

**IN THE 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

**BRIEF OF AMICI CURIAE NATIONAL CENTER FOR LESBIAN
RIGHTS, GLBTQ LEGAL ADVOCATES & DEFENDERS, THE
NATIONAL CENTER FOR TRANSGENDER EQUALITY, FORGE, THE
TRANSGENDER LAW & POLICY INSTITUTE, AND TRANS PEOPLE OF
COLOR COALITION IN SUPPORT OF REVERSAL ON BEHALF OF
PLAINTIFFS-APPELLANTS**

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Counsel for Amici Curiae

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? YES NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) YES NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? YES NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s Shannon P. Minter

Date: October 25, 2016

Counsel for: Amicus

CERTIFICATE OF SERVICE

I certify that on October 25, 2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s Shannon P. Minter
(signature)

October 25, 2016
(date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 16-1989 Caption: Carcano et al. v. McCrory et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

GLBTQ Legal Advocates and Defenders
(name of party/amicus)

who is amicus , makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES NO

2. Does party/amicus have any parent corporations? YES NO
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3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES NO
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No. 16-1989 Caption: Carcano et al. v. McCrory et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

National Center for Transgender Equality
(name of party/amicus)

who is _____ amicus _____, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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No. 16-1989 Caption: Carcano et al. v. McCrory et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Trans People of Color Coalition
(name of party/amicus)

who is _____ amicus _____, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Transgender Law and Policy Institute
(name of party/amicus)

who is _____ amicus _____, makes the following disclosure:
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FORGE
(name of party/amicus)

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TABLE OF AUTHORITIES

CASES

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<i>Bd. of Educ. of the Highland Local Sch. Dist.</i> , No. 2:16-CV-524, 2016 WL 5372349 (S.D. Ohio Sept. 26, 2016).....	3, 5, 13, 22
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<i>Brocksmith v. United States</i> , 99 A.3d 690 (D.C. 2014).....	5
<i>Carcano v. McCrory Berger</i> , No. 1:16-CV-236, 2016 WL 4508192 (M.D.N.C. Aug. 26, 2016).....	17, 21, 24
<i>City of Cleburne, Tex. v. City of Cleburne Living Ctr.</i> , 473 U.S. 432 (1985).....	5, 25
<i>Daly v. Daly</i> , 102 Nev. 66, 715 P.2d 56 (1986).....	6
<i>Doe v. McConn</i> , 489 F. Supp. 76 (S.D. Tex. 1980).....	6
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<i>Frontiero v. Richardson</i> , 411 U.S. 677 (1973).....	4, 14
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<i>Hernandez-Montiel v. I.N.S.</i> , 225 F.3d 1084 (9th Cir. 2000).....	13
<i>In re Estate of Gardiner</i> , 273 Kan. 191, 42 P.3d 120 (2002).....	6
<i>In re Marriage Cases</i> , 43 Cal.4th 757, 183 P.3d 384 (2008).....	20
<i>Kitchen v. Herbert</i> , 755 F.3d 1193 (10th Cir. 2014).....	20
<i>Littleton v. Prange</i> , 9 S.W.3d 223 (Tex. App. 1999).....	6
<i>Lyng v. Castillo</i> , 477 U.S. 635 (1986).....	4, 12
<i>Mass Bd. of Ret. v. Murgia</i> , 427 U.S. 307 (1976).....	4
<i>Norsworthy v. Beard</i> , 87 F. Supp. 3d 1104 (N.D. Cal. 2015).....	3
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<i>Romer v. Evans</i> , 517 U.S. 620 (1996).....	18, 24
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<i>Texas v. United States</i> , Civil Action No. 7:16-cv-00054-O, 2016 U.S. Dist. LEXIS 113459 (N.D. Tex. Aug. 21, 2016).....	9
<i>United States v. Virginia</i> , 518 U.S. 515 (1996).....	3, 18
<i>Windsor v. United States</i> , 699 F.3d 169 (2d Cir. 2012), <i>aff'd</i> , 133 S. Ct. 2675 (2013).....	4, 14

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Mass. Gen. Laws ch. 46, § 13	26
Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, §§ 4701-13, 123 Stat. 2190, 2835-44 (2009)....	15
Md. Code, Health-Gen. § 4-211.....	26
Or. Rev. Stat. § 33.460.....	26
Protecting Freedom of Conscience from Government Discrimination Act, Miss. Laws 2016, HB 1523 § 2 (eff. July 1, 2016), http://billstatus.ls.state.ms.us/documents/2016/html/HB/1500-1599/HB1523SG.htm	8
R.I. Admin. Code § 31-1-29:35.0.....	26
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OTHER AUTHORITIES

AGNES GEREKEN SCHAEFER ET AL., RAND CORP., ASSESSING THE IMPLICATIONS OF ALLOWING TRANSGENDER PERSONNEL TO SERVE OPENLY (2016), http://www.rand.org/content/dam/rand/pubs/research_reports/RR1500/RR1530/RAND_RR1530.pdf	10
Alison Bauter, <i>Repeal of Transgender Law Lands on 2018 Massachusetts Ballot</i> , BEACON HILL PATCH (Oct. 12, 2016),	

http://patch.com/massachusetts/beaconhill/repeal-transgender-anti-discrimination-law-lands-2018-massachusetts-ballot	15
Amy Kapczynski, <i>Same-Sex Privacy and the Limits of Anti-Discrimination Law</i> , 112 YALE L.J. 1257, 1276 (2003).....	21
ANN P. HAAS ET AL., WILLIAMS INST., SUICIDE ATTEMPTS AMONG TRANSGENDER AND GENDER NON-CONFORMING ADULTS: FINDINGS OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY (2014), http://williamsinstitute.law.ucla.edu/wp-content/uploads/AFSP-Williams-Suicide-Report-Final.pdf	7
Aruna Saraswat et al., <i>Evidence Supporting the Biologic Nature of Gender Identity</i> , 21 ENDOCRINE PRACTICE 199 (2015), https://www.ncbi.nlm.nih.gov/pubmed/25667367	13
Associated Press, <i>Ohio Judge Orders Girls' Bathroom Access for Transgender Student</i> , FOX NEWS (Sept. 27, 2016), http://www.foxnews.com/us/2016/09/27/ohio-judge-orders-girls-bathroom-access-for-transgender-student.html	9
Associated Press, <i>Minnesota School District Sued Over Transgender Bathroom Policy</i> , TWIN CITIES PIONEER PRESS (Sept. 9, 2016), http://www.twincities.com/2016/09/09/minnesota-school-district-sued-over-transgender-bathroom-policy/	10
Bill Miller, <i>D.C. Settles Bias Suit in 1995 Death</i> , WASHINGTON POST (Aug. 11, 2000), https://www.washingtonpost.com/archive/local/2000/08/11/dc-settles-bias-suit-in-1995-death/5c0720e1-5cc6-454c-bdae-2545873ec59b/	8
Births, Deaths, Marriages, and Relationships Registration Act 1995 (N.Z.), http://www.legislation.govt.nz/act/public/1995/0016/latest/DLM359369.html	26
<i>Changing Birth Certificate Sex Designations: State-By-State Guidelines</i> , LAMBDA LEGAL, http://www.lambdalegal.org/know-your-rights/article/trans-changing-birth-certificate-sex-designations (last updated Feb. 3, 2015).....	27
COMMONWEALTH OF AUSTRALIA, AUSTRALIAN GOVERNMENT GUIDELINES ON THE RECOGNITION OF SEX AND GENDER (2013), http://www.ag.gov.au/Publications/Documents/AustralianGovernmentGuidelinesontheRecognitionofSexandGender/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.PDF	26
Complaint, Horizon Christian Fellowship, et al. v. Williamson, et al., No. 1:16-cv-12034-PBS (D. Mass. Oct. 11, 2016).....	15
Complaint, Nebraska v. United States, Civil Action No. 4:16-cv-03117 (D. Neb. Jul. 8, 16).....	9

<i>Conforming Birth Certificate Policies to Current Medical Standards for Transgender Patients H-65.967</i> , AM. MEDICAL ASS'N, https://searchpf.ama-assn.org/SearchML/searchDetails.action?uri=%2FAMADoc%2FHOD.xml-0-5096.xml	27
Daniel Wiessner, <i>More States Sue Obama Administration Over Transgender Directive</i> , REUTERS (Jul. 8, 2016), http://www.reuters.com/article/us-usa-lgbt-lawsuit-idUSKCN0ZO2B4..	9
Dawn Rhodes & Duaa Eldeib, <i>No Decision from Judge on Barring Transgender Student from Locker Room</i> , CHICAGO TRIBUNE (Aug. 15, 2016), http://www.chicagotribune.com/news/local/breaking/ct-transgender-lawsuit-palatine-met-20160815-story.html	9
<i>Document Requirements to Amend a Birth Record</i> , MINN. DEP'T OF HEALTH, http://www.health.state.mn.us/divs/chs/osr/reqdocs.html	26
Erving Goffman, <i>The Arrangement Between the Sexes</i> , 4 THEORY & SOC'Y 301 (1977).....	22
Eve Glicksman, <i>Transgender Today</i> , 44 AM. PSYCHOLOGICAL ASS'N 36 (2013), http://www.apa.org/monitor/2013/04/transgender.aspx	11
GALE S. POLLOCK & SHANNON MINTER, PALM CTR., REPORT OF THE PLANNING COMMISSION ON TRANSGENDER MILITARY SERVICE (2014), http://www.palmcenter.org/wp-content/uploads/2014/08/Report-of-Planning-Commission-on-Transgender-Military-Service_0-2.pdf	10
<i>Gender Change on a Birth Certificate</i> , Wash. State Dep't of Health, http://www.doh.wa.gov/LicensesPermitsandCertificates/BirthDeathMarriageandDivorce/GenderChange	26
<i>Guidelines for Psychological Practice With Transgender and Gender Nonconforming People</i> , 70 AM. PSYCHOLOGICAL ASS'N 832 (2015), http://www.apa.org/practice/guidelines/transgender.pdf	6, 8
HUMAN RIGHTS CAMPAIGN, CORPORATE EQUALITY INDEX 2016: RATING AMERICAN WORKPLACES ON LESBIAN, BISEXUAL AND TRANSGENDER EQUALITY (2015), http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/CEI-2016-FullReport.pdf	11
Jan Hoffman, <i>Estimate of U.S. Transgender Population Doubles to 1.4 Million Adults</i> , N.Y. TIMES (June 30, 2016), http://www.nytimes.com/2016/07/01/health/transgender-population.html	14
Joellen Kralik, <i>"Bathroom Bill" Legislative Tracking</i> , NAT'L CONFERENCE STATE LEGISLATURES (Aug. 30, 2016), http://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking635951130.aspx	8

Katy Steinmetz, *Being Transgender Is Not a Mental Illness*, TIME MAGAZINE (July 26, 2016), <http://time.com/4424589/being-transgender-is-not-a-mental-disorder-study/>..... 11

LADIES AND GENTS: PUBLIC TOILETS AND GENDER (Olga Gershenson & Barbara Penner eds., 2009)..... 22

Letter from Guy Warner, Director, N.Y. State Dep’t of Health, Bureau of Vital Records, N.Y STATE DEP’T OF HEALTH (Sept. 28, 2015), <http://www.transequality.org/sites/default/files/docs/id/Instruction%20sheet%2005-23-14.docx#overlay-context=documents/state/new-york>..... 26

Lisa Mottet, *Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People*, 19 MICH. J. GENDER & L. 373 (2013)..... 27

Matthew Rosenberg, *Transgender People Will Be Allowed to Serve Openly in Military*, N.Y. TIMES (June 30, 2016), <http://www.nytimes.com/2016/07/01/us/transgender-military.html>..... 15

NAT’L COALITION ANTI-VIOLENCE PROGRAMS, LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER, AND HIV-AFFECTED INTIMATE PARTNER VIOLENCE IN 2015: A REPORT FROM THE NATIONAL COALITION OF ANTI VIOLENCE PROGRAMS (2016), http://www.avp.org/storage/documents/2015_ncavp_lgbtqipvreport.pdf. 6

NAT’L COLLEGIATE ATHLETIC ASS’N, NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES (2011), https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf..... 11

NAT’L CTR. TRANSGENDER EQUALITY & NATIONAL GAY AND LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY (2012), http://www.transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf..... 7

LAMBDA LEGAL, WHEN HEALTH CARE ISN’T CARING: TRANSGENDER AND GENDER-NONCONFORMING PEOPLE (2010), http://www.lambdalegal.org/sites/default/files/publications/downloads/whcic-insert_transgender-and-gender-nonconforming-people.pdf..... 7

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Terry S. Kogan, <i>Sex-Separation in the Public Restrooms: Law, Architecture, and Gender</i> , 14 MICH. J. GENDER & L. 1 (2007).....	23
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INTEREST OF *AMICI CURIAE*¹

Amici are a coalition of civil and human rights groups and legal service organizations committed to preventing, combatting, and redressing discrimination and protecting the equal rights of transgender individuals.² *Amici* submit this brief in support of Appellants to ensure that the Constitution's guarantees of equal protection effectively protect transgender persons. All *amici* have given their authorization to have this brief filed on their behalf.

¹ The parties have consented to the filing of this brief. The parties and counsel for the parties have not contributed money that was intended to fund preparing or submitting this brief. No person other than the amici curiae, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief. *See* Fed. R. App. P. 29.

² A brief description of each *amicus* is included herein as Appendix A.

SUMMARY OF THE ARGUMENT

This Court should hold that laws that discriminate against transgender persons are subject to strict scrutiny under the Equal Protection Clause based on the well-established factors the Supreme Court has used to determine whether laws that classify based on a particular personal characteristic warrant such heightened scrutiny. Under those factors, such scrutiny is required where a group has suffered a history of discrimination based on a characteristic that is unrelated to one's ability to contribute to society. Heightened scrutiny is particularly warranted where the discrimination is based on a trait that is integral to identity and where the group cannot fully protect itself in the majoritarian political process.

Classifications based on transgender status warrant strict scrutiny because they target a small, vulnerable minority that has suffered a long and continuing history of irrational discrimination and are rarely, if ever, justified by a compelling or even legitimate purpose. The privacy justification advanced by the State and accepted by the District Court cannot withstand any level of scrutiny because it amounts to no more than a restatement of the law's exclusion of transgender people from using restroom facilities consistent with their gender identity. In addition, by defining sex based on the gender markers on an individual's birth certificate, the law's standard for determining which restrooms transgender people can access

results in an unpredictable and incoherent standard and, as such, reveals the impermissible motivation behind the law's passage.

Amici urge the Court to hold that such laws are subject to strict scrutiny and that HB2 cannot withstand even rational basis review, much less that exacting inquiry.

ARGUMENT

I. Classifications That Are Irrelevant Or Rarely Relevant To Government Decision-Making Receive Heightened Scrutiny Under The Equal Protection Clause.

Amici agree with Plaintiffs that classifications based on transgender status are inherently sex-based and thus, at a minimum, warrant the intermediate scrutiny applied to laws that discriminate based on sex. *See United States v. Virginia*, 518 U.S. 515, 532-33 (1996).³ But as Plaintiffs also correctly argue, laws that discriminate based on transgender status also meet the criteria for strict scrutiny and should be evaluated under that standard. For the reasons explained below, where a statute treats transgender persons differently than others, the government should bear

³ *See, e.g., Glenn v. Brumby*, 663 F.3d 1312, 1320 (11th Cir. 2011) (holding that anti-transgender discrimination rests on gender stereotypes and thus warrants heightened scrutiny); *Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep't of Educ.*, No. 2:16-CV-524, 2016 WL 5372349, at *15 (S.D. Ohio Sept. 26, 2016) (“[T]ransgender individuals are a quasi-suspect class because discrimination against them is discrimination on the basis of sex.”); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015) (same).

the burden of proving the statute's constitutionality by showing that the classification is narrowly tailored to serve a compelling governmental interest.

II. Classifications Based On Transgender Status Warrant Strict Scrutiny Under the Traditional Framework.

The Supreme Court has developed a framework for determining which classifications are likely to reflect prejudice, and, thus, should be scrutinized more heavily to ensure that they were enacted for a proper purpose and do not reflect either intentional or unthinking bias. The most important factors in this framework are: (1) whether a classified group has suffered a history of invidious discrimination; and (2) whether the classification has any bearing on a person's ability to perform in or contribute to society. *See Mass Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973); *see also Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013). At times, the Supreme Court has considered two additional but not essential factors: (3) whether the class exhibits "obvious, immutable, or distinguishing characteristics that define them as a discrete group," *Lyng v. Castillo*, 477 U.S. 635, 638 (1986); and (4) whether the group is "a minority or politically powerless." *Id.*⁴ No single factor is dispositive, and each can serve as a warning sign that a particular classification

⁴ *See Windsor*, 699 F.3d at 181 ("Immutability and lack of political power are not strictly necessary factors to identify a suspect class.").

“provides no sensible ground for differential treatment,” *City of Cleburne, Tex. v. City of Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985), or is “more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective,” *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982).

Transgender status readily satisfies all of these factors, and laws that discriminate against transgender people, including HB2, warrant strict scrutiny.

A. Transgender People Have Suffered A Long History Of Discrimination.

“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). They “have suffered a history of persecution and discrimination.” *Adkins v. City of New York*, 143 F. Supp.3d 134, 139 (S.D.N.Y. 2015). Courts have acknowledged that history of discrimination in multiple areas, including public and private employment, housing, and access to healthcare.⁵ Historically, transgender people have also been denied the right to marry, cut off from their children, and subjected to discriminatory criminal laws that penalized their very existence. *See*,

⁵ *See e.g., Bd. of Educ. of the Highland Local Sch. Dist.*, 2016 WL 5372349, at *16 (“[T]ransgender people have historically been subject to discrimination including in education, employment, housing, and access to healthcare”); *Adkins*, 143 F. Supp. 3d at 139 (same).

e.g., *In re Estate of Gardiner*, 273 Kan. 191, 215, 42 P.3d 120, 137 (2002) (finding that a transgender woman was not a woman within the meaning of the marriage statutes and could not validly marry a man); *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999) (same); *Daly v. Daly*, 102 Nev. 66, 71, 715 P.2d 56, 60 (1986) (terminating a parent’s parental rights after she underwent a gender transition); *Doe v. McConn*, 489 F. Supp. 76, 79 (S.D. Tex. 1980) (challenging Houston law making “crossdressing” a crime).

That history of discrimination continues today. As the American Psychological Association has acknowledged, transgender people “experience discrimination, ranging from subtle to severe, when accessing housing, health care, employment, education, public assistance, and other social services.”⁶ Transgender people are at high risk for hate violence, including sexual assault and murder. Transgender women and people of color in particular “disproportionately experience severe forms of anti-transgender violence, including police violence, and are less likely to receive help from law enforcement.”⁷ In schools, transgender students are

⁶ *Guidelines for Psychological Practice With Transgender and Gender Nonconforming People*, 70 AM. PSYCHOLOGICAL ASS’N 832, 838 (2015), <http://www.apa.org/practice/guidelines/transgender.pdf>.

⁷ *Id.*; see also NAT’L COALITION ANTI-VIOLENCE PROGRAMS, LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER, AND HIV-AFFECTED INTIMATE PARTNER VIOLENCE IN 2015: A REPORT FROM THE NATIONAL COALITION OF ANTI VIOLENCE PROGRAMS 29 (2016), http://www.avp.org/storage/documents/2015_ncavp_lgbtqipvreport.pdf.

frequently targeted for harassment and bullying, and, as a group, transgender youth experience dramatically higher rates of depression and suicide attempts than their non-transgender peers.⁸ In the health care arena, transgender people face pervasive bias and discrimination,⁹ and, in some cases, transgender individuals have been denied even lifesaving emergency medical care solely because of their transgender

⁸ See NAT'L CTR. TRANSGENDER EQUALITY & NATIONAL GAY AND LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 2-3 (2012), http://www.transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf [hereinafter INJUSTICE AT EVERY TURN] (“A staggering 41% of respondents reported attempting suicide compared to 1.6% of the general population . . . Those who expressed a transgender identity or gender non-conformity while in grades K-12 reported alarming rates of harassment (78%), physical assault (35%) and sexual violence (12%)”); ANN P. HAAS ET AL., WILLIAMS INST., SUICIDE ATTEMPTS AMONG TRANSGENDER AND GENDER NON-CONFORMING ADULTS: FINDINGS OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 11 (2014), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/AFSP-Williams-Suicide-Report-Final.pdf> (“A higher than average prevalence of lifetime suicide attempts was consistently found among . . . respondents who reported that they had been harassed, bullied, or assaulted in school . . . due to anti-transgender bias”).

⁹ See INJUSTICE AT EVERY TURN, *supra* note 7 at 6; LAMBDA LEGAL, WHEN HEALTH CARE ISN'T CARING: TRANSGENDER AND GENDER-NONCONFORMING PEOPLE (2010), http://www.lambdalegal.org/sites/default/files/publications/downloads/whcic-insert_transgender-and-gender-nonconforming-people.pdf.

status.¹⁰ Incarcerated transgender people “report harassment, isolation, forced sex, and physical assault, both by prison personnel and other inmates.”¹¹

In the past few years, transgender people have faced an unprecedented legislative and political backlash. Last year alone, state legislators introduced scores of anti-transgender bills.¹² In addition to HB2 in North Carolina, Mississippi enacted HB 1523, a law that created an extremely broad religious exemption, applicable to virtually any state law, for persons who believe that the terms man or woman “refer to an individual’s immutable biological sex as objectively determined by anatomy and genetics at time of birth.”¹³ In May, 2016, Texas and eleven other states filed a

¹⁰ See Bill Miller, *D.C. Settles Bias Suit in 1995 Death*, WASHINGTON POST (Aug. 11, 2000), <https://www.washingtonpost.com/archive/local/2000/08/11/dc-settles-bias-suit-in-1995-death/5c0720e1-5cc6-454c-bdae-2545873ec59b/> (describing how D.C. rescue workers responding to a car accident stopped treatment after discovering a transgender woman’s male genitalia, resulting in her death).

¹¹ *Guidelines for Psychological Practice With Transgender and Gender Nonconforming People*, *supra* note 6, at 839; see also *Farmer v. Brennan*, 511 U.S. 825, 831 (1994).

¹² See Joellen Kralik, “Bathroom Bill” Legislative Tracking, NAT’L CONFERENCE STATE LEGISLATURES (Aug. 30, 2016), <http://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking635951130.aspx>; see also Stephen Peters, *New HRC Report Reveals Unprecedented Onslaught of State Legislation Targeting Transgender Americans*, HUMAN RIGHTS CAMPAIGN (Feb. 22, 2016), <http://www.hrc.org/blog/new-hrc-report-reveals-unprecedented-onslaught-of-state-legislation-targeti> (“An unprecedented 44 anti-transgender bills are being considered in 16 states . . . In 2015, at least 125 anti-LGBT bills were introduced in state houses all across the country. Twenty-one specifically targeted transgender people . . .”).

¹³ Protecting Freedom of Conscience from Government Discrimination Act, Miss. Laws 2016, HB 1523 § 2 (eff. July 1, 2016),

federal lawsuit seeking to enjoin the enforcement of federal agency guidance stating that federal sex discrimination laws require equal treatment of transgender students and workers with respect to gender-segregated facilities.¹⁴ Two weeks later, a second group of states filed a similar lawsuit in Nebraska.¹⁵ Across the country, the same conservative organizations that once sought to intervene in lawsuits to defend state laws barring same-sex couples from marriage bans are filing cases challenging the adoption of non-discrimination policies for transgender students by public schools.¹⁶

<http://billstatus.ls.state.ms.us/documents/2016/html/HB/1500-1599/HB1523SG.htm> [hereinafter HB 1523]. On June 30, 2016, a federal district court judge held that HB 1523 is unconstitutional and issued a preliminary injunction enjoining its enforcement. That ruling is now on appeal to the Fifth Circuit. *See Barber v. Bryant*, No. 3:16-CV-417-CWR-LRA, 2016 WL 3562647, at *34 (S.D. Miss. June 30, 2016).

¹⁴ *See Texas v. United States*, No. 7:16-cv-00054-O, 2016 U.S. Dist. LEXIS 113459 (N.D. Tex. Aug. 21, 2016).

¹⁵ Complaint, *Nebraska v. United States*, No. 4:16-cv-03117 (D. Neb. Jul. 8, 16); *see also* Daniel Wiessner, *More States Sue Obama Administration Over Transgender Directive*, REUTERS (Jul. 8, 2016), <http://www.reuters.com/article/us-usa-lgbt-lawsuit-idUSKCN0ZO2B4>.

¹⁶ An Ohio school district, represented by the Alliance Defending Freedom (ADF), filed suit challenging non-discrimination policies. *See* Associated Press, *Ohio Judge Orders Girls' Bathroom Access for Transgender Student*, FOX NEWS (Sept. 27, 2016), <http://www.foxnews.com/us/2016/09/27/ohio-judge-orders-girls-bathroom-access-for-transgender-student.html>. Similarly, in Illinois, a group of parents and students represented by ADF brought suit challenging the same policies. *See* Dawn Rhodes & Duaa Eldeib, *No Decision from Judge on Barring Transgender Student from Locker Room*, CHICAGO TRIBUNE (Aug. 15, 2016), <http://www.chicagotribune.com/news/local/breaking/ct-transgender-lawsuit-palatine-met-20160815-story.html>. ADF is also representing a group of students

B. Being Transgender Has No Bearing On Ability To Perform In Or Contribute To Society.

Being transgender does not bear any relationship to a person's ability to perform in or contribute to society. For example, the U.S. Armed Forces lifted its longstanding ban on open military service by transgender persons earlier this year, recognizing that being transgender does not impair a person's ability to fulfill the demanding duties and obligation of active military service.¹⁷ The National Collegiate Athletic Association has similarly recognized that being transgender is not a bar to athletic ability and has adopted a policy requiring equal treatment of

bringing similar claims in Minnesota. *See* Associated Press, *Minnesota School District Sued Over Transgender Bathroom Policy*, TWIN CITIES PIONEER PRESS (Sept. 9, 2016), <http://www.twincities.com/2016/09/09/minnesota-school-district-sued-over-transgender-bathroom-policy/>.

¹⁷ *See* AGNES GEREKEN SCHAEFER ET AL., RAND CORP., *ASSESSING THE IMPLICATIONS OF ALLOWING TRANSGENDER PERSONNEL TO SERVE OPENLY* 45 (2016), http://www.rand.org/content/dam/rand/pubs/research_reports/RR1500/RR1530/RAND_RR1530.pdf (citing as precedent the successful integration of transgender service members in the armed forces of Australia, Canada, Israel, and the United Kingdom); *see also* GALE S. POLLOCK & SHANNON MINTER, PALM CTR., *REPORT OF THE PLANNING COMMISSION ON TRANSGENDER MILITARY SERVICE* (2014), http://www.palmcenter.org/wp-content/uploads/2014/08/Report-of-Planning-Commission-on-Transgender-Military-Service_0-2.pdf (summarizing publicly available data showing that allowing transgender service members to serve openly does not have a negative effect on unit cohesion, operational effectiveness, or readiness).

transgender persons in collegiate sports.¹⁸ Across the country, many businesses have recognized that being transgender is irrelevant to workplace performance and have adopted non-discrimination policies designed to attract and retain qualified transgender employees.¹⁹ The federal government has adopted similar policies, prohibiting discrimination against transgender employees in every federal agency.²⁰

The nation's leading medical and mental health associations have also affirmed that being transgender is not a mental illness or disorder²¹ and, in itself,

¹⁸ NAT'L COLLEGIATE ATHLETIC ASS'N, NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES 13 (2011), https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf.

¹⁹ See HUMAN RIGHTS CAMPAIGN, CORPORATE EQUALITY INDEX 2016: RATING AMERICAN WORKPLACES ON LESBIAN, BISEXUAL AND TRANSGENDER EQUALITY (2015), <http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/CEI-2016-FullReport.pdf>.

²⁰ See OFFICE PERSONNEL MGMT., ADDRESSING SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION IN FEDERAL CIVILIAN EMPLOYMENT: A GUIDE TO EMPLOYMENT RIGHTS, PROTECTIONS, AND RESPONSIBILITIES (2015), <http://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/addressing-sexual-orientation-and-gender-identity-discrimination-in-federal-civilian-employment.pdf>.

²¹ Eve Glicksman, *Transgender Today*, 44 AM. PSYCHOLOGICAL ASS'N 36 (2013), <http://www.apa.org/monitor/2013/04/transgender.aspx> (outlining the latest Diagnostic and Statistical Manual (DSM) update replacing “‘gender identity disorder’ with ‘gender dysphoria’ as a diagnosis. The shift underscores that being transgender is not a disorder in itself”); see also Katy Steinmetz, *Being Transgender Is Not a Mental Illness*, TIME MAGAZINE (July 26, 2016), <http://time.com/4424589/being-transgender-is-not-a-mental-disorder-study/> (describing new research showing that “the social rejection and violence that many transgender people experience appears to be the primary source of their mental distress, as opposed to the distress being solely the result of being transgender”).

has no bearing on a person’s judgment, stability, or general capabilities. As one court recently explained: “Some transgender people experience debilitating dysphoria while living as the gender they were assigned at birth, but this is the product of a long history of persecution forcing transgender people to live as those who they are not.” *Adkins*, 143 F. Supp. 3d at 139. There is no “data or argument suggesting that a transgender person, simply by virtue of transgender status, is any less productive than any other member of society.” *Id.* Like others, transgender people who have acceptance and support, and who are afforded the same opportunities open to others, can thrive and become contributing members of society.

C. Being Transgender Is An Immutable Characteristic And An Integral Part Of Identity That Defines A Discrete Group.

Transgender persons unquestionably have “immutable [and] distinguishing characteristics that define them as a discrete group,” and “the characteristic of the class calls down discrimination when it is manifest.” *Lyng*, 477 U.S. at 638; *see also Adkins*, 143 F. Supp. 3d at 139-40 (recognizing that being transgender is an immutable characteristic).

Being transgender is an integral component of personal identity. It is a characteristic that fundamentally defines who a person is, and that is not susceptible

to voluntary change.²² “Efforts to change a child’s or adolescent’s gender identity, gender expression, or sexual orientation are not an appropriate therapeutic intervention. No evidence supports the efficacy of such interventions to change sexual orientation or gender identity, and such interventions are potentially harmful.”²³ As such, a person’s gender identity is “so fundamental” that individuals “should not be required to abandon” it in order to avoid discrimination. *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1093 (9th Cir. 2000).

D. Transgender People Are A Small And Politically Vulnerable Minority.

Finally, transgender people are a small, politically vulnerable minority who plainly lack the political power to achieve equality in the political process. *See, e.g., Adkins*, 143 F. Supp. 3d at 140 (“Transgender people are a politically powerless minority.”); *Bd. of Educ. of the Highland Local Sch. Dist.*, 2016 WL 5372349, at *16 (same). Until recently, as noted above, legal and medical authorities stigmatized transgender people as inherently deviant, criminal, immoral, and mentally ill.

²² Modern medical science recognizes that while the factors that determine gender identity are not fully understood, it is shaped by a complex interaction of biological, psychological, and social forces, people do not experience their gender identity as a choice and it is highly resistant to change. *See, e.g., Aruna Saraswat et al., Evidence Supporting the Biologic Nature of Gender Identity*, 21 ENDOCRINE PRACTICE 199, 199-204 (2015), <https://www.ncbi.nlm.nih.gov/pubmed/25667367>.

²³ SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, ENDING CONVERSION THERAPY: SUPPORTING AND AFFIRMING LGBTQ YOUTH 51 (2015), <http://store.samhsa.gov/shin/content//SMA15-4928/SMA15-4928.pdf>.

Numerically, transgender people are a very small group, comprising only a tiny fraction of the population.²⁴ As such, they lack “the strength to politically protect themselves from wrongful discrimination.” *Windsor*, 699 F.3d at 184.

That transgender persons have gained some protections in recent years does not alter that conclusion. The Supreme Court has never construed the concept of political powerlessness to mean that a group is unable to secure *any* protections for itself through the normal political process. For example, when the Supreme Court first recognized sex as a suspect or quasi-suspect classification, Congress already had passed Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963. *See Frontiero*, 411 U.S. at 687-88.

The limited protections currently provided to transgender people do not remotely match the legislative protections available to women at the time the courts first applied heightened scrutiny to classifications based on sex. There is no federal legislation expressly prohibiting discrimination on the basis of transgender status in employment or education, as there was on the basis of sex when *Frontiero* was decided. Indeed, no federal legislation had ever been passed to protect people on the

²⁴ *See* Jan Hoffman, *Estimate of U.S. Transgender Population Doubles to 1.4 Million Adults*, N.Y. TIMES (June 30, 2016), <http://www.nytimes.com/2016/07/01/health/transgender-population.html> (explaining that even though the transgender population is larger than previously realized, transgender adults encompass “just 0.6 percent of the adult population”).

basis of their transgender status until 2009, when gender identity was added to the federal hate crimes laws. *See* Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, §§ 4701-13, 123 Stat. 2190, 2835-44 (2009). The Secretary of Defense only this year authorized the repeal of the military’s ban on transgender service members.²⁵ Moreover, when transgender people have secured protections in courts and legislatures, opponents have aggressively used the legislative and ballot initiative process to repeal those laws and to enact new laws—including HB2—that expressly target and discriminate against transgender persons.²⁶

III. THE STATE’S PRIVACY-RELATED JUSTIFICATIONS FOR HB2 CANNOT WITHSTAND SCRUTINY.

The privacy justifications offered by the state and accepted by the District Court cannot withstand any level of scrutiny, much less the heightened scrutiny required in this case. Those justifications boil down to a circular restatement of the law’s aims –

²⁵ Matthew Rosenberg, *Transgender People Will Be Allowed to Serve Openly in Military*, N.Y. TIMES (June 30, 2016), <http://www.nytimes.com/2016/07/01/us/transgender-military.html>.

²⁶ *See, e.g.*, Alison Bauter, *Repeal of Transgender Law Lands on 2018 Massachusetts Ballot*, BEACON HILL PATCH (Oct. 12, 2016), <http://patch.com/massachusetts/beaconhill/repeal-transgender-anti-discrimination-law-lands-2018-massachusetts-ballot>; *see also* Complaint, Horizon Christian Fellowship, et al. v. Williamson, et al., No. 1:16-cv-12034-PBS (D. Mass. Oct. 11, 2016) (federal lawsuit challenging Massachusetts law that added gender identity as a protected class to the public accommodations law).

to define sex in a manner that excludes certain transgender women from women’s restrooms and certain transgender men from men’s restrooms. As such, its aim is an illegitimate one: the exclusion of transgender people. HB2 also violates the Equal Protection Clause because its definition of “biological sex” is so internally inconsistent and riddled with exceptions that even if its asserted purpose of restricting access to restrooms based on genital anatomy were legitimate, there simply is no rational relationship between that goal and what the statute actually does, showing that the real purpose of the law is to discriminate against transgender persons. *See Eisenstadt v. Baird*, 405 U.S. 438, 449 (1972) (“Even on the assumption that the fear of pregnancy operates as a deterrent to fornication, the Massachusetts statute is . . . so riddled with exceptions that deterrence of premarital sex cannot reasonably be regarded as its aim.”).

A. The District Court Failed To Subject HB2 To Meaningful Review.

Although HB2 intentionally targets transgender people, the district court’s analysis erroneously focused on whether the State may provide separate restrooms for men and women—not on whether the State could justify its disparate treatment of transgender people. HB2 excludes persons whose “biological sex” (defined by the gender marker on one’s birth certificate) differs from their gender identity—*i.e.*, transgender persons—from using the same gender-segregated public restrooms as others. The only persons affected by that exclusion are transgender people—

specifically, those who have been unable to correct the gender marker on their birth certificates.²⁷ Under HB2, all non-transgender people can continue to use restrooms consistent with their gender identity, while many transgender people cannot. Indeed, achieving that exclusion is the law’s overriding purpose and effect. Yet, rather than requiring the State to justify its disparate treatment of transgender people, the district court held that HB2 is justified by the State’s interest in providing separate restrooms for men and women—a practice not challenged by any party in this case.

Plaintiffs accept the provision of separate restrooms and locker rooms for men and women in schools, workplaces, and public spaces. Rather than challenging or seeking to disrupt that social convention, they seek only to be integrated into such gender-separated spaces on equal terms with others, so that transgender women can use the same facilities as other women, and transgender men can use the same facilities as other men. It is HB2’s intended prohibition of such equal use that must be justified, not the existence of separate facilities for men and women.

The district court did not require the State to identify an independent justification for that discriminatory exclusion, an elemental aspect of equal

²⁷ While the State may argue that HB2 also bars non-transgender men from entering women’s facilities, the district court correctly found that North Carolina’s trespassing laws already prohibited such entry and that HB2 did not change the law in that regard. *Carcano v. McCrory*, No. 1:16-CV-236, 2016 WL 4508192, at *7 (M.D.N.C. Aug. 26, 2016). The only persons affected by HB2 are transgender people.

protection review. *Romer v. Evans*, 517 U.S. 620, 632-33 (1996). It erred by conflating means and ends—that is, by defining the privacy interest that HB2 purportedly protects in a manner that merely restates the very same statutory classification that intentionally keeps certain transgender women out of the women’s room and certain transgender men out of the men’s room. That “justification” is nothing more than a restatement of HB2’s goal—the exclusion of transgender people from gender-segregated restrooms.

The district court’s circular conclusion repeats the same analytical error identified by the Supreme Court in *Virginia*, 518 U.S. 515. In that case, the Supreme Court explained that the Commonwealth of Virginia, as well as the courts below, had misapplied heightened scrutiny by conflating the “means” with the “end” when determining whether the challenged discrimination—in that case, the school’s exclusion of women—met the exacting test of substantially advancing a sufficiently important government interest. *Id.* at 545. As a result of that analytical error, the lower courts failed to undertake any meaningful scrutiny of that exclusion, simply concluding—in circular fashion—that because Virginia asserted an interest in providing students with the benefits of single-gender education, the exclusion of women from Virginia Military Institute “was essential to Virginia’s purpose, for without such exclusion, the Commonwealth could not ‘accomplish [its] objective of providing single-gender education.’” *Id.* at 528-529. In other words, the Court

explained, the State’s justification for single-gender education could not be the need to exclude women from Virginia Military Institute in order to achieve it.

Here, the State and the district court opinion repeat that error by conflating HB2’s asserted *end*—providing separate restrooms for men and women based on “biological sex”—with the discriminatory *means*—defining “biological sex” in a way that deliberately excludes transgender people—it has chosen to further that end. Doing so short-circuits the required showing that excluding transgender persons from the same gender-segregated facilities used by others serves any purpose whatsoever, apart from the impermissible purpose of discriminating against a disfavored group by excluding them from shared public facilities. Just as the exclusion of women could not be the justification for the single-sex educational environment at issue in *VMI*, neither can the exclusion of transgender women from women’s restrooms and the exclusion of transgender men from men’s restrooms be the justification for HB2.

The State’s reliance on the presumed physical differences between transgender women and other women to justify HB2 is equally circular, again doing nothing more than conflating the law’s asserted purpose and its exclusionary means.²⁸ The State may not use those presumed physical differences to justify HB2

²⁸ Amici here and elsewhere sometimes include only the comparison between transgender women and other women, and not also transgender men and other men,

because they merely restate the exclusion that HB2 effects—they do not explain it. According to the district court, HB2 seeks to exclude transgender women who may have penises from the women’s restroom, singling them out precisely on the basis of their presumed physical differences from other women. In the past, courts held that States could not justify the exclusion of same-sex couples from marriage based on similarly tautological claims, merely by asserting a purported state interest in limiting marriage only to opposite-sex couples or only to couples who can procreate through heterosexual intercourse. As the Tenth Circuit noted, such arguments are “wholly circular. Nothing logically or physically precludes same-sex couples from marrying[.]” *Kitchen v. Herbert*, 755 F.3d 1193, 1216 (10th Cir. 2014); *see also In re Marriage Cases*, 43 Cal. 4th 757, 853, 183 P.3d 384, 451 (2008) (“[E]ven the most familiar and generally accepted of social practices and traditions often mask an unfairness and inequality that frequently is not recognized or appreciated by those not directly harmed by those practices or traditions.”). Similarly here, the district court improperly bypassed the relevant question of whether HB2 actually furthers any legitimate privacy interest by defining the privacy interest in a circular manner that excludes only transgender persons from the ability to use restrooms consistent

so as to make the point more clearly. The same analysis applies, of course, regardless of whether the comparison is between transgender women and other women or transgender men and other men.

with their gender identity—*i.e.*, by simply asserting, in conclusory fashion, that “the privacy interests that justify the State’s provision of sex-segregated bathrooms, showers, and other similar facilities arise from the physiological differences between men and women, rather than differences in gender identity.” *Carcano v. McCrory Berger*, No. 1:16-CV-236, 2016 WL 4508192, at *19 (M.D.N.C. Aug. 26, 2016). In fact, however, the privacy interests at issue cannot possibly rest *solely* upon “physiological differences,” entirely divorced from gender identity. As another court confronted with a similar argument recently explained, “to frame the . . . [privacy] question [solely] in the sense of sex assigned at birth while ignoring gender identity frames it too narrowly for the constitutional analysis.” *Students and Parents for Privacy v. U.S. Dep’t of Educ.*, No. 16-CV-4945, 2016 WL 6134121, at *46 (N.D. Ill. Oct. 18, 2016). The physiological differences between men and women do not have meaning in and of themselves, but rather, their meaning emerges only insofar as they are proxies for a person’s identity as male or female. Divorced from their relationship with a person’s gender identity and considered as mere body parts, those differences would have no more intrinsic significance than hair color, height, or any other physical trait and would not give rise to any privacy interests.²⁹ Thus,

²⁹ As one scholar has explained: “The fact is, biological difference itself tells us nothing about the difference this difference makes. There are innumerable ‘biological’ differences—hair color, age, or height, for example—that would not support privacy claims.” Amy Kapczynski, *Same-Sex Privacy and the Limits of*

contrary to the district court’s analysis, the mere invocation of male and female genitalia, completely unconnected to their relationship to gender identity, cannot fully justify or explain HB2’s exclusion of transgender women from women’s facilities. *See, e.g., Bd. of Educ. of the Highland Local Sch. Dist.*, 2016 WL 5372349, at *16 (noting that reliance on “biological sex” raises a number of questions, including for individuals who have “lost external genitalia in an accident.”). Rather, such an “explanation” is merely a blatant post hoc rationalization, designed to zero in on the sole manner in which a transgender woman may differ from other women in order to elevate that presumed difference, shorn of all historical and social context,³⁰ into the supposedly defining feature of gender-segregated facilities, in order to justify excluding transgender persons from them.

Anti-Discrimination Law, 112 YALE L.J. 1257, 1276 (2003); *see also id.* at 1277 (noting that judicial decisions recognizing privacy interests related to genitals must be understood as protecting “gender identity itself”).

³⁰ As scholars from many disciplines have explained, gender-segregated restrooms are not simply a natural reflection of the physiological differences between men and women. TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING (Harvey Molotch & Laura Noren, eds., 2010); LADIES AND GENTS: PUBLIC TOILETS AND GENDER (Olga Gershenson & Barbara Penner eds., 2009). As sociologist Erving Goffman long ago noted, “the *functioning* of sex-differentiated organs is involved, but there is nothing in this functioning that *biologically* recommends segregation; *that* arrangement is totally a cultural matter.” Erving Goffman, *The Arrangement Between the Sexes*, 4 THEORY & SOC’Y 301, 316 (1977).

Rather, in the U.S., they arose out of specific social and historical circumstances—particularly widespread cultural anxieties about the entry of large numbers of women into the public workforce—in the late nineteenth century. Massachusetts passed the first law mandating gender-segregated restrooms in 1887

To be clear, the point of such an analysis is neither to deny the typical anatomical differences between men and women nor the obvious fact that, for the vast majority of people, the appearance of their genitals is aligned with the person's gender. For a transgender person, however, that alignment does not exist. Because HB2's only purpose is to target the class of persons defined by that non-alignment, it cannot be justified merely by invoking the majoritarian norm that for most people, such alignment exists.³¹

and other states followed suit. Far from simply reflecting biological differences between the sexes, these laws were “deeply bound up with early nineteenth century moral ideology concerning the appropriate role and place for women in society.” Terry S. Kogan, *Sex-Separation in the Public Restrooms: Law, Architecture, and Gender*, 14 MICH. J. GENDER & L. 1, 3 (2007). Recognizing that gender stereotypes have played a powerful role in the history of gender-segregated restrooms does not compel their abolition, any more, for example, than recognizing the history of gender inequality in marriage compelled the elimination of marriage as legal institution. Rather, just as eliminating gender inequality in marriage has strengthened marriage as an institution, eliminating discrimination against transgender people is fully compatible with the continued existence of gender-segregated restrooms.

³¹ Moreover, it bears emphasis that while a transgender woman may have a penis, that does not make a transgender woman less female than other women, any more than a woman who is unusually tall or muscular or has a stereotypically “masculine” demeanor is less of a woman than other women. HB2 discriminates against transgender women, harming them just as it would harm any other woman singled out for exclusion from the women's restroom based on some aspect of her appearance or mannerisms that was deemed to be insufficiently “feminine” for a woman. Conversely, sharing a restroom with a transgender woman does not harm other women in any way; there is no reasonable expectation of privacy that includes ensuring that a non-transgender woman using public facilities will be insulated from ordinary contact with transgender women, who are entitled to participate in all aspects of society on equal terms with other persons. Moreover, as the district court opinion acknowledged, ordinary interactions in restrooms and other gender-

In sum, rather than considering whether HB2’s facial discrimination against transgender persons is narrowly tailored to serve a compelling or important purpose, or serves any legitimate purpose at all, the district court improperly treated that discrimination as an end in itself, simply assuming that the State may permissibly subject persons whose gender identity differs from their “biological sex” to disparate treatment. But even under rational basis review, a classification must “bear a rational relationship to an independent and legitimate legislative end.” *Romer*, 517 U.S. at 633. Here, the State failed to offer and the district court failed to require any such independent purpose. Instead, the district court merely restated the classification itself, concluding that HB2 is valid because the State may restrict public restrooms to men and women whose male or female identity matches the genital anatomy associated with their assigned sex at birth—*i.e.*, to non-transgender persons. Such an analysis improperly bypasses meaningful judicial review and underscores that the only purpose served by HB2 is the impermissible one of imposing discrimination against a vulnerable group for its own sake, unsupported by any independent legitimate end.

segregated facilities do not involve involuntarily being seen unclothed by others. *Carcano*, 2016 WL 4508192, at *4-5, *15, *27-28. As a general rule, persons who wish to avoid being seen unclothed in such settings can easily do so.

B. HB2’s Definition Of “Biological Sex” Is So Riddled With Exceptions That Its Asserted Purpose Of Enforcing Separation In Restrooms According To Genitalia Cannot Reasonably Be Regarded As Its Aim.

HB2 fails equal protection review for an additional reason as well, which is that its definition of “biological sex” is so internally inconsistent and riddled with exceptions that even if its purported goal of ensuring that only persons with certain genitals may use gender-segregated restrooms were legitimate, it simply cannot be credited as HB2’s actual aim. In *Eisenstadt v. Baird*, the Supreme Court struck down a Massachusetts law that barred unmarried persons from using contraception to prevent pregnancy. 405 U.S. 438. The Court found that even assuming the State’s asserted interest of preventing premarital sex was legitimate, the law was so “riddled with exceptions that deterrence of premarital sex cannot reasonably be regarded as its aim.”³²

³² *Eisenstadt*, 405 U.S. at 449 (noting, for example, that the law permitted unmarried persons to obtain contraceptives to prevent disease and permitted married persons to obtain contraceptives “without regard to their intended use,” including “illicit sexual relations with unmarried persons”). Similarly, in *City of Cleburne*, the Supreme Court struck down a city law that required group homes for disabled persons to obtain a special use permit, finding that the permit requirement was so underinclusive that the city’s motivation must have “rest[ed] on an irrational prejudice.” *City of Cleburne*, 473 U.S. at 477. See also *Bostic v. Schaefer*, 760 F.3d 352, 381-82 (4th Cir. 2014) (holding that the Virginia Marriage Laws were similarly underinclusive with respect to the State’s asserted interest in limiting the right to marry to couples who could biologically procreate).

Similarly, here, HB2’s provision that “biological sex” is determined by the gender marker on birth certificate creates untenable inconsistencies. Even assuming there is some privacy interest in individuals not sharing a restroom with persons whose genitals are different than their own, HB2 fails in any way to advance that interest. In many other states and some other countries, a transgender person can obtain a new or corrected birth certificate that reflects the person’s identity as male or female without undergoing genital reconstructive surgery.³³ That practice is consistent with contemporary standards of care, which recognize that surgeries are

³³ See, e.g., California: Cal. Health & Safety Code §§ 103426, 103430; Connecticut: Conn. Gen.Stat. §§ 19a-42; District of Columbia: D.C. Code § 7-210.01; Hawai’i: Haw. Rev. Stat. § 338-17.7; Maryland: Md. Code, Health-Gen. § 4-211; Massachusetts: Mass. Gen. Laws ch. 46, § 13; Minnesota: *See Document Requirements to Amend a Birth Record*, MINN. DEP’T OF HEALTH, <http://www.health.state.mn.us/divs/chs/osr/reqdocs.html> (last visited Oct. 25, 2016); New York: *See* Letter from Guy Warner, Director, N.Y. State Dep’t of Health, Bureau of Vital Records, N.Y STATE DEP’T OF HEALTH (Sept. 28, 2015), <http://www.transequality.org/sites/default/files/docs/id/Instruction%20sheet%2005-23-14.docx#overlay-context=documents/state/new-york>; Oregon: Or. Rev. Stat. § 33.460; Rhode Island: R.I. Admin. Code § 31-1-29:35.0; Vermont: Vt. Stat. Ann. tit. 18, § 5112; Washington: *See Gender Change on a Birth Certificate*, Wash. State Dep’t of Health, <http://www.doh.wa.gov/LicensesPermitsandCertificates/BirthDeathMarriageandDivorce/GenderChange> (last visited Oct. 25, 2016); Australia: *see* COMMONWEALTH OF AUSTRALIA, AUSTRALIAN GOVERNMENT GUIDELINES ON THE RECOGNITION OF SEX AND GENDER (2013), <http://www.ag.gov.au/Publications/Documents/AustralianGovernmentGuidelinesontheRecognitionofSexandGender/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.PDF>; New Zealand: Births, Deaths, Marriages, and Relationships Registration Act 1995 (N.Z.), <http://www.legislation.govt.nz/act/public/1995/0016/latest/DLM359369.html>.

not possible or necessary for all transgender people, and with the recommendation of the American Medical Association and other medical experts, which strongly support the elimination of any government requirement that an individual must have undergone surgery in order to change the sex indicated on a birth certificate.³⁴ Conversely, in at least four states and many other countries, a transgender person cannot obtain a new or corrected birth certificate even if he or she has undergone genital reconstructive surgery.³⁵

As a result, under HB2, some transgender women who have penises will have female birth certificates and thus will be able to use women's restrooms and locker rooms, even though preventing such a situation is purportedly the sole privacy-related purpose of the law. At the same time, some transgender women who have vaginas will have male birth certificates and will be unable to use women's

³⁴ See, e.g., *Conforming Birth Certificate Policies to Current Medical Standards for Transgender Patients H-65.967*, AM. MEDICAL ASS'N, <https://searchpf.ama-assn.org/SearchML/searchDetails.action?uri=%2FAMADoc%2FHOD.xml-0-5096.xml> (last visited Oct. 25, 2016).

³⁵ See Lisa Mottet, *Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People*, 19 MICH. J. GENDER & L. 373, 381-82, 396 n.90 (2013) (describing statutory and decisional law in Idaho, Kansas, Ohio, Puerto Rico, and Tennessee); see also *Changing Birth Certificate Sex Designations: State-By-State Guidelines*, LAMBDA LEGAL, <http://www.lambdalegal.org/know-your-rights/article/trans-changing-birth-certificate-sex-designations> (last updated Feb. 3, 2015) (providing a state-by-state survey of requirements for obtaining a new or corrected birth certificate).

restrooms and locker rooms, even though in terms of their genitals, they are indistinguishable from other women. Such women will be forced into men's restrooms and locker rooms, where their presence surely would be much more disruptive of social norms of privacy than permitting transgender persons to use restrooms and locker rooms based on their gender identity, as all other persons are permitted to do. The same is true for transgender men. Some transgender men who have vaginas will have male birth certificates and thus will be able to use men's restrooms and locker rooms, despite not having a typically male genital anatomy. In contrast, some transgender men who have penises will be unable to obtain new or corrected birth certificates and thus will be required to use women's facilities, even though their presence in such facilities directly contradicts the asserted purpose of the law and would be much more disruptive of social norms of privacy than the pre-HB2 status quo, which permitted all persons to use restrooms based on their gender identities.

In short, while the State asserts that the purpose of HB2 is not to harm transgender people, despite its facial discrimination against them, but merely to ensure that there are no gender atypical genitals in shared public restrooms, the law is so riddled with exceptions—and indeed, so directly mandates just the opposite result in some cases—that promoting such a goal “cannot reasonably be regarded as its aim.” *Eisenstadt*, 405 U.S. at 449. That conclusion is even more unavoidable

here, where the entire purpose of this part of the law was to address the purported “threat” to privacy posed by transgender persons, and where the only persons affected by the law are those who are transgender. Given that narrow focus, the fact that HB2 forces some transgender persons who have undergone genital reconstructive surgery to use restrooms corresponding to their birth sex, while simultaneously permitting other transgender persons who have not undergone genital reconstructive surgery to use restrooms based on their gender identity underscores the irrationality of this law and reveals the improper purpose behind it. HB2 was enacted in order to discriminate against transgender persons, as the circumstances of its enactment and legislative history also make clear. Under any standard of review, such a law violates the requirement of equal protection.

CONCLUSION

The Court should hold that state laws that discriminate against transgender persons are subject to strict scrutiny, and that the state statute challenged in this appeal cannot survive this demanding standard.

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Respectfully submitted,

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