

April 8, 2016

Dear Police Chief or Sheriff,

We are writing to you because a bill recently passed by the North Carolina General Assembly, House Bill 2, purports to impose requirements on your agency and other state and local government agencies that violate federal law and could subject your agency to federal lawsuits, investigations, and loss of federal funding. In addition, while House Bill 2 creates no new criminal law, it is possible that your agency could receive calls for police assistance based on the mistaken belief that individuals using public restrooms are committing a crime.

We share the following information so that your agency is fully informed when making important decisions about how best to treat members of the public as well as employees with dignity and respect. Allowing transgender individuals to access restrooms and other facilities consistent with their gender identity is not only in the best interest of public safety, it is also required by federal law.

Discrimination against transgender individuals is harmful and counter to the public safety mission of law enforcement

Excluding transgender individuals from public facilities that correspond to their gender identity sends a message to transgender individuals and other members of the public that there is something wrong with them and that they are not entitled to the same dignity as other students. Transgender individuals, especially youth, are especially likely to be victims of crime, and yet research shows that they are often afraid to seek assistance from law enforcement.ⁱ

We all care about privacy and safety in public restrooms. Allowing transgender individuals to use restrooms appropriate for their gender identity does not jeopardize, but protects public safety. North Carolina already has laws against sexual assault or invading others' privacy in restrooms. Law enforcement agencies across the country support providing nondiscriminatory access to public restrooms for transgender people and report it has no negative impact on public safety.ⁱⁱ

Refusing to allow transgender individuals to use restrooms consistent with their gender identity, including in police stations and facilities receiving U.S. Justice Department grants, violates federal anti-discrimination law and risks litigation and loss of federal funds

House Bill 2 purports to require state and local government agencies to discriminate against transgender members of the public, as well as transgender staff. House Bill 2 is the subject of ongoing litigation, and the North Carolina Department of Justice has declined to defend it in court. Compliance with House Bill 2 creates serious legal and fiscal risks for law enforcement agencies because it conflicts with several federal laws.

The Omnibus Crime Control and Safe Streets Act of 1968, Juvenile Justice and Delinquency Prevention Act of 1974, Victims of Crime Act (VOCA) of 1984, and Violence Against Women Act (VAWA) of 1994, all prohibit sex discrimination by federal grant recipients, including police and sheriff departments, prosecutors courts, juvenile justice facilities, and victim assistance programs.ⁱⁱⁱ Under an existing Attorney General Memo, as well as explicit statutory language in VAWA, these prohibitions include discrimination based on gender identity.^{iv} Many courts have also held that sex discrimination laws like Title IX protect transgender people.^v Guidance from the U.S. Justice Department’s Office on Violence Against Women (OVW) states that under VAWA, any sex-specific program or service (including restrooms) must be accessible based on an individual’s self-identified gender. OVW states that while a program may ask a person’s gender identity for this purpose, “[t]he recipient may not, however, ask questions about the beneficiary’s anatomy or medical history or make burdensome demands for identity documents.”^{vi} Departments receiving federal funding could face investigations, lawsuits, and loss of federal funds if they deny individuals access to public restrooms in their facilities that are consistent with the individual’s gender identity.

With regard to your employees, Title VII of the Civil Rights Act of 1964 prohibits sex discrimination by state and local government employers.^{vii} The U.S. Justice Department and Equal Opportunity Commission have recognized that Title VII prohibits gender identity discrimination and requires employers to provide equal access to workplace restrooms and changing facilities consistent with an employee’s gender identity.^{viii} Private employers have faced lawsuits for denying such restroom access to transgender employees, including by the EEOC,^{ix} and several police departments have been sued in recent years for discrimination against transgender employees.^x The Occupational Safety and Health Administration (OSHA) has also said that restroom restrictions for transgender workers can threaten their health and safety,^{xi} opening employers to OSHA complaints.

Use of public facilities consistent with a person’s gender identity is not a crime and attempts to enforce House Bill 2 through arrest or other police action are likely unconstitutional

House Bill 2 specifies no enforcement mechanism and creates no new criminal law. There is no North Carolina law that makes simply using a public restroom consistent with one’s gender identity a crime. Nevertheless, private individuals or other local officials may, based on a misunderstanding of state law, make calls for service based solely on their objection to such restroom use by transgender individuals. This is not a police matter. Absent specific wrongful conduct, such as lewd behavior or a refusal to leave private property when asked to do so by the owner, law enforcement officers have no grounds in North Carolina law to arrest anyone simply based on their entry into a restroom. Making arrests or taking other police actions based solely on a transgender individual’s restroom use could constitute discrimination under federal grant statutes. Federal courts have also held that discrimination against transgender individuals is subject to heightened scrutiny under the Equal Protection Clause of the U.S. Constitution, a clause that may be implicated if law enforcement officers take police action against a transgender individual for using a restroom in a public building.^{xii} If departments receive such calls for service, they should deal sensitively with all involved but make clear that it is not a police matter absent specific wrongful conduct.

We hope this letter is helpful in addressing some of the questions and concerns raised by House Bill 2. You may wish to consult *How to Serve Diverse Communities* from the U.S. Justice Department’s Office of Community Oriented Policing Services for more information about serving the transgender

community with dignity and respect.^{xiii} If you have any questions, please feel free to contact Harper Jean Tobin at the National Center for Transgender Equality at hjtobin@transequality.org or (202) 745-2303.

Thank you for the work you do every day to ensure the safety of North Carolinians.

Sincerely,



Harper Jean Tobin
Director of Policy
National Center for Transgender Equality

ⁱ Nat'l. LGBTQ Task Force & Nat'l Ctr. for Transgender Equality, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* 162 (2011).

ⁱⁱ E.g., Rachel Percelay, *Florida Experts Debunk The Transgender "Bathroom Predator" Myth*, Media Matters for America (Jan. 12, 2016), <http://mediamatters.org/research/207916> (quoting police officials from across Florida); Carlos Maza & Rachel Percelay, *Texas Experts Debunk The Transgender "Bathroom Predator" Myth*, Media Matters for America (Oct. 15, 2015), <http://mediamatters.org/research/20617> (quoting police officials from across Texas); Luke Brinker & Carlos Maza, *15 Experts Debunk Right-Wing Transgender Bathroom Myth*, Media Matters for America (Mar. 20, 2014), <http://mediamatters.org/research/198533> (quoting police officials and victim advocacy groups in Colorado, Iowa, Massachusetts, Minnesota, Nevada, New Mexico, Oregon, and Vermont).

ⁱⁱⁱ 42 U.S.C. § 3789d; 42 U.S.C. § 10604; 42 U.S.C. § 5672(b); 42 U.S.C. § 13925(b)(13).

^{iv} Attorney General Memorandum, *Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964* (Dec. 15, 2014); 42 U.S.C. § 13925(b)(13).

^v E.g., *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566, 572-75 (6th Cir. 2004); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000); *Rumble v. Fairview Health Serv.*, No. 14-cv-2037, 2015 WL 1197415 (D. Minn. Mar. 16, 2015); *Fabian v. Hosp. of Cent. Conn.*, No. 3:12-cv-1154, 2016 WL 1089178 (D. Conn. Mar. 18, 2016); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008); *Finkle v. Howard Cty., Md.*, 12 F.Supp. 3d 780 (D. Md. 2014).

^{vi} Office on Violence Against Women, *Frequently Asked Questions: Nondiscrimination Grant Conditions in the Violence Against Women Reauthorization Act of 2013* (Apr. 9, 2014),

<https://www.justice.gov/sites/default/files/ovw/legacy/2014/06/20/faqs-ngc-vawa.pdf>.

^{vii} 42 U.S.C. § 2000e-2.

^{viii} Attorney General Memorandum, *supra* note iv; *Lusardi v. McHugh*, E.E.O.C. App. No. 0120133395 (Apr. 1, 2015).

^{ix} *EEOC v. Deluxe Fin. Servs. Corp.*, No. 0:15-cv-02646-ADM-SER (D. Minn., filed June 4, 2015, settled Jan. 20, 2016).

^x E.g., *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Finkle v. Howard Cty., Md.*, 12 F. Supp. 3d 780 (D. Md. 2014); *see also* Brief of Lambda Legal Defend and Education Fund as Amicus Curiae, *Roberts v. Clark Cty. Sch. Dist.*, No. 2:15-cv-00388 (D. Nev. filed Jan. 29, 2016), http://www.lambdalegal.org/sites/default/files/roberts_nv_20160129_amicus-brief.pdf.

^{xi} U.S. Occupational Safety & Health Admin., *A Guide to Restroom Access for Transgender Workers* (2015), <https://www.osha.gov/Publications/OSHA3795.pdf>.

^{xii} *Glenn*, 663 F.3d 1312; *Adkins v. City of New York*, --- F.Supp.3d ---, 2015 WL 7076956 (S.D.N.Y. Nov. 15, 2015).

^{xiii} Caitlin Gokey et al., *How to Serve Diverse Communities*, in POLICE PERSPECTIVES: BUILDING TRUST IN A DIVERSE NATION (2016), <http://www.vera.org/pubs/police-perspectives-guide-series-building-trust-diverse-nation> (Caitlin Gokey & Susan Shah, eds.).