



THE CASE FOR INCLUSION

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North Carolina Goes Head-To-Head With Department Of Justice Over HB2

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On Monday, North Carolina's governor and its secretary of the Department of Public Safety filed a lawsuit against U.S. Department of Justice, asking a federal court to declare that HB2 does not violate Title VII. The lawsuit is a response to a letter that the DOJ issued on May 4, 2016, demanding that North Carolina "remedy" HB2 to make it comply with federal law by Monday, May 9.

In the letter, the DOJ asserted that HB2, as it is written, violates Title VII and that "[a]ccess to sex-segregated restrooms and other workplace facilities consistent with gender identity is a term, condition or privilege of employment. Denying such access to transgender individuals, whose gender identity is different from their gender assigned at birth, while affording it to similarly situated non-transgender employees, violates Title VII."

Essentially, North Carolina is using the lawsuit as a preemptive strike, anticipating that the DOJ will soon file an action to have HB2 declared unconstitutional.

North Carolina officials make several Title VII arguments in the lawsuit and call the May 9 deadline unrealistic.

The first argument is that Title VII protections do not apply to transgender individuals unless and until Congress explicitly decides they do, meaning it will take an act of Congress for North Carolina to recognize transgender status as a protected class.

The second is that the law does not treat transgender employees differently from non-transgender employees, arguing that "[a]ll state employees are required to use bathrooms and changing facilities assigned to persons of their same biological sex, regardless of gender identity, or transgender status." The Court will need to decide if the law constitutes *de facto* discrimination against transgender individuals despite its apparent neutrality.

Another argument North Carolina makes is that Title VII does not prohibit employers from "balancing the special

circumstances posed by transgender employees with the right to bodily privacy held by non-transgender employees in the workplace” arguing that under the current status of the law, agencies MAY make a reasonable accommodation if there is a special request in special circumstances for single occupancy restrooms “when readily available and when practicable.” Essentially, North Carolina is saying that employers may accommodate transgender employees if they want to and when they can. The DOJ is saying that employers are REQUIRED to accommodate transgender employees.

The Equal Employment Opportunity Commission has [interpreted Title VII as prohibiting discrimination against transgender people](#). The DOJ will likely respond to the lawsuit by filing a countersuit asking the court to declare that HB2, as drafted, violates Title VII.