UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

JOAQUÌN CARCAÑO, *et al.*,
Plaintiffs,
v.

ROY A. COOPER, *et al.*,
Defendants,
v.

PHIL BERGER, *et al.*,
Intervenor-Defendants

No. 1:16-cv-00236-TDS-JEP

BRIEF IN SUPPORT OF INTERVENOR-DEFENDANTS' MOTION TO DISMISS FOURTH AMENDED COMPLAINT

NATURE OF THE MATTER AND STATEMENT OF FACTS

Plaintiffs' Fourth Amended Complaint challenges North Carolina House Bill 142 (Session Law 2017-4, "HB 142"), enacted March 30, 2017. A compromise between proponents and opponents of House Bill 2 (Session Law 2016-3, "HB 2"), HB 142: (1) repeals HB 2, including that law's biological-access standard for public restrooms, showers, and changing facilities (HB 142, § 1); (2) "preempt[s]" state and local bodies from regulating access to such facilities "except in accordance with an act of the General Assembly" (*id.* § 2); and (3) postpones until after December 1, 2020 enactment or amendment of any local "ordinance regulating private employment practices or regulating public accommodations" (*id.* §§ 3, 4). HB 142 passed 70-48 in the House and 32-16 in the Senate, supported by 30 of 45 House Democrats and 9 of 15 Senate Democrats.[1] It was

[1] http://www.ncleg.net/gascripts/voteHistory/RollCallVoteTranscript.pl?sSession=2017&sChamber=H&RCS=144 (House); http://www.ncleg.net/gascripts/voteHistory/RollCallVoteTranscript.pl?sSession=2017&sChamber=S&RCS=50 (Senate).

signed into law by Governor Cooper, who had opposed HB 2 when attorney general and when running for governor. 4th Am. Compl. ("Compl.") ¶¶ 8, 10.

Plaintiffs' new challenge to HB 142 merely recycles their claims against now-repealed HB 2. For the reasons explained below, the complaint should be dismissed.[2]

QUESTION PRESENTED

Should Plaintiffs' Fourth Amendment Complaint be dismissed?

SUMMARY OF ARGUMENT

Plaintiffs' complaint should be dismissed for multiple reasons.

First, Plaintiffs' new claims lack standing and ripeness (*infra* I.A–B). HB 142 does not regulate Plaintiffs, but rather limits the authority of North Carolina agencies and local governments. It does not repeal any pre-existing law Plaintiffs might have favored, and Plaintiffs can only speculate that enjoining HB 142 would bring them any concrete benefit. Insofar as Plaintiffs fear harms from HB 142, they allege only contingent future events that might never happen, and which can be adjudicated only in the context of a concrete factual dispute. In sum, Plaintiffs' challenge to HB 142 lacks the concrete, immediate and personal stake required to create an Article III case or controversy.

Second, Plaintiffs' allegations fail to state claims upon which relief can be granted (*infra* II.A–C). Their due process and equal protection claims fail because HB 142—principally a preemption statute—does not regulate them, classify them, disproportionately

[2] Plaintiffs and the Executive Branch Defendants have moved for entry of a consent decree. Doc. 216. For the reasons set out below, this Court lacks jurisdiction over Plaintiffs' claims and so cannot enter a consent decree. Intervenors will file an opposition to the motion to enter the consent decree in due course.

burden them, or deprive them of any pre-existing legal protection. Their federal statutory claims based on educational and employment discrimination fail for that reason too (*i.e.*, that HB 142 does not discriminate) and also because those sex discrimination statutes do not encompass gender-identity discrimination.

Third, the complaint asks this Court to commandeer state and local governments contrary to the 10th Amendment (*infra* III). Plaintiffs' main objection to HB 142 is that it leaves them without the legal regime they would prefer, and they frankly ask this Court to ordain such a regime by fiat. Federal courts lack such power over state governments.

Finally, the contingent claims against now-repealed HB 2 are unripe (*infra* IV). Because claims targeting HB 2 depend on a series of speculative assumptions about future legal developments, adjudicating them now would be premature.

ARGUMENT

I. The Complaint Should be Dismissed for Lack of Subject Matter Jurisdiction.

HB 142 sets no substantive access policies or anti-discrimination norms, but is instead a jurisdictional measure: It determines what body sets certain access policies (the General Assembly), and postpones local development of anti-discrimination norms until December 1, 2020. But Plaintiffs—who welcomed the repeal of HB 2—claim that HB 142 "perpetuate[s]" HB 2's harms against LGBT persons. Compl. ¶ 265.

Before considering their merits, this Court must assess whether those claims involve an Article III "case or controversy." None of the claims is supported by allegations

establishing standing or ripeness and the complaint should therefore be dismissed for lack of subject-matter jurisdiction.[3]

A. Plaintiffs lack standing.

Standing requires allegations that a plaintiff has suffered "a concrete and particularized injury," "fairly traceable" to the defendant and "likely to be redressed by a favorable judicial decision." *Ansley v. Warren*, 861 F.3d 512, 517 (4th Cir. 2017) (quotes and citation omitted). Plaintiffs' pleadings satisfy none of those three requirements.

1. Plaintiffs plead no concrete, particularized deprival of a legally protected right.

Plaintiffs' complaint alleges no cognizable injury from HB 142. This is unsurprising, since the statute enacts no access or anti-discrimination standards, has no enforcement provision, makes no demands on private conduct, and carries no penalties. *See Doe v. Pryor*, 344 F.3d 1282, 1287 (11th Cir. 2003) (no injury-in-fact where "[a] prosecution is not likely, and there is no credible threat of enforcement"). Indeed, HB 142 *repealed* the biological-access standard in HB 2 that triggered Plaintiffs' original lawsuit. *See, e.g.*, Doc. 1 at ¶ 1 (Original Complaint). Nor are Plaintiffs legally injured by HB 142's preemption provisions. They do not plead that a single North Carolina agency or locality had their preferred policies in force when HB 142 was passed. The City of Charlotte—which enacted such a policy in February 2016, Compl. ¶¶ 3, 200—repealed it in December

[3] In *Howe v. Haslam*, the Court of Appeals of Tennessee addressed similar challenges to a Tennessee statute that preempted local ordinances in essentially the same way that HB 142 does. *See* No. M2013-01790-COA-R3CV, 2014 WL 5698877 (Tenn. Ct. App. Nov. 4, 2014). The court in that case dismissed for lack of justiciable injuries under state jurisdictional doctrines borrowed from Article III.

of that year, *id.* ¶ 233, and HB 142 was not enacted until March 2017. *Id.* ¶¶ 243–44. The simple fact is that enjoining HB 142 would not create the legal regime Plaintiffs desire anywhere in North Carolina. HB 142 thus makes no practical difference for any Plaintiff and so does not legally injure them. *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563 (1992).

The only way HB 142 affects anyone is by preempting local lawmaking, *i.e.*, it shifts decision-making from agencies and localities to the General Assembly. But this still leaves Plaintiffs free to pursue access policies through the General Assembly.[4] The same is true of HB 142's temporary preemption of new local anti-discrimination policies—anyone may still seek those before the General Assembly. Indeed, one of the Plaintiffs (Gilmore) has done so. *See* Compl. ¶ 177 (stating Gilmore "actively worked to defeat anti-LGBT bills proposed in the state legislature"). Consequently, each Plaintiff's standing turns on allegations that HB 142 has "prevented [them] from advocating for" policies "before *local* government bodies." *See, e.g.*, Compl. ¶¶ 82 (Carcaño), 120 (McGarry), 155 (Schafer), 170 (Goss), 180 (Gilmore), 192 (Harper) (emphasis added).

Having to seek policy changes through the legislature instead of an agency or locality is not the "legally protected interest" that standing requires. *See Dreher v. Experian Info. Sols., Inc.*, 856 F.3d 337, 343 (4th Cir. 2017); *Friends for Ferrell Parkway, LLC v. Stasko*, 282 F.3d 315, 321 (4th Cir. 2002) (no standing where plaintiffs had no state-law right to their preferred policy); *cf. Salt Inst. v. Leavitt*, 440 F.3d 156, 159 (4th Cir. 2006)

[4] By the same token, HB 142 also forecloses *proponents* of HB 2's now-repealed biological-access policy from seeking to enact it at the agency or local level.

("Because the statute upon which appellants rely does not grant the rights that appellants claim were invaded, appellants cannot establish an injury in fact[.]").[5] North Carolina has broad authority to determine the locus of decision-making on these issues. "Local political subdivisions are mere instrumentalities of the state for the more convenient administration of local government, whose territory and functions rest in the absolute discretion of the state[.]" *Town of Boone v. State*, 369 N.C. 126, 131, 794 S.E.2d 710, 714 (2016) (quotes and citation omitted); *see also City of Greensboro v. Guilford Cty. Bd. of Election*s, 248 F. Supp. 3d 692, 695 (M.D.N.C. 2017) ("Under the North Carolina Constitution, cities and counties are essentially creatures of the state. ... Municipalities have no inherent powers; they have only such powers as are delegated to them by legislative enactment.") (quotes omitted). Nor do the Due Process or Equal Protection Clauses compel North Carolina to devolve authority to set these policies to localities. The Fourth Circuit has rejected a theory of standing premised on "the destruction of [plaintiffs'] opportunities to lobby for" preferred policies. *Friends for Ferrell Parkway*, 282 F.3d at 324. Lack of a legally protected interest in local or decentralized decision-making means no Plaintiff has standing.

Plaintiffs' other theory is that they are hurt by HB 142 because they must go about their lives *without* a law guaranteeing the specific terms of their facility use on public property. *See, e.g.*, Compl. ¶¶ 80 (Carcaño), 113 (McGarry), 152 (Schafer), 167 (Goss),

[5] Indeed, no transgender plaintiffs even allege they have previously been involved in local lobbying for gender-identity access policies, but allege only that they "would advocate" for such policies if not prevented by HB 142. Compl. ¶¶ 83, 121, 156, 170.

179 (Gilmore), 188 (Harper). Both Counts I and II are expressly premised on such an injury. *See id.* ¶ 303 (alleging HB 142 is unconstitutionally vague because it "provides no guidance on what conduct may be subject to criminal or other penalty" under, for example, North Carolina trespass law), *id.* ¶ 310 (alleging HB 142 violates substantive due process because it "creates and perpetuates a permanent state of legal uncertainty"); *id.* ¶ 323 (alleging HB 142 denies equal protection because of the "permanent state of legal uncertainty [it] create[s] and perpetuate[s]").

This novel theory of "injury by uncertainty," however, would remove the injury requirement from standing analysis. There are a virtually unlimited number of uncertainties in any legal system that could be addressed through new legislation. *See, e.g.*, Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 32–33 (2012) (discussing inevitable uncertainty in laws). Intervenor-Defendants are unaware of any authority suggesting that a legislature's decision *not* to pass laws resolving some interpretive issue (absent a specific legal duty to do so) constitutes an "injury" that confers standing to demand additional rules through litigation. *Cf.* Compl. ¶ 265 (alleging HB 142 injures Plaintiffs "by creating a regulatory vacuum"). If uncertainty alone created standing, countless cases dismissed for lack of injury would instead have gone to the merits based on doubt about whether plaintiffs' rights had been violated. *See, e.g.*, *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013).

At any rate, HB 142 merely returns North Carolina to the *status quo ante* existing before Charlotte enacted its now-repealed ordinance. Plaintiffs can hardly mean to suggest that in the absence of HB 2 or HB 142, North Carolina could have been compelled to adopt

such an ordinance for the sake of "clarity." Compl. ¶¶ 16, 305, 310. That dramatic expansion of standing would make *every* jurisdiction that has not yet legislated on the subject of gender-identity access (or any other topic) subject to suit by potentially-regulated parties. Such an amorphous theory would "launch standing doctrine into outer space." *Friends for Ferrell Parkway*, 282 F.3d at 325.

2. Plaintiffs' alleged injuries also fail traceability and redressability.

As to traceability, HB 142's preemption provisions regulate, not Plaintiffs' conduct, but the authority of state agencies and localities, "independent actors not before the court[] … whose exercise of broad and legitimate discretion the court[] cannot presume either to control or to predict[.]'" *Lujan*, 504 U.S. at 562. Consequently, Plaintiffs bear a *heavier* burden of pleading standing, given their "asserted injury arises from the government's allegedly unlawful regulation … of *someone else*[.]" *Id.* (emphasis added).

Plaintiffs' allegations fail that burden. The complaint confirms that when HB 142 was passed, no entity subject to HB 142 was governed by Plaintiffs' preferred policies. Charlotte *previously* enacted them, but they never went into effect and the city later repealed them. Compl. ¶¶ 4, 233. That raises an insurmountable traceability problem: Because Plaintiffs' alleged injuries *preceded* HB 142, they cannot be traceable to HB 142. Instead, they are traceable to the prior independent acts of North Carolina agencies and localities, who failed to enact (or repealed) the policies Plaintiffs desire. *See Doe v. Obama*, 631 F.3d 157, 162 (4th Cir. 2011) ("[W]here a third party … makes the independent decision that causes an injury, that injury is not fairly traceable to the government."); *Mirant Potomac River, LLC v. U.S. E.P.A.*, 577 F.3d 223, 226 (4th Cir. 2009) (denying

standing to sue the United States where state maintained separate regulations). Traceability is therefore lacking as to each Plaintiff.

As to redressability, because HB 142 does not regulate Plaintiffs themselves, enjoining HB 142 would not redress any injury to them. *See Doe*, 344 F.3d at 1286 (no redressability because "[n]othing the Attorney General could be ordered to do or refrain from doing would redress the injuries J.B. alleges"). Even if Plaintiffs had a right to pursue policies locally, no Plaintiff would obtain relief unless a local jurisdiction took the *independent* step of enacting rules like the now-repealed Charlotte ordinance. Whether any would do so is speculation. *Lujan*, 504 U.S. at 562; *id.* at 568–69 (plurality); *Friends for Ferrell Parkway*, 282 F.3d at 320–23. The Fourth Circuit has refused to find redressability in comparable circumstances. *Frank Krasner Enterprises, Ltd. v. Montgomery Cty., MD*, 401 F.3d 230, 235–36 (4th Cir. 2005) ("We have previously denied standing because the actions of an independent third party, who was not a party to the lawsuit, stood between the plaintiff and the challenged actions.").

Some Plaintiffs would skirt these problems by alleging they "believe[]" various local jurisdictions—notably, *not* including Charlotte—would enact such ordinances if HB 142 were enjoined. *See* Compl. ¶¶ 81 (Carcaño), 170 (Goss), 190 (Harper). Yet the basis for this "belief" is paper-thin: Because those localities have "regularly monitored … consideration" of such policies, Plaintiffs are "informed and believe[] … that [the localities] would pass such ordinances if they were legally permitted to do so under H.B. 142." Compl. ¶¶ 81, 170, 190. Those allegations are guesses about the future, not facts, leaving Plaintiffs with only "the remote possibility, unsubstantiated by allegations of fact,

that their situation might [be] better had [the state] acted otherwise, and might improve were the court to afford relief." *Warth v. Seldin*, 422 U.S. 490, 507 (1975); *see also Iota Xi Chapter Of Sigma Chi Fraternity v. Patterson*, 566 F.3d 138, 148 (4th Cir. 2009) ("It must be 'likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'").

The fact that Plaintiffs' theory of standing depends on the reactions of *government* actors to repeal or invalidation of HB 142 makes it even more tenuous. Standing generally cannot be premised on predicting a government's reaction to a favorable court ruling. *See Commonwealth of Massachusetts v. Mellon*, 262 U.S. 447, 487 (1923); *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 136 (2011). And once more, Plaintiffs' theory of standing implies a massive expansion in federal jurisdiction: Any statute with preemptive effect, state or federal, could be challenged on the theory that some lower, preempted jurisdiction might choose to do something different.

B. Plaintiffs' claims are unripe.

Ripeness turns on "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003). Plaintiffs' claims satisfy neither prong.

Plaintiffs' claimed injuries are speculative. It is unclear whether any Plaintiff will ever be injured in any way arising from using the facilities in question. No Plaintiff pleads that any prosecution for trespass is pending or imminent. If such circumstances ever arise in the future, there is no reason to expect they will even involve one of Plaintiffs as opposed to some other person. Because Plaintiffs' feared injuries are at most "contingent future

events that may not occur as anticipated, or indeed may not occur at all," their claims are unripe. *Texas v. United States*, 523 U.S. 296, 300 (1998); *Doe v. Virginia Dep't of State Police*, 713 F.3d 745, 758 (4th Cir. 2013) ("Where an injury is contingent upon a decision to be made by a third party that has not yet acted, it is not ripe as the subject of decision in a federal court.").

At a minimum, the circumstances of the injuries Plaintiffs allege are impossible to predict. Even if they come to pass, the time, place, factual circumstances, applicable trespass or other legal rules, and private and government actors involved—all are unknown. But those details are critical to resolving potentially complex issues when they arise. Because "further factual development would 'significantly advance [this Court's] ability to deal with the legal issues presented' and would 'aid [it] in their resolution,'" the case is not yet ripe. *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 737 (1998).

Plaintiffs cannot solve this issue by relying on their alleged uncertainty about the applicable law. The Supreme Court has already addressed and rejected the similar argument that "mere uncertainty as to the validity of a legal rule constitutes a hardship for purposes of the ripeness analysis." *Nat'l Park Hosp. Ass'n*, 538 U.S. at 811. Plaintiffs must wait to present these claims in the context of fully developed facts and law.

II. Plaintiffs' Allegations Fail to State a Claim.

A. Plaintiffs fail to state a substantive due process claim (Count I).

Plaintiffs' substantive due process claim rests on the allegation that HB 142 "creates and perpetuates a permanent state of legal uncertainty" regarding use of sex-separated facilities by transgender persons. Compl. ¶ 310. They allege HB 142 "provides no guidance

on what conduct may be subject to criminal or other penalty," *id.* ¶ 303, and "encourages arbitrary and discriminatory enforcement," *id.* ¶ 308.

That theory is puzzling on its face. Plaintiffs make no assertion that HB 142 regulates *their own* conduct or that the law is vague in what it actually prohibits—the regulation of certain facility access, public accommodations and private employment practices by state agencies and local governments. Plaintiffs do not allege any uncertainty in how it is enforced against the regulated agencies and governments. Plaintiffs point to no confusing terms, problematic language, or potential construction of HB 142 itself that would potentially "trap the innocent" by not providing fair warning. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *Stuart v. Huff*, 834 F. Supp. 2d 424, 433 (M.D.N.C. 2011) (quoting same). In the absence of any allegation of vagueness or uncertainty in HB 142 *itself*, their due process challenge fails.

Instead, Plaintiffs rest their due process challenge on fears regarding hypothetical enforcement of *other* statutes not challenged in this case—specifically, North Carolina's second-degree trespass statute, N.C. Gen. Stat. § 14-159.13. But HB 142 did not amend North Carolina trespass law, and does not control how that statute is applied. Plaintiffs nonetheless allege HB 142 will work "in conjunction with" that statute or other unidentified laws to penalize them for using particular facilities. Compl. ¶ 298; *see also id.* ¶¶ 306–07, 310–11.

That approach fares no better. "[T]he void-for-vagueness doctrine focuses on legislation—not 'policies and actions.'" *Swagler v. Neighoff*, 398 F. App'x 872, 879 (4th Cir. 2010). It thus does not cover the entirely speculative consequences of HB 142 for how

other persons might enforce trespass laws. Even more fundamentally, Plaintiffs' allegations amount only to an anticipatory challenge to *potential* applications, not of HB 142, but of the trespass statute. As explained above, Plaintiffs' fear is not actionable in the absence of an immediate threat or actual arrest. *See Doe*, 344 F.3d at 1287–88. At any rate, striking down statutes and ordinances as void for vagueness is "a disfavored judicial exercise" and should be avoided. *Schleifer by Schleifer v. City of Charlottesville*, 159 F.3d 843, 853 (4th Cir. 1998). "It is preferable for courts to demonstrate restraint by entertaining challenges to applications of a law as those challenges arise." *Id.*

B. Plaintiffs fail to state an equal protection claim (Count II).

A valid equal protection claim must allege that HB 142 either (1) "explicitly classifies" persons based on certain characteristics, or (2) is a "facially neutral" law whose enforcement "disproportionately affects one class of persons over another" with "a discriminatory intent or animus." *United States v. Johnson*, 122 F. Supp. 3d 272, 349 (M.D.N.C. 2015) (quoting *Monroe v. City of Charlottesville*, 579 F.3d 380, 388 (4th Cir. 2009)). Plaintiffs must also allege the resultant "disparity in treatment" fails the applicable scrutiny. *Johnson*, 122 F. Supp. 3d at 350 (quoting *Morrison v. Garraghty*, 239 F.3d 648, 654 (4th Cir. 2001)). Plaintiffs have not properly alleged that HB 142 violates equal protection and so Count II should be dismissed.

First, HB 142 "classifies" no one, explicitly or otherwise: It only (1) repeals HB 2 and (2) centralizes authority to set certain access and non-discrimination policies. Plaintiffs suggest that HB 142 "targets" LGBT persons, Compl. ¶ 289, but fail to allege that HB 142

"explicitly classifies" anyone—a necessary condition for an equal protection claim. *Johnson*, 122 F. Supp. 3d at 349.

To the extent Plaintiffs allege HB 142 classifies LGBT persons by *repealing* beneficial anti-discrimination provisions, Compl. ¶ 320, the allegation fails for two reasons. HB 142 repealed no anti-discrimination norms whatsoever: Plaintiffs do not plead that any North Carolina agency or locality had Plaintiffs' preferred policies in force when HB 142 was passed. The City of Charlotte, which enacted such a policy in February 2016, Compl. ¶¶ 3, 200, repealed it months before HB 142. *Id.* ¶ 233. But even assuming *arguendo* that HB 142 somehow affected existing anti-discrimination norms, Plaintiffs could still not base an equal protection claim on such a theory: "[T]he simple repeal or modification of ... antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid ... classification." *Crawford v. Bd. of Educ. of City of Los Angeles*, 458 U.S. 527, 539 (1982); *see id.* at 538 ("[T]he Equal Protection Clause is not violated by the mere repeal of ... legislation or policies that were not required by the Federal Constitution in the first place.").

On this point it is instructive to compare HB 142 with the Colorado constitutional amendment invalidated in *Romer v. Evans*, 517 U.S. 620 (1996). Colorado's Amendment 2 provided that "'[n]either the State of Colorado ... nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby *homosexual, lesbian or bisexual orientation, conduct, practices or relationships* shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences,

protected status or claim of discrimination.'" *Id.* at 624 (quoting Colo. Const., Art. II, § 30b) (emphasis added). Several such anti-discrimination laws existed in Colorado at the time. *Id.* at 623. Amendment 2, in other words, "identifie[d] persons by a single trait and then denie[d] them protection across the board," placing them outside the existing and future protection of anti-discrimination laws and denying them legal or legislative recourse. The Supreme Court held that explicit classification violated equal protection. *See id.* at 633 (observing that "[t]he resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence").

HB 142 is nothing like the Colorado amendment. HB 142 does not single out "homosexuals" or anyone else, *id.* at 624, nor deprive anyone of existing legal protections; Plaintiffs do not plead that any existed in North Carolina at the time. It does not place Plaintiffs outside the scope of any future legal protections; it simply determines the political locus for making decisions about the scope of those protections. It does not impose any unique burden on Plaintiffs; *both* Plaintiffs and the proponents of HB 2 are limited to pursuing policies in the General Assembly. It sets no substantive access or anti-discrimination standards, has no enforcement provision, makes no demands on private conduct, and carries no penalties. The contrast with Amendment 2 is night and day, underscoring why HB 142 cannot violate equal protection as an unjustified classification.

Second, because HB 142 did not repeal any existing anti-discrimination norms or access policies (as discussed above), Plaintiffs cannot plausibly allege that HB 142 is a facially neutral law that "disproportionately burdens" LGBT or transgender persons, *see* Compl. ¶ 289; *cf. Johnson*, 122 F. Supp. 3d at 349. To the extent HB 142 directly affects

transgender persons at all, it *benefits* them by repealing HB 2's biological-access policy for certain state facilities and ensuring that such a policy cannot be enacted by agencies or localities. *See* HB 142, §§ 2–4.

Third, Plaintiffs' allegations also fail to state an equal protection claim under the "political-process doctrine." *See* Compl. ¶¶ 323, 332 (alleging HB 142 "imposes a different and more burdensome political process" on transgender and LGBT persons). Recently in *Schuette v. BAMN*, the Supreme Court clarified that a state violates equal protection by "alter[ing] the procedures of government to target racial minorities" so as to "inflict[] ... a specific injury" on them. 134 S. Ct. 1623, 1632, 1636 (2014). This doctrine forbids a state, for instance, from overturning a local housing discrimination ordinance—and requiring future ordinances be enacted by referendum—where the facts showed that "invidious discrimination would be the necessary result of the procedural restructuring." *Id.* at 1632 (discussing *Hunter v. Erickson*, 393 U.S. 385 (1969)). Nor may a state surgically ban "desegregative busing" in order to perpetuate existing injuries from prior *de jure* school segregation. *Schuette*, 134 S. Ct. at 1632–33 (discussing *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982)).

Plaintiffs' allegations fail to allege a political-process violation for several reasons. Unlike the laws challenged in *Hunter* and *Seattle*, HB 142 does not rescind any existing anti-discrimination or access policies, but instead *repeals* HB 2's biological-access policy. Nor does HB 142 plausibly impose a "more burdensome political process" on transgender persons seeking local gender-identity access policies, Compl. ¶ 323, because, by its terms, HB 142 *equally* forecloses local advocacy for the biological-access policies previously

embodied in HB 2. Far from "targeting" either side, HB 142 simply lodges authority for *any* kind of access policy in the General Assembly, leaving both sides free to pursue policies there. Finally, as discussed, HB 142 inflicts no cognizable injuries on Plaintiffs, *see supra* 3–10, unlike the laws challenged in *Hunter* and *Seattle*, which perpetuated concrete, existing harms. *See Schuette*, 134 S. Ct. at 1637–38.

A comparison between *Schuette* and this case demonstrates why the political-process doctrine does not plausibly apply to Plaintiffs' allegations. *Schuette* rejected an equal protection challenge to a Michigan constitutional amendment that prohibited racial preferences in state university admissions. 134 S. Ct. at 1629. The amendment, in other words, did not just shift decision making power on affirmative action from one set of public officials to another; it eliminated the power altogether. The court of appeals had struck down the amendment on equal protection grounds, but the Supreme Court reversed, holding that the court of appeals' approach provided "no principled limitation" and raised "serious questions of compatibility with the Court's settled equal protection jurisprudence." *Id.* at 1634. From an equal protection perspective, HB 142's effect is far more benign than the amendment in *Schuette*: HB 142 merely shifts authority from agencies and localities to the General Assembly, while leaving open the possibility of statewide legislation. This case, moreover, presents one of the very situations that the *Schuette* court cautioned against, namely, an effort to use the Equal Protection Clause to limit a legislature's exercise of its "power … to … enact[] limits on the power of local authorities or other governmental entities to address certain subjects." *Id.* at 1635.

C. Plaintiffs fail to state Title IX and Title VII claims (Counts VI and VII).

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, prohibit discrimination on the basis of "sex" in specified circumstances. *See* 20 U.S.C. § 1681(a) (education); 42 U.S.C. § 2000e-2(a) (employment). Plaintiffs argue that both statutes' prohibition on "sex" discrimination "includes discrimination on the basis of gender nonconformity, gender identity, transgender status, and gender transition." Compl. ¶¶ 393 (Title IX), 401 (Title VII). They allege that application of HB 142 by the University of North Carolina denies Plaintiffs Carcaño, McGarry and Shafer (and members of Plaintiff ACLU), use of "restrooms and changing facilities consistent with [their] gender identity without fear of penalty" in violation of Title IX, *id.* ¶¶ 395–98 (Count VI), and also in violation of Title VII as to Carcaño, *id.* ¶ 403 (Count VII).

HB 142 cannot violate Title IX or Title VII because it does not discriminate: Once more, it only repeals HB 2 and preempts certain decisions by state agencies and political subdivisions. That is not discriminatory treatment within the meaning of either statute. *See* 20 U.S.C. § 1681(a) (providing that no person may be "excluded from participation in, be denied the benefits of, or be subjected to discrimination" in education on the basis of sex); 42 U.S.C. § 2000e-2 (providing that an employer may not "discriminate against any individual" or "limit, segregate, or classify his employees or applicants for employment" because of sex). Thus for the same reason Plaintiffs fail to state a claim for an equal protection violation, their Title IX and Title VII claims fail too.

Plaintiffs' claims fail for the additional reason that their premise is false. "Sex," as Congress used the term in both statutes, refers to the *physical* differences between the sexes, *i.e.*, "male and female, under the traditional binary conception of sex consistent with one's birth or biological sex." *Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 676 (W.D. Pa. 2015) (discussing Title IX). Nothing in either statute's text, structure, legislative history, or authoritative regulatory interpretations suggests that "sex" also means gender identity. On the contrary, when Congress wants to protect against gender-identity discrimination, it does so explicitly. *See* 42 U.S.C. § 13925(b)(13)(A) (Violence Against Women Act). Plaintiffs' argument that the statutes' prohibitions against sex discrimination embraces concepts such as "gender identity, transgender status, and gender transition" is thus false as a matter of law. Compl. ¶¶ 393 (Title IX), 401 (Title VII).

As the Western District of Pennsylvania held in *Johnston*, Title IX "does not prohibit discrimination on the basis of transgender itself because transgender is not a protected characteristic under the statute." 97 F. Supp. 3d at 674. *Johnston* comports with federal regulatory interpretations of Title IX, which allow regulated institutions to provide "separate toilet, locker room, and shower facilities on the basis of sex," *see* 34 C.F.R.§ 106.33, and to "separate[e] ... students by sex" within physical education classes and certain sports "the purpose or major activity of which involves bodily contact," *see id.* § 106.34—provisions that would be incoherent if "sex" were determined, not by physical characteristics, but by one's "internal sense of belonging to a particular gender." Compl. ¶ 44. And if Title IX *were* suddenly held to cover gender-identity discrimination as well, it would likely be unconstitutional. As a Spending Clause statute, *see Franklin v. Gwinnett*

Cnty. Pub. Sch., 503 U.S. 60, 74 (1992), Title IX must give fair notice of its funding conditions. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006); *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). The latent possibility that schools would have to treat sex as equivalent to gender identity, on pain of losing federal funding, would offend that clear-notice requirement. This Court should interpret Title IX to avoid that constitutional problem. *See, e.g., Rust v. Sullivan*, 500 U.S. 173, 190 (1991). Count VI should therefore be dismissed.

Likewise, "nearly every federal court that has considered the question" whether sex discrimination includes gender-identity discrimination under Title VII "has found that transgendered individuals are not a protected class under Title VII." *Johnston*, 97 F. Supp. 3d at 674 (collecting cases); *see also Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221–22 (10th Cir. 2007); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982).[6] While discrimination against men *qua* men and women *qua* women is prohibited, "transsexuals may not claim protection under Title VII from discrimination based solely on their status as a transsexual." *Etsitty*, 502 F.3d at 1222. But that is Plaintiffs' only theory why HB 142 discriminates based on gender identity in violation of Title VII. Count VII should be dismissed as well.

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[6] Intervenor-Defendants recognize contrary circuit authority as to Title IX, *see, e.g., Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017), *pet. for cert. filed*, Aug. 28, 2017, but submit that the decision is contrary to the statutory text. The Fourth Circuit reached a contrary holding as to Title IX as well, but the decision was vacated by the Supreme Court when the U.S. Department of Education rescinded the guidance on which the panel relied. *See G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 722 (4th Cir. 2016), *vacated and remanded*, 137 S. Ct. 1239 (2017).

III. Granting Plaintiffs' Requested Relief Would Violate the 10th Amendment.

Plaintiffs' claims should be dismissed for the independent reason that granting them would commandeer state and local governments in violation of the 10th Amendment. The complaint asks the Court to "[r]equir[e] Defendants in their official capacities" to "ensure" transgender persons may use facilities in various settings "in accordance with their gender identity," and to "requir[e] Defendants" to "allow local governments to enact and continue to enforce" anti-discrimination provisions benefiting "LGBT people." Compl. at 102. This is nothing less than an express invitation to the Court to unconstitutionally "'commandee[r] the legislative processes'" of North Carolina. *New York v. United States*, 505 U.S. 144, 161 (1992) (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981)).

The 10th Amendment underscores that federal power cannot be deployed to "commandeer" state legislative processes or executive officials to enact, enforce, or administer a "federal regulatory program." *New York*, 505 U.S. at 161; *Printz v. United States*, 521 U.S. 898, 926, 935 (1997). Yet Plaintiffs ask this Court to do just that—namely, to "require" North Carolina officials to enact and administer access and non-discrimination policies that do not now exist under state or local law. "[S]uch commands are fundamentally incompatible with our constitutional system." *Printz*, 521 U.S. at 935. For the distinct reason that granting Plaintiffs' requested relief would violate the Constitution's structural limitations on federal power, the Court should dismiss Plaintiffs' complaint in its entirety.

IV. Plaintiffs' Challenges to HB 2 are Unripe.

Lastly, several counts of the complaint relate not to HB 142, but rather to now-repealed HB 2. Notwithstanding its repeal, Plaintiffs challenge HB 2 with stand-alone equal protection and due process claims pled "solely in the event that this Court finds that (1) one or more provisions of HB 142 are unlawful and (2) the provision of HB 142 repealing HB 2 is not severable from HB 142's unlawful provisions," Compl. ¶¶ 346 (Count III), 373 (Count IV), 382 (Count V), and also appear to incorporate HB 2 into their Title IX and Title VII claims. *Id.* at 98 (Count VI), 100 (Count VII).

These claims will not be ready for decision unless this Court first denies Defendants' motion to dismiss, and then resolves such questions as (1) whether Plaintiffs prevail against Defendants as to HB 142, (2) whether Plaintiffs prevail on grounds applicable to HB 2 as well, (3) whether any provisions of HB 142 are severable from others, and (4) whether invalidation of HB 142 could bring HB 2 back to life in some way. Those questions may not arise at all, and are likely to be contested if they do. Plaintiffs' challenges to HB 2 depend, in other words, on a string of speculative predictions about the state of the law at some uncertain point in the future.

A request for legal rulings on hypothetical circumstances that will not even exist until after a string of unpredictable events and decisions is unripe by definition. *Doe*, 713 F.3d at 758. Indeed, what Plaintiffs seek is essentially an advisory opinion, which this Court lacks jurisdiction to issue. *See, e.g., City of Fredericksburg, Va. v. F.E.R.C.*, 876 F.2d 1109, 1113 (4th Cir. 1989); *see also Giovani Carandola, Ltd. v. Fox*, 396 F. Supp. 2d 630, 635 (M.D.N.C. 2005) ("There is no need to address the old statute when the newer

version is also before the Court. If the new statute survives the challenges against it, the General Assembly would have no reason to reenact the older statute. Alternatively, if the new, narrower statute is overturned, the precedent of this case would prevent the General Assembly from reenacting the old statute. Entering a declaratory judgment on the validity of the old statute would be an improper advisory opinion[.]"), *aff'd in part, vacated in part, rev'd in part*, 470 F.3d 1074 (4th Cir. 2006).

CONCLUSION

For the foregoing reasons, Intervenor-Defendants respectfully ask the Court to dismiss Plaintiffs' Fourth Amended Complaint.

Respectfully submitted,

By: /s/ S. Kyle Duncan
S. Kyle Duncan* (DC Bar #1010452)
Gene C. Schaerr* (DC Bar #416638)
Stephen S. Schwartz* (DC Bar #477947)
Counsel for President Pro Tempore Phil Berger and Speaker Tim Moore
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900
Washington, DC 20006
Telephone: (202) 714-9492
Email: kduncan@schaerr-duncan.com
gschaerr@schaerr-duncan.com
sschwartz@schaerr-duncan.com
*appearing pursuant to Local Rule 83.1(d)

By: /s/ Robert D. Potter, Jr.
Robert D. Potter, Jr. (State Bar #17553)
Counsel for President Pro Tempore Phil Berger and Speaker Tim Moore
2820 Selwyn Avenue, #840
Charlotte, NC 28209
Telephone: (704) 552-7742
Email: rdpotter@rdpotterlaw.com

Counsel for Intervenor-Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this date I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all CM/ECF participating attorneys.

This the 23rd day of October, 2017.

/s/ S. Kyle Duncan
Counsel for Intervenor-Defendants

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with Local Rule 7.3(d)(1) because it contains 6,244 words, as determined by the word-count function of Microsoft Word.

This the 23rd day of October, 2017.

/s/ S. Kyle Duncan
Counsel for Intervenor-Defendants