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' SURREPLY IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs ask that the University of North Carolina, its Board of Governors, and the Chairman of the Board (collectively UNC Defendants) be ordered to refrain from enforcing North Carolina's law regulating access to bathrooms and changing facilities. The UNC Defendants, however, have repeatedly explained that the law contains no specific enforcement mechanisms and that they accordingly have no intention of taking enforcement action. Yet Plaintiffs continue to insist that this Court should preliminarily enjoin the UNC Defendants from taking enforcement actions they are not and have no intention of taking. The Court should reject Plaintiffs' Motion for Preliminary Injunction against the UNC Defendants, because there is no ongoing or imminent enforcement action to enjoin and thus no justiciable controversy as to them.

I. Plaintiffs Fail To Establish This Court's Jurisdiction

A. Plaintiffs Must Establish A Credible Threat That The UNC Defendants Will Enforce The Challenged Statute Against Them

A challenge to a law is justiciable and ripe only if the plaintiffs carry their burden of showing that the defendants they are suing enforce the law against them or threaten to enforce the law against them. UNC Defts' Resp. Br. 8–23. Plaintiffs make a handful of attempts to evade this requirement, but none has merit as to the UNC Defendants.

First, Plaintiffs suggest that they need not establish a credible threat of enforcement because "a defendant's 'voluntary cessation of a challenged practice' moots an action only if . . . it [is] absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." Plfs' Reply 7. The voluntary-cessation doctrine, however, presupposes a defendant who started doing something and then stopped doing it—that is, a defendant who initially "settled into a continuing practice" that injures the plaintiffs, but subsequently "abandoned" that practice in response to litigation. *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 n. 5 (1953); *see, e.g.*, *Wall v. Wade*, 741 F.3d 492, 496–97 (4th Cir. 2014) (voluntary-cessation doctrine applicable where defendant "abandon[s]" a previous policy after litigation starts). The UNC Defendants never "settled into a continuing practice" of enforcing the challenged statute. It makes no sense to invoke "voluntary cessation" when there is no practice to voluntarily cease.

Moreover, the voluntary-cessation doctrine is an "exceptio[n] to *mootness*," not an exception to *standing* or *ripeness*. *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs (TOC), Inc.*, 528 U.S. 167, 189 (2000) (emphasis added). It is an "immense and

unacceptable stretch to call the [voluntary-cessation doctrine] into service as a substitute for the allegation of present or threatened injury upon which initial standing must be based." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 109 (1998). Because the point here is that Plaintiffs' claims are not justiciable or ripe to begin with—not that the claims started out as justiciable and ripe but later became moot—the voluntary-cessation doctrine does not apply.

Second, Plaintiffs suggest that they need not establish a credible threat of enforcement because the credible-threat requirement matters only where the lawsuit challenges "an arcane law that lingers on the books." Plfs' Resp. 7. That is incorrect. Courts have applied the credible-threat requirement to dismiss challenges to a modern statute regulating railroad operations (*Ex Parte La Prade*, 289 U.S. 444, 458 (1933)), a modern statute regulating labor unions (*CIO v. McAdory*, 325 U.S. 472, 475 (1945)), a modern university policy regulating sexual harassment (*Rock for Life-UMBC v. Hrabowski*, 411 Fed. Appx. 541, 547 (4th Cir. 2010)), and a modern town ordinance regulating picketing (*Moore v. City of Asheville*, 290 F. Supp. 2d 664, 670–71 (W.D.N.C. 2003)). Plaintiffs cite no authority to support their assertion that the credible-threat requirement applies only to challenges to "arcane law[s]."

Third, Plaintiffs argue that *G.G. v. Gloucester County School Board*, — F.3d —, 2016 WL 1567467 (4th Cir. 2016), relieves them of the obligation to show a credible threat of enforcement. Plfs' Reply 6. It does not. For one thing, the Fourth Circuit never discussed justiciability or ripeness in *G.G.*, so its decision says nothing about the scope of

those doctrines. More significantly, there *was* a credible threat of enforcement in *G.G.*, because "the school principal informed G.G. that he could no longer use the boys' restroom *and would be disciplined if he did*." *G.G. v. Gloucester County School Bd.*, 132 F. Supp. 3d 736, 741 (E.D. Va. 2015) (emphasis added). Plaintiffs have never identified a comparable threat of discipline here and no comparable threat exists. Enforcing the credible-threat requirement in this case is thus perfectly compatible with *G.G.*

Finally, Plaintiffs claim they need not show that the UNC Defendants will "physically bar or remove Plaintiffs from restrooms." Plfs' Resp. 6. This argument attacks a strawman. Although Plaintiffs do not have to show that the UNC Defendants are threatening to "physically remove" them from bathrooms, they *do* have to show that these defendants are threatening to do *something* to them (for example, disciplining them for using those bathrooms). As discussed below, Plaintiffs have not made this threshold showing.

B. Plaintiffs Cannot Establish A Credible Threat That The UNC Defendants Will Enforce The Challenged Statute Against Them

Even though it is Plaintiffs' burden to establish that a credible threat of enforcement *does* exist—and their failure to carry that burden alone renders this case non-justiciable—the UNC Defendants have gone further and identified extensive evidence showing that such a threat does *not* exist. UNC Defts' Resp. 14–15. Plaintiffs are wrong to dismiss this evidence as a "litigating position." Plfs' Reply 7. Government actors like the UNC Defendants "are accorded a presumption of good faith because they are public servants, not self-interested private parties," and, in the absence of "evidence

to the contrary," courts may not dismiss their representations as "mere litigation posturing." *Stauffer v. Gearhart*, 741 F.3d 574, 582 (5th Cir. 2014). Plaintiffs are likewise wrong to claim that the UNC Defendants' position "finds no support in other conduct or statements." Plfs' Reply 7. The UNC Defendants have disclaimed both the authority and the intention to take enforcement action in announcements to students, directives to university officials, and letters to the Federal Government. *See* UNC Defts' Resp. 14–15. Each of Plaintiffs' attempts to overcome these assurances fails.

First, Plaintiffs assert that President Spellings and other University officials have stated that the UNC Defendants will comply with the Act. In particular, Plaintiffs emphasize that President Spellings' Guidance Memorandum "direct[s] constituent schools to 'fully meet their obligations under the Act.'" Plfs' Reply 3; *see also id.* at 5 ("The memorandum further directs schools to 'fully meet their obligations under the Act.''"). Plaintiffs, however, take the quoted statement out of context. The memorandum actually explains that "University institutions *should take the following actions to fully meet their obligations* under the Act": (1) "Designate and label multiple-occupancy bathrooms and changing facilities for single-sex use with signage," (2) "Provide notice of the Act to campus constituencies as appropriate," and (3) "Consider assembling and making information available about the locations of designated single-occupancy bathrooms and changing facilities on campus." Guidance Memorandum 2 (emphasis added), ECF No. 38-5. The memorandum and subsequent statements explaining it confirm that "meeting the University's obligations under the Act" does not

entail taking *any* enforcement action, because "[t]he Act does not contain provisions concerning enforcement." *Id.*; *see also* Spellings April 11 Statement, ECF No. 50-2 ("The guidance we issued . . . caution[s] that the law does not address enforcement and confers no authority for the University . . . to undertake enforcement actions"). Plaintiffs cannot complain about the University's decision to "comply" with the Act by taking the three steps noted above—and only those steps—when none of those steps causes Plaintiffs any harm.

Regardless, even assuming the University *had* imposed an independent requirement excluding transgender people from bathrooms consistent with their gender identity (which it has not), Plaintiffs would *still* fall short of establishing jurisdiction. In order to show that a challenge to a university policy is justiciable and ripe, it is not enough for the plaintiff to establish that the policy exists and that he objects to it; he must also establish that he "face[s] a credible threat of disciplinary action under [the] policy." *Rock for Life-UMBC*, 411 Fed. Appx. at 548. Plaintiffs have not even *tried* to show a credible threat that they face disciplinary action for using bathrooms consistent with their gender identity.

Second, Plaintiffs claim that the University's constituent schools have "sen[t] campus-wide emails regarding compliance with [the Act] that were personally received by Plaintiffs." Plfs' Reply 5. When read in their entirety, however, the emails on which Plaintiffs rely *confirm* that the UNC Defendants have no intention of doing anything to enforce the Act against their staff or students. One of the two emails, sent to the campus

community at UNC-Chapel Hill, states: "We have been asked how the University intends to 'enforce' this provision of the law. As noted in [President Spellings'] memorandum, the law does not contain any provisions concerning enforcement." Folt Email, ECF No. 67-5. As a result, "**all of UNC-Chapel Hill's relevant policies remain in effect.**" *Id.* (emphasis in original). The other email, sent to the campus community at UNC-Greensboro, conveys the same message: "The law does not confer authority to the University or any other public agency to undertake enforcement actions." Gilliam Email, ECF No. 67-11. These assurances that the UNC Defendants do not plan to take any enforcement action—assurances "that were personally received by Plaintiffs" (Plfs' Reply 5)—defeat Plaintiffs' claims.

Third, Plaintiffs claim that the University could enforce the challenged statute through "codes of conduct that require compliance with state law and permit discipline for violating it." Plfs' Reply 5. But that argument overlooks the "common sense" distinction between a law that is "directed to . . . agents of the State" and one that is "addressed to . . . private citizens." *Printz v. United States*, 521 U.S. 898, 930 (1997). The challenged statute is directed *only* at public agencies, *not* at private citizens. It provides that "*public agencies 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) (emphasis added); *cf. Dept. of Homeland Security v. Maclean*, 135 S. Ct. 913, 922–23 (2015) (holding that a law providing a federal agency "shall prescribe regulations prohibiting the disclosure of [certain] information" merely

directs an agency "to 'prescribe regulations,'" but does not itself "create a prohibition" applicable to individuals). The Act's requirement that bathrooms be "designated" in a particular way confirms as much; bathrooms are "designated" as men-only or women-only by the agency that operates them, not by their users. Because the Act is a directive to public agencies, not to private individuals, transgender people who use bathrooms consistent with their gender identity do not themselves violate state law. They thus never run afoul of the University's code of conduct.

In any event, the critical question here is not whether the UNC Defendants *could* enforce the challenged statute by disciplining students for violating its code of conduct. The question is whether they *are* enforcing or threatening to enforce the statute in this way. Plaintiffs have never shown that the UNC Defendants are doing any such thing, and the UNC Defendants have disclaimed any intention of doing so. Hence, even if the UNC Defendants' interpretation of its enforcement authority under the Act were incorrect (which it is not), the UNC Defendants' decision to adopt that interpretation and to refrain from taking any enforcement action would mean that the UNC Defendants still are not imposing any injury on Plaintiffs.

In the final analysis, Plaintiffs cannot show that the UNC Defendants threaten to take any "disciplinary action" (*Rock for Life-UMBC*, 411 Fed. Appx. at 548) against transgender people who use bathrooms consistent with their gender identity. Their reply noticeably fails to identify a single instance in which the UNC Defendants have taken or

threatened to take such action. Plaintiffs' reply thus confirms that this lawsuit is neither justiciable nor ripe.

II. PLAINTIFFS FAIL TO SHOW THAT THEIR CONSTITUTIONAL CLAIMS ARE COGNIZABLE

The UNC Defendants have explained that Plaintiffs' constitutional claims violate North Carolina's sovereign immunity and exceed the scope of § 1983. UNC Defts' Resp. 29–34. Plaintiffs fail to respond to the argument that their claims exceed the scope of § 1983. They thus, in effect, admit error on this point.

Plaintiffs do assert that *Ex parte Young*, 209 U.S. 123 (1908), allows them to sue the Board of Governors and its Chairman notwithstanding sovereign immunity. *Young*, however, does not allow Plaintiffs to sue the Board. *Young* establishes an exception from sovereign immunity for lawsuits seeking "prospective relief," but the exception applies only to lawsuits "against [individual] state officials." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 101, 105 (1984). A lawsuit against "the State or one of its agencies or departments" is prohibited "regardless of the nature of the relief sought." *Id.* at 100. The Board is a state agency that shares the state's immunity (UNC Defts' Resp. 30–31), so Plaintiffs may not sue the Board even if they seek purely prospective relief.

Young also does not allow Plaintiffs to sue Chairman Bissette. Plaintiffs concede that, to invoke *Young*, they must show that Chairman Bissette is "specifically charged with the execution" of the challenged statute. *Young*, 209 U.S. at 158; *see* Plfs' Reply 9. Yet they fail to show that the Chairman of the Board of Governors—a presiding officer of a board with 32 voting members—is responsible for the execution of *any* state law, let

alone specifically responsible for the execution of this state law at UNC's various campuses. The most Plaintiffs can muster is the assertion that Chairman Bissette "chairs" a body that, in turn, "supervis[es]" university officials. Plfs' Reply 9 (emphasis added). But chairmanship and supervision do not amount to *execution* of state law; if they did, chairmen of congressional committees would be considered executive officials rather than legislative ones. Because Plaintiffs cannot establish that Chairman Bissette has a specific responsibility for executing the challenged statute, they cannot show that *Young* allows them to sue him.[*]

CONCLUSION

Whatever the merits of their substantive arguments, Plaintiffs identify no concrete controversy with the UNC Defendants, who neither enacted nor enforce the state law Plaintiffs dislike. As to those defendants, therefore, Plaintiffs' motion should be denied.

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[*] For the reasons explained in the UNC Defendants' Response, even assuming that Plaintiffs can establish that their claims are justiciable and ripe, that they can overcome sovereign immunity, and that their claims fall within the scope of § 1983, Plaintiffs *still* fail to establish the irreparable-injury, balance-of-hardships, and public-interest prerequisites for preliminary relief.

Dated: July 5, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 5, 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: July 5, 2016

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