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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INTRODUCTION

H.B.2 was built on a mixture of fear, misunderstanding, and antipathy—but it must be defended with evidence. Defendants have failed to carry their burden of demonstrating an exceedingly persuasive justification for H.B.2's categorical exclusion of transgender individuals like Plaintiffs from public facilities that are consistent with their gender identity. Defendants' burden is particularly heavy: not only is H.B.2 without parallel in the country, but many places *protect* what North Carolina has outlawed—without any demonstrated harm to anyone.

This appeal presents the narrow question of whether to enjoin, on a preliminary basis, H.B.2's affirmative *mandate* of statewide discrimination against transgender people. It can be resolved on a simple basis: the district court's own factual finding that, on the record below, transgender individuals like Plaintiffs have used facilities matching their gender identity without any demonstrated harms. That is irreconcilable with a legal conclusion that Defendants have met their burden of demonstrating an exceedingly persuasive justification for H.B.2.

ARGUMENT

I. The Nature Of H.B.2's Discrimination Against Transgender Individuals Is Critical To The Equal Protection Analysis.

A. H.B.2 Discriminates Against Transgender Individuals.

There is no serious doubt that H.B.2 targets transgender individuals. Pls.' Br. 18-27. Defendants maintain that the law requires everyone to use public

facilities matching their birth certificates, but that ignores the Supreme Court's command to focus on "the group for whom the law is a restriction." *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2451 (2015). Consider if Defendants' arguments were employed to defend laws banning same-sex couples from marriage: a state could deny that its law facially discriminated against gay people "since on its face [the law denies] *everyone*"—regardless of sexual orientation—a same-sex spouse. Defs.' Br. 36 (emphasis in original). That would be nonsensical, because it fails to take into account the group for whom the law is a relevant restriction.[1]

Defendants' retort that H.B.2 is also "relevant" to non-transgender people—in the sense that some support the law—does not make it operate as a relevant *restriction* on them. State law before H.B.2 already excluded non-transgender individuals from facilities contrary to their sex. Pls.' Br. 23-24. What lawmakers sought to "clarify" pertained *solely* to transgender individuals.

No reasonable observer of H.B.2's enactment could believe that transgender people were accidentally or incidentally regulated by the law. They were its intended target. Pls.' Br. 24-26 (discussing factors evidencing discriminatory intent). Indeed, Defendants admit that H.B.2 was enacted "in response" to

[1] Defendants do not explain why this principle—which they admit has been applied in various contexts, Defs.' Br. 37 n.13—would not apply to equal protection. *See In re Marriage Cases*, 183 P.3d 384, 441 (Cal. 2008) (rejecting the reasoning that a lesbian or gay man could simply marry someone of a different sex).

Charlotte's ordinance, which sought to protect transgender people and their right to use facilities matching their gender identity. Defs.' Br. 4.

B. H.B.2's Discrimination Against Transgender Individuals Is Legally Relevant To The Equal Protection Analysis.

Defendants ask this Court to pay no attention to the population that H.B.2 actually affects, because the district court held that intermediate scrutiny was required in any event. Defs.' Br. 23. But the nature of H.B.2's discrimination is not only relevant to whether the court correctly *identified* the appropriate level of scrutiny but also whether it was correctly *applied*.

The fact that H.B.2 discriminates against only transgender people, rather than everyone, removes a linchpin from Defendants' argument: that H.B.2 satisfies heightened scrutiny because birth certificates are an accurate proxy for genitalia in at least 99% of individuals.[2] Defs.' Br. 55. That figure conflates both transgender and non-transgender individuals. For non-transgender individuals, the gender marker on a birth certificate reliably corresponds to the genitalia typical of any particular individual's sex. For transgender individuals, however, it does not. A number of states do not require genital surgery to change the gender marker on a birth certificate; conversely, some states and most countries do not permit such a

[2] Although Defendants misleadingly assert that H.B.2 separates facilities by "biological sex," the statute defines that term through birth certificates, which may or may not match a biological characterization of individuals' genitalia.

change, even with genital surgery.[3] Defendants cannot mask the unreliability of birth certificates as a proxy for the genitalia of *transgender individuals* by simply folding *non-transgender individuals* into the mix. Access to facilities for non-transgender people was unchanged by H.B.2 and is not at issue in this litigation. Pls.' Br. 23-24.

The district court's analysis would inexorably justify laws discriminating against a small minority. A law guaranteeing everyone but Japanese Americans the right to use public restrooms could be defended on the grounds that the law still served a government interest "[f]or the remaining [99-plus percent] of the population." JA967. That parallels the district court's faulty reasoning that, even if there were *no* relationship between a law and the government's interest with respect to the minority it affects, the law is justified whenever such a relationship exists for the majority group. *Id.*

C. The Permissibility Of Having Separate Facilities For Men And Women Does Not Establish That H.B.2 Is Constitutional.

Defendants also maintain that it is irrelevant whether H.B.2 discriminates against transgender individuals because, even if it did, it would be justified for the same reasons that justify separate facilities for men and women. Defs.' Br. 34-39. But those are two fundamentally distinct issues. *See G.G. ex rel. Grimm v.*

[3] Pls.' Br. 32; *see also* Nev. Admin. Code § 440.030 (effective Nov. 2, 2016) (permitting changes to gender markers on birth certificates without surgery).

Gloucester Cty. Sch. Bd., 822 F.3d 709, 720 (4th Cir. 2016) (observing that the court's "inquiry is not ended" by the mere permissibility of sex separation), *cert. granted in part*, No. 16-372, 2016 WL 4565643 (U.S. Oct. 28, 2016).[4]

The difference between the two issues relates to the existence of harm. Having separate facilities for men and women is permissible as a general matter because of the absence of harm. Defendants wrongly assume that it is permissible to exclude a non-transgender man from the women's restroom, for example, because doing so is justified under intermediate scrutiny. But it is permissible for a different reason—the absence of harm to the non-transgender man—which ends the equal protection analysis.[5] Pls.' Br. 21-22. Put differently, without harm, there is nothing the government need justify.

In contrast, the exclusion of a transgender female, such as Plaintiff H.S., from the women's restroom indisputably causes harm. Defendants are simply incorrect to suggest that excluding H.S. from the women's restroom presents

[4] The district court correctly recognized that "*G.G.* remains the law in this circuit," JA946, unless and until the Supreme Court overrules it. The grant of certiorari does not change that—nor the daily irreparable harm inflicted by H.B.2. *G.G.* is also not necessary to Plaintiffs' likelihood of success on the merits, particularly given the record below. *See infra*, Section III.

[5] Defendants' cited authority only confirms this point: an equal protection claim requires some form of *adverse* treatment, such as a barrier making it more difficult "to obtain a *benefit*." *Ne. Fla. Chap. of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (emphasis added).

"exactly the same" issue as excluding a non-transgender man, like Governor McCrory, from the women's restroom. Defs.' Br. 19. Governor McCrory does not have a female gender identity, nor is he perceived as a woman; and using the men's restroom poses no threat to his health or safety. None of that is true for H.S.

Defendants repeatedly make false assertions that Plaintiffs "conceded" that separating facilities by sex "is substantially related" to an important objective. Defs.' Br. 29-36. They quote the district court's mischaracterization of Plaintiffs' position—not anything Plaintiffs or their counsel actually said. In fact, the exchange cited by the district court for this purported acknowledgement reveals the opposite: Plaintiffs explained that, even if challenged, the existence of sex-separated facilities would not automatically "be subjected to heightened scrutiny," because they cause "no stigma" to men or women. JA783.

II. H.B.2 Must Be Tested Under Heightened Scrutiny.

A. Defendants Agree That Heightened Scrutiny Is Required.

It is important to emphasize what Defendants do not argue on appeal: they do not ask for rational basis review. Indeed, the words "rational basis" never appear in their brief. Although Defendants quibble with the particular theory of sex discrimination that applies to H.B.2, they do not dispute, and have thereby waived any objection to, the proposition that at least intermediate scrutiny is required. Even if sex were constitutionally limited to the gender marker on one's

birth certificate, "'all gender-based classifications today' warrant 'heightened scrutiny.'" *United States v. Virginia*, 518 U.S. 515, 555 (1996) (citation omitted).[6] H.B.2 can therefore survive only if, at a minimum, Defendants satisfy their burden of demonstrating an "exceedingly persuasive justification." *Id.* at 531 (quotation marks omitted). They cannot conceivably do so on the record before this Court.

B. "Biology" Does Not Negate H.B.2's Sex-Based Discrimination Against Transgender Individuals.

H.B.2 discriminates against transgender individuals on the basis of at least two sex-based considerations triggering heightened scrutiny: (1) sex stereotypes, and (2) transgender status.

Sex Stereotyping. H.B.2 reflects the stereotypical belief that a transgender individual is not a "real" man or woman, deserving of equal treatment as such, without genital surgery. *Cf., e.g.*, *Roberts v. Clark Cty. Sch. Dist.*, 312 F.R.D. 594, 599 (D. Nev. 2016) (employer demanded medical records showing genital surgery); *Lusardi v. McHugh*, No. 0120133395, 2015 WL 1607756, at *7 (EEOC Apr. 1, 2015) (employer insisted upon proof of the "final surgery").

Indeed, Defendants view Plaintiffs' use of facilities matching their gender identity as a "rejection of settled norms." Defs.' Br. 51; *accord* JA489 (H.B.2

[6] While Defendants make the distinct assertion that "virtually every federal court to consider the issue has held that transgender status is not a protected class under the Equal Protection Clause or Title VII," Defs.' Br. 51 n.17, that is demonstrably false. *See* Pls.' Br. 30-31, 34 (collecting cases).

sponsor characterizing Charlotte's ordinance as protecting "gender nonconformity"). But Defendants assert that acting upon gender stereotypes is not prohibited if those stereotypes are based on a biological characteristic. Even if H.B.2 had actually relied upon a biological characteristic, as opposed to the proxy of birth certificates, that distinction would be untenable.

Discrimination based on gender nonconformity is not any less sex-based merely because the nonconformity may in part be biological. If Defendants were correct, then the government could discriminate against a woman whose breasts were deemed too small or hips too narrow, because those are biological characteristics. That is not the law. *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) ("[N]either a woman with male genitalia nor a man with stereotypically female anatomy, such as breasts, may be [discriminated against] by reason of that nonconforming trait" (quotation marks omitted).). To the contrary, *Price Waterhouse* recognized that sex discrimination is not *limited* to discrimination based on "biological" differences; rather, sex discrimination has always *included* discrimination based on such differences. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989); *see Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000) (recognizing that, before *Price Waterhouse*, some courts had confined sex to one's "distinguishing biological or anatomical characteristics").

Relatedly, Defendants insist that sex stereotypes encompass only "behaviors, mannerisms, and appearances." Defs.' Br. 49. That is legally and logically unsupportable. *See, e.g.*, *City of Los Angeles v. Manhart*, 435 U.S. 702, 707-08 (1978) (recognizing that the generalization that women live longer than men may be true on average, but holding that requiring *all* women to pay more for pensions than men discriminates on the basis of sex). None of Defendants' authorities can reconcile the inherent contradiction in Defendants' assertion that "sex" is limited to anatomy[7] but that sex stereotyping claims *cannot* be mounted against a law that insists on specific anatomical features before it will treat a man as a man or a woman as a woman. Furthermore, Defendants' government justification hinges upon presumptions—even if inaccurate—about the *appearance* of transgender individuals' genitalia and their imagined exposure. JA914.

H.B.2 is not the "opposite" of sex stereotyping; nor does it *protect* gender nonconformity. Defs.' Br. 50. This argument rests on the fiction that Mr. Carcaño can simply use women's facilities, even though he is accurately perceived by all who see him as a man. Using women's facilities is no more viable for him than it

[7] This Court has rejected that narrow view of sex, and other courts agree that *Price Waterhouse* "eviscerated" the very interpretation that Defendants' authorities embrace. *Compare Bauer v. Lynch*, 812 F.3d 340, 347 n.9 (4th Cir. 2016), *and Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004), *with Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 & n.2 (10th Cir. 2007), *and Johnston v. Univ. of Pittsburgh*, 97 F. Supp. 3d 657, 671 & n.14 (W.D. Pa. 2015).

is for any other man. Indeed, the district court found that doing so would expose him to harassment and violence. JA982.

Transgender Status. Although Defendants dispute Plaintiffs' sex stereotyping arguments, they altogether fail to rebut Plaintiffs' showing that H.B.2 discriminates on the basis of transgender status. Because "gender stereotyping is simply one means of proving sex discrimination," discrimination because an individual is transgender directly establishes sex discrimination, independent of stereotypes. *Macy v. Holder*, No. 0120120821, 2012 WL 1435995, at *9-11 (EEOC Apr. 20, 2012). Defendants never deny that transgender status constitutes, at the very least, a sex-based consideration.

Instead, Defendants argue that the definition of sex cannot include gender identity because, according to them, sex reduces to a "bodily conception"—and nothing more—for constitutional purposes. Defs.' Br. 40.

Yet Defendants have no substantive response to the simple example of a non-transgender man who lost his external genitalia due to accident or illness. By their own logic, the government could exclude him from men's facilities (perhaps fearing that his body might upset others). Defendants assert that H.B.2 would not require his exclusion because he would still have a male birth certificate, but the

question here is whether Defendants' "constitutional" definition of sex—not H.B.2—would permit his exclusion, and it clearly would.[8]

As discussed below, none of the authorities Defendants cite as purportedly establishing a constitutional "bodily conception" of sex confronted the question of how to define sex when gender identity differs from birth-assigned sex. *See infra*, Section III.C. Medical authorities have, however, and they agree that gender identity is the critical determinant of sex in that situation.[9] JA110-12. Indeed, they also confirm that gender identity has biological roots, JA109, a fact that further undermines the erroneous premise of Defendants' authorities. *Cf. Etsitty*, 502 F.3d at 1221-22 (noting that "[s]cientific research may someday cause a shift" in understanding sex and "the possibility that sexual identity may be biological suggests reevaluating whether transsexuals are a protected class").

[8] It is no answer to dismiss this scenario as rare, Defs.' Br. 55-56, because transgender people are also a small minority. Indeed, it is only when sex-related characteristics are not in typical alignment—which only happens atypically—that it becomes necessary to ascertain what determines an individual's sex.

[9] Defendants admit they failed to rebut Plaintiffs' showing on this point, but assert they have "now" offered evidence below. Defs.' Br. 40 n.15. Their burden was to substantiate a justification for H.B.2 *before* the district court's preliminary injunction ruling—not *after*.

C. Government Discrimination Against Transgender People Is Inherently Suspect and Requires Strict Scrutiny.

Defendants do not challenge Plaintiffs' showing that discrimination against transgender people rings each and every alarm bell alerting courts that a government classification calls for careful judicial scrutiny. They do not deny that transgender people have suffered an ugly and painful history of discrimination, which continues to this day. They do not contest that being transgender has no bearing on an individual's ability to contribute to society. They do not doubt that transgender people lack sufficient political power to prevent discrimination. They do not show that transgender people can voluntarily change their gender identity.[10]

Instead, Defendants argue that transgender people are not a sufficiently "discrete" class because they supposedly lack any common feature. But every transgender person shares a single defining characteristic: a gender identity different from their birth-assigned sex. Plaintiffs' expert testimony also established that "'gender identity' is a well-established concept" and "firmly established early in life." JA133. The fact that transgender individuals may be "diverse" in a variety of ways (including which transition steps they may have taken) is therefore irrelevant to whether they constitute a class. Defs.' Br. 26.

[10] Defendants argue that gender dysphoria desists for some children, but that does not show that gender identity is under voluntary control for them, let alone for those whose gender dysphoria persists beyond childhood. *See* JA109, JA133.

Defendants do not explain why this definition of transgender people is insufficient to constitute a suspect class given that there is no question that being transgender is unrelated to the ability to contribute to society. In *City of Cleburne v. Cleburne Living Center*, the Supreme Court held that discrimination based on disability was not subject to heightened scrutiny because, according to the Court, one's disability has a bearing on one's ability to function in everyday life. 473 U.S. 432, 442-43 (1985). The Court explained, in the course of analyzing *that* factor, that individuals with disabilities may differ from one another "in relevant respects" that would generally allow for permissible classification by the government—in contrast to traits that would "seldom" allow for permissible classification. *Id.* at 440, 442. Here, apart from the contested issue of access to facilities, Defendants do not argue that being transgender would generally give rise to permissible government classification. *Cf. id.* at 446.

Furthermore, Defendants' arguments for why transgender people are insufficiently "discrete" prove too much, because no group could qualify for protection as a suspect class by Defendants' metric. For example, an individual can be biracial or multiracial, but that does not negate that a racial minority constitutes a discrete class for equal protection purposes. Likewise, many courts have recognized that sexual orientation merits heightened scrutiny, even though sexual attraction to men or women can fall along a continuum. *See, e.g.*, *Windsor*

v. United States, 699 F.3d 169, 181-85 (2d Cir. 2012) ("homosexuality is a sufficiently discernible characteristic to define a discrete minority class").

Defendants assert that there are "occasionally" some transgender individuals whose gender identity does not fall within the norm. Defs.' Br. 13-14. But a similar point could be made about anatomical sex-related characteristics. JA113-16 (describing intersex conditions). The majority of people, however, have a male or female gender identity. JA639.

Perhaps most instructive for purposes of heightened scrutiny, the government is perfectly capable of identifying and targeting transgender people for harmful differential treatment. The continuing history of discrimination against transgender people makes that abundantly clear.

Rather than fully engage on the merits, Defendants instead claim that Plaintiffs have waived strict scrutiny. But Plaintiffs consistently pressed for "heightened scrutiny," *see generally* Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction (D.E. 22), a phrase that this Court has held includes strict scrutiny as a matter of law. *See Bostic v. Schaefer*, 760 F.3d 352, 375 (4th Cir. 2014) (deciding whether "some form of heightened scrutiny, such as strict scrutiny" should apply); *Glenn*, 663 F.3d at 1315 n.4 ("Heightened scrutiny is composed of intermediate scrutiny and strict scrutiny").

To be sure, heightened scrutiny includes intermediate scrutiny—which Plaintiffs agreed should *also* apply—but they never claimed that strict scrutiny should *not* apply. Instead, Plaintiffs' counsel explained at the hearing that "we have made a number of different arguments" for heightened scrutiny, including sex discrimination arguments for intermediate scrutiny. JA800. But the district court recognized that Plaintiffs also argued transgender people "qualify as a suspect class." JA959 n.30. Plaintiffs further explained that H.B.2 is not justified by "compelling state interests" or "narrowly drawn" under due process "for all the same reasons it cannot withstand the heightened equal protection standard." D.E. 22 at 38. In short, strict scrutiny was never waived; but even if H.B.2 is construed—at a minimum—as discriminating based on a quasi-suspect classification, it could not survive.

III. Defendants Failed To Satisfy Their Heavy Burden Of Demonstrating An Exceedingly Persuasive Justification For H.B.2 On The Record Below.

A. The Finding That Transgender Individuals Previously Used Public Facilities Without Harming Privacy Is Fatal To H.B.2.

This Court need look no further than the district court's own factual findings to see why its privacy rationale was legally erroneous.[11] The district court found

[11] Defendants assert that constitutional issues should not be decided on a preliminary basis, but their cited authority does not support that proposition, and reversal *or* affirmance would not avoid deciding such issues. Defs.' Br. 22-23 (citing authority that ruled on likelihood of success of constitutional claim).

"*uncontested evidence*" that transgender individuals like Plaintiffs had long used facilities consistent with their gender identity "without causing any known infringement on the privacy rights of others." JA986 (emphasis in original); *see* JA954-55, JA987. This finding forecloses a legal conclusion that H.B.2 bears a substantial or necessary relationship to a government interest in privacy (or, for that matter, safety—which Defendants have all but abandoned).[12]

Defendants assert that this finding is irrelevant, but it conclusively refutes the supposed harms that a preliminary injunction would cause. Indeed, the district court's finding fatally undermines its legal justification for H.B.2, *regardless* of the precise meaning of sex or whether birth certificates are reliable proxies for genitalia among transgender individuals. The district court found that Plaintiffs had used facilities matching their gender identity without causing anyone harm—notwithstanding the court's belief that Plaintiffs' birth certificates "accurately" reflect their genitalia rather than their gender identity. JA967. That powerfully illustrates how, even if H.B.2 could ascertain genitalia with perfect precision, it would still be insufficient to carry Defendants' burden of showing a sufficient relationship to privacy as a matter of law.

[12] Defendants only mention safety in passing, without responding to Plaintiffs' showing that nondiscrimination protections do not harm safety. Pls.' Br. 43-46; JA168-245.

The district court was correct—and certainly not clearly erroneous—to reject Defendants' assertion that transgender individuals' use of facilities matching their gender identity was "an aberration rather than the prevailing norm in North Carolina" before H.B.2. JA921. Defendants protest that there was "sparse" evidence, which they assert could not support a reasonable inference that transgender individuals used facilities matching their gender identity on a "widespread" basis. Defs.' Br. 61 n.21. But, under heightened scrutiny, the burden was on *Defendants*, not Plaintiffs. *Virginia*, 518 U.S. at 533. Specifically, Defendants' burden was to justify the law "applying a blanket rule to all [transgender] people in all facilities under all circumstances." JA990.

Defendants failed to introduce any evidence to substantiate their privacy rationale. *Cf. Bd. of Educ. of the Highland Local Sch. Dist., v. U.S. Dep't of Educ.*, No. 2:16-CV-524, — F. Supp. 3d —, 2016 WL 5372349, at *17 (S.D. Ohio Sept. 26, 2016) ("*Highland*") (rejecting school's privacy justification as speculative and lacking any factual underpinning), *appeal docketed*, No. 16-4107 (6th Cir. Sept. 28, 2016). The district court did not mince words: "Defendants have not offered any evidence whatsoever," "despite having four months between the filing of this lawsuit and the hearing." JA921; *accord* JA914 n.3 (confirming Defendants' intent not to offer additional exhibits or testimony), JA954 (emphasizing lack of evidence). Indeed, Defendants *agreed* that transgender individuals had used

facilities matching their gender identity before H.B.2 without "any problem." JA832; *see* JA988.

Perplexingly, Defendants now assert that the district court "found ample evidence" to support its privacy rationale. Defs.' Br. 62. Their cited "evidence" consists entirely of statements by legislators (which Defendants never presented to the district court[13]) expressing a *subjective* belief that transgender people posed a threat to "the safety and privacy of women and children"—without any factual support to substantiate those fears. *Id.* at 62 n.23. If that can justify H.B.2, then the law's mere title, "Public Facilities Privacy and Security Act," would have sufficed. Equal protection requires more than abstract fear projected into law. *See Virginia*, 518 U.S. at 544-45 (rejecting "fears" based on the inclusion of women as not "solidly grounded"). Indeed, fear and misunderstanding of historically marginalized groups is a core reason why heightened scrutiny exists in the first place. Defendants cannot satisfy their heavy burden with armchair theorizing of imagined harms, such as hypothetical 17-year-olds showering with hypothetical 12-year-olds, all while ignoring the evidence that those harms have not transpired in reality. These supposed harms are predictions "hardly proved." *Id.* at 542.

[13] Defendants assert that legislative transcripts were unavailable, but audio recordings were publicly available, and Defendants were free to introduce relevant portions—as Plaintiffs did. JA417.

The refrain that H.B.2 reflects "common sense" also does not substitute for evidence. Defs.' Br. 6-7, 53, 62. This Court recently made that clear in invalidating, under intermediate scrutiny, a North Carolina statute barring individuals convicted of certain sex offenses, including with solely adult victims, from places associated with minors. *Doe v. Cooper*, No. 16-1596, — F.3d —, 2016 WL 6994223, at *8-9 (4th Cir. Nov. 30, 2016). The government's appeals to "logic and common sense"—but unaccompanied by "credible evidence"—were insufficient to carry its burden of demonstrating a substantial relationship to its objectives. *Id.*

While Defendants' failure to carry their heightened-scrutiny burden is itself fatal, Plaintiffs also introduced evidence demonstrating that, pre-H.B.2, a range of transgender individuals had used public facilities matching their gender identity without issue. That includes the three individual transgender Plaintiffs, who used such facilities at UNC's campuses and elsewhere. JA127-30, JA159-61, JA164-67, JA913-14. On that basis alone, the denial of a preliminary injunction covering all North Carolina public facilities was unsupportable as to the individual transgender Plaintiffs. But Plaintiffs also documented the experiences of transgender ACLU-NC members, JA249-53, school officials working with transgender students, JA281-87, and schools adopting policies and practices that respect each student's gender identity, JA568-69. *See also, generally*, Amicus

Curiae Brief of School Administrators (D.E. 87). Further, Plaintiffs presented expert testimony explaining that social role transition—including the use of facilities matching one's gender identity—is an "undeniable necessity for transgender individuals," undertaken because affords benefits "[f]or the majority of transgender people." JA137-39. In sum, it was not clearly erroneous for the court to find that these practices—unaccompanied by any harm—were the "prevailing norm" rather than mere "aberration[s]." JA921. On this basis alone, Plaintiffs established a likelihood of success on the merits.

B. The Government Can Protect Privacy Without H.B.2's Exclusion Of Transgender People From Public Facilities.

There are multiple reasons why the pre-H.B.2 practices discussed above did not spark the privacy violations that Defendants imagine. As a threshold matter, Defendants do not dispute the existence and availability of privacy partitions in public facilities. JA955. Instead, they assert that such partitions are "not solid" and are different "in kind" from H.B.2's separation of facilities by birth certificate gender markers. Defs.' Br. 57. But Defendants' privacy justification, and the legal authority they cite, presupposes *visual* exposure of one's genitalia (and *involuntary* exposure, which is also absent here). *See, e.g.*, *Lee v. Downs*, 641 F.2d 1117, 1120 (4th Cir. 1989) (multiple guards watched the forcible removal of a prisoner's undergarments). Opaque privacy barriers—of whatever construction—address visual exposure. For example, despite Defendants' apparent belief that stall

dividers are "not solid," there is no meaningful risk of exposure to nudity in restrooms. JA783, JA919, JA951. Defendants also cannot explain how facilities were perceptibly different "in kind" before H.B.2. Rather, they admit that, even after H.B.2, "'some transgender individuals will continue to use the bathroom that they always used and nobody will know.'" JA986, JA836.

Furthermore, Defendants acknowledge that anyone who wants to avoid a transgender person can take steps to accomplish that goal, such as by changing their clothes in a more private area, without suffering any of the class-based stigma that H.B.2 inflicts on transgender people. JA568-69; *Cruzan v. Special Sch. Dist. No. 1*, 294 F.3d 981, 984 (8th Cir. 2002). Defendants failed to offer any "credible evidence" to explain why these solutions are insufficient. *Doe*, 2016 WL 6994223, at *9. Instead, they falsely assert that solutions that numerous jurisdictions, schools, and businesses have adopted "would be akin to abolishing locker rooms and multi-user facilities altogether." Defs.' Br. 57. But individuals who prefer greater privacy for whatever reason—including modesty about being undressed in front of *anyone*—have always been able to protect their own privacy, without altering the multi-user character of facilities. JA919.

To the extent that an individual objects to *being seen* by transgender people, H.B.2 also draws a particularly irrational line. For example, whether a non-transgender man has a valid objection to being seen by Mr. McGarry while he

washes his hands in the men's restroom cannot logically turn on whether Mr. McGarry has had genital surgery and updated his birth certificate. Either way, the non-transgender man is still being seen (or not) by Mr. McGarry—and without knowing the gender marker on Mr. McGarry's birth certificate.[14]

Conversely, to the extent that an individual objects to *seeing* transgender people, Defendants do not dispute the district court's finding that "for obvious reasons, transgender individuals generally seek to avoid having their nude or partially nude bodies exposed." JA914. Tellingly, despite an estimated 44,000 transgender North Carolinians—each interacting with hundreds of other individuals—Defendants failed to present a single witness in North Carolina who even knowingly saw and objected to a transgender individual using any facility. And, whether transgender or not, it remains illegal under North Carolina law to gratuitously expose one's private parts to another. N.C. Gen. Stat. § 14-190.9.

Ultimately, H.B.2 undermines both purported privacy interests—seeing transgender people and being seeing by them—by relegating transgender people to facilities that visibly conflict with their gender identity. *Cf. Rubin v. Coors Brewing Co.*, 514 US. 476, 489 (1995) (a law cannot "directly and materially advance its aim" where other aspects of the law "counteract its effects").

[14] Defendants also do not argue, and could not credibly argue, that transgender people seek access to facilities matching their gender identity for any sexual or predatory purpose. JA987.

Defendants do not challenge the district court's finding that women will feel "alarm" by Mr. Carcaño's presence in women's facilities, because they accurately perceive him as a man, JA 986—underscoring that, even as a matter of perception, sex does not reduce to genitalia. These women will hardly be reassured by his disclosure that he is transgender—although such a disclosure will certainly jeopardize *his* safety.

Defendants' fallback argument is that, even where no one's body is subject to view, those who object to being in the mere "vicinity" of transgender individuals have the legal right to oust such individuals from communal spaces. Defs.' Br. 57 (citing JA917). Discomfort with the mere presence of members of a minority group is not a valid government justification for excluding them and causing them harm under any level of scrutiny. *Cleburne*, 473 U.S. at 448 (holding that fear and negative attitudes cannot justify singling out one group for unequal treatment); *Highland*, 2016 WL 5372349, at *17 (rejecting school's argument that transgender student's mere presence in the girls' restroom "would compromise anyone's privacy interests"). Defendants present no limiting principle about what other forms of discomfort might justify breaches of equality. And, as noted above, H.B.2 in fact *causes* discomfort and alarm.

C. Defendants' Authorities Do Not Support Their Privacy Justification.

Defendants' reliance on the sex discrimination cases cited by the district court (*Virginia*, 518 U.S. at 550; *Nguyen v. INS*, 533 U.S. 53 (2001); *Bauer*, 812 F.3d at 350; *Faulkner v. Jones*, 10 F.3d 226 (4th Cir. 1993)) is also misplaced. First, separating restrooms and similar facilities on the basis of sex, if done in a way that respects individuals' gender identity, *can* be accomplished in ways that do not necessarily cause harm or stigma. These authorities never held that privacy can justify separation where it is harmful and stigmatizing—rather, they denounced such separation. *Virginia*, 518 U.S. at 547 (holding that separate training program created for women was "unequal in tangible and intangible" ways). While separating restrooms and similar facilities on the basis of sex does not stigmatize one group as inferior, excluding transgender individuals from those spaces, as H.B.2 does, subjects them to harmful and stigmatizing treatment.

Second, to the extent these cases addressed privacy at all, they underscored that privacy justifications must be factually proven—not assumed. *Virginia* recognized that a shift from admitting only men to admitting both men and women would entail changes. But, in discussing alterations to living arrangements, the Supreme Court explained that "[e]xperience shows such adjustments are manageable" and cited as evidence the experience of other military institutions that had successfully admitted women. 518 U.S. at 550 n.19. Here, by contrast,

Defendants failed to present any evidence to meet their burden of showing why the practices existing before H.B.2—in which transgender individuals like Plaintiffs were already using facilities matching their gender identity—were not "manageable." In fact, Plaintiffs offered a plethora of "uncontested" evidence, JA986, demonstrating that this practice has been wholly manageable in North Carolina and elsewhere.

Third, cases about admission to military academies, proof of parentage, and law enforcement fitness requirements are grossly inapposite to the exclusion of transgender individuals from facilities matching their gender identity.[15] Contrary to Defendants' suggestion, none of these cases ever defined sex—nor purported to do so—because that question was never presented. Beyond the fact that none of these cases involved transgender individuals, there was never any doubt about the sex of the litigants. And, while Defendants portray these authorities as somehow affirming discrimination, they generally ruled *against* discrimination and *in favor* of inclusion, whether by invalidating the exclusion of women from military

[15] For example, Defendants state that *Virginia* permitted adjustments to military standards "because of physiological differences," Defs.' Br. 45, but that passage referred to "adjust[ing] aspects of the physical training programs." 518 U.S. at 550 n.19. Accounting for sex-related differences to ensure an individual is sufficiently strong or healthy for a task (which was also the issue in *Bauer*) or to ensure an individual is actually the parent of a child (*Nguyen*) is a far cry from the facts here. Defendants do not suggest, for instance, that Plaintiffs are somehow physically incapable of using toilets in the restrooms to which they seek access.

academies (*Virginia*; *Faulkner*) or by upholding policies facilitating the inclusion of women in law enforcement (*Bauer*).

Defendants' insistence that *Nguyen*—a case about proving parentage—compels H.B.2's constitutionality is confounding. Only one person gives birth to a child. *Nguyen* held that it was permissible to take that "unique" fact of the birth process into account in determining citizenship. 533 U.S. at 64. Defendants cannot explain how *Nguyen* dictates which facilities transgender people must use. Moreover, in stark contrast to H.B.2, the statutory scheme in *Nguyen* was "not marked by misconception and prejudice, nor does it show disrespect for either class." *Id.* at 73. To the extent Defendants claim that any sex discrimination based on "biological characteristics" is permissible, or insulated from sex stereotypes, Defs.' Br. 46, that is false for the reasons explained above, *see supra*, Section II.B.

D. Defendants Cannot Show That H.B.2's Categorical Exclusion Of Transgender Individuals Like Plaintiffs Is Adequately Tailored.

Government action like H.B.2 that *categorically* excludes an entire group of people like Plaintiffs from public facilities consistent with their gender identity, and causes harm as a result, lacks a substantial relationship to an important government interest. *See Virginia*, 518 U.S. at 546 (goal of producing citizen-soldiers was "not substantially advanced by women's categorical exclusion"); *Knussman v. Maryland*, 272 F.3d 625, 637 (4th Cir. 2001) ("irrebutable

presumption" that male employees could not qualify for primary-caregiver leave was not substantially related to an important interest).

H.B.2 is a blunt instrument. As the district court noted, it creates a "wholesale ban" that blocks privacy accommodations tailored to particular circumstances. JA955; *see* JA919-21. Before H.B.2, schools were able to treat transgender students equally *and* tailor accommodations for students desiring greater privacy, for whatever reason. JA568-69. As illustrated by the preliminary injunction covering UNC facilities, this Court can remove H.B.2's categorical bar and restore the ability to tailor to individual circumstances. JA990; *see Ne. Fla. Chap.*, 508 U.S. at 666.

Defendants' attempts to portray H.B.2 as a tailored law are baseless. First, Defendants assert that reliance on birth certificates serves bodily privacy for at least 99% of individuals. As noted above, that figure improperly combines both transgender and non-transgender individuals, and Defendants' observation that the figure is national in scope is a *non sequitur*. H.B.2 created a "new restriction" only for transgender individuals, JA984, and birth certificates are unreliable proxies for genitalia *as to them*.

Defendants assert that reliance on birth certificates is at least *more* tailored to bodily privacy than reliance on gender identity. In *Doe*, this Court rejected the government's similar, "conclusory assertion that minors would be 'more exposed

to harm without [the law] than with it.'" 2016 WL 6994223, at *9. Furthermore, by Defendants' logic, stationing government officials to perform genital checks outside public facilities might be the *most* tailored measure. But it would be perfectly tailored to nothing at all, because, as with H.B.2, there is no demonstrated problem in need of solving. *See Virginia*, 518 U.S. at 542-45. In fact, as noted above, H.B.2 *creates* problems by forcing transgender individuals into facilities that visibly conflict with their gender identity.

Second, the fact that H.B.2 is "limited" to multiple-occupancy facilities is cold comfort, because single-occupancy facilities are generally unavailable. JA981. Defendants also assert that H.B.2 does not stigmatize Plaintiffs because they are not "required" to use only single-occupancy facilities. Defs.' Br. 57. But, in reality, those are the only facilities that transgender individuals like Plaintiffs can use. They cannot use facilities matching their birth certificates, including because of harm to their health, JA137-40, and exposure to harassment and violence, JA982. The combined effect of all this is that transgender individuals like Plaintiffs are not merely excluded from public facilities but from public life itself. Pls.' Br. 60.

Third, Defendants boast that H.B.2 supposedly showcases legislative *restraint* because it leaves non-governmental facilities untouched. But Defendants cannot simultaneously assert with any credibility that (1) transgender people like

Plaintiffs must be categorically banned from public facilities matching their gender identity because their exclusion is *substantially* related to solving a *real* problem, but that (2) H.B.2 deserves praise for letting businesses "experiment" with a practice that, according to Defendants, has calamitous results. H.B.2 is "at once too narrow and too broad." *Romer v. Evans*, 517 U.S. 620, 633 (1996). Even setting aside the issue of tailoring, it is revealing that Defendants were unable to substantiate their privacy fears through the thousands of North Carolina businesses without a discriminatory mandate like H.B.2. The imagined parade of horribles never came to pass.

Fourth, H.B.2 is not adequately tailored simply because some transgender individuals who have had genital surgery can access facilities matching their gender identity. H.B.2 looks to birth certificates, not surgery. *See supra*, Section I.B. Furthermore, transgender individuals like Plaintiffs who have not had genital surgery are no threat to anyone's privacy. *See supra*, Section III.A-B.

Finally, Defendants admit that H.B.2 was a "response" to Charlotte's ordinance, Defs.' Br. 4, but that only explains H.B.2's preemption provisions—not the discriminatory mandate in Part I, challenged here. Having survived for hundreds of years without such a mandate, like every other state in the country, North Carolina can surely survive without Part I of H.B.2 while this litigation proceeds.

IV. Defendants Have Failed To Contest the Remaining Factors Warranting Entry Of A Preliminary Injunction.

Defendants do not offer—and have therefore waived—any substantive rebuttal of Plaintiffs' showing that a preliminary injunction is necessary to prevent irreparable harm, that the balance of equities tips sharply in favor of an injunction, and that an injunction would promote the public interest.[16] Instead, Defendants plead for a remand so they may have a "do-over" before the district court, in light of their earlier failure to offer "any evidence whatsoever." JA921. They are entitled to remand, they say, because months *after* their deadline for opposing Plaintiffs' motion for a preliminary injunction, *after* the district court confirmed Defendants' choice not to offer evidence, and *after* the district court had already issued its injunction, they finally "supplemented" the record in this case. Defs.' Br. 63-64 (citing D.E. 173, filed October 28, 2016); JA914 n.3.

Defendants cannot be rewarded for their dilatory conduct, lest all litigants be allowed to seek remand simply by filing new evidence after the district court rules. And Defendants' own characterization of their new evidence belies their assertion that it addresses "the three equitable factors" rather than seeking to substantiate

[16] Defendants argue only that Plaintiffs cannot demonstrate a "clear" likelihood of success. But the relevant standard is a *likelihood* of success—not "a certainty of success." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) (quotation marks omitted) (reversing denial of preliminary injunction over dissent's objection that likelihood of success was insufficiently "clear").

Defendants' argument on the merits. Defs.' Br. 63-65. In sum, Defendants seek to re-litigate the entire preliminary injunction on an entirely new record; but, by their nature, preliminary injunctions are decided on the record that exists at the time.

To be sure, Plaintiffs agree with Defendants that the stakes here are significant—the staggering 41 percent of transgender individuals who attempt suicide makes that painfully clear, JA138—but that makes Defendants' wholesale failure to meet their burden all the more inexcusable. While the preliminary injunction that was granted applied a small bandage to H.B.2's harms, it was limited to three individuals—and even as to them, to UNC's campuses—leaving thousands of individuals unprotected and H.B.2's discrimination fully in place at thousands of public facilities. Pls.' Br. 56-61.

CONCLUSION

Plaintiffs respectfully request reversal and remand for entry of a preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the version of the Federal Rules of Appellate Procedure in effect prior to December 1, 2016, because it is 6,997 words, excluding the parts of the brief exempted by Rule 32(f) (formerly Rule 32(a)(7)(B)(iii)). *See* Notice Regarding Implementation of December 1, 2016, Amendments to the Federal Rules of Appellate Procedure (4th Cir. Nov. 14, 2016).

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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CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2016, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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