No. 16-1989

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOAQUÍN CARCAÑO, *et al.*,

Plaintiffs-Appellants,

v.

PATRICK McCRORY, in his official capacity as Governor of North Carolina,

Defendant-Appellee,

and

PHIL BERGER, in his official capacity as President *pro tempore* of the North Carolina Senate, and **TIM MOORE**, in his official capacity as Speaker of the North Carolina House of Representatives,

Intervenors/Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of North Carolina
No. 1:16-cv-00236-TDS-JEP

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Tobias Barrington Wolff, *Civil Rights Reform and the Body*, 6 Harv. L. & Pol'y Rev. 201 (2012) 58

INTRODUCTION

Plaintiff Joaquín Carcaño is a man. Mr. Carcaño is recognized as a man in public and by his friends, family, and coworkers. Below is a photograph of him:

(JA126)

Yet, when Mr. Carcaño enters a government building as part of his everyday life, North Carolina's House Bill 2 ("H.B.2") now bars him from using the men's restroom that other men use and that he himself previously used without incident. H.B.2 targets Mr. Carcaño for this harm because he is transgender.

Although Mr. Carcaño's gender identity is male, and he lives as a man in all aspects of his life, H.B.2 excludes him from public facilities designated for men because the sex assigned to him at birth was female. That exclusion, which relegates Mr. Carcaño to the women's restroom or to a single-user restroom if available, is harmful, humiliating, and potentially dangerous. H.B.2 inflicts this same harm on the other transgender Plaintiffs and on transgender members of

Plaintiff ACLU of North Carolina, who together represent some of the more than 44,000 transgender people estimated to be living in the state.

H.B.2 is a law like no other. No state other than North Carolina has enacted a restriction banning transgender people from using restrooms and other public facilities matching their gender identity. To the contrary, numerous state and local governments have expressly protected transgender people from discrimination across a range of contexts, including in sex-separated restrooms and other facilities. Such protections are of paramount importance. Transgender people experience well-documented discrimination and harassment in employment, in public accommodations, in health care, at the hands of the police, and by government agencies. Against this backdrop, the City of Charlotte amended its nondiscrimination ordinance to provide express protection to transgender people. North Carolina responded with lightning speed not only to stamp out that protection in an extraordinary special session but also to impose an unprecedented statewide requirement of discrimination against transgender people in public facilities.

Far from taking into account the hardships transgender North Carolinians already face, H.B.2 makes them pariahs in their own state. Courthouses, airports, libraries, public schools, state and local agency offices, highway rest stops, police departments, state hospitals, and the very halls of government itself are now unsafe

for, and unwelcome to, transgender North Carolinians. Such unequal treatment simply cannot be squared with the Fourteenth Amendment's promise of equality under the law. Indeed, the district court recognized the harms that H.B.2 inflicts—and the utter lack of any justification for those harms—when it granted a preliminary injunction against enforcement of H.B.2 by the University of North Carolina under Title IX.

But the district court held that Plaintiffs were not likely to succeed on their equal protection claim, which reaches the full range of public facilities governed by H.B.2, and wrongly denied the broader injunctive relief Plaintiffs sought. The district court did so based in part on the extraordinary rationale that transgender people are only a small minority of the population. That is not how the Constitution's guarantee of equal protection works. The district court's denial of broader injunctive relief under the Equal Protection Clause should therefore be reversed.

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. On August 26, 2016, the district court granted a preliminary injunction on Plaintiffs' Title IX claim but refused the broader injunctive relief Plaintiffs sought on their equal protection claim. On August 29, 2016, Plaintiffs

timely filed a notice of appeal. This Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

STATEMENT OF ISSUES

Whether the district court erred in denying a preliminary injunction providing broader relief from Part I of H.B.2 under the Equal Protection Clause than the preliminary injunction it issued.

STATEMENT OF THE CASE

Gender Identity

Gender identity is a well-established concept in medicine, and all human beings develop this elemental, internal view of belonging to a particular gender. JA133. Gender identity is a characteristic established early in life that cannot be voluntarily changed. JA109. People born with anatomical features typically associated with females usually have a female gender identity; and those born with anatomical features typically associated with males usually have a male gender identity. JA133. For transgender individuals, however, their gender identity differs from their birth-assigned sex, giving rise to a sense of being "wrongly embodied." *Id.* The medical diagnosis for this condition, when accompanied by clinically significant distress, is gender dysphoria, and living in a manner consistent with one's gender identity in every aspect of life is a critical component of treatment. *Id.*

Plaintiffs

The Plaintiffs in this case include three transgender North Carolinians as well as the American Civil Liberties Union of North Carolina ("ACLU-NC") and its transgender members. Mr. Carcaño (pictured *supra*) is a 28-year-old man who works for the University of North Carolina ("UNC") at Chapel Hill, as a Project Coordinator at the Institute for Global Health and Infectious Disease. His gender identity is male, but his birth certificate has a female gender marker.

Payton McGarry (JA163)

H.S. (JA157)

Plaintiff Payton Grey McGarry (pictured above) is a 20-year-old man and a full-time student at UNC Greensboro, where he is a member of Phi Mu Alpha Sinfonia, a music fraternity. Like Mr. Carcaño, Mr. McGarry's gender identity is male, but his birth certificate has a female gender marker. JA162-64.

Plaintiff H.S. (pictured above) is a 17-year-old girl, and a senior at the UNC School of the Arts High School, where she focuses on art and visual studies.

H.S.'s gender identity is female, but her birth certificate has a male gender marker. JA156-57.

Plaintiff ACLU-NC has many transgender members whose birth certificates do not match their gender identity, including grade school and university students, and adults who routinely visit public buildings. JA249-53.

Prior to H.B.2, Mr. Carcaño, Mr. McGarry, and H.S.—like numerous other transgender individuals in North Carolina—used restrooms and other sex-separated facilities consistent with their gender identity without incident. Mr. Carcaño and Mr. McGarry used facilities designated for men, and H.S. used facilities designated for women or girls. JA127-30, JA159-61, JA164-67, JA913-14. The facilities that the individual Plaintiffs and transgender ACLU-NC members used included those in public airports; state public agencies, such as the Division of Motor Vehicles; rest stops operated by the North Carolina Department of Transportation; state courthouses and office buildings; and buildings on UNC and other public school campuses. JA127-30, JA159-61, JA164-67, JA248-53.

Passage of H.B.2

Prior to 2016, 18 states, the District of Columbia, and more than 200 municipalities had adopted laws expressly prohibiting discrimination against transgender individuals. JA184. On February 22, 2016, after considering such protections for years, the Charlotte City Council joined them by amending

Charlotte's longstanding nondiscrimination ordinance to include, among other characteristics, "sexual orientation, gender identity, and gender expression" as impermissible bases of discrimination in places of public accommodation in Charlotte. JA308.

State lawmakers were quick to express outrage over Charlotte's ordinance, with a particular focus on the protections that the law provided for transgender individuals. Defendant-Intervenor and House Speaker Tim Moore described the ordinance as "protect[ing] adults who feel compelled to dress up like the opposite sex," and stated that he opposed the ordinance "to protect children, who from the time they've been potty trained, know to go into the bathroom of their god-given appropriate gender." JA389. Another state representative stated, "I think it's ridiculous that your anatomy isn't what governs what restroom you use." JA392. Defendant-Intervenor and Senate President *pro tempore* Phil Berger characterized the ordinance's protection of transgender women as "allow[ing] men to share public bathrooms with little girls and women," and asked, "[h]ow many fathers are now going to be forced to go to the ladies' room to make sure their little girls aren't molested?" JA396, JA408. And one senator, who would go on to sponsor H.B.2, said of the ordinance, "The City Council of Charlotte has lost its mind." JA395.

Within two days of the ordinance's passage, Speaker Moore was publicly exploring a special session of the North Carolina General Assembly to overturn it. JA383. Legislators subsequently held a special session—at a cost of $42,000—by invoking a provision of the state constitution that had not been used since 1981. JA414, JA434. In a process beset with procedural irregularities, H.B.2 was drafted, introduced, passed out of committees, passed by both houses of the General Assembly, and signed by the Governor all within the span of 12 hours on March 23, 2016. JA434.

The night before the special session, a spokesman for Speaker Moore admitted that the bill had not yet been publicly released. JA413. The House Minority Leader described the process as "hide-and-seek democracy," noting, "We don't know what we're discussing here, we don't know what we're voting on. What we're doing is a perversion of the process." *Id*. Indeed, when the legislative session opened at approximately 10 a.m. on March 23, the bill had still not been released. JA417. Once the bill was read in, Representatives had to be given a recess to review the bill before it was taken up in Committee—although only five minutes was granted for that purpose. JA417, 420. In the Senate, the process proceeded so quickly that Democrats walked off the Senate floor in protest, stating that they had not been allowed to participate in the process, with the Senate Minority Leader calling the procedure "an affront to democracy" and a "farce."

JA425, 429. By that evening, Governor McCrory had signed the bill, which went into effect immediately. JA437.

H.B.2's Discrimination Against Transgender Individuals

This appeal concerns Part I of H.B.2, which prohibits transgender individuals whose gender identity differs from the sex stated on their birth certificates from using public restrooms and other single-sex facilities that match their gender identity. Notably, however, H.B.2 has two other provisions, Parts II and III, that together preempt any ordinance adopted by a local government to prohibit discrimination in employment or in a place of public accommodation. Parts II and III of H.B.2, standing alone, were more than sufficient to preempt the Charlotte ordinance. Part I of H.B.2 went much farther.[1] Part I imposes a discriminatory mandate that every public agency and public school must "require every multiple occupancy bathroom or changing facility to be designated for and only used by persons based on their biological sex." JA299-300. H.B.2 defines "biological sex" as the sex "stated on a person's birth certificate." *Id.*

H.B.2's passage generated immense confusion and public backlash. Within weeks, Governor McCrory issued an Executive Order regarding the law. N.C. Exec. Order 93 (April 12, 2016) (JA440). The Executive Order clarified, among

[1] Unless otherwise indicated, references herein to "H.B.2" generally refer to Part I of H.B.2.

other things, that no private business was required to follow H.B.2. JA440. But it did nothing to eliminate the core discriminatory mandate of Part I of H.B.2—its exclusion of transgender individuals, and no one else, from public restrooms and other sex-separated facilities that are consistent with their identity and that they used without incident prior to the law's passage. And although H.B.2 and the Executive Order "allowed" agencies and schools to provide single-occupancy facilities as a special accommodation, neither H.B.2 nor the Executive Order actually required that such facilities be provided. JA299-303, JA440-42.

For Plaintiffs, and the more than 44,000 transgender North Carolinians like them, H.B.2 has created an unprecedented legal regime that places transgender people into a singular, openly stigmatized class.[2] Transgender people alone are barred from using sex-separated facilities matching who they are, which all other men and women are permitted to use. JA299-301. For Mr. Carcaño, Mr. McGarry, and H.S., using restrooms that visibly conflict with their gender identity is not an option—just as it would not be an option for non-transgender individuals.

[2] The district court acknowledged at the hearing that more than 44,000 transgender adults reside in North Carolina, which is based on recent estimates that transgender individuals comprise 0.6 percent of the population, although the court cited an older estimate (0.3 percent) in its order. *Compare* JA842 *with* JA967; *see* Andrew R. Flores *et al.*, *How Many Adults Identify As Transgender in the United States?*, Williams Institute (June 2016), http://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf.

JA129, JA160, JA166. Plaintiffs fear for their safety because being forced to use restrooms inconsistent with their gender identity could lead to violence or harassment against them. *Id.* They are not alone. H.B.2 generated more intakes and reports of harm to ACLU-NC than any other piece of state legislation in the last decade. JA253.

Being barred from the same facilities used by other women and men also unquestionably stigmatizes transgender people, marking them as different and unequal to everyone else in every public setting. The negative impact of such a regime on transgender people's ability to participate as equal members of our society—or even just to enter public spaces—is profound.

H.B.2's discriminatory mandate also undermines well-established medical protocols and utilizes a definition of "biological sex" that is medically unjustified. Treatment for gender dysphoria is governed by internationally accepted standards of care. JA134-35. In accordance with these standards, transgender individuals undergo individualized treatment to live in alignment with their gender identity. Treatment often includes changes in one's gender expression and role, known as social transition. JA135-36. To be effective, social transition must occur in all aspects of life, including when using sex-separated spaces such as restrooms or locker rooms. JA137-40. The harms associated with undermining social transition are significant: more than 40% of transgender individuals attempt suicide, posing a

risk of death that far exceeds most other medical conditions. JA112, JA138. In addition to social transition, treatment for gender dysphoria may include hormone therapy, which has significant masculinizing or feminizing effects on the physical appearance of an individual. JA136. Although some individuals may undergo surgical treatment, many do not, whether because it is not necessary for them, is cost prohibitive, or is medically contraindicated. JA136-37. These various treatment measures do not change a person's gender, which already exists, but instead bring the person's physical appearance and social presentation into better alignment with their core gender.

Procedural History

Plaintiffs commenced this action on March 28, 2016, alleging that H.B.2 was unconstitutional on its face and as applied to transgender individuals like Plaintiffs under the Equal Protection and Due Process Clauses and that it violated Title IX.[3] On May 16, 2016, Mr. Carcaño, Mr. McGarry, H.S., and ACLU-NC moved, in relevant part, to preliminarily enjoin enforcement of Part I of H.B.2 by Governor McCrory and UNC. JA101. Subsequently, Speaker Moore and Senator Berger sought and were granted leave to intervene permissively. JA931.

[3] The action below also includes additional Plaintiffs and claims specific to the preemption provisions of H.B.2, which are not at issue in this appeal.

On August 26, 2016, the district court granted in part and denied in part Plaintiffs' motion for a preliminary injunction. JA911. The district court granted preliminary relief as to the three individual Plaintiffs on their Title IX claim against UNC.[4] The court correctly analyzed the Title IX claim as asking whether H.B.2's "exclusion of transgender individuals" from sex-specific facilities was permissible. JA983-89. The court held that all four preliminary-injunction factors were satisfied and found "no reason" to believe that a return to the status quo ante would compromise any government interest in safety or privacy. JA915.

The district court denied Plaintiffs' motion as to their equal protection claim against Governor McCrory, however, holding that Plaintiffs were not likely to succeed on the merits of that claim. JA970. In so deciding, the district court puzzlingly reversed course on its Title IX analysis. The court reasoned that, because the law does not harm the 99.7% of people who are *not transgender*, the law adequately serves interests in maintaining separate facilities for men and women—even though Plaintiffs never challenged sex-separated facilities and instead sought only equal access to them. JA966-70.

[4] No party appealed the preliminary injunction against UNC. The district court also declined to issue a final ruling on Plaintiffs' motion for a preliminary injunction as to their due process claims; those claims are not at issue in this appeal. JA978-80.

The district court's denial of preliminary relief on Plaintiffs' equal protection claim leaves Part I of H.B.2 fully intact as to all transgender individuals (including ACLU-NC members) other than Mr. Carcaño, Mr. McGarry, and H.S. With respect to those three individuals, the denial leaves Part I intact for all public facilities outside UNC's control.

SUMMARY OF ARGUMENT

1. Part I of H.B.2 does not discriminate against everyone. Instead, it discriminates solely against transgender individuals like Plaintiffs by excluding them—and only them—from facilities matching their gender identity.

The district court, however, assumed that H.B.2 discriminates against everyone on the basis of sex simply by virtue of the existence of sex separation in public facilities. That is incorrect. Unless a man is harmed by his exclusion from the women's restroom, he has no cognizable equal protection injury. North Carolina law prior to H.B.2 also already barred men from accessing the women's restroom. All H.B.2 accomplished was to eject transgender individuals like Plaintiffs from the facilities that match the sex that they identify as and are known as—which they previously used without incident.

Plaintiffs have never challenged the legality of sex-separated facilities. Instead, they challenged only the discriminatory exclusion of transgender individuals from facilities that others of the same sex are permitted to use. The

district court's conclusion that sex-separated facilities are permissible as a general matter fails to justify H.B.2's discriminatory treatment of those who are transgender.

2. H.B.2 requires heightened scrutiny under the Equal Protection Clause. First, discrimination against transgender individuals is a form of sex discrimination. This Court's own binding precedent confirms as much. Moreover, the overwhelming weight of federal authority has recognized that discrimination based on an individual's transgender status inherently relies upon sex stereotypes about what is expected of a man or a woman. H.B.2 refuses to treat a transgender man like Plaintiff Joaquín Carcaño as a man because he does not meet North Carolina lawmakers' idea of what constitutes a "real" man.

Regardless of how sex is defined, gender identity is a sex-based consideration, and discrimination on that basis requires heightened scrutiny. H.B.2 also uses a definition of "biological sex" that attempts to reduce an individual's sex to his or her birth certificate, without any regard for that individual's gender identity. When an individual's sex-related characteristics are not all in alignment with one another, however, it is gender identity that determines an individual's sex.

Second, discrimination against transgender individuals itself bears all the hallmarks of a suspect classification requiring strict scrutiny. Transgender people are a politically vulnerable minority, and they have long been subjected to public

and private discrimination, all because of an immutable characteristic that has no bearing on their ability to contribute to society.

3. There is no constitutionally adequate justification for H.B.2 under any level of scrutiny. H.B.2's defenders raise the twin flags of privacy and safety. These imaginary concerns failed to persuade this Court the last time they were offered to justify excluding a transgender boy from the boys' restroom, and there is even greater reason to reject them here. The district court made factual findings that allowing Plaintiffs to resume use of the facilities matching their gender identity at UNC would *not* pose a safety or privacy risk to anyone. Those findings logically apply with equal force to other public facilities in the state. Indeed, the district court found that, across North Carolina, transgender individuals have long used facilities matching their gender identity without incident. It also found that denial of a preliminary injunction could cause problems by relegating transgender men with typically masculine appearances, for example, to women's facilities. These factual findings are impossible to reconcile with the district court's legal conclusion that H.B.2 could be justified on the basis of privacy.

Privacy and safety are not in a zero-sum competition with equality, where gains on one front must be offset with losses from the other. There are constitutionally permissible ways to promote privacy and safety for everyone—but H.B.2 is not one of them.

4. The toll that H.B.2 exacts on the everyday lives of transgender people is devastating and irreparable. Only a preliminary injunction can halt these harms. Returning North Carolina to the status quo that existed before March 2016 would harm no one while also protecting the public interest.

ARGUMENT

I. Preliminary Injunction Standard

Plaintiffs are entitled to a preliminary injunction where they demonstrate that (1) they are likely to succeed on the merits, (2) they will likely suffer irreparable harm absent an injunction, (3) the balance of equities weighs in their favor, and (4) an injunction is in the public interest. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 724 (4th Cir. 2016), *petition for cert. filed*, 85 U.S.L.W. 3086 (U.S. Sept. 1, 2016) (No. 16-273). Contrary to the district court's suggestion, however, there is no rule that Plaintiffs cannot make a clear showing on likelihood of success on the merits—or any other factor—simply because a court must apply "existing principles of law to new areas." JA956. Courts routinely perform that function as a matter of course. *See, e.g., G.G.*, 822 F.3d at 723 (applying existing principles of law to hold that discrimination against a transgender student in restroom access was unlawful).

In analyzing the denial of a preliminary injunction, this Court applies *de novo* review to the district court's legal conclusions and clear-error review to its

factual findings. *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 235 (4th Cir. 2014). The district court abuses its discretion where the denial is either "guided by erroneous legal principles" or "rests upon clearly erroneous factual findings." *G.G.*, 822 F.3d at 724 (quotation marks omitted).

II. Plaintiffs Have Established A Likelihood Of Success On Their Equal Protection Claim.

A. H.B.2 Discriminates Against Transgender Individuals By Excluding Only Them From Facilities That Match The Sex With Which Each Individual Identifies.

The district court identified the correct question presented by this case—but it answered a far different question in its legal analysis. The district court correctly explained that "the issue currently before the court is whether Title IX or the Constitution prohibits Defendants from enforcing HB2's *exclusion of transgender individuals* from [covered] facilities under all circumstances based solely on the designation of 'male' or 'female' on their birth certificate." JA989 (emphasis added). But the court's equal protection analysis answered a fundamentally different question—whether the government may exclude *all individuals* from facilities not matching the gender marker on their birth certificates. JA966-67.

Thus, the court analyzed the permissibility of separating facilities by sex as a general matter, rather than addressing the issue Plaintiffs actually raised: the permissibility of excluding only transgender individuals from facilities that others who identify as the same sex are allowed to use. The court reasoned that because

"only 0.3% of the national population is transgender," separating individuals based on the gender listed on their birth certificates is justifiable for at least "the remaining 99.7% of the population."[5] JA967. It then concluded that "a law that classifies individuals with 99.7% accuracy" is sufficient to withstand heightened scrutiny. *Id.* That analysis—both its assumption that H.B.2 discriminates against everyone on the basis of sex, and that H.B.2's constitutionality can be justified by its application to non-transgender people—suffers from several fatal defects.

Nature of H.B.2's Harm. The district court's approach is at war with the Supreme Court's repeated instruction that "[t]he proper focus of the constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2451 (2015) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 894 (1992) (plurality)). Indeed, the district court's analysis bears a striking resemblance to the reasoning rejected in *Casey*, where the government argued that less than 1% of individuals obtaining abortions would be affected by an abortion law mandating spousal notification, because most individuals seeking an abortion voluntarily choose to provide notice to their spouses. 505 U.S. at 894. However, *Casey* explained that the law had to "be judged by reference to those for whom it [was] an

[5] As noted above, transgender individuals actually are currently estimated to comprise 0.6% of the population nationally and in North Carolina. JA845.

actual rather than an irrelevant restriction." *Id.* at 895; *accord Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2320 (2016).

This proposition has been applied in other contexts as well. For example, although laws barring marriage to someone of the same sex literally applied to everyone, and never used the words "lesbian" or "gay," courts recognized that they discriminated against lesbians and gay men—the group for whom such laws were a restriction. *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015). Likewise, when the Supreme Court held that women could not be excluded from the Virginia Military Institute, it focused on the particular women who had been denied equal opportunity rather than on all women, because "it [was] for them that a remedy [had to be] crafted." *United States v. Virginia*, 518 U.S. 515, 550 (1996).

Here, the district court misapprehended the precise harm at issue, by focusing on the group for whom H.B.2 is irrelevant (non-transgender individuals), rather than the group for whom H.B.2 is a restriction (transgender individuals like Plaintiffs). H.B.2 discriminates against transgender individuals like Plaintiffs by inflicting a very specific and unique harm: exclusion from facilities matching their gender identity. The district court presumed that, because the law "classifies citizens on the basis of 'biological sex' and requires that each sex use separate [facilities]," JA958, it discriminates against *everyone* on the basis of sex. But H.B.2 deprives only transgender individuals of access to facilities matching their

gender identity; no one else suffers that deprivation. For example, although Mr. Carcaño and Mr. McGarry are men, they are barred from men's facilities. By comparison, non-transgender men are not. Apart from transgender individuals like Plaintiffs, everyone else has the exact same right after H.B.2 to access the sex-specific facilities that they used before H.B.2.

This Court's decision in *G.G.* illustrates how discriminatory policies like H.B.2 inflict a targeted harm solely on transgender individuals. *G.G.* arose from the enactment of a Virginia school board policy that was functionally indistinguishable from H.B.2 and that limited sex-specific restrooms and locker rooms to their "corresponding biological genders." 822 F.3d at 716; *accord* JA952. The school board enacted the policy after learning that the plaintiff, a transgender boy, had been using the boys' restroom. 822 F.3d at 715-16. This Court held that the plaintiff alleged a valid claim for sex discrimination under Title IX, which notably requires that the plaintiff experience harm. *Id.* at 718. This Court recognized that the harm was the school's refusal to provide transgender students with "access to restrooms congruent with their gender identity." *Id.* at 715. Non-transgender students did not suffer that harm.

Like Title IX, an equal protection claim requires that a plaintiff experience both differential treatment *and* harm. Differential treatment itself does not give rise to cognizable injury under the Equal Protection Clause absent tangible harm or

stigma. *See Johnson v. OPM*, 783 F.3d 655, 665 (7th Cir. 2015) (holding that "[t]he mere allegation of unequal treatment, absent some kind of actual injury, is insufficient" for an equal protection claim); *cf. Bostic v. Schaefer*, 760 F.3d 352, 372 (4th Cir. 2014) (holding that differential treatment that also causes stigma is sufficient to constitute a cognizable injury under equal protection). For example, a man excluded from the women's restroom without any resulting harm or stigma would not have a viable sex discrimination claim. By contrast, a transgender woman who is excluded from the women's restroom experiences significant stigma and harm, and thus has a viable sex discrimination claim.

Ultimately, if the district court's 99.7% analysis were correct, then no government action discriminating against transgender people would ever be unconstitutional, because those laws would not adversely affect 99.7% of the population.[6] For example, the government could fire a transgender employee for dressing in a manner consistent with his or her gender identity, because a policy requiring employees to dress in a manner consistent with their birth-assigned sex

[6] It should also go without saying that no numerical threshold is required before individuals in a minority group qualify as "person[s]" entitled to "equal protection of the laws." U.S. Const. amend. XIV; *see Nyquist v. Mauclet*, 432 U.S. 1, 11 n.15 (1977) (applying intermediate scrutiny and rejecting the notion that, if a statute works for all but an "exceedingly small" number of individuals, that justifies its existence); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 351 (1938) ("the constitutional right [does not] depend upon the number of persons who may be discriminated against" (quotation marks omitted)).

would pose no problem for 99.7% of employees who are not transgender. In fact, however, courts have held that such conduct is unlawful sex discrimination. *See infra*, Section II.B.1.

H.B.2 Created A New Rule for Transgender People, Not For Anyone Else. H.B.2's targeting of transgender individuals like Plaintiffs is clear from the fact that North Carolina's criminal trespass law already barred non-transgender men and women from accessing facilities inconsistent with their gender. *See* N.C. Gen. Stat. § 14-159.13 (defining second-degree trespass as entering or remaining on premises after being notified not to enter or remain); *In re S.M.S.*, 675 S.E.2d 44, 13 (N.C. Ct. App. 2009) (holding that a fifteen-year-old boy had committed second-degree trespass when he entered a girls' locker room despite a "Girl's Locker Room" sign on the door). Indeed, the district court agreed that application of the trespass law to non-transgender individuals' use of sex-specific facilities was "straightforward and uncontroversial." JA918. The only "new restriction" in H.B.2 was "for transgender individuals." JA984.

H.B.2 thus did not invent sex-separated facilities, which already existed, nor did it create the legal authority to maintain sex-separated facilities, which also already existed. A statute must be evaluated by what it "actually" authorizes or prohibits beyond preexisting law. *See Patel*, 135 S. Ct. at 2451 (holding that the constitutionality of a statute authorizing warrantless searches could not rely on its

application to situations where warrantless searches were already legally permitted and where the statute thus "[did] no work").

What H.B.2 *changed* about North Carolina law is that, when Mr. Carcaño sees a sign on a restroom door that reads "men," that sign must now be understood to mean "men—except for transgender men." The district court agreed that, while "UNC has not changed the symbols on its sex-segregated facilities, the meaning of those words and symbols has changed as result of [H.B.2]." JA936. That change makes a difference only for transgender individuals like Plaintiffs. It makes no difference for non-transgender men and women, who may continue to access the same facilities they always used.

H.B.2's Text, Context, and Purpose. H.B.2 need not use the word "transgender" to facially discriminate against transgender individuals, because it already does so through the phrase "biological sex." Defining "biological sex" as the sex listed on one's birth certificate adversely affects only transgender individuals because, for non-transgender individuals, H.B.2's definition of "biological sex" will always match their gender identity. H.B.2 excludes Mr. Carcaño from the men's restroom because he does not possess a birth certificate matching his gender identity. The mismatch between his gender identity and birth-assigned sex is *precisely* what defines him as transgender. *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ.* ("*Highland*"), No. 2:16-CV-524,

-- F. Supp. 3d --, 2016 WL 5372349, at *2, *15-17 (S.D. Ohio Sept. 26, 2016) (holding that a policy requiring students to use restrooms and locker rooms matching their "biological sex" discriminated against the plaintiff based on her transgender status).

Indeed, Defendants have conceded that H.B.2 is directed at transgender individuals, disagreeing only with the *scope* of H.B.2's discrimination. They argued below that the policy in *G.G.* was distinguishable because it "applied across-the-board to *all* gender dysphoric individuals. H.B.2, by contrast, is more nuanced: it bars only a *subset* of those individuals from single-sex facilities," referring to those without amended birth certificates.[7] Intervenor-Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction (D.E. 61) at 20 (emphasis in original).

The context of H.B.2 also confirms its targeting of transgender people. *Cf. N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 221 (4th Cir. 2016) (applying *Arlington Heights* to identify discriminatory intent). Lawmakers rushed to enact H.B.2 in defiance of ordinary legislative processes after Charlotte

[7] Defendants' argument—that, because not all transgender people are harmed by H.B.2, it does not discriminate on the basis of transgender status—is frivolous. *See Nyquist*, 432 U.S. at 9 ("The fact that the statute [directed at aliens] is not an absolute bar [to financial assistance for all aliens] does not mean that it does not discriminate against the class."); *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 118-19 (2d Cir. 2004) (recognizing that discrimination against only women with young children is still sex discrimination).

expressly protected transgender people from discrimination in its ordinance. Defendant-Intervenor Moore described Charlotte's ordinance as protecting "adults who feel compelled to dress up like the opposite sex" and who do not "know to go into the bathroom of their god-given appropriate gender." JA389. A sponsor of H.B.2 characterized the Charlotte ordinance as protecting "a cross-dresser's liberty to express his gender nonconformity." JA489. Another lawmaker expressed confusion about why Charlotte "[had] to make way for this .0001 [sic] percent of the population." JA392.

Indeed, the district court credited that lawmakers had privacy concerns about transgender people using facilities consistent with their gender identity. JA968. That confirms that transgender people were the intended target of H.B.2 and not mere collateral damage in service of other goals. *See Exodus Refugee Immigration, Inc. v. Pence*, No. 16-1509, -- F.3d --, 2016 WL 5682711, at *3 (7th Cir. Oct. 3, 2016) (holding that a state policy of excluding Syrian refugees discriminates based on nationality, even if the government is motivated by public safety concerns).

H.B.2's Application to Transgender Individuals. Plaintiffs challenged H.B.2 both on its face and as applied. Even if H.B.2 could be conceived as facially constitutional by discriminating against everyone on the basis of sex—which is inaccurate—H.B.2 would still need to be constitutional as applied to transgender

individuals like Plaintiffs—which it is not. "In an as-applied challenge . . . the state must justify the challenged regulation with regard to its impact on the plaintiffs." *Educ. Media Co. at Va. Tech, Inc. v. Insley*, 731 F.3d 291, 298 (4th Cir. 2013). The district court recognized that the relevant inquiry was "the argument for safety and privacy concerns proffered by the State *as to transgender users*," but it failed to actually analyze that issue. JA985-86 (emphasis in original).

Plaintiffs never challenged the existence of sex-separated facilities, and nothing about the injunction they sought would have required the end of sex-separated facilities. That is illustrated by the portion of the preliminary injunction that the district court granted. UNC's sex-separated facilities did not cease to exist after the preliminary injunction was granted below. Rather, the court's injunction was tailored to the unlawful conduct at issue: the exclusion of transgender individuals, but not anyone else, from facilities matching their gender identity. Here, too, what must be justified is not the exclusion of men from the women's room and women from the men's room, but rather H.B.2's exclusion of transgender individuals from the facilities they previously used without any problem.

B. The Constitutionality Of H.B.2 Must Be Tested Under The Rigorous Inquiry Required By Heightened Scrutiny.

Because H.B.2 excludes transgender individuals from facilities matching their gender identity, it must be analyzed under the rigors of heightened scrutiny

for two reasons: (1) discrimination against transgender individuals is a form of sex discrimination, which requires intermediate scrutiny at a minimum, and (2) discrimination against transgender individuals bears all the indicia of a suspect classification, which requires strict scrutiny. *See infra*, Section II.C (describing the government's burdens under intermediate and strict scrutiny).

1. H.B.2 Discriminates Against Transgender Individuals Like Plaintiffs On The Basis Of Sex.

Discrimination against transgender individuals is discrimination on the basis of sex. Indeed, that was precisely *G.G.*'s holding: the exclusion of a transgender boy from the boy's restroom discriminated against him "on the basis of sex" under Title IX. 822 F.3d at 718. It would be anomalous to conclude that the exclusion of a transgender individual from a facility matching his gender identity discriminates on the basis of "sex" under Title IX but not under the Equal Protection Clause. That is particularly so given that courts draw upon a common body of law in analyzing discrimination claims, as *G.G.* itself recognized. *See id.*; *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007).

Modern precedent overwhelmingly supports *G.G.*'s recognition that discrimination against transgender individuals is discrimination on the basis of sex. As Judge Davis explained, the "weight of circuit authority" has recognized that "discrimination based on transgender status is already prohibited by the language

of federal civil rights statutes, as interpreted by the Supreme Court." *G.G.*, 822 F.3d at 727, 729 (Davis, J., concurring).

Sex discrimination encompasses any harmful differential treatment on the basis of "sex-based considerations." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241-42, 251 (1989). H.B.2 imposes differential treatment on Plaintiffs and other transgender individuals because of at least two such considerations. One is an individual's perceived nonconformity to gender-based stereotypes and expectations. Another is an individual's transgender status itself, defined by the discordance between one's gender identity and birth-assigned sex.

Discrimination Based on Sex Stereotypes. First, more than a quarter century ago, the Supreme Court explained in the context of Title VII that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group." *Price Waterhouse*, 490 U.S. at 251. Sex stereotyping is equally impermissible under the Equal Protection Clause. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 139 n.11 (1994). In *Price Waterhouse*, the plaintiff had been denied partnership because her superiors viewed her as "macho" and advised her to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." 490 U.S. at 235 (quotation marks omitted). The employer had no objection to promoting a woman—but it wanted to promote only a particular kind

of woman. By subjecting the plaintiff to adverse treatment because of "sex-based considerations," the employer engaged in sex discrimination. *Id.* at 241-42.

Following *Price Waterhouse*, virtually every federal appeals court to consider the issue has recognized an inextricable link between discrimination on the basis of transgender status and discrimination on the basis of gender nonconformity. *See Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004); *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000). In short, there is "a congruence between discriminating against transgender . . . individuals and discrimination on the basis of gender-based behavioral norms." *Glenn*, 663 F.3d at 1316. Protections against sex stereotyping also encompass discrimination based on physical sex-related characteristics. Certainly, the government could not exclude a woman from the women's restroom because it considered her too tall, her voice too deep, or her breasts too small. There is no carve-out for transgender people from this universal protection against sex stereotyping.

H.B.2 discriminates against Plaintiffs because they fail to satisfy the standards for what constitutes a "real" man or a "real" woman according to North Carolina lawmakers. For example, even though Mr. Carcaño has a male gender identity, and is regarded as a man by friends, family, coworkers, and strangers,

H.B.2 rejects that Mr. Carcaño is a man. JA126-27. He still falls short of what North Carolina lawmakers have decided makes a man a man, because his birth certificate classifies him as female.

Discrimination based on Plaintiffs' nonconformity to the vision of manhood or womanhood decreed by H.B.2 is a form of sex stereotyping. Courts have recognized that discrimination against transgender people can arise from a failure to recognize their gender. For example, employers found liable for sex discrimination admitted that, when they saw a transgender woman dressed in typical women's attire, they nonetheless perceived a man merely dressed as a woman. *See Glenn*, 663 F.3d at 1314; *Schroer v. Billington*, 577 F. Supp. 2d 293, 305 (D.D.C. 2008). Likewise, intentionally using the wrong gender pronouns to describe a person can evidence a perception of gender nonconformity. *See Myers v. Cuyahoga Cty.*, 182 F. App'x 510, 520 (6th Cir. 2006) (supervisor referred to transgender woman as a "he/she"); *cf. Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001) (supervisors reminded a non-transgender male plaintiff that "he did not conform to their gender-based stereotypes, [by] referring to him as 'she' and 'her'"). Across all of these cases, individuals failed to conform to their employers' gender-based expectations—to such a degree that they were not even seen as their gender at all. That is sex stereotyping in its most extreme form.

The only way for a transgender man like Mr. McGarry, who was born in North Carolina, to conform to H.B.2's gender-based expectations is to update his birth certificate, which would require him to undergo genital surgery. N.C. Gen. Stat. § 130A-118(b)(4). Notably, however, many states do not require surgery to update the gender marker on a birth certificate. Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction (D.E. 22) at 32 (citing laws in 11 states and the District of Columbia); JA581-91. Conversely, in four states and most countries, the sex designation on a birth certificate can never be updated, meaning that transgender individuals born in these jurisdictions will never meet the North Carolina standard for real manhood or real womanhood. D.E. 22 at 33.

To the extent that H.B.2 requires genital surgery of some individuals before they can access facilities matching their gender identity, like Mr. McGarry, North Carolina imposes a sex stereotype about what is expected of men and women. In *Lusardi v. McHugh*, No. 0120133395, 2015 WL 1607756, at *2 (EEOC Apr. 1, 2015), the employer refused to allow a transgender woman to use the women's restroom unless she could furnish proof of having undergone the "final surgery." The EEOC explained that an employer cannot condition restroom access upon "the completion of certain medical steps . . . [to] somehow prove the bona fides of the individual's gender identity." *Id.* at *8. If the plaintiff in *Price Waterhouse* could not be coerced to "dress more femininely," 490 U.S. at 235, North Carolina

certainly cannot insist that Plaintiffs undergo surgery to conform to lawmakers' gender-based expectations regarding anatomy.

Discrimination Based on Transgender Status, Gender Identity, and Birth-Assigned Sex. H.B.2 discriminates on the basis of Plaintiffs' transgender status, which is itself a form of sex discrimination. An individual is defined as transgender because of the discordance between two characteristics: one's birth-assigned sex and one's gender identity. Were it not for the discordance between these characteristics, Plaintiffs would not be harmed by H.B.2 and would not be barred from using the same facilities as other men and women. For example, if Mr. Carcaño's birth-assigned sex were male rather than female, and his gender identity were male, H.B.2 would not exclude him from a facility matching that gender identity. It is only because the two characteristics are not aligned that H.B.2 expels Mr. Carcaño from facilities that accord with his gender.

Defendants dispute that protections against discrimination based on transgender status encompass an individual's right to access facilities matching their gender identity. Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction (D.E. 55) at 11. That is incorrect for the reason set forth above—that but for Plaintiffs' transgender status, they *could* access gender identity-consistent facilities. But Defendants' argument is also belied by the fact that one of H.B.2's purposes was to block Charlotte's ordinance, which, through its inclusion of

"gender identity" under the city's nondiscrimination ordinance, Defendants understood *would* protect the right of transgender people to use facilities consistent with their gender identity.

Discrimination based on a "sex-based consideration" is sex discrimination, as discussed above, and there is no question that gender identity is one such consideration. Given that elements of one's gender expression such as dress, hairstyle, and make-up usage constitute sex-based considerations under *Price Waterhouse*, it would be incongruous to conclude otherwise for gender identity.

Indeed, more than simply a correlate of sex, a robust body of case law has held that discrimination because of gender identity is necessarily discrimination because of sex. *See, e.g.*, *G.G.*, 822 F.3d at 730 (recognizing that the majority holds that "the term 'sex' means a person's gender identity") (Niemeyer, J., dissenting)); *Schwenk*, 204 F.3d at 1201-02 (holding that conduct motivated by an individual's "gender or sexual identity" is because of "gender," which is interchangeable with "sex"); *Roberts v. Clark Cty. Sch. Dist.*, No. 2:15-cv-00388-JAD-PAL, 2016 WL 5843046, at *6 (D. Nev. Oct. 4, 2016); *Fabian v. Hosp. of Cent. Conn.*, No. 3:12-cv-1154, -- F. Supp. 3d --, 2016 WL 1089178, at *13 (D. Conn. Mar. 18, 2016); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015); *Rumble v. Fairview Health Servs.*, No. 14-cv-2037, 2015 WL 1197415, at

*2 (D. Minn. Mar. 16, 2015). Discrimination based on gender identity is thus literally sex discrimination.

Furthermore, discrimination against a transgender individual also constitutes sex discrimination in the same way that firing an employee because she converts from Christianity to Judaism "would be a clear case of discrimination 'because of religion,'" and [n]o court would take seriously the notion that 'converts' are not covered." *Schroer*, 577 F. Supp. 2d at 306.

What is at the core of sex—and what is not—becomes most pronounced when the various characteristics typically associated with sex do not "all point in the same direction." *G.G.*, 822 F.3d at 722. The significance of gender identity in determining an individual's sex is powerfully illustrated by one of the scenarios posited in *G.G.* In the event that a non-transgender individual loses their external genitalia—for example, a military service member who has been injured, or someone with an illness—that person does not lose their sex. *G.G.*, 822 F.3d at 720-21; *accord Sommerville v. Hobby Lobby Stores*, Charge Nos. 2011CN2993/2011CP2994, slip op. at 8 (Ill. Hum. Rts. Comm'n May 15, 2015) (JA494). A man in that situation is still a man because his gender identity is still male. The fact that aspects of his anatomy may not be typically male does not make him a woman. Yet, the logical conclusion of Defendants' position would suggest that the government could ban him from the men's restroom, placing

dispositive weight on his anatomy and affording no weight whatsoever to his gender identity.

The logical fallacies in Defendants' arguments extend beyond circumstances involving genital injuries. Plaintiffs' expert testimony also detailed a wide range of medical conditions in which an individual's sex-related characteristics are not all typically male or typically female. JA113-16 (noting that genital characteristics manifest with sufficient variation that they are classified along a "spectrum"). Across the board, treating these individuals in a manner consistent with their gender identity is critical to their health and well-being. JA111-16. The same is true for transgender individuals. Dr. Deanna Adkins, Director of the Duke Center for Child and Adolescent Gender Care, testified that, with the exception of some serious childhood cancers, gender dysphoria is the most fatal condition she treats because of the harms that flow from failing to recognize a transgender individual's gender identity.[8] JA112 (noting attempted suicide rates); *see also* JA138.

Defendants contend that protections against sex discrimination extend only to discrimination based on so-called "biological sex" and thus cannot encompass

[8] The district court discounted the relevance of testimony from a "medical perspective" in understanding sex for legal purposes, JA961-62; but that cannot be reconciled with this Court's approach in *G.G.*, which took into account the medical realities of sex, and their potential complexity, for legal purposes. 822 F.3d at 721 ("What about an intersex individual? What about an individual born with X–X–Y sex chromosomes?").

gender identity. That is wrong both as a matter of law and as a matter of fact. In the past, some courts held that "sex" was limited to biology—but *Price Waterhouse* "eviscerated" those authorities. *Smith*, 378 F.3d at 573; *Glenn*, 663 F.3d at 1318 & n.5; *Schroer*, 577 F. Supp. 2d at 305. The plaintiff in *Price Waterhouse* was not denied partnership because of her chromosomes or her genitalia; it was because of her nonconformity to sex stereotypes. *See also Bauer v. Lynch*, 812 F.3d 340, 347 n.9 (4th Cir. 2016) ("Both biological and cultural differences can give rise to Title VII sex discrimination."). Factually, the district court accepted Plaintiffs' unrebutted evidence that gender identity itself has biological roots. JA912 (finding that transgender individuals exhibit distinct brain structure, connectivity, and function not matching their birth-assigned sex). Thus, even if—contrary to precedent—"sex" could be limited to biology, that would not justify casting gender identity outside its scope.

2. Discrimination Based On Transgender Status Requires Strict Scrutiny.

In addition to triggering heightened scrutiny based on sex, H.B.2 also separately triggers strict scrutiny because it discriminates based on transgender status.

In identifying whether a classification warrants strict scrutiny, the Supreme Court has considered whether: (a) the class has historically been subjected to discrimination, *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987); (b) the class's

defining characteristic frequently bears upon one's ability to contribute to society, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985); (c) the class exhibits "obvious, immutable, or distinguishing characteristics that define them as a discrete group," *Gilliard*, 483 U.S. at 602 (quotation marks omitted); and (d) the class is a minority or politically vulnerable, *id*. While not all four factors must be met to warrant heightened scrutiny, *see Golinski v. OPM*, 824 F. Supp. 2d 968, 983-84 (N.D. Cal. 2012), all four decidedly point in favor of strict scrutiny here.

Transgender people have long faced widespread discrimination in access to employment, education, health care, housing, transportation, places of public accommodation, police protection, courts, and government benefits programs, continuing to this day. *See* JA507-33. "The hostility and discrimination that transgender individuals face in our society today is well-documented." *Brocksmith v. United States*, 99 A.3d 690, 698 n.8 (D.C. 2014). Indeed, "this history of persecution and discrimination is not yet history." *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139-140 (S.D.N.Y. 2015). A recent national survey of transgender Americans found that 90% faced harassment, discrimination, or other mistreatment at work. JA527. Transgender students experience alarming rates of harassment (78%), physical assault (35%), and sexual violence (12%), leading one in six to drop out of school. *Id*. Nearly one-fifth of transgender people have

experienced homelessness. *Id.* Further, an individual's transgender status also has no relation to that person's ability to contribute to society. *See Highland*, 2016 WL 5372349, at *16. Indeed, Plaintiffs' own lives illustrate resilience in the face of significant adversity. On the basis of these considerations alone, strict scrutiny would be warranted.

In addition, transgender people have "immutable [and] distinguishing characteristics that define them as a discrete group, or as the Second Circuit put it in *Windsor*, 'the characteristic of the class calls down discrimination when it is manifest.'" *Highland*, 2016 WL 5372349, at *16 (quoting *Windsor v. United States*, 699 F.3d 169, 183 (2d Cir. 2012)) (additional quotation omitted); *Adkins*, 143 F. Supp. 3d at 139-140 (recognizing that any circumstance exposing the mismatch between one's gender identity and birth-assigned sex "calls down discrimination"). Furthermore, gender identity is not a characteristic that an individual can voluntarily change or should be expected to change. JA109, 133; *accord Hernandez-Montiel, v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) (gender identity is "so fundamental" to identity that individuals "should not be required to abandon" it). Finally, "as a tiny minority of the population, whose members are stigmatized for their gender non-conformity in a variety of settings, transgender people are a politically powerless minority group." *Highland*, 2016 WL 5372349, at *16; *accord* JA967. Indeed, as the court in *Highland* recognized, the passage of

H.B.2 itself is one such illustration of the relative political powerlessness of transgender people. 2016 WL 5372349, at *16; *see also Adkins*, 143 F. Supp. 3d at 140 (noting that there are no openly transgender members of the United States Congress or the federal judiciary).

The district court failed to consider whether transgender people qualify as a suspect class, because it mistakenly believed that such a determination would result in only intermediate scrutiny. JA959. That is incorrect.[9] Discrimination based on transgender status bears all the indicia of a suspect classification requiring strict scrutiny.

C. H.B.2 Fails Any Level Of Scrutiny.

H.B.2's class-based targeting demands close review as discrimination based on sex and transgender status. Under intermediate scrutiny, which is triggered by sex-based classifications, the government must demonstrate that its sex-based action is substantially related to an "exceedingly persuasive justification." *Virginia*, 518 U.S. at 524, 535-36 (quotation marks omitted). Under strict scrutiny,

[9] The district court's opinion asserts that Plaintiffs acknowledged at the preliminary-injunction hearing that discrimination based on transgender status should receive intermediate scrutiny. JA959. While Plaintiffs did state that such discrimination meets the test for intermediate scrutiny, they never waived the argument that discrimination based on transgender status *also* meets the test for strict scrutiny. Indeed, the district court noted that the parties "devoted substantial time and energy to arguments regarding [] whether transgender individuals qualify as a suspect class for Equal Protection purposes," *id*., which classifications, the court expressly noted, "are subject to strict scrutiny." JA957.

a law must be narrowly tailored to advance compelling state interests. *Bostic*, 760 F.3d at 377. The existence of nondiscriminatory means for achieving the state's interests, however, undermines the nexus between the means employed and the end sought. *See Virginia*, 518 U.S. at 550 n.19; *Clark v. Jeter*, 486 U.S. 456, 461, 464-65 (1988) (finding that a state law limiting when paternity suits could be brought failed to pass intermediate scrutiny because other means existed to address state concerns about proof problems with passage of time).

Under both intermediate and strict scrutiny, "[t]he burden of justification is demanding and it rests entirely on the State." *Virginia*, 518 U.S. at 533. Furthermore, constitutionality is judged based on the "the actual state purposes, not rationalizations for actions in fact differently grounded." *Id.* at 535-36.

Even under rational basis review, the classification must "bear a rational relationship to an independent and legitimate legislative end," to "ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." *Romer v. Evans*, 517 U.S. 620, 632–33 (1996).

H.B.2 cannot meet any of these standards.

1. H.B.2 Fails To Further Any Interest In Safety Or Privacy.

Under both intermediate and strict scrutiny, when the government defends its law "as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.'" *PSINet*,

Inc. v. Chapman, 362 F.3d 227, 238 (4th Cir. 2004) (citation omitted). Instead, close scrutiny requires the government to demonstrate that the challenged classification is "a meaningful step towards solving a real, not fanciful problem." *Schleifer ex rel. Schleifer v. City of Charlottesville*, 159 F.3d 843, 849 (4th Cir. 1998); *see also Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 799 (2011) ("The State must specifically identify an 'actual problem' in need of solving.").

The district court's own findings demonstrate why—under any level of scrutiny—H.B.2 is the quintessential solution in search of a problem. The court found that transgender individuals like Plaintiffs had been using facilities matching their gender identity for extended periods of time "without complaint," "without causing any known infringement on the privacy rights of others," and "without posing a safety threat to anyone." JA955, JA986-87. The district court also noted that, "for obvious reasons, transgender individuals generally seek to avoid having their nude or partially nude bodies exposed in bathrooms, showers, and other similar facilities." JA914. Counsel for Governor McCrory admitted that he was "certain" that transgender people had likely used restrooms matching their gender identity before H.B.2, and he was "not aware of any problem with that." JA832. The State thus had no choice but to admit that "it had no problems with that pre-2016 legal regime." JA988. For all these reasons, the district court granted the preliminary injunction against UNC, thereby allowing Plaintiffs to resume use of

UNC facilities matching their gender identity. These findings also logically apply beyond UNC campuses, given that transgender individuals like Plaintiffs were using public facilities elsewhere as well.

The post-H.B.2 legal regime is also instructive. The district court noted the candid acknowledgement by counsel for Governor McCrory that, even with H.B.2, "'some transgender individuals will continue to use the bathroom that they always used and nobody will know.'" JA986 (quoting JA836). Preventing supposed "harm" that is purely hypothetical and unsubstantiated—and, indeed, contradicted by all known evidence—cannot conceivably constitute even a legitimate interest, let alone a substantial or compelling one. Furthermore, as discussed below, transgender individuals who were born in states that do not require surgery for changing their birth certificates can also use facilities matching their gender identity, regardless of the appearance of their genitalia.

a. The district court correctly found that public safety is not harmed by enjoining H.B.2.

For all of the reasons above, the district court correctly rejected public safety as a justification for H.B.2. Defendants speculated that nondiscrimination protections for transgender people would lead to a wave of crime by men pretending to be transgender to access women's facilities. JA987. But this Court rebuffed the same "amorphous" concerns in *G.G.* 822 F.3d at 723 n.11 (holding that the Court was "unconvinced" by purported "safety concerns"). The district

court below properly followed that guidance, finding that Defendants did "not offer[] sufficient evidence to distinguish Plaintiffs' factual circumstances, or those pertaining to anyone else in North Carolina for that matter, from those in *G.G.*," particularly where Plaintiffs had used facilities "corresponding with their gender identity without complaint for far longer than G.G. used the boys' bathrooms at his school." JA954-55. Not even Governor McCrory seems convinced by the public safety arguments in his briefs, having repeatedly admitted publicly that abuse of "transgender protections to commit crimes in bathrooms . . . wasn't a problem"; there have been "[n]o" such cases in the last five years; and he is not "aware of" any such cases ever occurring. JA458.

Indeed, highly speculative fears like the ones raised by Defendants have been rejected time and again by the courts as a valid justification for discriminatory laws. *See Whole Woman's Health*, 136 S. Ct. at 2313-14 ("Determined wrongdoers, already ignoring existing statutes and safety measures, are unlikely to be [deterred] . . . by a new overlay of regulations."); *Exodus Refugee*, 2016 WL 5682711, at *1-3 (holding that a speculative fear of Syrian terrorists could not justify discrimination against Syrian refugees). The total absence of factual support for legislators' fears at the time of H.B.2's passage also bars inventing *post hoc* factual support for purposes of litigation. *Virginia*, 518 U.S. at 535-36.

The record below also contained "unrefuted evidence" from Plaintiffs' expert "that jurisdictions that have adopted accommodating bathroom access policies have not observed subsequent increases in crime." JA988; *see* JA173-76, JA179-184, *see also* JA232-45. As the district court correctly recognized, "North Carolina's decades-old laws against indecent exposure, peeping, and trespass protect[] the legitimate and significant State interests of privacy and safety." JA914. Defendants' only submission on this topic—a handful of "news articles" describing indecency crimes—provided "no indication that a sexual predator could successfully claim transgender status as a defense against prosecution under these statutes." JA954.

In fact, when it comes to safety risks, transgender people themselves are the group most vulnerable to harassment and violence in sex-separated spaces such as restrooms that do not accord with their gender identity. JA166; JA176-77. Thus, while H.B.2 has no positive impact on the safety of non-transgender people, the law greatly increases risk of harassment and bodily harm for transgender North Carolinians. *Id.* The district court recognized that forcing Mr. Carcaño to use the women's restroom, for example, would cause alarm and suspicion. JA986. A classification that not only fails to serve its purported justification but, in fact, actively undermines it by endangering a vulnerable minority, cannot survive any level of constitutional review.

Finally, any safety concerns are belied by the limited relief Plaintiffs seek, which would merely restore the status quo that previously existed in North Carolina. A preliminary injunction against Part I of H.B.2 would not reinstate Charlotte's nondiscrimination ordinance but would instead halt H.B.2's *affirmative* discrimination requirement against transgender people. North Carolina has never had any such requirement before H.B.2, and neither do 49 other states. *See Exodus Refugee*, 2016 WL 5682711, at *3 (noting the "oddity" of Indiana's position, since there "are after all fifty states, and nothing to suggest that Indiana is a magnet for Syrians"). Because Plaintiffs' request would simply restore the parties to "the status quo ante" before H.B.2, JA990, and the "State acknowledges that it had no problems with that pre-2016 legal regime," the "entry of an injunction should not work any hardship on them." JA984, JA988.

b. Privacy concerns do not justify H.B.2's discrimination.

Defendants would have the Court believe that Plaintiffs seek nothing less than the abolition of sex-segregated facilities. But Plaintiffs seek nothing other than to continue being able to access those facilities equally. *See Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. Of Educ.*, No. 16-cv-943-PP, 2016 WL 5239829, at *6 (E.D. Wis. Sept. 22, 2016) (explaining that "the issuance of the injunction will not disturb the school's ability to have boys' restrooms and girls' restrooms" but rather "will require only that Ash . . . be allowed to use the

existing boys' restrooms."); *see also Highland*, 2016 WL 5372349, at *20 (directing school officials merely "to treat Jane Doe as the girl she is"). Tellingly, the district court had no trouble rejecting purported privacy concerns as they related to Plaintiffs' Title IX claim. JA986 (finding "*uncontested evidence* that [before H.B.2, agencies] allowed the individual transgender Plaintiffs to use bathrooms and other facilities consistent with their gender identity for an extended period of time without causing any known infringement on the privacy rights of others"); JA988 ("the court has no reason to believe that an injunction returning to the state of affairs as it existed before March 2016 would pose a privacy or safety risk for North Carolinians, transgender or otherwise").

These findings cannot be squared with the district court's legal conclusion that privacy somehow operates differently in settings covered by Plaintiffs' equal protection claim. Privacy interests are not transformed because Mr. Carcaño uses a restroom in the North Carolina Health and Human Services building, which he visits as part of his job, instead of in buildings on a UNC campus. JA129. This Court already has rejected the notion that "G.G.'s use—*or for that matter any individual's appropriate use*—of a restroom" would infringe upon others' constitutional rights. 822 F.3d at 723 n.10 (emphasis added). And as the district court found here, "like the situation in *G.G.*, bathroom, shower, and other facilities are often separately partitioned to preserve privacy and safety concerns." JA955.

The lower court's analysis went awry when it considered how society "justif[ies] the decision to provide sex-segregated facilities." JA962. The court cited four cases suggesting that sex-based inequality is sometimes permissible based on "physiological characteristics," and relied on these cases to conclude that transgender people may be excluded from communal facilities because of their genital anatomy, even though none of these cases involved transgender people. JA962-66 (citing *Virginia*, 518 U.S. at 515; *Tuan Anh Nguyen v. INS*, 533 U.S. 53 (2001); *Bauer*, 812 F.3d at 340); and *Faulkner v. Jones*, 10 F.3d 226 (4th Cir. 1993)). These four cases share one theme, and it is not the one the district court discerned. Instead, it is that where the government can provide equal access, it must do so—even if there are physiological differences potentially warranting accommodation.[10]

First, as in this case, the defendants in *United States v. Virginia* argued that privacy concerns justified the exclusion of women from the Virginia Military Institute ("VMI"). 518 U.S. at 522, 524-25. They claimed that admitting women

[10] The district court characterized various statements by Plaintiffs' counsel at argument as supposed concessions that "bodily privacy qualifies as an important State interest and that sex-segregated facilities are substantially related to that interest." *See, e.g.*, JA960. Plaintiffs disagree with that characterization, but it is beside the point because, as noted above, Plaintiffs are not challenging sex-separated facilities, but rather the discriminatory exclusion of only transgender individuals from facilities that match the sex with which they identify. Whatever the State's interest in privacy, Plaintiffs have consistently argued that it does not justify H.B.2's discriminatory classification.

to VMI "would destroy . . . any sense of decency that still permeates the relationship between the sexes," *id*. at 528 (quotation marks omitted and ellipsis in original), and "necessarily be 'radical,' [and] so 'drastic' . . . as to transform, indeed 'destroy' VMI's program," *id*. at 540. But rather than accept privacy concerns as a reason to discriminate, the Supreme Court instead ended VMI's discrimination and required that privacy concerns be addressed through any necessary alterations. *Id*. at 550 n.19. "[P]hysiological differences," *id.*, thus could not trump the obligation to provide "genuinely equal protection," *id*. at 557. Similarly, the district court noted here that other jurisdictions and school districts have expressly permitted transgender students to use facilities that match who they are with minimal changes, if any, to preserve privacy. JA951-52.

Faulkner v. Jones involved a challenge to the male-only policy at South Carolina's military college, The Citadel, and reached the same result. 10 F.3d 226, 228-29 (4th Cir. 1993). *Faulkner* referred to "society's undisputed approval of separate public rest rooms for men and women based on privacy concerns," but the decision's overarching conclusion was that equality is required where it is achievable. *Id.* at 233 (requiring The Citadel to admit the female plaintiff to day classes, notwithstanding that it might "be disruptive in the first days" and would "probably shake The Citadel's stability temporarily"). Just as "The Citadel could still maintain its primary mission, even if women were added to the classroom,"

id., sex-specific facilities still maintain their primary character and reasonable expectations of privacy when transgender people use them.

Bauer involved a Title VII challenge by a male FBI Academy trainee, who argued that the Academy's gender-normed standards—which required fewer push-ups of female trainees than male trainees—constituted sex discrimination. 812 F.3d at 342. *Bauer* recognized, however, that the Academy had adopted those standards so that more women, of equivalent fitness to men, could qualify, given that women "demonstrate their fitness differently." *Id.* at 351. *Bauer* thus upheld the gender-normed fitness requirements because they furthered rather than hindered equal access by women.

Tuan Anh Nguyen v. INS is not to the contrary. *Nguyen* examined differing requirements under immigration law for men and women to prove parentage of children born abroad. 533 U.S. 53, 59 (2001). *Nguyen* held that different requirements were permissible because of the ability to demonstrate parentage through giving birth. *Id.* at 64. The Court held that this differential treatment was not based on a stereotype. *Id.* at 68. Here, however, H.B.2 is premised on the bias-based stereotype that transgender individuals like Plaintiffs are not "real" men and women unless they update their birth certificates, including through surgical treatment to conform their bodies to the gender-based expectations of lawmakers.

In sum, Defendants cannot demonstrate that H.B.2 actually supports any legitimate—let alone important or compelling—government interest in public safety or privacy.

2. H.B.2 Is Not Tailored To Interests In Safety Or Privacy.

Even if an important or compelling interest were at issue here, H.B.2 is not adequately tailored to further such interests. Under intermediate scrutiny, courts must ensure that the sex-based distinction "closely serves to achieve [the proffered] objective." *Craig v. Boren*, 429 U.S. 190, 200 (1976). Under strict scrutiny, the classification must be narrowly tailored to further compelling interests. *Entm't Merchants Ass'n*, 564 U.S. at 799.

H.B.2 is the antithesis of a reasonably tailored law: it imposes a blanket ban against Plaintiffs' use of facilities matching their gender identity, and it precludes a "flexible, case-by-case" approach to addressing privacy or safety concerns. JA984. Previously, schools (and other public agencies) could develop "a 'tailored' plan that addresse[d] the unique needs and circumstances of each case." JA919. H.B.2 has now taken the ability to "tailor" off the table and replaced it with a categorical "one-size-fits-all" approach that is insensitive to context. JA991.

The existence of nondiscriminatory alternatives is important in evaluating a sex-based classification—particularly where a law like H.B.2 "fixes" something that is not broken. *See, e.g.*, *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 151

(1980) (holding that a statute discriminating between widows and widowers was unconstitutional where a nondiscriminatory approach could achieve the government's objective); *Orr v. Orr*, 440 U.S. 268, 281 (1979) (holding that nondiscriminatory means were available to achieve the government's goal in spousal support, making its discrimination in requiring only men to pay alimony "gratuitous"); *Craig*, 429 U.S. at 198 (reviewing "decisions that have invalidated statutes employing gender as an inaccurate proxy for other, more germane bases of classification").

In fact, non-discriminatory alternatives to H.B.2 abound. Existing criminal laws "protect the privacy and safety of all citizens, regardless of gender identity." JA991; *see also Whole Woman's Health*, 136 S. Ct. at 2314 ("The record contains nothing to suggest that [Texas's] H.B.2 would be more effective than pre-existing [criminal] law at deterring wrongdoers."). Partitions and curtains are also nondiscriminatory means to enhance privacy for everyone. JA951-52 ("as in *G.G.*, other forms of accommodation might be available to protect privacy and safety concerns"); *see also* 10A N.C. Admin. Code 13G.0309 (mandating privacy partitions or curtains in North Carolina adult care homes).[11] Nor is there even a meaningful risk of exposure to nudity in the context of restrooms, given their

[11] Nor could Defendants object to such straightforward solutions since, as Defendant-Intervenor Moore has insisted, the State "cannot put a price tag" on measures to enhance privacy and safety. JA383.

partitioned nature. JA919, JA951-52; *accord Highland*, 2016 WL 5372349, at *17-19 (holding that the exclusion of a transgender boy from the boys' restroom failed to rationally or substantially further privacy given the existence of stall dividers); *Whitaker*, 2016 WL 5239829, at *6 (holding that a transgender boy's use of the restroom does not violate others' privacy rights). The same is also often true for showers, which "today often contain partitions, dividers, and other mechanisms to protect privacy similar to bathrooms." JA951; JA918-20 (describing local school official's "seamless" experience with treating transgender students equally); JA903-07 (counsel for *amici* school administrators describing their experience); JA568-69 (Department of Education guidance describing schools' experience).

Importantly, this Court already has found that the Department of Education's position—that privacy and safety can be maintained without discrimination against transgender students—is "reasonable." *G.G.*, 822 F.3d at 721-24. If privacy and safety can be reasonably served without discrimination, H.B.2 certainly cannot survive intermediate scrutiny, because a state cannot needlessly discriminate where a neutral option will work. Indeed, it is absurd to contend that the federal government, 49 other states, thousands of local governments, and millions of businesses across America have failed to preserve privacy and safety by not expressly excluding transgender people from facilities matching their gender identity—but that North Carolina finally cracked the code in 2016 with H.B.2.

The utter lack of close tailoring also is underscored by the fact that H.B.2 now *creates* potential "alarm and suspicion" by consigning a transgender man like Mr. Carcaño, who everyone accurately perceives to be male, to women's facilities. JA986. As this Court recognized, "rather than protect privacy, it appears at least equally likely that denying an injunction will create privacy problems," by requiring transgender people like Plaintiffs, "who outwardly appear as the sex with which they identify, to enter facilities designated for the *opposite* sex." *Id*.

A law cannot be regarded as safeguarding an interest when it does so selectively, arbitrarily, or unreasonably. *See Craig*, 429 U.S. at 204 (where the law prohibits "only the selling of 3.2% beer to young males and not their drinking" of it, the "relationship between gender and traffic safety becomes far too tenuous"). The district court agreed that any government interest in safety or privacy is "undermined" by H.B.2's reliance on birth certificates, which is an unreliable proxy for presuming the genital characteristics of transgender individuals. JA986-87. As noted above, a number of states do not require surgery for changing the gender marker on a birth certificate, while some states and most countries refuse to change the gender marker even with surgery, all of which is significant given that 42% of North Carolina residents were born out-of-state. JA765. Furthermore, H.B.2 leaves thousands of non-government facilities—like those in restaurants, stores, and gyms—wholly untouched; and yet Defendants have no factual support

that the absence of a discriminatory mandate like H.B.2 harms safety or privacy in those contexts. H.B.2's exceptionally poor "fit" demonstrates the law is not constitutionally tailored to address its ostensible goals. *See*, *e.g.*, *Craig*, 429 U.S. at 204; *Pickett v. Brown*, 462 U.S. 1, 14-15 (1983) (holding that exceptions to a statute-of-limitations restriction undermined the state's argument that the law was substantially related to the state's interest in preventing stale or fraudulent claims); *Entm't Merchants Ass'n*, 564 U.S. at 801-02.

Finally, "if the arguments and evidence show that a statutory provision is unconstitutional on its face"—as Plaintiffs have shown here—"an injunction prohibiting its enforcement is 'proper.'" *Whole Woman's Health*, 136 S. Ct. at 2307. H.B.2's categorical banishment of transgender individuals from public facilities matching their gender identity is unlawful across-the-board. That is confirmed by the district court's factual findings. *See* JA954 ("Defendants have not offered sufficient evidence to distinguish Plaintiffs' factual circumstance, *or those pertaining to anyone else in North Carolina* for that matter, from those in *G.G.*" (emphasis added)). Facial relief is necessary and appropriate here given the thousands of transgender North Carolinians harmed by H.B.2.

II. Plaintiffs Have Satisfied The Other Preliminary Injunction Factors.

A. H.B.2 Inflicts Irreparable Harm On Transgender Individuals.

The depth and scale of the harms that H.B.2 has inflicted on transgender individuals in North Carolina is staggering. The district court thus had no difficulty concluding that the Plaintiffs had "clearly shown that they will suffer irreparable harm in the absence of preliminary relief." JA981.

As a threshold matter, the constitutional nature of the injury here—denial of the right to equal protection—renders it irreparable. *See Ross v. Meese*, 818 F.2d 1132, 1135 (4th Cir. 1987); *see also Faulkner*, 10 F.3d at 233. Beyond interfering with transgender individuals' ability to use government buildings safely, making them fearful, and harming their health, government discrimination like that effected by H.B.2 can inflict "[d]ignitary wounds" that linger even after a court has tried to remedy the harm, because some injuries "cannot always be healed with the stroke of a pen." *Obergefell*, 135 S. Ct. at 2606. That reality makes the need for preliminary relief here all the more urgent.

H.B.2's exclusion of transgender individuals from the facilities matching their gender identity erects a serious barrier to their participation as equal and respected members of our society. It requires them to "out" themselves as transgender, marking them as different from other women and men, and leaving them with the Hobson's choice of using public facilities that visibly conflict with

their gender identity—thereby exposing themselves to stigma and the serious risk of harassment and violence—or avoiding public spaces altogether. A law that targets a disfavored minority group of people in this way, restricting their ability to participate in ordinary civil society except at the price of severe stigma and humiliation, violates the requirement of equal protection in the most basic way. H.B.2 brands transgender individuals as outcasts undeserving of society's basic regard as the men and women that they are within our social fabric. JA137-40; JA166.

H.B.2 also pushes transgender people further into the margins of the law. If there were no constitutional bulwark against H.B.2, and the district court's legal analysis were otherwise correct, transgender individuals would have to risk literal trespass across the gender lines drawn by the government simply to live as who they are. That is a crushing burden. H.B.2 does not cause non-transgender individuals to "observe any public restroom very carefully before utilizing it" and to *fear* the sight of "a law enforcement officer in the vicinity"; but that is precisely what life now looks like for a transgender woman living in North Carolina if she uses the women's restroom. JA253 (detailing the steps that a 65-year-old transgender female ACLU-NC member now undertakes). It is hard to see how the ability to participate in society on equal terms—or dignity itself—can survive under those conditions. H.B.2 demeans transgender peoples' lives and their very

existence in all-too-familiar ways that mar this nation's commitment to equal protection of the law for all.[12] *See Lawrence v. Texas*, 539 U.S. 558, 576 (2003).

Furthermore, H.B.2 directly clashes with the current scientific understanding of gender and with the standards of medical care for transgender persons, which recognize that being able to live consistently with one's gender identity is essential to the health and well-being of transgender people, just as it is for non-transgender people. JA127-30, JA135-40 (explaining the importance of living in a manner consistent with one's gender identity). Plaintiffs' unrebutted expert testimony explained that "[a]ccess to the same restrooms and other facilities available to others is an undeniable necessity for transgender individuals." JA137-40. Indeed, the deprivation of access to facilities matching one's gender identity can *create* new mental health risks that were otherwise kept at bay, such as anxiety and depression. JA138.

H.B.2's harms cannot be masked by the fiction that transgender individuals can simply use the facilities contrary to their gender identity. That option is no option at all. Transgender persons cannot change who they are any more than non-

[12] Restrooms have historically been a battleground for equality with respect to other groups, including African Americans and people with disabilities. *See* Tobias Barrington Wolff, *Civil Rights Reform and the Body*, 6 Harv. L. & Pol'y Rev. 201 (2012); Carlos Ball, *Why Bathrooms Are a Civil Rights Issue*, Huffington Post (May 25, 2011), http://www.huffingtonpost.com/carlos-a-ball/why-bathrooms-are-a-civil_b_707376.html.

transgender persons. Use of a facility contrary to their gender identity plainly exposes transgender people such as Plaintiffs to harassment and violence. *E.g.*, JA166. A transgender woman recounted violence she had faced in the past because of her gender identity—waking up with a tube in her throat and broken ribs—and explained that she "would rather be judged in court than run the risk of getting [her] face beaten in again because that is more than likely the outcome" of using the men's restroom. JA389.

Relegating transgender individuals to separate single-user and gender-neutral facilities also fails to provide an adequate solution for the harm that H.B.2 inflicts. The district court found that gender-neutral facilities are generally unavailable at public agencies covered by H.B.2. JA981; *accord* JA137, JA160, JA165. More fundamentally, shunting transgender individuals into alternative facilities stigmatizes them as second-class North Carolinians unfit to share communal spaces with everyone else. *See* JA138. Even if such facilities were widely available—which they are not—forcing only a single group of persons to use them would be grossly discriminatory, singling them out for constant exposure, stigma, isolation, and humiliation. In addition to those serious harms, such a regime would also cause many transgender individuals to delay or minimize trips to the restroom—in many cases avoiding use of public restrooms entirely—

increasing their risk for health problems such as dehydration and urinary tract infections. *See* JA56-57; *accord G.G.*, 822 F.3d at 716.

Although the district court recognized the harms caused by H.B.2 are irreparable, it doubted that they would prevent transgender individuals "from participating in public life." JA968. But transgender individuals cannot take part in public life on equal terms as others when they are continually marked as different than everyone else and forced to "out" themselves to others in public spaces—particularly when they must endure this discrimination even when they walk into the halls of government. If they wish to participate in democracy by speaking with their representatives or by testifying before the legislature—whether about the repeal of H.B.2 or anything else—they are not welcome to use the facilities like everyone else there. If this or any other litigation had been commenced in state court, Plaintiffs would not have been able to use the restrooms matching who they are during the hearing on their own motion, during the oral argument in this appeal, or during the trial at which they will testify. H.B.2's sprawling reach covers both ordinary places—such as libraries, airports, rest stops, and government offices—and the places where people turn in times of crisis, such as police departments and state hospitals. In short, H.B.2 requires discrimination in the places where "public life" takes place, a grim reality that transgender North Carolinians confront whenever they set foot outside their homes.

B. The Balance Of Equities And Public Interest Weigh Heavily In Favor Of An Injunction.

The district court also correctly concluded that the balance of equities tips sharply in favor of a preliminary injunction. JA983. As detailed above, H.B.2 imposes devastating hardships on transgender individuals like Plaintiffs. Meanwhile, returning to the status quo that existed in North Carolina until March 23, 2016 will not harm Defendants. JA984. Not only did the district court find that no problems existed prior to H.B.2's passage, but North Carolina "is in no way harmed by issuance of a preliminary injunction which prevents the state from enforcing restrictions likely to be found unconstitutional." *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002) (quotation marks omitted). "If anything, the system is improved by such an injunction." *Id.* (quotation marks omitted).

Likewise, "upholding constitutional rights surely serves the public interest." *Id.* Indeed, the district court agreed that denial of a preliminary injunction could unleash a whole new set of privacy problems by relegating transgender individuals to facilities contrary to their gender. JA986. The protection of privacy and safety will also continue to be served by preexisting laws, all of which can continue to coexist with a commitment to equal protection of the law.

CONCLUSION

"A prime part of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded." *Virginia*, 518 U.S. at 557. There can be no question that, until recently, transgender people were among those historically most ignored or excluded by the law's protections who need the Constitution's promises to us all to protect them. Plaintiffs respectfully urge this Court to reverse the district court's denial of relief on Plaintiffs' equal protection claim and direct entry of a preliminary injunction enjoining Part I of H.B.2.

REQUEST FOR ORAL ARGUMENT

Plaintiffs respectfully request oral argument pursuant to Local Rule 34(a).

* * *

Respectfully submitted,

Dated: October 18, 2016

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it is 13,932 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type-style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013, in 14-point Times New Roman font.

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STATUTORY APPENDIX

North Carolina House Bill 2, Second Extra Session (2016) (Session Law 2016-3), *available at* http://www.ncleg.net/Sessions/2015E2/Bills/House/PDF/H2v4.pdf (JA299-303)

GENERAL ASSEMBLY OF NORTH CAROLINA
SECOND EXTRA SESSION 2016

SESSION LAW 2016-3
HOUSE BILL 2

AN ACT TO PROVIDE FOR SINGLE-SEX MULTIPLE OCCUPANCY BATHROOM AND CHANGING FACILITIES IN SCHOOLS AND PUBLIC AGENCIES AND TO CREATE STATEWIDE CONSISTENCY IN REGULATION OF EMPLOYMENT AND PUBLIC ACCOMMODATIONS.

Whereas, the North Carolina Constitution directs the General Assembly to provide for the organization and government of all cities and counties and to give cities and counties such powers and duties as the General Assembly deems advisable in Section 1 of Article VII of the North Carolina Constitution; and

Whereas, the North Carolina Constitution reflects the importance of statewide laws related to commerce by prohibiting the General Assembly from enacting local acts regulating labor, trade, mining, or manufacturing in Section 24 of Article II of the North Carolina Constitution; and

Whereas, the General Assembly finds that laws and obligations consistent statewide for all businesses, organizations, and employers doing business in the State will improve intrastate commerce; and

Whereas, the General Assembly finds that laws and obligations consistent statewide for all businesses, organizations, and employers doing business in the State benefit the businesses, organizations, and employers seeking to do business in the State and attracts new businesses, organizations, and employers to the State; Now, therefore,

The General Assembly of North Carolina enacts:

PART I. SINGLE-SEX MULTIPLE OCCUPANCY BATHROOM AND CHANGING FACILITIES

SECTION 1.1. G.S. 115C-47 is amended by adding a new subdivision to read:

"(63) To Establish Single-Sex Multiple Occupancy Bathroom and Changing Facilities. – Local boards of education shall establish single-sex multiple occupancy bathroom and changing facilities as provided in G.S. 115C-521.2."

SECTION 1.2. Article 37 of Chapter 115C of the General Statutes is amended by adding a new section to read:

"**§ 115C-521.2. Single-sex multiple occupancy bathroom and changing facilities.**

(a) Definitions. – The following definitions apply in this section:

(1) Biological sex. – The physical condition of being male or female, which is stated on a person's birth certificate.

(2) Multiple occupancy bathroom or changing facility. – A facility designed or designated to be used by more than one person at a time where students may be in various states of undress in the presence of other persons. A multiple occupancy bathroom or changing facility may include, but is not limited to, a school restroom, locker room, changing room, or shower room.

(3) Single occupancy bathroom or changing facility. – A facility designed or designated to be used by only one person at a time where students may be in various states of undress. A single occupancy bathroom or changing facility may include, but is not limited to, a single stall restroom designated as unisex or for use based on biological sex.

(b) Single-Sex Multiple Occupancy Bathroom and Changing Facilities. – Local boards of education shall require every multiple occupancy bathroom or changing facility that is designated for student use to be designated for and used only by students based on their biological sex.

(c) Accommodations Permitted. – Nothing in this section shall prohibit local boards of education from providing accommodations such as single occupancy bathroom or changing facilities or controlled use of faculty facilities upon a request due to special circumstances, but in no event shall that accommodation result in the local boards of education allowing a student to use a multiple occupancy bathroom or changing facility designated under subsection (b) of this section for a sex other than the student's biological sex.

(d) Exceptions. – This section does not apply to persons entering a multiple occupancy bathroom or changing facility designated for use by the opposite sex:

(1) For custodial purposes.

(2) For maintenance or inspection purposes.

(3) To render medical assistance.

(4) To accompany a student needing assistance when the assisting individual is an employee or authorized volunteer of the local board of education or the student's parent or authorized caregiver.

(5) To receive assistance in using the facility.

(6) To accompany a person other than a student needing assistance.

(7) That has been temporarily designated for use by that person's biological sex."

SECTION 1.3. Chapter 143 of the General Statutes is amended by adding a new Article to read:

"Article 81.

"Single-Sex Multiple Occupancy Bathroom and Changing Facilities.

"**§ 143-760. Single-sex multiple occupancy bathroom and changing facilities.**

(a) Definitions. – The following definitions apply in this section:

(1) Biological sex. – The physical condition of being male or female, which is stated on a person's birth certificate.

(2) Executive branch agency. – Agencies, boards, offices, departments, and institutions of the executive branch, including The University of North Carolina and the North Carolina Community College System.

(3) Multiple occupancy bathroom or changing facility. – A facility designed or designated to be used by more than one person at a time where persons may be in various states of undress in the presence of other persons. A multiple occupancy bathroom or changing facility may include, but is not limited to, a restroom, locker room, changing room, or shower room.

(4) Public agency. – Includes any of the following:

a. Executive branch agencies.

b. All agencies, boards, offices, and departments under the direction and control of a member of the Council of State.

c. "Unit" as defined in G.S. 159-7(b)(15).

d. "Public authority" as defined in G.S. 159-7(b)(10).

e. A local board of education.

f. The judicial branch.

g. The legislative branch.

h. Any other political subdivision of the State.

(5) Single occupancy bathroom or changing facility. – A facility designed or designated to be used by only one person at a time where persons may be in various states of undress. A single occupancy bathroom or changing facility may include, but is not limited to, a single stall restroom designated as unisex or for use based on biological sex.

(b) Single-Sex Multiple Occupancy Bathroom and Changing Facilities. – Public agencies shall require every multiple occupancy bathroom or changing facility to be designated for and only used by persons based on their biological sex.

(c) Accommodations Permitted. – Nothing in this section shall prohibit public agencies from providing accommodations such as single occupancy bathroom or changing facilities upon a person's request due to special circumstances, but in no event shall that accommodation result in the public agency allowing a person to use a multiple occupancy bathroom or changing facility designated under subsection (b) of this section for a sex other than the person's biological sex.

(d) Exceptions. – This section does not apply to persons entering a multiple occupancy bathroom or changing facility designated for use by the opposite sex:

(1) For custodial purposes.

(2) For maintenance or inspection purposes.
(3) To render medical assistance.
(4) To accompany a person needing assistance.
(4a) For a minor under the age of seven who accompanies a person caring for that minor.
(5) That has been temporarily designated for use by that person's biological sex."

PART II. STATEWIDE CONSISTENCY IN LAWS RELATED TO EMPLOYMENT AND CONTRACTING

SECTION 2.1. G.S. 95-25.1 reads as rewritten:

"**§ 95-25.1. Short title and legislative ~~purpose.~~purpose; local governments preempted.**

(a) This Article shall be known and may be cited as the "Wage and Hour Act."

(b) The public policy of this State is declared as follows: The wage levels of employees, hours of labor, payment of earned wages, and the well-being of minors are subjects of concern requiring legislation to promote the general welfare of the people of the State without jeopardizing the competitive position of North Carolina business and industry. The General Assembly declares that the general welfare of the State requires the enactment of this law under the police power of the State.

(c) The provisions of this Article supersede and preempt any ordinance, regulation, resolution, or policy adopted or imposed by a unit of local government or other political subdivision of the State that regulates or imposes any requirement upon an employer pertaining to compensation of employees, such as the wage levels of employees, hours of labor, payment of earned wages, benefits, leave, or well-being of minors in the workforce. This subsection shall not apply to any of the following:

(1) A local government regulating, compensating, or controlling its own employees.
(2) Economic development incentives awarded under Chapter 143B of the General Statutes.
(3) Economic development incentives awarded under Article 1 of Chapter 158 of the General Statutes.
(4) A requirement of federal community development block grants.
(5) Programs established under G.S. 153A-376 or G.S. 160A-456."

SECTION 2.2. G.S. 153A-449(a) reads as rewritten:

"(a) Authority. – A county may contract with and appropriate money to any person, association, or corporation, in order to carry out any public purpose that the county is authorized by law to engage in. A county may not require a private contractor under this section to abide by ~~any restriction that the county could not impose on all employers in the county, such as paying minimum wage or providing paid sick leave to its employees,~~ regulations or controls on the contractor's employment practices or mandate or prohibit the provision of goods, services, or accommodations to any member of the public as a condition of bidding on a ~~contract.~~contract or a qualification-based selection, except as otherwise required or allowed by State law."

SECTION 2.3. G.S. 160A-20.1(a) reads as rewritten:

"(a) Authority. – A city may contract with and appropriate money to any person, association, or corporation, in order to carry out any public purpose that the city is authorized by law to engage in. A city may not require a private contractor under this section to abide by ~~any restriction that the city could not impose on all employers in the city, such as paying minimum wage or providing paid sick leave to its employees,~~ regulations or controls on the contractor's employment practices or mandate or prohibit the provision of goods, services, or accommodations to any member of the public as a condition of bidding on a ~~contract.~~contract or a qualification-based selection, except as otherwise required or allowed by State law."

PART III. PROTECTION OF RIGHTS IN EMPLOYMENT AND PUBLIC ACCOMMODATIONS

SECTION 3.1. G.S. 143-422.2 reads as rewritten:

"**§ 143-422.2. Legislative declaration.**

(a) It is the public policy of this State to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of race, religion, color, national origin, age, biological sex or handicap by employers which regularly employ 15 or more employees.

(b) It is recognized that the practice of denying employment opportunity and discriminating in the terms of employment foments domestic strife and unrest, deprives the State of the fullest utilization of its capacities for advancement and development, and substantially and adversely affects the interests of employees, employers, and the public in general.

(c) The General Assembly declares that the regulation of discriminatory practices in employment is properly an issue of general, statewide concern, such that this Article and other applicable provisions of the General Statutes supersede and preempt any ordinance, regulation, resolution, or policy adopted or imposed by a unit of local government or other political subdivision of the State that regulates or imposes any requirement upon an employer pertaining to the regulation of discriminatory practices in employment, except such regulations applicable to personnel employed by that body that are not otherwise in conflict with State law."

SECTION 3.2. G.S. 143-422.3 reads as rewritten:

"**§ 143-422.3. Investigations; conciliations.**

The Human Relations Commission in the Department of Administration shall have the authority to receive charges of discrimination from the Equal Employment Opportunity Commission pursuant to an agreement under Section 709(b) of Public Law 88-352, as amended by Public Law 92-261, and investigate and conciliate charges of discrimination. Throughout this process, the agency shall use its good offices to effect an amicable resolution of the charges of discrimination. This Article does not create, and shall not be construed to create or support, a statutory or common law private right of action, and no person may bring any civil action based upon the public policy expressed herein."

SECTION 3.3. Chapter 143 of the General Statutes is amended by adding a new Article to read:

"Article 49B.

"Equal Access to Public Accommodations.

"**§ 143-422.10. Short title.**

This Article shall be known and may be cited as the Equal Access to Public Accommodations Act.

"**§ 143-422.11. Legislative declaration.**

(a) It is the public policy of this State to protect and safeguard the right and opportunity of all individuals within the State to enjoy fully and equally the goods, services, facilities, privileges, advantages, and accommodations of places of public accommodation free of discrimination because of race, religion, color, national origin, or biological sex, provided that designating multiple or single occupancy bathrooms or changing facilities according to biological sex, as defined in G.S. 143-760(a)(1), (3), and (5), shall not be deemed to constitute discrimination.

(b) The General Assembly declares that the regulation of discriminatory practices in places of public accommodation is properly an issue of general, statewide concern, such that this Article and other applicable provisions of the General Statutes supersede and preempt any ordinance, regulation, resolution, or policy adopted or imposed by a unit of local government or other political subdivision of the State that regulates or imposes any requirement pertaining to the regulation of discriminatory practices in places of public accommodation.

"**§ 143-422.12. Places of public accommodation – defined.**

For purposes of this Article, places of public accommodation has the same meaning as defined in G.S. 168A-3(8), but shall exclude any private club or other establishment not, in fact, open to the public.

"**§ 143-422.13. Investigations; conciliations.**

The Human Relations Commission in the Department of Administration shall have the authority to receive, investigate, and conciliate complaints of discrimination in public accommodations. Throughout this process, the Human Relations Commission shall use its good offices to effect an amicable resolution of the complaints of discrimination. This Article does not create, and shall not be construed to create or support, a statutory or common law private right of action, and no person may bring any civil action based upon the public policy expressed herein."

PART IV. SEVERABILITY

SECTION 4. If any provision of this act or its application is held invalid, the invalidity does not affect other provisions or applications of this act that can be given effect without the invalid provisions or application, and to this end the provisions of this act are severable. If any provision of this act is temporarily or permanently restrained or enjoined by judicial order, this act shall be enforced as though such restrained or enjoined provisions had not

been adopted, provided that whenever such temporary or permanent restraining order or injunction is stayed, dissolved, or otherwise ceases to have effect, such provisions shall have full force and effect.

PART V. EFFECTIVE DATE

SECTION 5. This act is effective when it becomes law and applies to any action taken on or after that date, to any ordinance, resolution, regulation, or policy adopted or amended on or after that date, and to any contract entered into on or after that date. The provisions of Sections 2.1, 2.2, 2.3, 3.1, 3.2, and 3.3 of this act supersede and preempt any ordinance, resolution, regulation, or policy adopted prior to the effective date of this act that purports to regulate a subject matter preempted by this act or that violates or is not consistent with this act, and such ordinances, resolutions, regulations, or policies shall be null and void as of the effective date of this act.

In the General Assembly read three times and ratified this the 23rd day of March, 2016.

s/ Daniel J. Forest
President of the Senate

s/ Tim Moore
Speaker of the House of Representatives

s/ Pat McCrory
Governor

Approved 9:57 p.m. this 23rd day of March, 2016

CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2016, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

/s/ Jon W. Davidson
Jon W. Davidson