



April 8, 2016

Secretary Nick Tennyson, Secretary of Transportation
North Carolina Board of Transportation
1550 Mail Service Center
Raleigh, North Carolina 27699-1550

Dear Secretary Tennyson and Board of Transportation Members,

We are writing to you as leaders in the management of North Carolina's transportation infrastructure, including the state's highways and public transit. A bill recently passed by the North Carolina General Assembly, House Bill 2, purports to impose requirements on highway rest areas, public transit facilities and other transportation facilities in the state that violate federal law and could subject your agency and its local partners to federal lawsuits, investigations, and loss of federal funding. House Bill 2 is the subject of ongoing litigation, and the North Carolina Department of Justice has declined to defend it in court.

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

Discrimination against transgender travelers is harmful and counter to NCDOT's public service mission

For travelers, being able to access public restrooms in airport terminals is essential to make long-distance travel possible. The U.S. Occupational Safety and Health Administration (OSHA) provides the following advice to employers, which is equally applicable with regard to the travelling public:

Gender identity is an intrinsic part of each person's identity and everyday life. Accordingly, authorities on gender issues counsel that it is essential for employees to be able to work in a manner consistent with how they live the rest of their daily lives, based on their gender identity. Restricting employees to using only restrooms that are not consistent with their gender identity, or segregating them from other workers by requiring them to use gender-neutral or other specific restrooms, singles those employees out and may make them fear for their physical safety. Bathroom restrictions can result in

employees avoiding using restrooms entirely while at work, which can lead to potentially serious physical injury or illness.ⁱ

Being forced to use facilities inconsistent with their innate identity may make it impossible for travelers to use public restrooms in rest areas, bus stations, and other transportation facilities, and therefore to travel across the state at all.

We all care about privacy and safety in restrooms. Allowing transgender travelers and employees to use restrooms appropriate for their gender identity does not jeopardize, but protects privacy and safety. North Carolina already has laws against sexual assault or invading others' privacy in restrooms. To the extent that any person feels uncomfortable using a restroom with another person, agencies can make private facilities available, including family restrooms, so long as no one is forced into separate facilities.

Refusing to allow transgender travelers to use facilities consistent with their gender identity violates federal anti-discrimination laws and risks litigation and loss of federal funds

House Bill 2 purports to require state and local government agencies to discriminate against transgender travelers, as well as transgender staff. However, compliance with House Bill 2 creates serious legal and fiscal risks for NCDOT and other transportation agencies in the state because it conflicts with several federal laws.

The Federal-Aid Highway Act of 1956 and the Federal Transit Act prohibit sex discrimination in highway rest stops, bus and train stations, and other transportation-related facilities that receive federal funds.ⁱⁱ The U.S. Justice and Transportation Departments have recognized that federal sex discrimination laws such as those found in the Federal-Aid Highway Act and Federal Transit Act prohibit gender identity discrimination,ⁱⁱⁱ as have many courts.^{iv}

Regarding your employees, Title VII of the Civil Rights Act of 1964 prohibits sex discrimination by state and local government employers.^v The U.S. Justice Department and Equal Employment 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.^{vi} Private employers have faced lawsuits for denying such restroom access to transgender employees, including by the EEOC,^{vii} and the Justice Department has also sued a state university for gender identity discrimination.^{viii} Federal courts have also held that discrimination against transgender individuals violates the Equal Protection Clause of the U.S. Constitution.^{ix}

Thus, NCDOT facilities and other publicly-owned or operated transportation facilities in North Carolina that engage in discriminatory practices pursuant to House Bill 2 would violate federal law. While House Bill 2 includes no enforcement mechanisms, violations of the Federal-Aid Highway Act,

the Federal Transit Act, or Title VII could result in federal litigation by members of the traveling public, employees, the EEOC or the U.S. Justice Department, as well as federal administrative investigations and potential loss of federal funding.

We hope this letter is helpful in addressing some of the questions and concerns raised by House Bill 2. You may wish to consult other resources such as OSHA's *Best Practices: A Guide to Restroom Access for Transgender Workers* for information about how to provide a safe and supportive environment for all travelers and employees and ensure compliance with federal laws and regulations.^x 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 serve North Carolinians and travelers from around the nation and the world.

Sincerely,



Harper Jean Tobin
Director of Policy
National Center for Transgender Equality

ⁱ U.S. Occupational Safety and Health Admin., *A Guide to Restroom Access for Transgender Workers*, OSHA Pub. 3795–2015, <https://www.osha.gov/Publications/OSHA3795.pdf>.

ⁱⁱ 23 U.S.C. §324; 49 U.S.C. § 5332.

ⁱⁱⁱ E.g., Attorney General Memorandum, *Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964* (Dec. 15, 2014); U.S. Dep't of Transportation, Proposed Circular, Equal Employment Opportunity (EEO) Requirements and Guidelines for Federal Transit Administration Recipients (Mar. 3, 2016), https://www.fta.dot.gov/sites/fta.dot.gov/files/docs/FTA_Proposed_EEO_Circular_3-3-16.pdf.

^{iv} E.g., *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011); *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. Hospital of Central 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).

^v 42 U.S.C. § 2000e-2.

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

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

^{viii} *United States v. Se. Okla. State Univ.*, No. civ-15-324-c, 2015 WL 4606079 (W.D. Okla. Jul. 10, 2015).

^{ix} *Glenn*, 663 F.3d at 1316.

^x U.S. Occupational Safety & Health Admin., *supra* note i.