



## Legends vs. the Truth about HB2

By: Rep. Paul Stam, Speaker Pro Tem  
North Carolina House of Representatives  
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Legend 8 revised & Legend 16 added July 6, 2016

Available at: <http://paulstam.info/wp-content/uploads/2016/07/Legends-vs-the-Truth-HB2.pdf>

The narrative of the mass media is that HB2, ([Session Law 2016 – 3, “Public Facilities Privacy and Security Act”](#)) was a big change, an outrageous overreach which denies rights and is unenforceable. Let's take these legends one by one and explain the law.

**Legend 1:** HB2 was a big change in North Carolina law.

**TRUTH:** (with one exception discussed under *Legend Number 8*) HB2 codified what had been the law of North Carolina for years, decades and, for the most part, centuries. It:

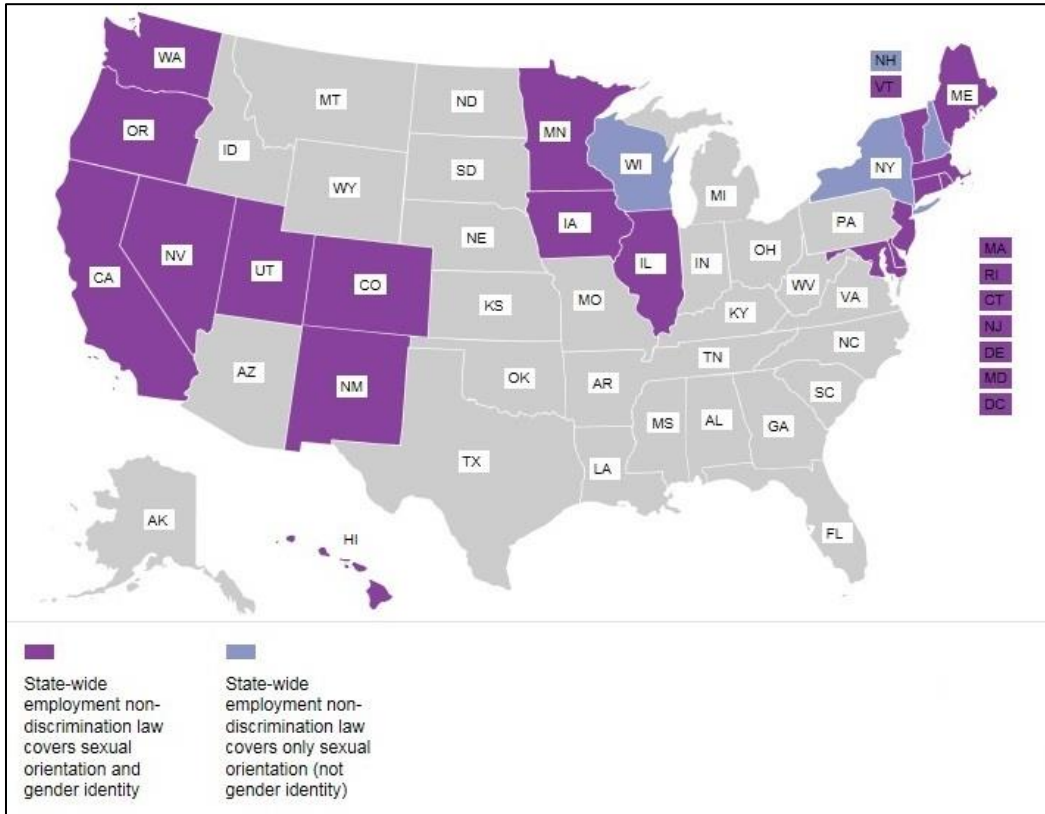
1. Provides for single sex multiple occupancy bathrooms and changing facilities in public buildings, public schools and public agencies (while allowing accommodations by single occupancy facilities and other exceptions) – please read it for yourselves. The Charlotte ordinance tried to set its policy throughout the city, **even in private businesses** (and even throughout the state for businesses contracting with Charlotte). There are an estimated 20,000 private entities in Charlotte that would have been affected. The new law sets common sense policy for government facilities but leaves private business free, subject to laws concerning indecent exposure, to make reasonable accommodations.

Pursuant to 180 years of NC Constitutional (Art. II Sec. 24(j) & Art. VII Sec. 1) economic policy, HB2:

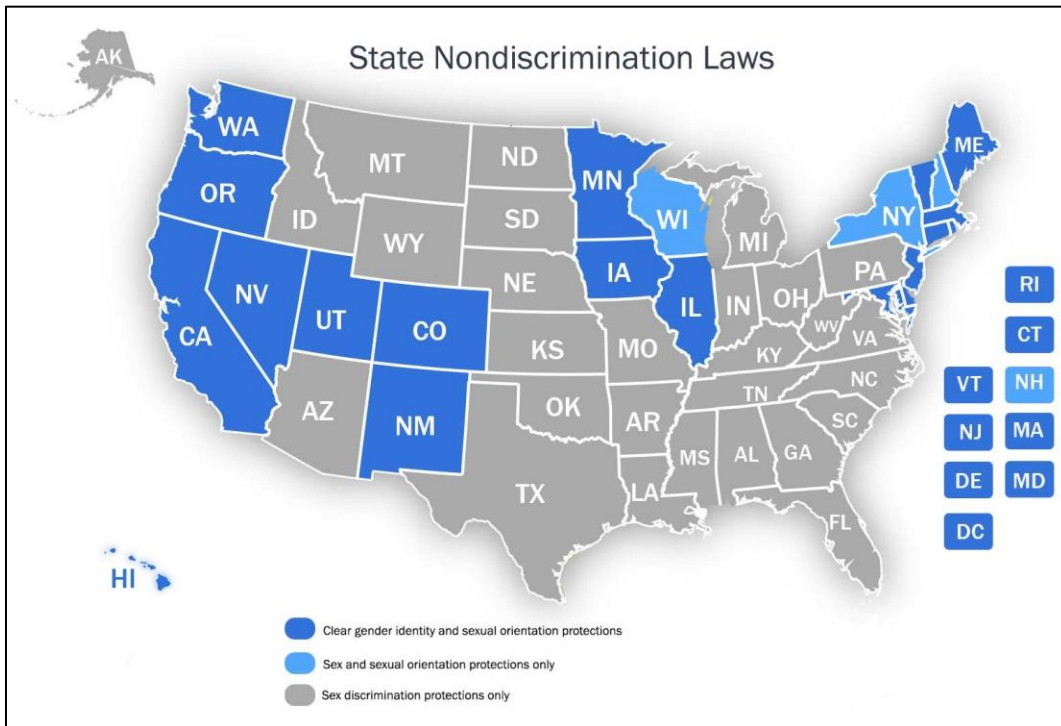
2. Preempts local ordinances on employers pertaining to compensation of employees, with exceptions.
3. Prohibits cities and counties from requiring private contractors to abide by regulations on employment practices or mandate or prohibit provision of goods, services, or accommodations to any member of the public, except as required by State law.
4. Preempts local ordinances that regulate or impose requirements on employers pertaining to discriminatory practices in employment.
5. States the public policy of the state prohibiting discrimination on the basis of race, religion, color, national origin, or biological sex in public accommodations.

**Legend 2:** North Carolina is a unique outlier engaged in some vast overreach.

**TRUTH:** The North Carolina state law on non-discrimination is the same or very similar to that of 28 other states.<sup>1</sup> For visual proof please examine the two maps below compiled by opponents of HB2. On each map the gray states similar to North Carolina do not have extra special rights based on “sexual orientation” or “gender identity.”



*www.aclu.org*



<sup>1</sup>See <http://paulstam.info/wp-content/uploads/2016/05/I-WANT-TO-HELP-PAYPAL.pdf>. Also see <https://www.aclu.org/map/non-discrimination-laws-state-state-information-map>.

Proponents of the Charlotte type discrimination ordinance say it has been enacted in 200 cities nationwide. Their leader, Rep. Chris Sgro, uses 100 cities. Whether it is 100 or 200 means that about 10,000 other cities and towns nationwide do not have an ordinance similar to Charlotte's.

**Legend 3:** Under HB2 the rights of LGBT persons are not protected. This is not true at all.

**TRUTH:** LGBT persons have the same rights that the rest of us do. Let me explain in detail:

*What is discrimination?* North Carolina residents have a full panoply of rights that come from the United States Constitution and Statutes, the North Carolina State Constitution (particularly Article I of the Declaration of Rights), and Statutes, and local ordinances. These rights are available in full to *almost* everyone.

Article I Section I of the North Carolina Constitution provides as follows:

**The equality and rights of persons.**

We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness.

There are exceptions. Aliens do not have the right to vote, whether here legally or illegally. Children do not have the right to enter into most contracts nor the right to vote nor the right to buy alcohol. Those who by mental disease are not able to conduct their own affairs may be declared incompetent by a Court. Their rights are protected and enhanced by the appointment of a Guardian. Convicted criminals lose some of their rights. But even convicted criminals have the right in most circumstances to not undress or use the bathroom or shower in the presence of a person of the opposite sex.<sup>2</sup>

Each of us has the same rights when facing the same circumstances. For historical reasons the exercise of these rights has been protected by additional constitutional or statutory provisions.

Article I Section 19 of the North Carolina Constitution provides:

**Law of the land; equal protection of the laws**

No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.

The 14<sup>th</sup> Amendment (Section 1) to the United States Constitution provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or

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<sup>2</sup> The North Carolina Department of Public Safety, Adult Correction and Juvenile Justice stated in a memo on May 10, 2016, that, "Convicted criminals and inmates do have privacy rights when it comes to their using the restroom or changing clothes and they have the right to not be observed by members of the opposite sex while using the restroom or changing clothes. The specific policy language is included in the Prison Rape Elimination Act (PREA), with which the Division of Adult Correction...Community Corrections and Juvenile Justice...abides."

immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

### **Private v. Public**

Some acts of discrimination may be appropriate for private persons but are not appropriate for a government. I may prefer to vacation in the mountains of North Carolina but the government of North Carolina must not say that I must go to the mountains rather than to the beach.

When Romeo met Juliet, he discriminated on the basis of (biological) sex because he chose a particular biological female. When Juliet met Romeo she discriminated on the basis of (biological) sex, choosing a particular biological male. Homosexual or lesbian persons are allowed to exercise private discrimination by choosing a partner of the same sex.

Discrimination based on some factors at sometimes may be reasonable (like choosing the mountains over the beach). A "discriminating" person is one who is discerning, one who notes "differences with nicety," one who has "excellent taste or judgment." But certain types of discrimination are improper for a government or for a provider of public accommodations. These types of discrimination are not changed by HB2.

Prior to the passage of HB2 the personal characteristics subject to extra scrutiny for discrimination have generally been race, color, national origin, sex (biological) and religion. That was true before the passage of the HB2 and that is true today. (Note: other personal character traits like age, handicap, and familial status are also used where appropriate. A complete list is included at the end of this paper.)

**Legend 4:** Proponents of the Charlotte type discrimination ordinance claim that HB2 sets them back a century. LGBT persons just want the same rights that everyone else already has.

**The TRUTH:** Please review again the maps shown under Legend 2. For many years bills have been filed to allow local governments to extend characteristics for extra scrutiny to "sexual orientation," "gender identity" and "gender expression." Some have been filed on a statewide basis. A list of those bills is attached at the end of this paper. **NONE** of these were ever passed by the General Assembly, whether in recent years or in past years, under Republican or Democratic majorities.<sup>i</sup> HB2 did not change that.

In 2009, N. C. Gen. Stat. §§115C-407.5 - 407.8. required all local schools to adopt a policy prohibiting bullying. This law references gender identity, physical appearance and sexual orientation for extra scrutiny. But that law specifically states that it is *only* to be used in the context of bullying in K-12 public schools.

There are **at least 38 characteristics** listed at the end of the paper that have obtained special scrutiny in the laws or ordinances of various states and cities for particular purposes.<sup>ii</sup>

None of this changes the proposition that, except in the circumstances stated at the beginning, **WE ALL HAVE THE SAME RIGHTS** when confronting the same situation.

The opponents of HB2 are demanding extra special rights. They are not asking to have the same rights that other North Carolinians have. The United States Supreme Court in its decision of July 2015 finding a constitutional right to same-sex marriage nationwide did not find that "sexual

orientation” was a “suspect classification.”

The primary problem with "identity"-based preferences (like “sexual orientation” or “gender identity”) is subjectivity. That subjectivity translates to rule other than by law. The “identity” actor determines the law. The law that codifies the right becomes nothing more than "law cover" for the individual, a tool of individualized empowerment.

“I want to be Cherokee,” said Sen. Elizabeth Warren, whose tenure at Harvard improved its diversity rating. But that did not turn her into a Native American.

**Legend 5:** “Sexual Orientation” is a reasonable and definable term in discrimination law.

**TRUTH:** No. “Sexual orientation” is inherently undefinable and undefined. What is the meaning of the word “orientation?” Is it purely subjective? Is it what is in a person's mind or does it relate to behavior?

What is meant by “sexual orientation?” Some people, male and female, have the “orientation” or “behavior” of wanting or having more than one sexual partner. For centuries we have had laws against bigamy and polygamy and there are civil consequences for adultery. Those laws are being challenged in some Western states. There are tens of thousands of polygamous marriages in those states that are not being prosecuted. In addition there are millions of Americans who see nothing wrong with polygamy or adultery, either because of their cultural background or their own personal desires.

Extra scrutiny for discrimination on the basis of “sexual orientation” would mean that a job applicant who states to his or her prospective employer or current employer that he or she has a polygamous marriage or is in a polygamous or adulterous living situation, or wishes to have multiple sexual partners, would have extra special rights to be hired or to not be fired. If the desire (or behavior) of having multiple sexual partners is not a “sexual orientation” what could be?

There are many good reasons why an employer might not want to employ a person whose “sexual orientation” is to polygamy or adultery. The employer should have the right to make that decision. Similarly, the employee should have the right to choose those employers who actually want such employees.

**Legend 6:** “Gender Identity” is a reasonable and definable term. False.

**TRUTH:** President Obama’s Departments of Justice and Education have proven that “gender identity” is purely subjective.

In the recent case of *G.G. ex rel. Grimm v. Gloucester Cnty. School Bd.*, No. 15–2056, 2016 WL 1567467 (4th Cir. Apr. 19, 2016), “gender identity” was the issue. Judge Niemeyer in dissent pointed out that “gender identity” is entirely subjective as it was applied by the 2-1 majority of the 4<sup>th</sup> Circuit panel.

On May 13, 2016, the United States Departments of Justice and Education issued a joint letter to public schools nationwide, explaining a school’s obligation under Title IX regarding transgender students and “gender identity.”<sup>3</sup> The letter claimed to rely on Title IX of the Education Amendments of 1972 and stated:

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<sup>3</sup> Available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

“[g]ender identity refers to an individual’s internal sense of gender. A person’s gender identity may be different from or the same as the person’s sex assigned at birth...Under Title IX, a school must treat students consistent with their gender identity even if their education records or identification documents indicate a different sex...Under Title IX, there is no medical diagnosis or treatment requirement that students must meet as a prerequisite to being treated consistent with their gender identity.” (*emphases added*).

This is **purely subjective**. It is left to the individual to determine whether “he,” “she” or “s(he)” identifies as female or male on a day-to-day basis.

Legal lines are more acceptable when drawn on the basis of benign and immutable characteristics - e.g., race, color, national origin, sex (biological) and disabilities. Religion is included as a suspect class because of its place in the First Amendment to the U.S. Constitution and Article I Section 13 of the NC Declaration of Rights.

If individuals are allowed to justify and demand universal acceptance of their behavior by wholly self-determined “identity” claims then the law becomes lawless.

To see where this is headed, please see Facebook’s new policy on updating a user’s gender identity on the user’s profile page: <https://www.rt.com/usa/236283-facebook-gender-custom-choice/>. Facebook offers 58 pre-populated options to choose from OR a user can create and type in the user’s chosen “gender” for the public to see.

**Legend 7:** HB2 has no enforcement provisions and can be disregarded. I have heard this statement from one community college President and from the affidavit of the President of UNC and from many others. Those spreading this legend think that the entire *corpus juris* has to be contained within each law.

**TRUTH:** This legend is not true at all. There is now the same enforcement of the law concerning changing rooms, locker rooms and facilities as before HB 2. To intentionally go into a room or remain in a room that is marked for a person of the opposite sex is a misdemeanor called trespass. In the matter of S.M.S. 196 N.C. App. 170, 675 S.E. 2d (2009).

There is also enforcement by the North Carolina Building Code, which is adopted by the State Building Code Council under express delegation of authority by the General Assembly. *Greene v. City of Winston-Salem*, 287 N.C. 66, 75, 213 S.E.2d 231, 237 (1975). It governs the construction, as well as the use and occupancy, of “public accommodations.” 2012 N.C. Bldg. Code § 101.2 (Int’l Code Council, Inc. 3d prtg. 2014). It expressly mandates the numbers of toilet and lavatory facilities in buildings. And it mandates that, in most commercial buildings, “[w]here plumbing fixtures are required, separate facilities shall be provided for each sex.” *Id.* §§ [P] 2902.1, 2902.2, Table 2902.1 (*emphasis added*). It requires signage for each facility “designating the sex.” *Id.* § 2902.4.

The law will not permit subjecting building owners and occupants to conflicting requirements: to construct, label and operate separate, sex-specific bathroom facilities, on one hand, and to not allow bathrooms designated by sex, on the other hand.

By forbidding facility operators from designating showers by sex, the Charlotte ordinance (and President Obama’s interpretation of Title VII and Title IX) also would conflict with the state’s

criminal indecent exposure statute, which expressly forbids cross-sex exposure of “private parts” in public places. N.C. Gen. Stat. § 14-190.9.

There are other remedies as well for government officials who refuse to obey the law-injunction and mandamus for starters.

**Legend 8:** The employment non-discrimination provisions prohibit one from suing in state court for discrimination. This oft repeated legend is not true.

**TRUTH:** Under both Title VII (equal employment opportunity law) and under title 42 U.S.C. 1981, discrimination suits can be brought in state court. This is called concurrent jurisdiction. In *Yellow Freight Syst. V. Donnelly*, 494 U.S. 820 at 823 (1990), the Supreme Court construed Title VII to allow suits in state court against private employers because (1) federal and state courts are presumed to have concurrent jurisdiction over cases arising under the laws of the United States and (2) Title VII contains no language stripping state courts of their "presumptive jurisdiction." *See also* Bullock v. Napolitano, 666 F.3d 281, 283 (4th Cir. N.C. 2012). *Legend 8* is oft repeated by those who know better. It does not become true by frequent repetition.

The real complaint is that there was an overlapping state tort claim. That claim was only for wrongful discharge from employment and only for discrimination based on race, national origin, color, sex, religion, age and handicap. That overlapping tort claim was affected by HB2. On July 1, 2016 that state tort claim was reinstated ([Session Law 2016-99](#)).

That does not change the fact that under HB2 claims of discrimination can still be brought in state court. I have heard it said that this is inadequate because Title VII has a shorter time for filing than the state law tort claim. For claims based on race that is not true.

Title 42 USC 1981, *Equal Rights Under the Law* provides:

**(a) Statement of equal rights**

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

**(b) “Make and enforce contracts” defined**

For purposes of this section, the term “make and enforce contracts” includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

**(c) Protection against impairment**

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

Section 1981 was enacted in 1870 after ratification of the 13th Amendment. It effectuates the purpose of that amendment, to eradicate the vestiges of slavery. For almost 50 years it has been construed to allow a private right of action against another private person for discrimination based on race. State courts have concurrent jurisdiction with federal courts. There is a four-year statute of limitations, longer than the three year statute of limitations on the state overlapping claim for wrongful discharge. Attorney fees are available. This is a much better remedy than the overlapping

state tort claim.

**Legend 9:** HB2 takes away rights to sue for violations of the rights of the disabled. This is not true.

**TRUTH:** The laws for disability discrimination are in [Chapter 168A of the NC General Statutes](#) and are quite robust. It complements the *Americans with Disabilities Act* 42 U.S.C. §§12101-12213.

**Legend 10:** HB2 means that one cannot sue for discrimination as a veteran.

**TRUTH:** Wrong. Rights of veterans to sue are set out in other statutes. North Carolina has preferences and protections for veterans. Veterans have preferences under the following statutes: N. C. Gen. Stat. §§ 17C-10.1, 20-7(f)(3b) & (q), 93B-15.1, 95-28.4, 105-277.1C, 113-296, 113-174.2(c)(6), 116-143.3A, 116-209.54(b)(6), 112C-115.4, 126 art. XIII, 127A-202.1, 127B-11,12, and 14, 128-15, 143B art. XIV Parts 2, 3 & 9.

**Legend 11:** House Bill 2 requires one to use the locker room or changing room or restroom based on biological sex assigned at birth. That is not true.

**TRUTH:** The law states “as shown on the birth certificate.” Birth certificates can be changed after sex reassignment surgery. [N.C. Gen. Stat. § 130A-118\(b\)\(4\)](#). In 46 states, birth certificates can be changed under varying criteria. HB 2 gives “full faith and credit” to these decisions of other states. There is no requirement that anyone carry or present a birth certificate.

**Legend 12:** HB2 is a North Carolina problem. Hardly.

**TRUTH:** In May, the State of Texas and 10 other states sued the federal government for relief from the same Presidential attack which has been launched against North Carolina.

The Department of Justice sued North Carolina for sanctions under Title VII and Title IX. Title VII involves employment discrimination for all employers of more than 15 employees. 42 U.S.C. § 2000(e)(2) (1994). Eighty percent of the employees in America are covered under Title VII. They are in every state of the nation. The Obama administration has threatened every business in America with more than 15 employees with Title VII suits if they do not submit to its subjective and radical redefinition of the word “sex.”

**Legend 13:** The federal government will take education money away if states do not cave in.

**TRUTH:** Under Title IX schools have the right to comply within 30 days after the completion of legal proceedings. This can take years. In the 44 year history of Title IX not one school has lost funding on this ground. The Obama administration announced on [May 12, 2016](#), that it would not seek to stop Title IX funding until the litigation is concluded.

**Legend 14:** North Carolina will suffer financial disaster if it persists in HB 2. This is a curious claim since HB2 did not significantly change the substantive law. See Legends 2, 3 and 4.

**TRUTH:** The Census Bureau recently reported that since 2013 North Carolina has had the fastest growing economy in the nation. Recently, and after the enactment of HB2, *Site Selection Magazine*<sup>4</sup> stated that North Carolina (despite HB2) and Texas (despite falling oil prices), were

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<sup>4</sup> Bruns, Adam. *Site Selection magazine*, May 2016. Available at <http://siteselection.com/issues/2016/may/prosperity-cup.cfm>.



ted for FIRST PLACE in the competition to locate new businesses. Even more recently, CEO Magazine ranked North Carolina 3<sup>rd</sup> in the nation as the BEST place to do business.<sup>5</sup>

A wolf will look for the crippled or sick or just born caribou calf to separate from the herd and take down. The wolf who tries to feed on the herd or the healthy will not often be successful.

It is unclear why the Human Rights Campaign decided to make an example of North Carolina. There was and is nothing unique about North Carolina's policies on non-discrimination, which were virtually the same before and after HB2.

But the campaign picked the wrong target. Of all the states, North Carolina is most likely to survive the onslaught. The other 28 states and the tens of millions of affected employees are waking up and realizing that they are all targets.

At last count more than 1.3million Americans have agreed to boycott Target for joining the attack on North Carolina.<sup>6</sup>

On March 16, PayPal announced that it would gladly receive \$3.6 million from the state of North Carolina to locate a new facility near Charlotte. Then on April 5<sup>th</sup>, PayPal President & CEO, Dan Schulman, announced that it would not move to North Carolina because of the passage of HB2. Certainly, this was not because of the bathroom/locker-room situation since the bill did not even apply to private business facilities. PayPal was incensed at the so-called failure of the legislation to include extra special protections for sexual orientation, gender expression and gender identity. PayPal lawyers apparently did not realize that this was the same law in effect on March 16. PayPal currently maintains its operations center and main office in Nebraska and has a technology center in Arizona as well as a data service office in Texas- all states with similar non-discrimination laws as North Carolina.

The problem for PayPal is that 28 other states (and the federal government) also lack those categories for extra special protection. So PayPal would be limited to 20 states:

California, Colorado, Connecticut, Delaware, Illinois, Iowa, Hawaii, Nevada, New Hampshire, New Jersey, New Mexico, New York, Maine , Maryland, Minnesota, Oregon, Rhode Island, Utah, Vermont, Washington, and Wisconsin

### **But PayPal will need to narrow its list further.**

In the publication *Rich States Poor States*<sup>7</sup> and the publication by the *National Tax Foundation on Tax policy*<sup>8</sup>, the following states are in the bottom 15 in economic or tax climate. PayPal would certainly want to avoid these states.

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<sup>5</sup> <http://www.bizjournals.com/charlotte/news/2015/05/08/north-carolina-is-no-3-for-business-climate-ceo.html>.

<sup>6</sup> Petition by the American Family Association. Available at <https://www.afa.net/action-alerts/sign-the-boycott-target-pledge/>.

<sup>7</sup> Rich States, Poor States, Alec-Laffer State Economic Competitiveness Index, 9<sup>th</sup> Edition 2016.

<https://www.alec.org/publication/rich-states-poor-states/>.

<sup>8</sup> 2016 State Business Tax Climate Index, November 17, 2015.

<http://taxfoundation.org/article/2016-state-business-tax-climate-index>.

**The 15 worst state rankings for fostering business development include:**

<i>2016 Rich States Poor States</i>	<i>National Tax Foundation on Tax Policy</i>
36) Washington	36) South Carolina
37) West Virginia	37) Louisiana
38) Maine	38) Arkansas
39) Pennsylvania	39) Georgia
40) Montana	40) Iowa
41) Oregon	41) Maryland
42) Hawaii	42) Ohio
43) Illinois	43) Wisconsin
44) Delaware	44) Connecticut
45) Minnesota	45) Rhode Island
46) California	46) Vermont
47) Connecticut	47) Minnesota
48) New Jersey	48) California
49) Vermont	49) New York
50) New York	50) New Jersey

**Now PayPal is down to only 5 states:**

Colorado, Nevada, New Hampshire, New Mexico, and Utah

But PayPal has another problem: It does business in 25 nations where homosexual acts are a crime.<sup>9</sup> So it would certainly want to reduce its footprint there. It would also want to stop its plans to expand to Cuba and would want to eliminate its operations in the People’s Republic of China. Each have brutal communist dictatorships.

Hopefully this research will be helpful to PayPal in its search for a new location more compatible with its principles.

**Legend 15:** The NBA, NCAA, ACC & the PGA will force North Carolina to back down. False.

The **TRUTH** is that these organizations are themselves NOT in compliance with Title VII or Title IX as defined by President Obama. If they get into compliance they would destroy almost half of their own industry.<sup>10</sup> To understand the practical ramifications of this section, read the footnoted article which recounts a High school track meet in Alaska. A high school BOY identifying as a girl won All-State honors in a GIRLS Track and Field event.<sup>11</sup>

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<sup>9</sup> See Press Release from Congressman Robert Pittenger, *Pittenger on PayPal Decision to Cancel Charlotte Project*, April 6, 2016.

<http://pittenger.house.gov/media-center/press-releases/pittenger-on-paypal-decision-to-cancel-charlotte-project>

<sup>10</sup> On June 2, 2016, NBA Commissioner Adam Silver said it was not the changing room provision that was the issue but rather the failure to protect LGBT rights. But that makes little sense. See Legends 2, 3 and 4.

<sup>11</sup> Hasson, Peter. The Daily Caller. “High School Boy Wins All-State Honors in Girls Track And Field.” Retrieved on June 3, 2016 at 2:29PM Available at

<http://dailycaller.com/2016/06/03/high-school-boy-wins-all-state-honors-in-girls-track-and-field/?print=1>.

## WHY is President Obama trying to end women's competitive sports?

On May 13, 2016, the United States Departments of Justice and Education issued a joint letter to public schools nationwide, attempting to explain a school's obligation under Title IX regarding transgender students.<sup>12</sup> It came with an implicit threat of denial of Title IX funding.

### THE PROBLEM

The letter claimed to rely on Title IX of the Education Amendments of 1972 and stated:

“[g]ender identity refers to an individual's internal sense of gender. A person's gender identity may be different from or the same as the person's sex assigned at birth...Under Title IX, a school must treat students consistent with their gender identity even if their education records or identification documents indicate a different sex...Under Title IX, there is no medical diagnosis or treatment requirement that students must meet as a prerequisite to being treated consistent with their gender identity.” (*emphasis added*)

This test is purely subjective. It is left to the individual to determine whether he or she identifies as female or male on any particular day or time.

Title IX requires that, “[N]o person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives Federal financial assistance.”<sup>13</sup> Title IX requires that schools treat females and males equally with respect to participation, opportunities, athletics scholarships and treatment of male and female teams.<sup>14</sup> Title IX athletic regulations were extensively debated by Congress and became law in June of 1975, giving high schools and colleges three years and elementary schools one year to comply.<sup>15</sup> A three part test was issued by the Office of Civil Rights in 1979.<sup>16</sup> Under this test schools will be in compliance with Title IX if:

“(1) males and females participate in athletics in numbers substantially proportional to their enrollment numbers; or (2) the school has a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of members of the underrepresented sex; or (3) the institution's existing programs fully and effectively accommodate the interests and abilities of the underrepresented sex.”<sup>17</sup>

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<sup>12</sup> Available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> (Referred to as *The Letter*).

<sup>13</sup> Title IX of the Education Amendments, 20 U.S.C. Â§1681 (1972).

<sup>14</sup> *Id.*

<sup>15</sup> Pub. L. 93-380, H.R. 69, Elementary and Secondary Education Amendments, introduced Jan. 3, 1973, passed Aug. 21, 1974. “[D]irected Secretary to prepare and publish, not more than 30 days after Aug. 21, 1974, proposed regulations implementing the provisions of this chapter regarding prohibition of sex discrimination in federally assisted programs, including reasonable regulations for intercollegiate athletic activities considering the nature of the particular sports.” See The Library of Congress at <http://thomas.loc.gov/cgi-bin/bdquery/z?d093:HR00069:>.

<sup>16</sup> 34 C.F.R. Part 106 and 44 Fed. Reg. 71413 et. Seq (1979).

<sup>17</sup> *Id.*

## The Departments of Justice and Education’s Solution for Athletes

According to the Department of Justice (DOJ) and the Department of Education (DOE), the solution is simple:

“Title IX regulations permit a school to operate or sponsor sex-segregated athletics teams when selection for such teams is based upon competitive skill or when the activity involved is a contact sport.”<sup>18</sup> However, a school may not “adopt or adhere to requirements that rely on overly broad generalizations or stereotypes about the differences between transgender students and other students of the same sex (i.e., the same gender identity) or others’ discomfort with transgender students”<sup>19</sup>

One of the purposes of Title IX was to create the same opportunity and equality of treatment for male and female student-athletes.<sup>20</sup> The regulation requires that any member of the "underrepresented sex" (the sex that has the fewest opportunities) must have an opportunity to play on the team of the overrepresented sex if that player is not provided with a team of the player's own sex.<sup>21</sup> Since males have more opportunities than females, a male playing on a female’s team would take away a participation opportunity for an underrepresented sex (female). Thus, in the interest of the "class" (all females), males are not allowed to take spots on a female’s team even though the reverse is permitted. Males have no right to try out for a female’s team *if* there are more males playing sports at that particular school than females.

There is little research on the impact of students’ participation based on age-appropriateness, and, as the letter notes, the policies needed at the collegiate level may not be the same at the high school or even middle school level of competition.<sup>22</sup> “[P]olicies that may be appropriate at the college level may ‘be unfair and too complicated for [the high school] level of competition.’”<sup>23</sup>

States and school districts have previously used discretion to enact their own policies concerning transgender students on school teams. Some have allowed transgender students to play on teams consistent with their gender identity regardless of their sex assigned at birth. Others evaluate the student’s eligibility for gender-specific school activities by considering their school records, medical history or the student’s gender-specific advantage of their participation. The North Carolina High School Athletic Association, adopted a rule that, “A Student’s gender is denoted by what is listed on the birth certificate.”<sup>24</sup> In North Carolina and in 46 states, the birth certificate can be changed under medical certification.<sup>25</sup>

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<sup>18</sup> 34 C.F.R. § 106.41(b). “Nothing in Title IX prohibits schools from offering coeducational athletic opportunities.”

<sup>19</sup> See *The Letter*.

<sup>20</sup> Available at <http://www.ncaa.org/about/resources/inclusion/title-ix-frequently-asked-questions#benefit>.

<sup>21</sup> Department of Education’s “Three-Part Test,” Policy Interpretation by Office of Civil Rights, 1979. Available at <http://www.womenssportsfoundation.org/home/athletes/for-athletes/know-your-rights/athlete-resources/mythbusting-what-every-female-athlete-should-know>.

<sup>22</sup> See *The Letter. On the Team: Equal Opportunity for Transgender Student Athletes* (2010) by Dr. Pat Griffin & Helen J. Carroll (*On the Team*), [https://www.ncaa.org/sites/default/files/NCLR\\_TransStudentAthlete%2B\(2\).pdf](https://www.ncaa.org/sites/default/files/NCLR_TransStudentAthlete%2B(2).pdf). See NCAA Office of Inclusion, *NCAA Inclusion of Transgender Student-Athletes* 2, 30-31 (2011), [https://www.ncaa.org/sites/default/files/Transgender\\_Handbook\\_2011\\_Final.pdf](https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf).

<sup>23</sup> See *The Letter*, footnote 18.

<sup>24</sup> NCHSSA, Attachment # 9, Birth Certificate & Gender, adopted April 28, 2014. Available at <http://www.nchsaa.org/file/1610>.

<sup>25</sup> N.C. Gen. Stat. § 130A-118(b)(4): Amendment of Birth and Death Certificates.

## The NCAA's Response

In April 2010, the National Collegiate Athletic Association<sup>26</sup> Executive Committee adopted policies to include transgender student-athletes. The NCAA Office of Inclusion “encourages thoughtful development of policies and practices that provide fair participation opportunities for all student-athletes, including transgender individuals.”<sup>27</sup> The two bylaws affected were 1) **mixed team status** and 2) the **use of banned substances**.<sup>28</sup> So long as the student is receiving hormone therapy, transgender students are permitted to participate in sex-segregated sports consistent with their gender identity.

### There are problems with these bylaws under the President's interpretation of Title IX:

- The “mixed team status” rules violate President Obama’s new “law.”
- Students may be forced by NCAA schools to show their medical records for proof of hormone therapy. This violates President Obama’s new law.

### NCAA “MIXED TEAM STATUS” POLICIES

*1. A trans male (Female to Male) student-athlete who has received a medical exception for treatment with testosterone for diagnosed Gender Identity Disorder or gender dysphoria and/or Transsexualism, for purposes of NCAA competition may compete on a men's team, but is no longer eligible to compete on a women's team without changing that team status to a mixed team.*<sup>29</sup>

*2. A trans female (Male to Female) student-athlete being treated with testosterone suppression medication for Gender Identity Disorder or gender dysphoria and/or Transsexualism, for the purposes of NCAA competition may continue to compete on a men's team but may not compete on a women's team without changing it to a mixed team status until completing one calendar year of testosterone suppression treatment.*<sup>30</sup>

If either of the above occurred, colleges and universities would see a decrease in the number of women's collegiate sports teams. Once a team is changed to “mixed-team status,” that team is no longer able to compete against females nor is that team classified as a female team.<sup>31</sup> As of 2011, the number of female athletes was still far behind the number of male athletes (see chart below).<sup>32</sup> The NCAA reported that the gap seems to be narrowing from its 2014-15 data with the average NCAA institution having approximately 437 student-athletes, 247 males and 190 females.<sup>33</sup> However, if the Departments of Justice and Education prevails on their purely subjective gender identity policy, there WILL be a decrease in the number of women's collegiate teams since they will become “mixed teams” under NCAA rules.

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<sup>26</sup> NCAA, which oversees competitive sports at over 1,000 colleges & universities.

<sup>27</sup> Inclusion of Transgender Student-Athletes- Bylaws, page 7 (August 2011)  
[https://www.ncaa.org/sites/default/files/Transgender\\_Handbook\\_2011\\_Final.pdf](https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf).

<sup>28</sup> Id. at 12.

<sup>29</sup> Id. at 13.

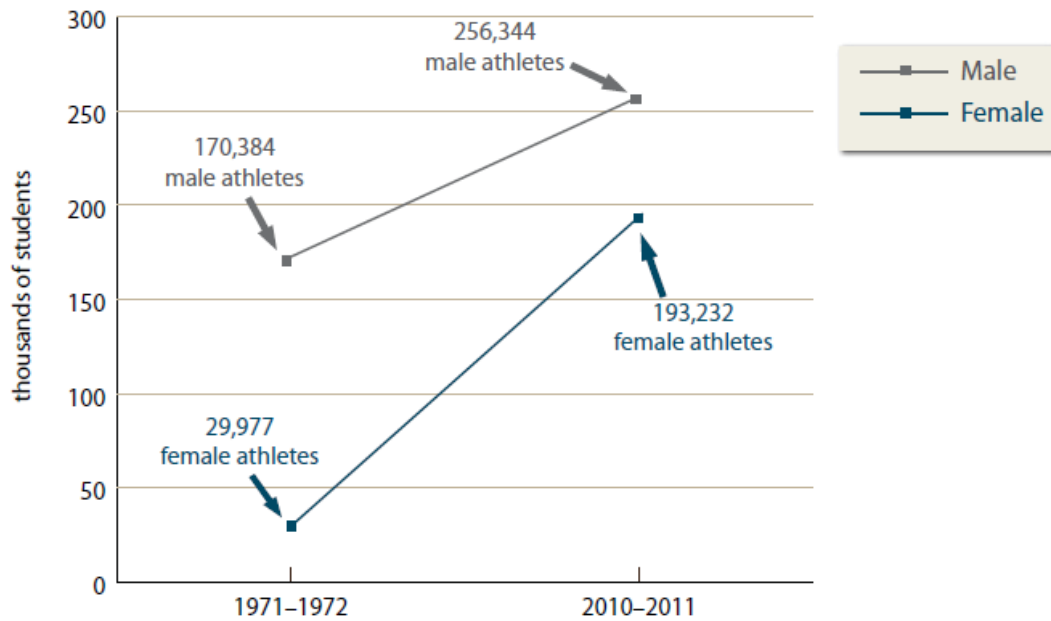
<sup>30</sup> Id. at 13.

<sup>31</sup> “A mixed team is a varsity intercollegiate sports team on which at least one individual of each gender competes. A mixed team shall be counted as one team. A mixed team shall count toward the minimum sponsorship percentage for men's championships... Once a team is classified as a mixed team, it retains that status through the remainder of the academic year without exception.” <http://www.smith.edu/admission/studygroup/docs/NCAA-Policy-on-Transgender-Student.pdf>.

<sup>32</sup> NCAA Sports Sponsorship and Participation Report, 1971-72 – 2010-11.

<sup>33</sup> Student-Athlete participation, 1981-82-2014-15; NCAA Sports Sponsorship and Participation Rates Report, available at <http://www.ncaa.org/sites/default/files/Participation%20Rates%20Final.pdf>.

## Male and Female Participation in College Sports, 1972–2011



SOURCE: NCAA Sports Sponsorship and Participation Report, 1971-72–2010-11.

In order to comply with Title IX funding, women and men must be provided *equitable* opportunities to participate in sports.<sup>34</sup> There is no requirement to offer identical sports but rather an equal opportunity to play.<sup>35</sup> **If more teams transition to mixed teams, female athletes will suffer.** Mixed teams are permitted to play all-male teams and compete in the men’s championships, but mixed teams are NOT permitted to play against all female teams nor are they permitted to participate in the women’s NCAA Championship.<sup>36</sup> If there is a team of 30 females and 1 male, the team must compete in the men’s championship. Female teams will ultimately suffer from a lower level of competition.<sup>37</sup> Some very talented female athletes will be less likely to join athletic teams since they will only be playing other mixed teams or all male teams.

Institutions must also demonstrate a history and continuing practice of program expansion for the underrepresented sex.<sup>38</sup> However, where more female teams transition to mixed teams, this will no longer be expanding opportunities for the underrepresented sex: female. Eventually, no schools will be in compliance with the rules required under President Obama’s new law on Title IX.

<sup>34</sup> 34 CFR 106.41 – Athletics.

<sup>35</sup>Id. See also <http://www.ncaa.org/about/resources/inclusion/title-ix-frequently-asked-questions#how>

<sup>36</sup> *Supra*, NCAA Inclusion of Transgender Student-Athletes, 12. see also

<http://www.smith.edu/admission/studygroup/docs/NCAA-Policy-on-Transgender-Student.pdf>.

<sup>37</sup> 34 CFR 106.41(c)(1) – Athletics. “In determining whether equal opportunities are available, the Director will consider [several] factors...(1) whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes[.]”

<sup>38</sup> Id.

## USE OF BANNED SUBSTANCES

The NCAA's bylaws states that,

*“Any transgender student-athlete who is not taking hormone treatment related to gender transition may participate in sex-separated sports activities in accordance with his or her assigned birth gender.*

- **A trans male (FTM) student-athlete who is not taking testosterone related to gender transition may participate on a men’s or women’s team.**
- **A trans female (MTF) transgender student-athlete who is not taking hormone treatments related to gender transition may not compete on a women’s team.**<sup>39</sup>

The provisions in these bylaws are in direct conflict with President Obama’s new law.

In 2010, a female identifying as a male was allowed to play on a women’s collegiate NCAA basketball team because the individual had not undergone hormone treatments.<sup>40</sup> If this player had undergone hormone treatment or the transgender athlete was a biological male identifying as a woman who wanted to play on the women’s team, the player could not have participated.

A transgender student-athlete in track and field won many honors and a national championship in women’s hammer throw but identified as a male.<sup>41</sup> The athlete was allowed to continue competing in the women’s category because the athlete had not undergone reassignment surgery or hormonal treatment which is consistent with NCAA regulations. If this athlete *had* undergone hormonal treatment, the student would have had to compete in the men’s division according to NCAA policies.

The NCAA provides additional considerations for the student-athlete when transitioning to the other sex. The student must submit a letter of request to participate on a sports team to the director and include with that letter a note from the student’s physician documenting the transition status and identifying the hormonal treatment and documenting of the student’s testosterone levels if relevant.<sup>42</sup> This NCAA requirement is in direct conflict with President Obama’s new law on Title IX.

### **The Effect on Women and Title IX Funding**

According to the Department of Justice “there is no medical diagnosis or treatment requirement that students must meet as a prerequisite to being treated consistent with their gender identity.”<sup>43</sup> The Department of Justice’s interpretation of Title IX concludes that these athletes should have been able to participate on *either* team that their self-determined gender aligned with, regardless whether they had taken hormones or sex reassignment surgery. No medical diagnosis or treatment should be required since “requiring students to produce such identification documents in order to

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<sup>39</sup> *Supra*, NCAA Inclusion of Transgender Student-Athletes, 13.

<sup>40</sup> [http://www.nytimes.com/2010/11/02/sports/ncaabasketball/02gender.html?\\_r=1](http://www.nytimes.com/2010/11/02/sports/ncaabasketball/02gender.html?_r=1)

<sup>41</sup> <http://www.usatoday.com/story/sports/college/2015/08/03/ncaa-transgender-athlete-guidelines-keelin-godsey-caitlyn-jenner/31055873/>.

<sup>42</sup> *Supra*, NCAA Inclusion of Transgender Student-Athletes, 14.

<sup>43</sup> See *The Letter*, page 2.

treat them consistent with their gender identity may violate Title IX when doing so has the practical effect of limiting or denying students equal access to an education program or activity.”<sup>44</sup>

According to the DOJ’s analysis of Title IX, the 1000 member schools of the NCAA WILL BE IN VIOLATION OF TITLE IX and will lose federal funding if they do not amend their policies concerning athletes and sex-reassignment surgery and hormone treatments. BUT THEN, if they do comply, what would be the effect on competition? A male could self-identity as a female and demand a position on the team. In addition to the competitive issue, will women put up with having an anatomically correct male in their shower rooms after practice and in their hotel rooms on travel days? Some will; most will not.

## **TITLE VII**

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, color, religion, sex and national origin.<sup>45</sup> Under Title VII, an employee may sue on the basis of disparate treatment, disparate impact and retaliation. Private schools can be sued under Title VII if they employ over 15 employees and are not “controlled” by a religious institution.<sup>46</sup> Most private schools are not “controlled” by a religious institution, even if they have a religious mission. Examples of those who can sue under Title VII in competitive sports include professional athletes, coaches, referees, and all others who are classified as an “employee.”<sup>47</sup> The WNBA<sup>48</sup> and the National Women’s Soccer League will have to employ males as athletes who self-identify as female athletes or be sued by the Equal Employment Opportunity Commission under Title VII. That will be the end of women’s professional sports.

## **Olympic Athletes**

In 2004, the International Olympic Committee released rules for transgender-athletic competition.<sup>49</sup> The athlete must have (1) had gender reassignment surgery, (2) have legal recognition of the assigned gender, and (3) have at least two years of hormone therapy.<sup>50</sup> In November 2015, the Committee proposed new guidelines that mirror the NCAA policies concerning transgender guidelines.<sup>51</sup> These guidelines will permit those who transition from female to male eligible to compete in the male category without restriction.<sup>52</sup> Those who transition from male to female will have conditions for competition in the female category.<sup>53</sup> However, the committee stated in the same letter that, “To avoid discrimination, if not eligible for female competition the athlete should be eligible to compete in male competition.”<sup>54</sup>

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<sup>44</sup> See *The Letter*, page 2.

<sup>45</sup> 42 U.S.C. § 2000(e)(2) (1994).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Women’s National Basketball Association.

<sup>49</sup> <http://edition.cnn.com/2004/SPORT/05/17/olympics.transsexual/>.

<sup>50</sup> <http://www.dailymail.co.uk/news/article-3412969/Olympics-change-policies-allow-transgender-athletes-compete-without-having-gender-reassignment-surgery.html>.

<sup>51</sup> [http://www.olympic.org/Documents/Commissions\\_PDFfiles/Medical\\_commission/2015-11\\_ioc\\_consensus\\_meeting\\_on\\_sex\\_reassignment\\_and\\_hyperandrogenism-en.pdf](http://www.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_ioc_consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf)

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* Some exceptions include: if the athlete declares its gender identity as female, she is prohibited from changing it for a minimum of four years. The athletes’ testosterone level must be below 10 nmol/L at least 1 year prior to competition.

<sup>54</sup> *Id.* In response to the interim award dated 24 July 2015 in *Chand v AFI and IAAF CAS 2014/A/3759*, the IOC Consensus Meeting.



It is unclear whether Title VII would apply to the US Olympic Team. It would be ironic if the Olympic Team for the United States was only able to compete this summer because it was NOT subject to President Obama’s new law. But the effect on future Olympic competitions for women would be catastrophic as the collegiate and professional pipeline would dry up.

### CONCLUSION

If the letter of the Departments of Justice and Education is converted into a law by the Federal Courts then the days are numbered for high school, collegiate, and professional women’s sports. Of course, this will not apply to sports like gymnastics where women outperform men.

Title IX was conceived as a boon to women in sports but, in the hands of President Obama, will be used as a weapon against them.

#### **Legend 16: Democrats tried to repeal HB2**

**TRUTH:** Not really. Eleven House Democrats voted for HB2 originally. There are 45 House Democrats. The repeal bill, [HB 946](#), only attracted 31 sponsors. Later they filed a “Discharge Petition” to force a vote on the House floor. Only 27 House Democrats (and no Republicans) signed the discharge petition.

A repeal bill, [SB 784](#), attracted only 7 sponsors in the Senate. There are 16 Senate Democrats.

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#### <sup>i</sup> **Sexual Orientation Related Bills Applicable to Local or State Government**

Session	Bill No.	S. L. No.	Short Title
1999	<a href="#">H844</a>		Orange County Civil Rights
2001	<a href="#">H941</a>		County Antidiscrimination Ordinances
2001	<a href="#">S864</a>		County Anti-Discrimination Ordinances
2009	<a href="#">H459</a>	2009-74	Rocky Mount/ Fair Housing Ordinance
2009	<a href="#">H721</a>	2009-115	Carrboro/Housing Discrimination
2011	<a href="#">S305</a>		Carrboro/Housing Discrimination
2011	<a href="#">H478</a>		Nondiscrimination in State/Employment
2013	<a href="#">H429</a>		Nondiscrimination in State/ Employment
2013	<a href="#">H647</a>		Nondiscrimination in State/Teacher Employment
2015	<a href="#">H443</a>		Nondiscrimination in Public Employment
2015	<a href="#">S180</a>		Carrboro/Housing Discrimination

#### <sup>ii</sup> **Protected Classes (N.C. Gen. State. Ann. § 143-422.2)**

<p><i>Suspect Class</i></p> <ol style="list-style-type: none"> <li>1. Race</li> <li>2. Religion</li> <li>3. Color</li> <li>4. National origin</li> <li>5. Sex (quasi-suspect)</li> </ol> <p><i>Non-comprehensive list of others in US states including North Carolina:</i></p> <ol style="list-style-type: none"> <li>6. Disability (N. C. Gen. Stat. 168A) (See Legend #9)</li> <li>7. Age (N.C. Gen. Stat. § 143-422.2)</li> <li>8. Victim of domestic/sexual violence status (N.C. Gen. Stat. §50B-5.5)</li> <li>9. AIDS/HIV status (N.C. Gen. Stat. § 130A-148(i))</li> <li>10. Sickle cell trait (N.C. Gen. Stat. § 95-28.1)</li> <li>11. Hemoglobin C trait (N.C. Gen. Stat. § 95-28.1)</li> <li>12. Genetic testing (N.C. Gen. Stat. §95-28.1A)</li> <li>13. Genetic counseling (N.C. Gen. Stat. §95-28.1A)</li> <li>14. Genetic information (N.C. Gen. Stat. §95-28.1A)</li> <li>15. Enlisted military (N.C. Gen. Stat. §127A-202.1)</li> <li>16. Jury Service (N.C. Gen. Stat. §9-32(a))</li> <li>17. Pregnancy (Vermont, Utah, West Virginia, Missouri, Kentucky, Hawaii, Alaska)</li> <li>18. Veteran status (See Legend #10)</li> <li>19. Marital status (Oregon, Virginia, Illinois, Florida)</li> <li>20. Familial status (North Dakota, Minnesota, North Carolina)</li> </ol>	<ol style="list-style-type: none"> <li>21. Sexual orientation (21 states)</li> <li>22. Gender identity (20 states)</li> <li>23. Gender expression (20 states)</li> <li>24. Arrest history (Wisconsin, Delaware)</li> <li>25. Convict status (Wisconsin, Hawaii)</li> <li>26. Incarceration history (New York, Illinois)</li> <li>27. Credit history (Oregon, Vermont, Hawaii, Delaware)</li> <li>28. Source of income (New York, Michigan)</li> <li>29. Caregiver status (D.C.)</li> <li>30. Occupation (Oregon)</li> <li>31. Ancestry (Rhode Island)</li> <li>32. Weight (Michigan)</li> <li>33. Height (Michigan, Kansas)</li> <li>34. Place of birth (Vermont)</li> <li>35. Homelessness (Connecticut)</li> <li>36. Political affiliation</li> <li>37. Student status (Michigan)</li> <li>38. Public benefit status (North Dakota, Minnesota,</li> <li>39. Refusal to perform abortion or sterilization (many states)</li> <li>40. Use of service animal (Washington)</li> <li>41. Off the job use of tobacco (Wyoming)</li> <li>42. Medical marijuana (New York, Nevada, Minnesota, Maine, Illinois)</li> <li>43. Black lung disease (Kentucky)</li> </ol>
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