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

JOAQUÍN CARCAÑO, *et al.* *Plaintiffs*, v. PATRICK MCCRORY, in his official capacity as Governor of North Carolina, *et al.* *Defendants*.	Case No. 1:16-cv-00236

UNC DEFENDANTS' BRIEF IN RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs' Motion for Preliminary Injunction should be denied because Plaintiffs ask this Court to enjoin something that is not happening and that is not likely to happen. The University of North Carolina, its Board of Governors, and the Chairman of the Board (collectively UNC Defendants) are not responsible for enacting North Carolina's law regulating access to bathrooms and changing facilities, and have neither attempted to enforce nor threatened to enforce its provisions. Yet Plaintiffs nonetheless seek a preliminary injunction prohibiting them from enforcing that law. Multiple insurmountable obstacles stand in the way of this request.

First, Plaintiffs' lawsuit is neither justiciable under the Constitution nor ripe for consideration under prudential doctrines limiting judicial review. A challenge to a law is justiciable and ripe only if the defendant enforces or threatens to enforce it against the

plaintiff, but here, the UNC Defendants have done neither. There is, therefore, no actual or imminent action for this Court to enjoin, and this Court lacks jurisdiction to hear Plaintiffs' Motion for Preliminary Injunction. Second, for the same reasons, Plaintiffs have not made the showing needed to justify the extraordinary remedy of a preliminary injunction. A plaintiff must show irreparable injury to get a preliminary injunction. But since the law at issue does not address enforcement and the UNC Defendants have taken no action to prevent Plaintiffs from using bathrooms consistent with their gender identity, Plaintiffs cannot show that the UNC Defendants cause them any injury at all (much less an irreparable one). Finally, Plaintiffs at a minimum have no entitlement to a preliminary injunction on their constitutional claims. Their request for an injunction on the basis of these claims contravenes North Carolina's sovereign immunity (which protects the Board and Chairman) and exceeds the scope of 42 U.S.C. § 1983 (which does not create a right of action against the Board). The Court should therefore deny Plaintiffs' motion as to the UNC Defendants.

STATEMENT OF FACTS

1. The University of North Carolina is "a public, multicampus university dedicated to the service of North Carolina and its people." N.C. Gen. Stat. § 116-1. The University comprises sixteen constituent institutions of higher education and one constituent high school. *Id.* § 116-4. The University's Board of Governors, headed by Chairman W. Louis Bissette, Jr., is responsible for "the general determination, control, supervision, management and governance of all affairs" of the University. *Id.* § 116-

11(2). The University's President, Margaret Spellings, executes the University's policies, subject to the Board's direction and control. Spellings Decl. ¶ 2, ECF No. 38-1.

The University has long held a strong commitment to equality, diversity, and inclusion. It prohibits "unlawful discrimination against any person on the basis of . . . sex, sexual orientation, [or] gender identity." *The Code of the Board of Governors of the University of North Carolina* § 103 (2001), ECF No. 38-3, *available at* http://www.northcarolina.edu/apps/policy/index.php. In addition, the University does not have a policy or practice of prohibiting transgender persons from using single-sex bathrooms consistent with their gender identity. Spellings Decl. ¶ 5.

2. On March 23, 2016, the North Carolina General Assembly enacted the Public Facilities Privacy and Security Act, 2016 N.C. Sess. Laws 3 (Act). The Act states that public agencies, including the University, "shall require every multiple occupancy bathroom or changing facility to be designated for and only used by persons based on their biological sex." N.C. Gen. Stat. § 143-760(b). It defines "biological sex" as "[t]he physical condition of being male or female, which is stated on a person's birth certificate." *Id.* § 143-760(a)(1). It also defines "multiple occupancy bathroom or changing facility" 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"—including "a restroom, locker room, changing room, or shower room." *Id.* § 143-760(a)(3).

The Act 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.* § 143-760(c). Such accommodations may not, however, "allo[w] a person to use a multiple occupancy bathroom or changing facility designated . . . for a sex other than the person's biological sex." *Id.* The Act contains no enforcement provisions and does not establish any civil or criminal penalties.

3. On multiple occasions, the University has made plain that the Act contains no enforcement provisions and assigns no enforcement authority to the University, and that the University therefore has no intention to take any steps to enforce the Act against transgender people who use University bathrooms consistent with their gender identity.

a. On April 5, Margaret Spellings, the President of the University, sent a memorandum about the Act to chancellors of the University's constituent institutions. Guidance Memorandum, ECF No. 38-5. The Guidance Memorandum, which "responds to requests for guidance . . . concerning the Act's requirements," consists of a series of frequently asked questions followed by President Spellings' answers. *Id.* at 1.

To begin, the Guidance Memorandum addresses the question: "What are the University's obligations under the Act relating to bathrooms and changing facilities?" *Id.* The memorandum answers: "University institutions must require every multiple-occupancy bathroom and changing facility to be designated for and used only by persons based on their biological sex." *Id.* The memorandum later states that, "[l]ike all public agencies, the University is required to fulfill its obligations under the law unless or until [a] court directs otherwise." *Id.* at 2.

The Guidance Memorandum turns next to what the University must do to comply with the Act. It explains that University institutions "fully meet their obligations under the Act" by taking three steps: (1) "[d]esignat[ing] and label[ing] multiple-occupancy bathrooms and changing facilities for single-sex use with signage," (2) "[p]rovid[ing] notice of the Act to campus constituencies as appropriate," and (3) "[c]onsider[ing] assembling and making information available about the locations of designated single-occupancy bathrooms and changing facilities on campus." *Id.* at 1–2. The memorandum adds that University institutions "already designate and label multiple-occupancy bathrooms and changing facilities for single-sex use with signage" and thus need only "maintain these [existing] designations and signage." *Id.* at 2. The memorandum states, however, that "[t]he Act does not contain provisions concerning enforcement." *Id.* It also reminds University institutions that they "may provide accommodations such as single-occupancy bathrooms or changing facilities." *Id.* In sum, the memorandum makes clear that University institutions should continue to do what they have always done—*i.e.*, designate bathrooms as men's rooms, women's rooms, or single-occupancy rooms.

Finally, the Guidance Memorandum emphasizes the University's continued commitment to equal treatment of students and employees. It explains that "[t]he Act does not require University institutions to change their nondiscrimination policies," that "those policies should remain in effect," and that "constituent institutions must continue

to operate in accordance with [those] policies and must take prompt and appropriate action to prevent and address any instances of harassment and discrimination." *Id.* at 1–2.

b. About one week later, on April 11, President Spellings issued a further statement clarifying the Guidance Memorandum. Spellings April 11 Statement, Francisco Decl. Ex. A. President Spellings explained that the Guidance Memorandum "simply states what the General Assembly and Governor passed into law," reiterated that campuses already label bathrooms for men and women, and stated that "the law does not address enforcement and confers no authority for the University . . . to undertake enforcement actions." *Id.* She also reemphasized that the University maintains its "commitment to diversity [and] inclusion," "will not change existing non-discrimination policies," and "will not tolerate any sort of harassing or discriminatory behavior on the basis of gender identity or sexual orientation." *Id.*

c. Finally, in support of the UNC Defendants' motion to stay proceedings in this case (ECF No. 38), President Spellings submitted a declaration confirming the University's response to the Act. Consistent with the absence of any enforcement provisions in the Act, President Spellings stated that the University "has not threatened to enforce the Act's requirement that the University require individuals to use the restroom or changing facility that corresponds with their biological sex." Spellings Decl. ¶ 13. She further declared that she had "no intent to exercise [her] authority to promulgate any guidelines or regulations that require that transgender students use the restrooms consistent with their biological sex." *Id.* ¶ 16. She also declared that, "[i]f any

transgender student or employee does complain that they have been forced to use a restroom inconsistent with their gender identity, [she] will ensure that the complaint is investigated to determine whether there has been a violation of the University nondiscrimination policy and applicable law." *Id.* ¶ 15.

4. Plaintiffs sued the University of North Carolina, the Board of Governors, and W. Louis Bissette, Jr. in his capacity as Chairman of the Board of Governors. Pursuant to § 1983, Plaintiffs assert that the Board and Chairman Bissette are violating the Equal Protection and Due Process Clauses of the Fourteenth Amendment. First Am. Compl. ¶¶ 183–234 (Counts I–III), ECF No. 9. Plaintiffs also assert that the University is violating Title IX of the Education Amendments of 1972 (Title IX). First Am. Compl. ¶¶ 235–243 (Count IV). Plaintiffs have moved for a preliminary injunction "enjoining Defendants . . . from enforcing" the Act's provisions concerning multiple-occupancy bathrooms and changing facilities. Mot. for Prelim. Inj. 3, ECF No. 21.

QUESTIONS PRESENTED

1. Does Plaintiffs' request for a preliminary injunction against the UNC Defendants satisfy constitutional and prudential restrictions on this Court's jurisdiction?
2. Should the Court preliminarily enjoin the UNC Defendants from enforcing the Act's provisions concerning multiple-occupancy bathrooms and changing facilities?
3. To the extent Plaintiffs' request for a preliminary injunction against the UNC Defendants rests on Plaintiffs' constitutional claims, does it respect state sovereign immunity and fit within the scope of § 1983?

ARGUMENT

The Court should deny Plaintiffs' Motion for Preliminary Injunction for three simple reasons. First, Plaintiffs cannot establish the concrete controversy that is required to invoke this Court's Article III jurisdiction, because they provide no evidence of a credible threat that the UNC Defendants will enforce the challenged statute against them. Second, Plaintiffs have no entitlement to the extraordinary remedy of a preliminary injunction. Since there is no credible threat that the UNC Defendants will enforce the challenged statute against them, Plaintiffs cannot show any injury at all, much less the irreparable injury that is required to justify immediate judicial intervention. Finally, Plaintiffs at the very least may not obtain a preliminary injunction on the basis of their constitutional claims, because a request that rests on those claims contravenes North Carolina's sovereign immunity and exceeds the scope of § 1983.

I. THE COURT LACKS JURISDICTION OVER PLAINTIFFS' REQUEST FOR A PRELIMINARY INJUNCTION AGAINST THE UNC DEFENDANTS

Federal courts have jurisdiction to resolve live cases and controversies, not to adjudicate abstract debates. This principle—which reflects "both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise" (*Warth v. Seldin*, 422 U.S. 490, 499 (1975))—defeats Plaintiffs' request for a preliminary injunction. As Plaintiffs' own filings and President Spellings' Declaration confirm, the Act lacks enforcement provisions and the UNC Defendants have neither done anything to enforce nor threatened to enforce the Act that Plaintiffs attack. The UNC Defendants thus have not inflicted the harm on Plaintiffs that is a prerequisite to suing in federal court.

For that reason alone, the Court should deny the request for an injunction against the UNC Defendants. *See United States v. South Carolina*, 840 F. Supp. 2d 898, 907–09 (D.S.C. 2011) (denying part of a request for a preliminary injunction for lack of standing); *Syngenta Crop Prot., Inc. v. EPA*, 202 F. Supp. 2d 437, 445–48 (M.D.N.C. 2002) (denying request for preliminary injunction for lack of ripeness).

A. The Lawsuit Against The UNC Defendants Is Not A Justiciable Case Or Controversy Under Article III

Article III of the Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies." U.S. Const. art. III, § 2. It is "abundantly clear" that a challenge to the validity of a statute presents a justiciable case or controversy only if the defendant enforces or threatens to enforce the statute. *Doe v. Duling*, 782 F.2d 1202, 1206 (4th Cir. 1986) (holding that challenge to statute prohibiting "fornication and cohabitation" was not justiciable because there was no actual or threatened enforcement). The UNC Defendants have neither enforced nor threatened to enforce the Act. In fact, the only steps they have taken in response to the Act comport with even Plaintiffs' understanding of the Equal Protection Clause, Due Process Clause, and Title IX. This point alone defeats Plaintiffs' request for a preliminary injunction against the UNC Defendants.

1. A challenge to a statute is justiciable only if the defendant enforces or threatens to enforce it

The "mere existence" of a statute does not make a challenge to that statute "an adversary case" under Article III. *Poe v. Ullman*, 367 U.S. 497, 507 (1961) (plurality opinion); *see Doe*, 782 F.2d. at 1207. To the contrary, a challenge to a statute qualifies as

a case or controversy only if the defendant enforces the statute, or there exists a "credible threat" that the defendant will enforce the statute, against the plaintiff. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014); *see Doe*, 782 F.2d at 1206.

This credible-threat requirement flows from the doctrine of Article III standing. A plaintiff has standing to maintain a lawsuit in federal court only if (1) he has suffered an "injury in fact"—*i.e.*, an "invasion" of a judicially cognizable interest that is "concrete and particularized" and "actual or imminent," (2) the injury is "fairly traceable to the challenged action of the defendant," and (3) it is "likely" that "the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (alterations and internal quotation marks omitted). A challenged statute can cause "actual or imminent" injury only if the defendant is enforcing it against the plaintiff, or if there is a "credible threat" that the defendant will enforce it against the plaintiff. *Susan B. Anthony List*, 134 S. Ct. at 2341–42.

The credible-threat requirement also flows from the ripeness doctrine. Article III prohibits federal courts from adjudicating "abstract disagreements" that have not ripened into "concrete case[s] or controvers[ies]." *Thomas v. Union Carbide Agr. Prods. Co.*, 473 U.S. 568, 579–80 (1985). A disagreement about a statute's validity does not become "a ripe controversy" until there is a "live dispute involving the actual or threatened application" of the challenged law. *Renne v. Geary*, 501 U.S. 312, 320–21 (1991).

The Supreme Court has enforced the credible-threat requirement in a wide range of cases. For example, in *Ex parte La Prade*, 289 U.S. 444 (1933), the Court dismissed a

constitutional challenge to an Arizona law regulating railroad operations because "Plaintiffs did not allege that [the Arizona Attorney General] threatened or intended to do anything for the enforcement of the statute." *Id.* at 458. In *CIO v. McAdory*, 325 U.S. 472 (1945), the Court refused to entertain a claim that an Alabama statutory provision regulating labor unions violated the Constitution and federal labor law, because state officials "ha[d] agreed not to enforce [the provision] until the final decision as to the [provision's] validity [in a companion case]." *Id.* at 475. Likewise, in *Poe*, a plurality of four Justices held that a constitutional challenge to a Connecticut law regulating contraception lacked "the immediacy which is an indispensable condition of constitutional adjudication" because "years of Connecticut history" revealed a "tacit agreement" not to enforce the law. 367 U.S. at 508. A fifth Justice agreed that that the lawsuit did not amount to "a real and substantial controversy" because there was no "definite and concrete threat to enforce these laws against [the plaintiffs]." *Id.* at 509 (Brennan, J., concurring in judgment). The Court did get around to adjudicating the constitutionality of the statute four years later—but only after Connecticut started arresting, prosecuting, and convicting people for violating it. *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965).

Courts in this Circuit have likewise dismissed challenges to laws for lack of a credible threat of enforcement. For instance, in *Doe*, the Fourth Circuit held that an unmarried couple could not challenge a state law prohibiting "fornication and cohabitation," because "[r]ecorded cases" and "recent arrest records" revealed that the

challengers "face[d] only the most theoretical threat of prosecution." 782 F.2d at 1206. The Court refused to "overlook this deficiency and opine in the abstract on the validity of state enactments" (*id.* at 1207), reasoning that "mak[ing] a symbolic pronouncement" in the absence of "a case or controversy" would contradict "the structure of government established by the Constitution" (*id.* at 1209). Similarly, in *Moore v. City of Asheville*, 290 F. Supp. 2d 664 (W.D.N.C. 2003), the district court refused to hear a challenge to an ordinance regulating speeches on public streets because the plaintiff failed to "allege something beyond the mere existence of [the] law"; the challenger "made no allegation that the law was applied to anyone else or that anyone threatened to apply the law to him." *Id.* at 671.

As these cases make clear, the requirement that plaintiffs demonstrate a credible threat of enforcement protects vitally important interests. It "maintains proper separation of powers" by ensuring that federal courts do not "come to operate as second vetoes, through whom laws must pass for approval before they could be enforced." *Doe*, 782 F.2d at 1205–06. It safeguards "the integrity of the judicial process" (*Poe*, 367 U.S. at 505) by "provid[ing] courts with arguments sharpened by the adversarial process" and "narrow[ing] the scope of judicial scrutiny to specific facts" (*Doe*, 782 F.2d at 1205). And it "protects federalism by allowing the states to control the application of their own" statutes. *Id.* The credible-threat requirement defeats Plaintiffs' request here.

2. Plaintiffs cannot show that the UNC Defendants enforce or threaten to enforce the Act against them

A plaintiff challenging a statute, as "[t]he party invoking federal jurisdiction," "bears the burden of establishing" that the defendant enforces or threatens to enforce that statute. *Susan B. Anthony List*, 134 S. Ct. at 2342. To satisfy this burden, the plaintiff "must show more than the fact that state officials stand ready to perform their general duty to enforce laws." *Vernon Beigay, Inc. v. Traxler*, 790 F.2d 1088, 1091 (4th Cir. 1986). A defendant negates the existence of a case or controversy by "agree[ing] not to enforce" the law. *CIO*, 325 U.S. at 475.

Here, Plaintiffs do not even allege, let alone prove, that the UNC Defendants enforce or threaten to enforce the Act. Neither their 243-paragraph complaint nor their numerous declarations identifies a single instance in which the UNC Defendants have taken or threatened to take any disciplinary action (or any other enforcement steps) against a person who uses a bathroom consistent with his or her gender identity.[1]

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[1] News articles report that at least some Plaintiffs continue to use University bathrooms consistent with their gender identity without incident. For example, one article reports that, even after the Act's passage, Plaintiff H.S. has continued to "us[e] the girls' restroom at" the University of North Carolina School of the Arts High School. Jess Clark, *High Schoolers Debate*, April 19, 2016, http://www.wral.com/high-schoolers-debate-fear-on-both-sides-of-hb2/15651439/. Another article reports that Plaintiff Payton McGarry "often uses men's locker rooms and bathrooms on campus" at the University of North Carolina at Greensboro. Daniel Reynolds, *Trans Student Suing North Carolina*, The Advocate, June 3, 2016, http://www.advocate.com/transgender/2016/6/03/trans-student-suing-north-carolina-enough-enough-video. *See also G.G. v. Gloucester County School Board*, — F.3d —, 2016 WL 1567467, at *10 (4th Cir. 2016) ("Because preliminary injunction proceedings are informal ones . . . , district courts may look to, and

Quite the reverse. Even though it is Plaintiffs' burden to establish that their lawsuit *is* justiciable, the UNC Defendants have demonstrated that it is *not*. The University has said time and again—to employees, students, and even the Department of Justice—that the Act itself does not contain enforcement provisions, and that the University accordingly does not intend to enforce the Act:

- "The Act does not contain provisions concerning enforcement of the bathroom and changing facility requirements." Guidance Memorandum 4.
- "We caution that the law does not address enforcement and confers no authority for the University or any other public agency to undertake enforcement actions." Spellings April 11 Statement.
- "The law does not address enforcement and confers no authority for the University . . . to undertake enforcement actions. . . . The University has no process or means to enforce [the Act's] provisions." Shanahan April 13 Letter to Department of Justice, Francisco Decl. Ex. B at 1, 3.
- "Throughout all of this time, the University has recognized that the Act does not address enforcement and therefore has not taken any steps to enforce the statute's requirements on its campuses." Spellings May 9 Letter to Department of Justice, Francisco Decl. Ex. C at 1.

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indeed in appropriate circumstances rely on, hearsay or other inadmissible evidence when deciding whether a preliminary injunction is warranted.").

- "The University has not threatened to enforce the Act's requirement that the University require individuals to use the restroom or changing facility that corresponds with their biological sex, as listed on their birth certificate. In fact, I have repeatedly cautioned the constituent institutions that the Act confers no enforcement authority on the University or any other entity." Spellings Decl. ¶ 13.
- "If any transgender student or employee does complain that they have been forced to use a restroom inconsistent with their gender identity, I will ensure that the complaint is investigated to determine whether there has been a violation of the University nondiscrimination policy and applicable law." *Id.* ¶ 15.
- "Pending a final judgment in this case, I have no intent to exercise my authority to promulgate any guidelines or regulations that require that transgender students use the restrooms consistent with their biological sex." *Id.* ¶ 16.

In light of these repeated assurances, any fears of enforcement by the UNC Defendants are purely speculative.

3. Plaintiffs' arguments confirm that the lawsuit against the UNC Defendants is not justiciable

a. The University's response to the Act does not make this case justiciable

Plaintiffs assert, without elaboration, that "the UNC System is abiding by the dictates of the law." Preston Decl. ¶ 28, ECF No. 22-15. This bare assertion, however, does not make this case justiciable, because "abiding by" a law is not the same thing as enforcing or threatening to enforce it. Indeed, the University has done only three things to abide by the Act: (1) maintained existing bathroom signage designating bathrooms for use by men or use by women, (2) provided factual information about what the Act says, and (3) provided information about the location of single-occupancy bathrooms. *Supra* 5. Plaintiffs have not challenged any of these actions under the Equal Protection Clause, Due Process Clause, or Title IX—understandably so, since none of these measures discriminates on the basis of sex or gender identity, or does anything to prevent transgender people from using bathrooms consistent with their gender identity. Because Plaintiffs do not challenge any of the actions that the UNC Defendants *did* take (the actions detailed above), but instead challenge a hypothetical action that the UNC Defendants have *not* taken and are *not* imminently poised to take (enforcement of the Act), their lawsuit is not justiciable.

b. The Guidance Memorandum does not make this case justiciable

Plaintiffs allege that President Spellings stated in her Guidance Memorandum that "'University institutions must require every multiple-occupancy bathroom and changing

facility to be designated for and used only by persons based on their biological sex.'" First Am. Compl. ¶ 171. This allegation takes the quoted statement out of context, inaccurately portraying a description of the Act's terms as a description of the University's policy. In reality, the Guidance Memorandum and other statements issued by University officials make plain that the UNC Defendants have not changed, and do not intend to change, their nondiscrimination policies, and that the UNC Defendants have not taken, and do not intend to take, any disciplinary or other action to enforce the Act.

To begin, the Guidance Memorandum as a whole makes it abundantly clear that the language that Plaintiffs quote describes *the Act's* requirements, not *the University's* position. The memorandum "responds to requests for guidance . . . concerning *the Act's requirements*." Guidance Memorandum 1 (emphasis added). It explains that "*[t]he Act requires* multiple occupancy bathrooms and changing facilities in government buildings to be designated for and only used by persons based on biological sex." *Id.* (emphasis added). It continues: "2. What are the University's obligations *under the Act* relating to bathrooms and changing facilities? A: University institutions must require every multiple-occupancy bathroom and changing facility to be designated for and used only by persons based on their biological sex." *Id.* (emphasis added and deleted).

Subsequent statements confirm that the quoted language from the Guidance Memorandum merely describes the Act's requirements. President Spellings' April 11 Statement explains that the Guidance Memorandum is "a Q&A summary *of the requirements of the [Act]*" and "provid[es] factual guidance on *the requirements of the*

law." A letter from the University to the Department of Justice states *twice* that the memorandum "provides only factual statements on the requirements of [the Act]." Shanahan Letter at 2, 5.

When the Guidance Memorandum turns from *the Act's* requirements to *the University's* response to those requirements, it underscores that the University's nondiscrimination policies will remain unchanged, that the University has no authority to enforce the Act's provisions, and that the University has not taken and does not intend to take any enforcement action to exclude transgender people from bathrooms consistent with their gender identity. Thus, the memorandum states that the Act "does not require University institutions to change their nondiscrimination policies" and that the Act "does not contain provisions concerning enforcement." Guidance Memorandum 1–2. Driving the point home, President Spellings' April 11 Statement reiterates that "UNC and its campuses will not change existing non-discrimination policies" and that the Act "confers no authority for the University . . . to undertake enforcement actions." And President Spellings' Declaration reconfirms that she has "no intent to exercise [her] authority to promulgate any guidelines or regulations that require that transgender students use the restrooms consistent with their biological sex" and that the University "has not threatened to enforce the Act's requirement." Spellings Decl. ¶¶ 13, 16.

The Guidance Memorandum further explains that, instead of adopting new policies or enforcing the Act's restrictions, University institutions "fully meet their obligations under the Act" by (1) maintaining existing signage, (2) disseminating factual

information about the Act's requirements, and (3) disseminating information about the location of single-occupancy bathrooms and changing facilities. *Supra* 5. Again, Plaintiffs do not challenge any of these measures. They accordingly cannot establish that any of the actions the UNC Defendants are undertaking violate their rights, even as Plaintiffs themselves understand them.

In all events, even on the erroneous assumption that the University had imposed an independent "requirement" excluding transgender people from bathrooms consistent with their gender identity, Plaintiffs' motion for a preliminary injunction against the UNC Defendants *still* would not be justiciable. A challenge to a university policy (no less than a challenge to a statute) qualifies as a case or controversy only if the defendant enforces or threatens to enforce the policy; the bare existence of a policy does not suffice. *Rock for Life-UMBC v. Hrabowski*, 411 Fed. Appx. 541, 548 (4th Cir. 2010); *Lopez v. Candele*, 630 F.3d 775, 781 (9th Cir. 2010). Here, even if the University had a policy of excluding transgender people from bathrooms consistent with their gender identity—and it does not—the UNC Defendants have neither enforced nor threatened to enforce it. Once again, no justiciable controversy is before the court.

c. Plaintiffs' subjective fears of enforcement do not make this case justiciable

Plaintiffs have submitted declarations asserting that they experience "fear of getting in trouble" for using bathrooms consistent with their gender identity (H.S. Decl. ¶ 32, ECF No. 22-8) or "anxiety" about "being forced into [the other sex's] restroom"

(Carcaño Decl. ¶ 22, ECF No. 22-4; McGarry Decl. ¶ 29, ECF No. 22-9). But these fears, even if sincere, do not suffice to make this lawsuit justiciable.

As the Fourth Circuit has emphasized, it takes "an *objective* threat" rather than a "*subjective* fear" of enforcement to establish a case or controversy. *Doe*, 782 F.2d at 1206 (emphases added); *see also Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1153 (2013) ("subjective fear . . . does not give rise to standing"). Thus, in *Doe*, the Fourth Circuit refused to hear a challenge to a state law prohibiting fornication and cohabitation, even though the plaintiffs there maintained "that they [had been] fearful of cohabiting or engaging in sexual intercourse since they ha[d] learned of the statutes in question." 782 F.2d at 1206. The Court held that this "subjective fear" was "'not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm.'" *Doe*, 782 F.2d at 1206 (quoting *Laird v. Tatum*, 408 U.S. 1, 13–14 (1972)). The Court acknowledged that "[e]very . . . law, by its very existence, may have some chilling effect on personal behavior," but reasoned that this "academic chill" does not suffice. *Id.* Here, as in *Doe*, Plaintiffs may have established a subjective fear of enforcement, but they have not established an objective threat of it. Their challenge accordingly is not justiciable.

In addition, a lawsuit satisfies Article III only if the plaintiff's injury is "fairly traceable to the challenged action of the defendant" rather than to "the independent action of some third party." *Lujan*, 504 U.S. at 560 (alterations and internal quotation marks omitted). For example, a business injured by an emissions regulation adopted by one government entity may not sue a different government entity that has "no connection" to

adoption of the challenged regulation, because in such circumstances, the plaintiff's injury is not "fairly traceable to *the defendants' actions*." *Mirant Potomac River, LLC v. EPA*, 577 F.3d 223, 226, 230 (4th Cir. 2009) (emphasis added). Similarly, a voter claiming to have been injured by a political party's voluntary adoption of an open primary may not sue the state board of elections, because the "source of the complaint" in such circumstances is the political party rather than the state. *Marshall v. Meadows*, 105 F.3d 904, 906 (4th Cir. 1997). Here, even if Plaintiffs' fears of enforcement constituted injuries in fact, they would be traceable only to the State (which enacted and enforces the Act). They would not be traceable to the UNC Defendants (who neither enacted nor enforce the Act). It follows, again, that the lawsuit against the UNC Defendants is not justiciable.

In the final analysis, "the absence of a threat of [enforcement]" means that "this action represents no more than an abstract debate, albeit a volatile one." *Doe*, 782 F.2d at 1207. Such a "clash of argument in the abstract . . . would be better suited to a campaign for public office or a legislative hearing." *Id.* This "does not mean that federal review" is "forever foreclosed"; if "actual or threatened enforcement" occurs, federal courts may at that time "assume an appropriate reviewing role under Article III." *Id.* at 1209. But until then, the lawsuit against the UNC Defendants is not justiciable.

B. The Lawsuit Against The UNC Defendants Is Not Prudentially Ripe

Even if there were Article III jurisdiction here, Plaintiffs' claims against the UNC Defendants still would not be "ripe for judicial review" as a "prudential" matter. *Nat'l*

Park Hospitality Ass'n v. Dept. of Interior, 538 U.S. 803, 808 (2003); *see also Sansotta v. Town of Nags Head*, 724 F.3d 533, 545 (4th Cir. 2013) (distinguishing "constitutional" from "prudential ripeness"). To determine whether a case is prudentially ripe, "courts must balance 'the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *Franks v. Ross*, 313 F.3d 184, 194 (4th Cir. 2002) (quoting *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998)). The plaintiff bears "[t]he burden of proving ripeness." *Miller v. Brown*, 462 F.3d 312, 319 (4th Cir. 2006).

For the same reasons Plaintiffs cannot establish Article III jurisdiction, they cannot show fitness for judicial review. "[P]rematurity and abstractness" constitute "insuperable obstacles" to judicial review (*Socialist Labor Party v. Gilligan*, 406 U.S. 583, 588 (1972)), and a challenge to a state law is both "premature" and "abstract" so long as there is no imminent threat of enforcement (*Doe*, 782 F.2d at 1207–08). For example, the court in *International Academy of Oral Medicine & Toxicology v. North Carolina State Board of Dental Examiners*, 451 F. Supp. 2d 746 (E.D.N.C. 2006), held that a challenge to an administrative policy concerning dental practices was unfit for review because the state dental board "d[id] not plan to take any action" on the basis of the policy. *Id.* at 751. So too here, the UNC Defendants have not and do not plan to take any enforcement action on the basis of the Act.

Nor would this Court's refusal to exercise jurisdiction cause hardship to Plaintiffs. "The hardship prong is measured by the immediacy of the threat and the burden imposed

on the [people] who would be compelled to act under threat of enforcement of the challenged law." *Miller*, 462 F.3d at 319. Immediate review is justified only if the harm "is immediate, direct, and significant." *W. Va. Highlands Conservancy, Inc. v. Babbitt*, 161 F.3d 797, 801 (4th Cir. 1998). For example, the Fourth Circuit in *Charter Federal Savings Bank v. Office of Thrift Supervision*, 976 F.2d 203 (4th Cir. 1992), refused to review a lawsuit against the Federal Deposit Insurance Commission because "several contingencies separate[d] [the plaintiff] from a threat of . . . agency action." *Id.* at 209. In this case, of course, there is *no* threat of enforcement—much less an *immediate* one—and thus no immediate, direct, and significant harm.

In sum, because Plaintiffs cannot establish either fitness or hardship, their claims against the UNC Defendants are prudentially unripe.

II. PLAINTIFFS ARE NOT ENTITLED TO PRELIMINARY RELIEF AGAINST THE UNC DEFENDANTS

An injunction is "a drastic and extraordinary remedy" that "should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008). If the plaintiff does not satisfy "[a]ll four requirements," the court "must" deny the injunction. *Cantley v. W. Va. Reg'l Jail & Corr. Facility Auth.*, 771 F.3d 201, 207 (4th Cir. 2014). If the plaintiff does satisfy all four requirements, by contrast, the issuance of an injunction

remains "a matter of equitable discretion" (*Winter*, 555 U.S. at 32); contrary to Plaintiffs' assertion that a court "must" grant a preliminary injunction under such circumstances (Plfs' Mem. 11, ECF No. 22), a preliminary injunction is "never awarded as of right" (*Winter*, 555 U.S. at 24).

Moreover, where the defendant is a state agency, "considerations of federalism" require courts to "abide by standards of restraint that go well beyond those of private equity jurisprudence." *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 603–04 (1975). The court must "'very strictly observ[e]'" the rule that "no injunction ought to issue" against state officers or agencies "'unless in a case reasonably free from doubt and when necessary to prevent great and irreparable injury.'" *Id.* at 603 (quoting *Mass. State Grange v. Benton*, 272 U.S. 525, 527, 529 (1926) (Holmes, J.)).

Here, even assuming that Plaintiffs' claims are justiciable and regardless of the likelihood of their success on the merits, Plaintiffs still are not entitled to a preliminary injunction against the UNC Defendants both because they cannot show imminent irreparable injury and because the balance of equities and public interest weigh decisively against them.

A. Plaintiffs Do Not Face Immediate Irreparable Injury From The UNC Defendants

One of the "basic requisites" of an injunction is "immediate irreparable harm." *O'Shea v. Littleton*, 414 U.S. 488, 502 (1974). Failure to show irreparable injury is "*by itself* a sufficient ground upon which to deny a preliminary injunction." *Direx Israel, Ltd. v. Breakthrough Med. Corp.*, 952 F.2d 802, 812 (4th Cir. 1991) (emphasis added). Thus,

courts have repeatedly denied preliminary injunctions solely because the plaintiff failed to show irreparable harm. *See, e.g.*, *Gelco Corp. v. Coniston Partners*, 811 F.2d 414, 420 (8th Cir. 1987) (cited in *Direx Israel*, 952 F.2d at 812) ("Once a court determines that the movant has failed to show irreparable harm . . . , the inquiry is finished and the denial of the injunctive request is warranted."); *Marshall v. Trenum*, No. 09-1309, 2009 WL 2588527, at *2 (D. Md. Aug. 19, 2009) ("The failure to make a clear showing of irreparable harm is, by itself, a ground upon which to deny injunctive relief."); *In re Young*, No. 04-54818, 2006 WL 3690678, at *2 (Bkcy. M.D.N.C. Dec. 12, 2006) ("Lack of irreparable injury alone is sufficient to deny a . . . preliminary injunction.").

In order to constitute irreparable injury, the harm must be not only significant but also "imminent"; "[a]n injunction will not be granted against something merely feared as liable to occur at some indefinite time in the future." *Norfolk & W. Ry. Co. v. Bhd. of R.R. Signalmen*, 164 F.3d 847, 856 (4th Cir. 1998) (internal quotation marks omitted). Thus, state laws cause irreparable injury to the plaintiff only if the plaintiff faces an "imminent threat" of enforcement. *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582, 589 (1961); *see Gersten v. Rundle*, 833 F. Supp. 906, 912 (S.D. Fla. 1993). The mere existence of the challenged statute does not constitute irreparable injury, "even if such statut[e] [is] unconstitutional." *Watson v. Buck*, 313 U.S. 387, 400 (1941). There must instead be a "*virtual certainty*" that enforcement proceedings "are to be begun . . . *immediately*." *Id.* (emphases added).

No such "virtually certain" threat of "immediate" enforcement looms here. Quite the opposite, Plaintiffs have not alleged that the University is currently injuring them by denying access to facilities. Moreover, the University has made it clear that, in light of the lack of enforcement provisions in the Act, it is not taking steps to enforce the Act. *Supra* 13–15. "[N]o suits ha[ve] been threatened, and no criminal or civil proceedings instituted, and no particular proceedings contemplated." *Watson*, 317 U.S. at 399. Plaintiffs thus cannot make the "clear showing of immediate irreparable injury" that is an indispensable prerequisite of a preliminary injunction. *Direx Israel*, 952 F.2d at 812.

B. The Balance Of Equities And Public Interest Disfavor An Injunction Against The UNC Defendants

In addition to likelihood of success on the merits and irreparable harm, a plaintiff seeking a preliminary injunction must show that the balance of equities tips in his favor. Failure to satisfy these prerequisites "alone requires denial of the requested injunctive relief." *Winter*, 555 U.S. at 23. For example, in *Winter*, the Supreme Court held that "even if plaintiffs [were] correct on the underlying merits," and "even if plaintiffs ha[d] shown irreparable injury," it was an abuse of discretion to issue a preliminary injunction because "any such injury [was] outweighed by the public interest and [the defendant's] interest." *Id.* at 23, 31 n.5.

Plaintiffs cannot show that the equities and public interest favor them for the same reason that Plaintiffs cannot show irreparable injury (or even an Article III harm): They do not face any imminent threat of any disciplinary action by the University. "The

absence of a 'remedy' works no injustice on those who have never suffered so much as the threat of [enforcement]." *Doe*, 782 F.2d at 1207.

Instead, the equities and public interest strongly favor the UNC Defendants. State authorities have a powerful interest "in managing their own affairs." *Milliken v. Bradley*, 433 U.S. 267, 281 (1977). This interest is both an equity to be considered when balancing hardships (*CSX Transp., Inc. v. Forst*, 777 F. Supp. 435, 441 (E.D. Va. 1991)) and a component of the public interest (*Erik V. v. Causby*, 977 F. Supp. 384, 390 (E.D.N.C. 1997)). This interest carries special weight in the context of public education, where "local autonomy . . . is a vital national tradition." *Missouri v. Jenkins*, 515 U.S. 70, 99 (1995); *see Erik V.*, 977 F. Supp. at 390. "The administration of public schools is a state . . . function rather than a federal judicial function, and so ought not to be subjected to the . . . tutelage of the federal courts." *United States v. Board of Sch. Comm'rs*, 128 F.3d 507, 510 (7th Cir. 1997) (Posner, J.). Courts have thus given significant weight to federalism when deciding whether to grant injunctions to prevent colleges from violating the First Amendment (*Southworth v. Grebe*, 151 F.3d 717, 734 (7th Cir. 1998), *rev'd on other grounds*, 529 U.S. 217 (2000)); injunctions to prevent schools from violating federal anti-discrimination laws (*Erik V.*, 977 F. Supp. at 390); and even injunctions to redress school segregation (*Jenkins*, 515 U.S. at 99).

Under these principles, the equities and public interest heavily disfavor a preliminary injunction against the UNC Defendants. The mission of the University of North Carolina and its constituent institutions is to educate students and serve the citizens

of North Carolina through teaching, research, and public service. The task of leading and running this complex university system—which has seventeen campuses, hundreds of buildings, over 50,000 employees, and more than 225,000 students—is best left to the University. The University has a powerful interest in managing its facilities, including bathrooms, locker rooms, changing rooms, and showers, free from ongoing monitoring by a federal court. The University operates these facilities—and has made clear that it will continue to operate these facilities—in a manner that does not threaten any disciplinary action for transgender people who use bathrooms consistent with their gender identity. Indeed, Plaintiffs' challenge focuses on the Act—which was adopted by the North Carolina General Assembly and the Governor, not the University—rather than on any policy or practice adopted by the UNC Defendants. Under these circumstances, there is no justification for this Court to intrude, via preliminary injunction, into the University's day-to-day operations.

C. Plaintiffs' Arguments Fail To Justify A Preliminary Injunction Against The UNC Defendants

The same obstacle that prevents Plaintiffs from invoking this Court's jurisdiction also renders all of their arguments in favor of a preliminary injunction inapplicable to the UNC Defendants. Plaintiffs argue that "forcing transgender individuals to use the wrong restroom" violates constitutional rights, threatens their "personal safety," compels them "to disclose their transgender status to complete strangers," and "communicates the state's moral disapproval of their identity." Plfs' Mem. 40–42. Yet none of these arguments applies to the UNC Defendants. Because (as detailed above) none of the UNC

Defendants takes or threatens to take any action that "forc[es] transgender individuals to use the wrong restroom," none of these defendants violates Plaintiffs' constitutional rights, threatens their personal safety, compels them to disclose their transgender status, or expresses moral disapproval of their identity. Just the opposite, President Spellings has stated that "[i]f any transgender student or employee does complain that they have been forced to use a restroom inconsistent with their gender identity, [she] will ensure that the complaint is investigated to determine whether there has been a violation of the University nondiscrimination policy and applicable law." Spellings Decl. ¶ 15. A preliminary injunction is not warranted.

III. AT A MINIMUM, PLAINTIFFS MAY NOT RELY ON THEIR CONSTITUTIONAL CLAIMS AS A BASIS FOR PRELIMINARY RELIEF

Plaintiffs' motion for a preliminary injunction rests on four legs: three constitutional claims under § 1983 against the Board and Chairman Bissette (Counts I–III) and one Title IX claim against the University (Count IV). Plaintiffs, however, are not entitled to invoke their constitutional claims in support of their request for a preliminary injunction against the Board and Chairman Bissette, because the constitutional claims violate North Carolina's sovereign immunity and exceed the scope of the right of action established by § 1983. Plaintiffs must therefore rely solely on their Title IX claim as a basis for preliminary relief, but that claim alone cannot justify this court's intervention.

A. The Request For A Preliminary Injunction Against The Board Violates Sovereign Immunity And Exceeds § 1983's Scope

The Constitution of the United States presupposes that "each State is a sovereign entity in our federal system" and thus "[is] not . . . amenable to the suit of an individual without its consent." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996). Where "the State or one of its agencies or departments is named as the defendant," "[t]his jurisdictional bar applies regardless of the nature of the relief sought." *Pennhurst State Sch. & Hosp v. Halderman*, 465 U.S. 89, 100 (1984). This immunity extends to "[s]tate-funded colleges and universities" that have "close ties to the State." *Blackburn v. Trs. of Guilford Technical Cmty. Coll.*, 822 F. Supp. 2d 539, 542–43 (M.D.N.C. 2011) (Schroeder, J.) (citing *Md. Stadium Auth. v. Ellerbe Becket Inc.*, 407 F.3d 255, 263 (4th Cir. 2005)). In *Huang v. Board of Governors of University of North Carolina*, 902 F.2d 1134 (4th Cir. 1990), the Fourth Circuit held that sovereign immunity precludes a lawsuit under § 1983 against the University of North Carolina's Board of Governors. *Id.* at 1139. This Court likewise concluded in *Costello v. University of North Carolina at Greensboro*, 394 F. Supp. 2d 752 (M.D.N.C. 2005), that the Board "enjoy[s] the state's [sovereign] immunity." *Id.* at 756.

Separately, § 1983 creates a private right of action only against a "person" who deprives an individual of constitutional rights under color of state law. A State or state agency "is not a 'person' within the meaning of § 1983," and thus may not be sued under that statute. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989). In *Huang*, the Fourth Circuit explained that the Board, "as [an] alter eg[o] of the state," "[is] not [a]

'perso[n]' within the meaning of § 1983." 902 F.2d at 1139 n.6. This Court has agreed that the Board is "an alter ego of the State of North Carolina" and thus may not be sued under § 1983. *Googerdy v. N.C. Agr. & Tech. State Univ.*, 386 F. Supp. 2d 618, 625 (M.D.N.C. 2005); *accord Mann v. Winston Salem State Univ.*, No. 14-1054, 2015 WL 5336146, at *4 (M.D.N.C. Sep. 14, 2015).

Here, under a straightforward application of these principles, Plaintiffs cannot obtain a preliminary injunction against the Board. Plaintiffs cannot bring their constitutional claims against the Board because it enjoys sovereign immunity. And Plaintiffs do not have a right of action for their constitutional claims against the Board because it is not a "person" that can be sued under § 1983.

B. The Request For A Preliminary Injunction Against Chairman Bissette Violates Sovereign Immunity

In *Ex parte Young*, 209 U.S. 123 (1908), the Supreme Court held that, notwithstanding state sovereign immunity, "officers of the state, [who] are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence an action . . . to enforce an unconstitutional state statute, may be enjoined from doing so." *Id.* at 156. *Young* establishes a "narrow exception" to state sovereign immunity, and where the exception does not apply state officers sued in their official capacity remain immune from suit—even where the plaintiff seeks purely prospective relief. *Seminole Tribe*, 517 U.S. at 76; *see Wright v. North Carolina*, 787 F.3d 256, 261–63 (4th Cir. 2015).

Two prerequisites to the applicability of *Ex parte Young* are pertinent here. One: The state officer in question must have a "duty in regard to the enforcement" of the challenged law. *Young*, 209 U.S. at 156. A "general duty to enforce the laws" is not enough; the officer must have a "specific duty to enforce the challenged statut[e]." *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 331 (4th Cir. 2001); *accord Wright*, 787 F.3d at 261–63. Two: The state officer must "threaten and [be] about to . . . enforce [the challenged] state statute." *Young*, 209 U.S. at 156. If the state officer has not "personally" "enforced, threatened to enforce, or advised other agencies to enforce the [challenged statute] against [Plaintiffs], the *Ex parte Young* fiction cannot apply." *McBurney v. Cuccinelli*, 616 F.3d 393, 402 (4th Cir. 2010).

Here, Plaintiffs satisfy neither prerequisite and, as a result, Chairman Bissette is entitled to sovereign immunity. First, Chairman Bissette does not have a duty to enforce the challenged statute. As an initial matter, Chairman Bissette does not even have a general responsibility for executing state laws. The North Carolina Constitution provides that "[t]he Governor shall take care that the laws be faithfully executed" (N.C. Const. art. III, § 5, cl. 4), thus "clearly assign[ing] the enforcement of laws to [him]" (*Wright*, 787 F.3d at 262). Neither North Carolina's Constitution nor its statutes makes the Chairman of the University's Board of Governors responsible for executing state law. *See* N.C. Gen. Stat. § 116-8 (establishing office of Chairman); *The Code of the Board of Governors of the University of North Carolina* § 202 (empowering the Chairman to preside over Board meetings, not to execute state law). Much less does Chairman

Bissette have (as *Ex parte Young* requires) specific responsibility for enforcing the statute challenged here. Quite the contrary, the Act says nothing at all about its enforcement.

Second, even if Chairman Bissette (who is merely one of 32 voting members of the Board) could do something to enforce the challenged statute, Plaintiffs have not shown that he threatens to do so. Plaintiffs have not even alleged, much less proved, that Chairman Bissette has "personally" "enforced, threatened to enforce, or advised other agencies to enforce" the Act against Plaintiffs. *Ex parte Young* thus does not come into play, and Chairman Bissette remains immune from Plaintiffs' lawsuit.

C. Plaintiffs' Inability To Invoke Their Constitutional Claims Further Undermines Their Entitlement To Preliminary Relief

For the reasons just discussed, Plaintiffs may not invoke their constitutional claims to support their request for a preliminary injunction. To be sure, Plaintiffs could still invoke their Title IX claim, because the Fourth Circuit has held that, "by accepting Title IX funding, a state agrees to waive" its immunity from Title IX claims. *Litman v. George Mason Univ.*, 186 F.3d 544, 554 (4th Cir. 1999). The Title IX claim standing alone, however, does not justify the preliminary injunction Plaintiffs seek.

First, confining Plaintiffs to the Title IX claim precludes a preliminary injunction against the Board and Chairman. The Board and Chairman are parties only to Plaintiffs' constitutional claims (Counts I–III), not to their Title IX claim (Count IV). First Am. Compl. ¶¶ 183–243. So once the Court holds that Plaintiffs' constitutional claims contravene state sovereign immunity and exceed the scope of § 1983, Plaintiffs can no longer obtain a preliminary injunction against these two defendants.

Second, in addition to wholly barring relief against the Board and Chairman, confining Plaintiffs to the Title IX claim makes it much harder for Plaintiffs to justify a preliminary injunction against the University. Plaintiffs' position on irreparable injury, balance of equities, and the public interest rests principally on the *constitutional* claims. *See* Plfs' Mem. 40 (arguing that "[t]he constitutional nature of the harms" makes the harms irreparable); *id.* at 41 (arguing that "constitutional violations of the right to privacy" are irreparable); *id.* at 42–43 (arguing that the denial of "equal protection" is an equity in Plaintiffs' favor); *id.* at 43 (arguing that the state "is in no way harmed" by a preliminary injunction against an unconstitutional law); *id.* at 44 (arguing that "it is always in the public interest to uphold constitutional rights" (brackets and quotation marks omitted)). Plaintiffs plainly cannot continue to rely on such arguments, however, once it is established that their constitutional claims contravene sovereign immunity and exceed the scope of § 1983.

In short, Plaintiffs' inability to maintain the constitutional claims further confirms that Plaintiffs are not entitled to a preliminary injunction against the UNC Defendants on any claim. Plaintiffs' motion should be denied.[2]

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[2] The UNC Defendants do not believe oral argument is necessary. If the Court concludes that a hearing or oral argument is warranted as to any of the parties in this case, however, the UNC Defendants respectfully request leave to participate in the hearing and to present oral argument.

CONCLUSION

The federal courts cannot adjudicate hypothetical disputes and they cannot enjoin a state agency from doing something it has no intention of doing. This Court should therefore deny Plaintiffs' request for a preliminary injunction.

Dated: June 9, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 9, 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notice of electronic filing to all registered parties.

Dated: June 9, 2016

/s/ Noel J. Francisco

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

JOAQUÍN CARCAÑO, *et al.* *Plaintiffs*, v. PATRICK MCCRORY, in his official capacity as Governor of North Carolina, *et al.* *Defendants*.	Case No. 1:16-cv-00236

DECLARATION OF NOEL J. FRANCISCO

1. My name is Noel J. Francisco. I am a licensed attorney and represent the University of North Carolina, its Board of Governors, and the Chairman of the Board of Governors (collectively UNC Defendants) in the above-captioned case. I make this declaration in support of UNC Defendants' Brief in Response to Plaintiffs' Motion for Preliminary Injunction.

2. Attached as Exhibit A is a copy of a statement issued by Margaret Spellings, President of the University of North Carolina, on April 11, 2016, titled "President Spellings comments on Public Facilities Privacy and Security Act (HB2)."

3. Attached as Exhibit B is a copy of a letter sent by Thomas C. Shanahan, Senior Vice President and General Counsel of the University of North Carolina, to Shaheena Ahmad Simons, Acting Chief of the Educational Opportunities Section of the Civil Rights Division of the United States Department of Justice, on April 13, 2016.

4. Attached as Exhibit C is a copy of a letter sent by President Spellings to Vanita Gupta, Principal Deputy Assistant Attorney General of the United States, on May 9, 2016.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: June 9, 2016

Noel J. Francisco

Declaration of Noel J. Francisco

EXHIBIT A

UNIVERSITY OF NORTH CAROLINA

President Spellings comments on Public Facilities Privacy and Security Act (HB2)

Last week, UNC General Administration issued a Q&A summary of the requirements of the Public Facilities Privacy and Security Act (HB2) enacted on March 23. That Q&A was developed in response to campus requests for guidance on how to interpret the new law and how to apply it across the University. As a state institution, the University is bound to comply with HB2 and all other laws passed by the General Assembly and signed by the Governor.

We have heard from students, faculty, and staff who see HB2 as an effort to single out individuals based on their sexual orientation or gender identity for ridicule or harassment. They are hurt, angry, and even afraid. It is apparent that our providing factual guidance on the requirements of the law has been misinterpreted by many as an endorsement of the law. Nothing could be further from the truth.

The guidance we issued simply states what the General Assembly and Governor passed into law, and it addresses some key issues:

- We clarify that UNC and its campuses will not change existing non-discrimination policies that apply to all students and employees, and that we will not tolerate any sort of harassing or discriminatory behavior on the basis of gender identity or sexual orientation;
- We explicitly say that campuses need not change existing labeling of bathrooms; and
- We caution that the law does not address enforcement and confers no authority for the University or any other public agency to undertake enforcement actions.

The University's fundamental values include a commitment to diversity, inclusion, academic freedom, free speech, free expression, and the pursuit of free inquiry. We want our campuses to be welcoming and safe places for students and faculty of all backgrounds, beliefs and identities.

I have contacted state leaders and advised them that this law is sending a chill throughout the University of North Carolina. It is adversely affecting faculty, staff, and student recruitment and retention. Some alumni are rescinding donations. This law could negatively impact the significant federal funding on which the University relies. One federal lawsuit has already been filed. And major conferences hosted by UNC campuses are now being delayed, cancelled, or moved to other states. Legislative leaders tell me they are open to hearing the University's concerns during the upcoming legislative short session, and we plan to take full advantage of that opportunity.

We will continue to share information with the University community as it becomes available.

Declaration of Noel J. Francisco

EXHIBIT B

UNIVERSITY OF NORTH CAROLINA

PO Box 2688
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Thomas C. Shanahan
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Constituent Universities

Appalachian State University

East Carolina University

Elizabeth City State University

Fayetteville State University

North Carolina Agricultural and Technical State University

North Carolina Central University

North Carolina State University at Raleigh

University of North Carolina at Asheville

University of North Carolina at Chapel Hill

University of North Carolina at Charlotte

University of North Carolina at Greensboro

University of North Carolina at Pembroke

University of North Carolina at Wilmington

University of North Carolina School of the Arts

Western Carolina University

Winston-Salem State University

Constituent High School

North Carolina School of Science and Mathematics

An Equal Opportunity/ Affirmative Action Employer

April 13, 2016

VIA ELECTRONIC AND U.S. MAIL: shaheena.simons@usdoj.gov

Ms. Shaheena Ahmad Simons, Acting Chief
U.S. Department of Justice
Civil Rights Division
Educational Opportunities Section
950 Pennsylvania Ave, NW
Washington, D.C. 20530

Subject: The Department of Justice's request for information on the University of North Carolina's compliance with Title IX of the Education Amendments of 1972 (Title IX) and the federal regulations implementing Title IX and the Violence Against Women Reauthorization Act of 2013 (VAWA)

Dear Acting Chief Simons:

I write to respond to your letter of April 8, 2016, requesting information about the University of North Carolina's compliance with Title IX, the regulations implementing Title IX, and VAWA. The University of North Carolina (the University) is a public multi-campus university composed of sixteen institutions of higher education and a constituent high school. The University's constituent institutions receive federal financial support and are covered by Title IX and VAWA.

We understand that your request has been prompted by the enactment of the Public Facilities Privacy and Security Act (H.B. 2), which was passed by the North Carolina General Assembly on March 23, 2016, following a one-day special session. The bill was quickly signed into law by the Governor and took effect that same day. After first receiving notice of the bill's contents on the morning of the General Assembly's special session, University staff discovered that the University would be subject to Part I, Section 1.3 of H.B. 2 as a public agency of the State of North Carolina. The University advised the General Assembly through staff that, as written, the bill could conflict with the University's obligations under Title IX and other federal regulations or sub-regulatory guidance as a recipient of federal funds.

With that background and context, I am able to provide the following information and answers to your questions:

1. Is the document attached to this letter a true and accurate copy of a memorandum from you to the UNC Chancellors?

Yes. The memorandum you provided dated April 5, 2016, is a true and accurate copy of the memorandum from President Spellings to the UNC constituent institutions' chancellors.

2. Does the attached memorandum still reflect the position of the UNC system regarding its obligations under, and its plans to comply with, H.B. 2?

The April 5, 2016, memorandum provides only factual statements on the requirements of H.B. 2. It is neither an endorsement of the law nor a statement of the position of the University concerning H.B. 2. With regard to H.B. 2's specific provisions related to multiple-occupancy bathroom and changing facility identification and use, our constituent institutions had been labeling multiple-occupancy bathrooms and changing facilities for male or female use, and some had been designating single occupancy facilities for family/unisex/gender-neutral use, prior to the new law's passage. The memorandum affirms that the adoption of H.B. 2 will not result in any changes in our constituent institutions' practices for signage or labeling of bathrooms.

The memorandum also addresses three other key issues relevant to your inquiry:

- The University and its constituent institutions will not change existing non-discrimination policies that apply to all students and employees, and we will not tolerate any sort of harassing or discriminatory behavior on the basis of gender identity or sexual orientation. The University's Policy Statement on Equality of Opportunity in the University is included with this response, and continues to include gender identity and sexual orientation as protected statuses, along with race, color, religion, sex, national origin, age, disability, genetic information, and veteran status. See **Attachment 1**.
- The law does not address enforcement and confers no authority for the University or any other public agency to undertake enforcement actions. Moreover, state and federal law protect personal privacy and prohibit the University from requesting and disclosing personal information concerning students, employees, patients, and others.
- The University and its constituent institutions will continue to operate in accordance with our non-discrimination policies and will address and remedy any instances of discrimination and harassment in accordance with existing University policy and applicable law.

Following the issuance of the memorandum, President Spellings reaffirmed the University's fundamental commitment to diversity and inclusion and to ensuring that our campuses are welcoming and safe places for students and faculty of all backgrounds, beliefs, and identities. A written statement issued by President Spellings is included with this response as **Attachment 2**. She has maintained contact on this issue with state leaders, including the Governor and members of the General Assembly, and has informed them not only of the reactions to the law from our students, faculty, staff, and University communities, but explained how H.B. 2 has affected campus climate. President Spellings has also shared information with state leaders about the growing costs and impact that the passage of the law is having in areas such as faculty, staff, and student recruitment; attendance at and participation in academic conferences; private fundraising; and competition for research and grant funding.

3. Please provide information about any additional steps UNC is taking to implement H.B. 2 beyond the issuance of the attached memorandum.

The University is taking no additional action. The April 5, 2016, memorandum from President Spellings provides only factual statements about the requirements of H.B. 2. The University's non-discrimination policies and equal opportunity practices and procedures remain in place; they are unaffected by the passage of H.B. 2. The passage of H.B. 2 has not required any change in practices for labeling bathrooms. As noted above, President Spellings continues to talk with state leaders about the effects of the law on the University.

4. Please provide any additional guidance documents that UNC has prepared for implementation of H.B. 2 on UNC campuses.

The University has no other guidance documents prepared for implementation of H.B. 2.

5. Please provide any other information that UNC believes is relevant for consideration.

The University did not request that H.B. 2 be considered or adopted; however, the University is specifically covered by H.B. 2 and is required as a public agency to comply with its applicable portions, including the provisions related to multiple-occupancy bathrooms and changing facilities. The Fourth Circuit has not yet determined whether discrimination based on "sex" includes discrimination based on "gender identity," and U.S. Supreme Court and Fourth Circuit case law is clear that state legislative enactments are presumptively valid and constitutional until an appropriate court determines otherwise.

During the special session on March 23, the University offered information and technical guidance to the General Assembly staff about the potential effects of the law. The University explained that H.B. 2's provisions could create tension with Title IX, Title VII, Executive Order 11246, as amended, and their associated regulations and with previous sub-regulatory guidance from the federal government. We also explained that the bill could affect more than $1 billion in funding to the University's constituent institutions due to our receipt of federal financial aid and grants and the status of the University and many of our constituent institutions as federal contractors.

Because H.B. 2 permits employers to have more expansive non-discrimination policies for their own employees, the University will not change any of its existing policies and equal opportunity practices, which already address sexual orientation and gender identity. See again **Attachment 1** and **Attachment 2**. The Governor issued Executive Order No. 93 on April 12, 2016, to clarify H.B. 2's requirements, and it affirms the University's interpretation that this law permits the University to include broader non-discrimination protections for employees and students than H.B. 2 explicitly provides. See **Attachment 3**. Additionally, and consistent with the University's existing Policy Statement on Equality of Opportunity, Executive Order No. 93 further expands the state's employment policy for state employees by including sexual orientation and gender identity as protected statuses. Although Executive Order No. 93 affirms that H.B. 2 requires the University to comply with the provisions of the new law related to bathrooms and changing facilities, the executive order, like H.B. 2, does not address enforcement in any way. The University has no process or means to enforce H.B. 2's provisions. The University and its constituent institutions did not take steps to verify or prohibit individuals from accessing bathrooms according to their gender identity prior to H.B. 2's passage, and will not adopt any such practices as a result of H.B. 2's passage.

In drafting and considering the bill, we understand that some legislators and staff in the General Assembly may have relied in part upon information found in a flyer entitled "Dispelling the Myths." This flyer is included with this response as **Attachment 4**. The flyer's content is based on the observation that federal sub-regulatory guidance that identifies gender identity as a protected class has not been determined to be legally binding on the University and also that no school has lost federal funding since the enactment of Title IX.

We gather that in supporting H.B. 2, some members of the North Carolina General Assembly and staff have relied on the District Court's order in *Grimm v. Gloucester County School Board*, a case now on appeal to the Fourth Circuit Court of Appeals. We know that the Department of Justice is fully familiar with that case, having filed a brief in support of the plaintiff, but some brief explanation may help put the provisions of H.B. 2 into context. In *Grimm*, a parent acting on behalf of her child who was born as a biological female but identifies and presents as male, contested the Gloucester County School Board's resolution and resulting policy that required students to use restroom and locker room facilities that corresponded to their "biological genders" and that called for students with "gender identity issues" to be provided with alternative appropriate private facilities. The plaintiff challenged the policy under the Equal Protection Clause of the Fourteenth Amendment and Title IX of the Education Amendments of 1972 and also sought a preliminary injunction. The School Board filed a motion to dismiss the Title IX claim, and the District Court granted the motion upon determining that the Department of Education's interpretive guidance that sex includes gender identity should not be given deference, in part because Title IX regulations are not ambiguous about the permissibility of having separate toilet or shower facilities based on sex. As you know, the District Court did not determine whether "sex" includes "gender identity."

As you may also know, the University is now a named defendant in a federal lawsuit, *Carcaño, et al. v. McCrory, et al.*, brought by the ACLU, Equality North Carolina, and three individuals who are either students or employees at constituent institutions of the University. That complaint is included with this response as **Attachment 5**. This lawsuit was filed within days of the enactment of H.B. 2. It challenges the constitutionality of the law under the Fourteenth Amendment and asserts that H.B. 2's treatment of transgender people violates Title IX of the Education Amendments of 1972. The plaintiffs are seeking declaratory and injunctive relief.

Appreciation of diversity and a commitment to inclusiveness are values inherent to the University. We therefore take our responsibilities under Title IX, Title VII, VAWA, Executive Orders 13672 and 11246, and other authority seriously. We are committed to providing safe and welcoming environments for all of our employees, students, and visitors. We will continue to work with our legislative leaders to address any concerns. We therefore welcome any additional authority or guidance that the Department of Justice or Department of Education may provide that would facilitate resolving this matter quickly.

Please let me know if you have any further questions or if I can be of additional assistance.

Sincerely,

Thomas C. Shanahan

cc: Margaret Spellings, President
W. Louis Bissette, Jr., Chair of the UNC Board of Governors

Enclosures (5):

Attachment 1 - Section 103 of *The Code of The University of North Carolina*
Attachment 2 - President Spellings' Written Statement on H.B. 2 from April 12, 2016
Attachment 3 - Executive Order No. 93 Issued by Governor McCrory on April 12, 2016
Attachment 4 - "Dispelling the Myths" Flyer
Attachment 5 - *Carcaño, et al. v. Patrick McCrory, Roy Cooper III, University of North Carolina; Board of Governors of the University of North Carolina; and W. Louis Bissette, Jr.*

Declaration of Noel J. Francisco

EXHIBIT C

UNIVERSITY OF NORTH CAROLINA

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Constituent Universities

Appalachian State University
East Carolina University
Elizabeth City State University
Fayetteville State University
North Carolina Agricultural and Technical State University
North Carolina Central University
North Carolina State University at Raleigh
University of North Carolina at Asheville
University of North Carolina at Chapel Hill
University of North Carolina at Charlotte
University of North Carolina at Greensboro
University of North Carolina at Pembroke
University of North Carolina at Wilmington
University of North Carolina School of the Arts
Western Carolina University
Winston-Salem State University

Constituent High School

North Carolina School of Science and Mathematics

An Equal Opportunity/ Affirmative Action Employer

May 9, 2016

Vanita Gupta
Principal Deputy Assistant Attorney General
U.S. Department of Justice
Washington, D.C. 20530

Dear Ms. Gupta,

We write in response to your letter of May 4, 2016 notifying the University of North Carolina ("University") that the Department of Justice has concluded that the University is in violation of Title IX of the Education Amendments of 1972 ("Title IX"), the Violence Against Women Reauthorization Act of 2013 ("VAWA"), and Title VII of the Civil Rights Act of 1964 ("Title VII"). According to your letter, the basis for this determination is the fact that the University, as a state agency, is subject to the recently enacted North Carolina Public Facilities Privacy and Security Act ("the Act" or "House Bill 2"), which provides that all public agencies in North Carolina shall require every multiple-occupancy bathroom and changing facility to be designated for and used only by persons based on their biological sex.

The University takes its obligations to comply with federal non-discrimination statutes and their implementing regulations very seriously. We believe that the University has at all times acted in compliance with federal law, and the University intends to continue to comply in the future. Nothing is more important to the University than the safety and well-being of its students, faculty, and staff. We have always worked to make our campuses welcome and safe for students and faculty of all backgrounds, beliefs, and identities. Toward that end, longstanding policy prohibits University personnel from discriminating on the basis of, among other things, gender identity, sex, or sexual orientation.

After the Act's passage, our chancellors, faculty, staff, and students responded with a flurry of questions and expressed substantial concerns. My April 5 memorandum and April 11 statement regarding the Act reflected good faith efforts on behalf of the University to answer some of these questions and to offer reassurance. Communicating in real time was not only essential, but also exceedingly difficult given the uncertainty in response to the Act. Throughout all of this time, the University has recognized that the Act does not address enforcement and therefore has not taken any steps to enforce the statute's requirements on its campuses.

We hope that the Department of Justice appreciates that the University is in a difficult position. The University, created by the State of North Carolina, has an obligation to adhere to laws duly enacted by the State's General Assembly and Governor. So, too, does the University have an equally clear obligation to follow federal law, including federal prohibitions on discrimination. In ordinary circumstances, these obligations are not in tension. In this instance, however, the Department has explained the conflict it sees between the Act and federal civil rights law. The Act remains the law of the State, however, and the

University has no independent power to change that legal reality. As you know, the question of whether Title IX requires schools to allow use of bathrooms and other single-sex facilities based on gender identity remains before the Fourth Circuit in *G.G. v. Gloucester County School Board*. A petition for rehearing *en banc* in that case is pending, and thus the Court has not issued its mandate.

In response to your request for assurances that the University is taking these matters seriously, the Board of Governors has scheduled a special meeting for tomorrow afternoon. At this time, the University pledges its good faith commitment to assure the proper application of non-discrimination law in the university setting, where there remain many difficult and unanswered questions.

We believe that this letter – which unequivocally confirms that the University has and will continue to comply with the requirements of Title IX, VAWA, and Title VII – should suffice at the present time to provide the assurance you sought about the University's efforts to ensure continued compliance with federal law.

If I can answer any questions or be of any further assistance, please do not hesitate to contact me.

Sincerely,

President Margaret Spellings

cc: W. Louis Bissette, Jr.
Thomas C. Shanahan