

NORTH CAROLINA HOUSE BILL 2
(2017 CONSTITUTIONAL RIGHTS & RESPONSIBILITIES
SECTION ANNUAL MEETING)
February 9, 2017 – NC Bar Center – Cary, NC

Table of Contents

I. HB2 OVERVIEW

Susanna S. Birdsong - Raleigh

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF’S MOTION FOR PRELIMINARY INJUNCTION.....	I-1
NATURE OF THE MATTER	I-2
STATEMENT OF FACTS	I-2
Charlotte’s Non-Discrimination Ordinance and the Enactment of House Bill 2	I-2
Plaintiffs are Transgender North Carolinians Who are Singled Out for Differential Treatment and Suffer Mental and Emotional Distress as A Result of House Bill 2.....	I-6
House Bill 2 Inflicts Severe Harms on Transgender People and Undermines Well-Established Medical and Scientific Protocols	I-9
STATEMENT OF THE QUESTION TO BE ANSWERED	I-11
ARGUMENT	I-11
Preliminary Injunction Standard.....	I-11
Plaintiffs are Likely to Succeed on Their Title IX Claim.....	I-12
Plaintiffs are Likely to Succeed on Their Equal Protection Claim.....	I-16
Plaintiffs are Likely to Succeed on Their Due Process Claims	I-35
Plaintiffs Satisfy the Other Preliminary Injunction Factors.....	I-40
CONCLUSION.....	I-44
CERTIFICATE OF SERVICE	I-46
SESSION LAW 2106-3 – HOUSE BILL 2.....	I-47
HOUSE BILL 946	I-52
HOUSE BILL 169	I-53
SENATE BILL 4	I-55
ACLU – EXPLANATION OF HB 2 PUBLIC FACILITIES PRIVACY AND SECURITY ACT	I-57

II-A. HB2, THE EQUAL PROTECTION CLAUSE, AND DEFERENCE TO AGENCY INTERPRETATIONS OF FEDERAL STATUTES

Enrique Armijo - Greensboro

SCOPE NOTE	II-A-1
INTRODUCTION	II-A-1
Two Issues Concerning HB2	II-A-1
CONSTITUTIONALITY	II-A-1
14 th Amendment: Equal Protection Clause.....	II-A-1
HB2: The Individual Ps	II-A-2

HB2 May Fail Even Rational Basis Review	II-A-2
STATUTORY INTERPRETATION	II-A-2
Basic Administrative Law Principles.....	II-A-2
Issue	II-A-2
Arguments.....	II-A-3
FURTHER READING	II-A-3

II-B. HB2 AND THE CONSTITUTION

Professor E. Gregory Wallace - Raleigh

BACKGROUND	II-B-1
TRADITIONAL EQUAL PROTECTION ANALYSIS OF HB2’S	
BATHROOM AND CHANGING FACILITY PROVISIONS	II-B-2
<i>Carcano v. McCroy</i>	II-B-2
<i>Board of Education of the Highland Local School District v. United</i>	
<i>States Department of Education</i>	II-B-3
<i>Johnston v. University of Pittsburgh</i>	II-B-4
Notes and Observations	II-B-5
ANIMUS.....	II-B-6
The Text of Colorado’s Amendment	II-B-6
Colorado’s Amendment Barred All Governmental Action	II-B-6
Supreme Court Describes the Colorado Amendment.....	II-B-6
Colorado Amendment Permitted Citizens to Obtain	
Nondiscrimination Protections at the Local Level.....	II-B-7
Supreme Court Held in <i>Romer</i>	II-B-7

III. HB2 AND EMPLOYMENT LAW—BEFORE, DURING AND AFTER
REVIEW OF EMPLOYMENT LAW PROTECTIONS

Eric L. Doggett and Laura J. Wetsch - Raleigh

INTRODUCTION	III-1
THE BATHROOM PROVISIONS	III-2
Who Is Affected?	III-2
How Does This Affect Employees?.....	III-3
MINIMUM WAGE, HOURS OF WORK, MINORS	III-5
DISCRIMINATION	III-8
Employment.....	III-8
Public Accommodations	III-13
ATTACHMENTS.....	III-15

IV. ETHICS

Crystal M. Richardson - Charlotte

WHAT DOES LGBTQ STAND FOR?.....	IV-1
Definitions.....	IV-1
Other Related Terms	IV-2

TO REPRESENT LGBT CLIENTS, A LAWYER NEEDS TO BE CULTURALLY COMPETENT	IV-5
THE IMPORTANCE OF CULTURAL COMPETENCY FOR ATTORNEYS.....	IV-15
LGBTQ MYTHS	IV-19
LGBTQ ORGANIZATIONS AND RESOURCES.....	IV-21

V-A. CITY, COUNTY, STATE

Frayda S. Bluestein – Chapel Hill

AN OVERVIEW OF LOCAL GOVERNMENT	V-A-1
GENERAL ORDINANCE AUTHORITY	V-A-17
IS NORTH CAROLINA A DILLON’S RUTH STATE.....	V-A-33
LOCAL ACTS RELATING TO HEALTH AND SANITATION.....	V-A-37

V-B. CITY, COUNTY, STATE CONSTITUTIONAL AND STATUTORY DEVELOPMENT IN RELATIONSHIPS BETWEEN THE NORTH CAROLINA GENERAL ASSEMBLY AND CITY/COUNTY GOVERNMENTS

Gerry F. Cohen - Raleigh

SCOPE NOTE	V-B-1
THE CONSTITUTIONAL OF 1776.....	V-B-1
Applicable Provisions of the 1776 Constitution	V-B-1
AMENDMENTS OF 1835	V-B-2
CONSTITUTION OF 1868	V-B-2
THE CONVENTION OF 1875	V-B-3
CONSTITUTIONAL AMENDMENTS OF 1915.....	V-B-3
CONSTITUTION OF 1971	V-B-5
Article VII – Local Government.....	V-B-5
DEVELOPMENTS IN THE HISTORY OF LOCAL GOVERNMENT	V-B-6

VI-A. HB2 IN THE COURTS

Christopher A. Brook – Raleigh

THIRD AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND NOMINAL DAMAGES	VI-A-1
INTRODUCTION	VI-A-2
PARTIES	VI-A-4
Plaintiffs.....	VI-A-4
Defendants	VI-A-5
JURISDICTION AND VENUE	VI-A-6
FACTUAL ALLEGATIONS	VI-A-7
Plaintiffs.....	VI-A-7
The City of Charlotte’s Enactment of a Non-Discrimination Ordinance.....	VI-A-26
The Events Leading to House Bill 2.....	VI-A-28

House Bill 2 Harms Transgender People.....	VI-A-35
House Bill 2 Harms Lesbian, Gay, and Bisexual Individuals, as well as Transgender Individuals.....	VI-A-41
CLAIMS OF RELIEF – COUNT I.....	VI-A-43
Discrimination Based on Sex and Transgender Status in Single- Sex Restrooms and Facilities (House Bill 2, Part I)	VI-A-43
Discrimination Based on Sex, Transgender Status, and Sexual Orientation in Preemption of Local Non-Discrimination Protections (House Bill 2, Part II).....	VI-A-46
Discrimination Based on Transgender Status Warrants Heightened Scrutiny.....	VI-A-48
Discrimination Based on Sexual Orientation Warrants Heightened Scrutiny.....	VI-A-48
COUNT II – VIOLATION OF RIGHT TO PRIVACY	VI-A-49
COUNT III – VIOLATION OF LIBERTY AND AUTONOMY IN THE RIGHT TO REFUSE UNWANTED MEDICAL TREATMENT.....	VI-A-51
COUNT IV – VIOLATION OF TITLE IX	VI-A-52
COUNT V – VIOLATION OF TITLE VII	VI-A-55
PRAYER FOR RELIEF	VI-A-55
CERTIFICATE OF SERVICE	VI-A-58

VI-B. HB 2 AND TITLE IX IN THE COURTS

Professor E. Gregory Wallace – Raleigh

LITIGATION INVOLVING HB2.....	VI-B-1
BACKGROUND	VI-B-2
THE FUTURE OF TITLE IX TRANSGENDER LITIGATION UNDER THE TRUMP ADMINISTRATION	VI-B-3
WHY THE FOURTH CIRCUIT IN <i>G.G.</i> WAS WRONG ON TITLE IX ...	VI-B-3
SEPARATING BATHROOMS AND CHANGING FACILITIES ON THE BASIS OF PHYSICAL ANATOMY IS VALID UNDER TITLE IX AND SECTION 106.33.....	VI-B-3
The DOE’s Interpretation of Title IX and Section 106.33 is Wrong	VI-B-3
AUER DEFERENCE SHOULD NOT HAVE BEEN EXTENDED TO THE JANUARY 2015 OCR LETTER.....	VI-B-5
A General Matter	VI-B-5
The OCR Letter Interpreting Section 106.33.....	VI-B-6