __:_____-CV-___-__

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,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF JUSTICE; LORETTA E. LYNCH, in her official capacity as Attorney General of the United States; VANITA GUPTA, in her official capacity as Principal Deputy Assistant Attorney General,

Defendants.

COMPLAINT FOR DECLARATORY RELIEF

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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 would have been taken for granted. Yet when North Carolina sought to protect that 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 the unprecedented threats by the United States Department of Justice ("Department"), the defendant here. Last week, the Department sent letters to North Carolina public officials and agencies informing them that, by complying with the Act, they were engaging in a "pattern or practice" of discrimination in violation of three federal civil rights laws. They were bluntly ordered to repudiate the Act within five calendar days—that is, by today—or else face enforcement actions that would drastically impact North Carolina, including the potentially catastrophic elimination of more than two billion dollars in federal funding. Instead of meekly complying, plaintiffs—the leaders of both chambers of the North Carolina General Assembly—have filed this declaratory judgment action.

2. A declaratory judgment is urgently needed for two basic reasons. First, it is needed to vindicate the sovereign right of North Carolina's citizens to decide how best to protect their own bodily privacy and dignity in intimate public settings. Second, it is needed to instruct the Department in no uncertain terms that its

overbearing abuse of executive authority flouts our Constitution's limitations on federal power and tramples on the sovereign dignity of the States and their citizens.

3. The ideological extremity—and utter unworkability—of the Department's position on the issues in this case is astonishing. Unlike the people of North Carolina, the Department believes that the only valid approach to issues 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 no federal statute or regulation remotely requires the Department's policy. Never mind that the Department's policy will inevitably lead to women and girls in public changing facilities encountering 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 biologically female inmates—which, besides being absurd and dangerous, also violates the Department's *own* federal prison regulations. Apparently, the Department believes that these obvious social costs are outweighed by the policy's purported psychological benefits to persons of conflicted gender identity.

4. 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 embody hostility towards those whose gender identity differs from their biological sex. To the contrary, the Act specifically 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 existing provisions allowing a person to obtain a sex-change operation, make a corresponding change to their birth certificate, and then use the public 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.

5. 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.

6. 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 and gender identities.

7. Nonetheless, in a series of highly publicized and unusual letters sent to North Carolina officials and agencies last week, the Department announced its "determination" that the Act, *on its face*, violates three federal civil rights statutes—

Title VII, Title IX, and the Violence Against Women Act. As explained more fully elsewhere in this Complaint, the legal theories reflected in the Department's determination letters are gravely flawed. For example, those theories all 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.

8. More important for present purposes, the Department's "determination" that the Act violates these civil rights laws represents an all-out assault, not only on the sovereign right of North Carolinians to determine their own policies regarding public bath and shower facilities, but on the right of every other State and local government to do the same. It is a remarkable act of executive overreach, one that unnecessarily insists on political correctness at the expense of privacy and safety for other vulnerable citizens, especially women and girls.

9. Relatedly, the Department's "determination" is also an assault on the whole system of single-sex bathrooms that, precisely because of privacy concerns, has been an accepted part of our Nation's social compact since time out of mind. As a legal matter, if a biologically male individual can access a women's bathroom based on a claim of "gender identity," then *any* males 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. Furthermore, as a practical matter, if owners of public

bathrooms, lockers, and shower facilities cannot exclude persons with male genitals from women's bathrooms, soon enough the public will sensibly demand that single-sex bathrooms be abandoned altogether in favor of single-occupancy facilities.

10. To be sure, owners of private bath, locker, and shower facilities may decide to move in that direction on their own. But state taxpayers should not be forced to shoulder the enormous costs of such a transition at the behest of federal officials who offer nothing more than policy arguments masquerading as law. Nor should innocent state residents be forced to endure the assault on their privacy that policy would produce in the interim.

11. In sum, declaratory relief is urgently needed in this case. It is needed to protect the sovereignty of North Carolina's people to set public policy on sensitive and controversial matters of bodily privacy and security. It is needed to shield North Carolina from an open-ended threat of a potentially catastrophic loss of federal funding based on nothing more than the Department's novel and untested misreading of longstanding federal requirements. And it is needed to clarify that federal officials abuse their authority—and violate the Constitution—when they peremptorily order a sovereign State to abandon properly enacted legislation, as if North Carolina were nothing more than a tributary of the federal government.

JURISDICTION AND VENUE

12. The Court has jurisdiction under 28 U.S.C. § 1331 because the action arises under the United States Constitution and federal law.

13. The Court may enter declaratory relief and any other appropriate relief under 28 U.S.C. § 2201 and § 2202.

14. The Court may review agency action and enter declaratory and other appropriate relief under the Administrative Procedure Act, 5 U.S.C. §§ 702-706.

15. Venue is proper under 28 U.S.C. § 1391(b) because a substantial part of the events or omissions giving rise to this action occurred in this judicial district.

16. Venue is also proper under 28 U.S.C. § 1391(e) because, in this action against officers and agencies of the United States, a substantial part of the events or omissions giving rise to this action occurred in this judicial district and because the Plaintiffs reside in this district and no real property is involved in this action.

PARTIES

17. Plaintiffs Phil Berger and Tim Moore serve as President pro tempore of the North Carolina Senate and as Speaker of the North Carolina House of Representatives, respectively. President pro tempore Berger and Speaker Moore lead the two chambers of the North Carolina General Assembly, which is constitutionally tasked with budgeting for the operation of all facets of state government and with enacting laws for the health, safety, and welfare of North Carolinians. Moreover, under North Carolina law, President Berger and Speaker Moore "jointly have standing to intervene on behalf of the General Assembly as a party in any judicial proceeding challenging a North Carolina statute or provision of the North Carolina Constitution." N.C. Gen. Stat. § 1-72.2-2.

18. Defendant United States Department of Justice ("Department") is an executive agency of the United States and is responsible for the enforcement of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*, and the Violence Against Women Reauthorization Act of 2013, 42 U.S.C. § 13925, *et seq.*

19. Defendant Loretta E. Lynch is the United States Attorney General. In this capacity she is responsible for the operation and management of the Department. She is sued in her official capacity only.

20. Defendant Vanita Gupta is a Principal Deputy Assistant Attorney General at the United States Department of Justice and an official of the Civil Rights Division of the United States Department of Justice. She has been delegated the responsibility to bring an enforcement action under Title VII, Title IX, and VAWA against the State of North Carolina and its public agencies and officials. She has been sued in her official capacity only.

FACTS

I. THE ACT

21. On March 23, 2016, the General Assembly of North Carolina passed the "Public Facilities Privacy and Security Act" (the "Act"), commonly known as HB2. 2015 Bill Text NC H.B. 2B (Mar. 23, 2016), amending N.C. Gen. Stat. § 115C-47.

22. 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).

23. "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).

24. 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).

25. 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.

26. 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).

27. 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").

28. 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.

II. THE DEPARTMENT'S "DETERMINATION" LETTERS

29. On May 4, 2016, the Department, through its Civil Rights Division, sent a letter to North Carolina Governor Patrick McCrory (the "McCrory Determination Letter").

30. The McCrory Determination Letter stated that the Department had "determined" and "concluded" that, as a result of complying with the Act, Governor McCrory and the State of North Carolina were "in violation of Title VII of the Civil Rights Act of 1964" because the State was "engaging in a pattern or practice of

discrimination against transgender state employees and both you, in your official capacity, and the State are engaging in a pattern or practice of resistance to the full enjoyment of Title VII rights by transgender employees of public agencies."

31. The McCrory Determination Letter explained that the Department had adopted the view that Title VII "applie[s] to discrimination against transgender individuals based on sex, including gender identity," and that Title VII requires "[a]ccess to sex-segregated restrooms and other workplace facilities consistent with gender *identity*." The letter further stated that under Title VII such "access ... is a term, condition, or privilege of employment."

32. The McCrory Letter concluded that "H.B. 2 ... is *facially discriminatory* against transgender employees on the basis of sex because it treats transgender employees, whose gender identity does not match their 'biological sex,' as defined by H.B. 2, differently from similarly situated non-transgender employees" (emphasis added). The letter further informed the Governor that, given the State's "pattern and practice" of Title VII discrimination, the Attorney General "may apply to the appropriate court for an order that will ensure compliance with Title VII."

33. Finally, the McCrory Determination Letter ordered the Governor to "advise" the Department "no later than close of business on May 9, 2016" whether he would "remedy these violations of Title VII, including by confirming that the State will not comply with or implement H.B. 2, and that it has notified employees of the State and public agencies that, consistent with federal law, they are

permitted to access bathrooms and other facilities consistent with their gender identity."

34. Also on May 4, 2016, the Department, through its Civil Rights Division, sent a letter to North Carolina Department of Public Safety ("DPS") Secretary Frank Perry (the "Perry Determination Letter").

35. The Perry Determination Letter "concluded" that the North Carolina DPS was in violation of Title VII, for the same reasons as those outlined in the McCrory Determination Letter.

36. In addition, the Perry Determination Letter "concluded" that DPS, as a receiver of federal funds from the Office on Violence Against Women ("OVW") "is in violation of the Violence Against Women Reauthorization Act of 2013" ("VAWA").

37. The Perry Determination Letter went on to allege that compliance with VAWA requires that any "individual" in "buildings controlled or managed by DPS or its sub-recipients"—buildings which would obviously include prisons throughout the State—be permitted "to access bathrooms and other facilities consistent with their gender identity."

38. Finally, the letter ordered Secretary Perry to "advise" the Department "no later than close of business on May 9, 2016" whether DPS has "remedied these violations to comply fully with Title VII and VAWA, including by confirming that DPS will not comply with H.B. 2, and that it has notified individuals and employees at facilities controlled or managed by DPS or its sub-recipients that, consistent with

federal law, they are permitted to access bathrooms and other facilities consistent with their gender identity."

39. Also on May 4, 2016, the Department, through its Civil Rights Division, sent a letter to the President of the University of North Carolina, Margaret Spellings (the "UNC Determination Letter").

40. The UNC Determination Letter "determined" that UNC was in violation of Title VII and VAWA, for the same reasons as those outlined in the McCrory and Perry Determination Letters.

41. In addition, the UNC Determination Letter "determined" that UNC was in violation of Title IX because of UNC's compliance with the Act.

42. Finally, the UNC Determination Letter ordered UNC President Margaret Spellings to "advise" the Department "no later than close of business on May 9, 2016" whether UNC has "remedied these violations to comply fully with Title IX and VAWA, as well as its obligations as an employer under Title VII, including by . . . advising the public, including UNC students, employees, and third parties that, in accordance with federal law, individuals are permitted to access UNC restrooms and other facilities consistent with their gender identity." The UNC Determination Letter threatened "enforcement action" if UNC failed to comply with the Department's order.

43. The Department's letters are calculated, not only to prevent North Carolina public officials from enforcing or implementing the Act, but also to pressure the North Carolina General Assembly into repealing the Act. Accordingly,