

UNITED STATES DISTRICT COURT
for the
MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF NORTH CAROLINA, et al.,

Defendants.

**BRIEF OF THE STATES OF NEW YORK, WASHINGTON, CALIFORNIA,
CONNECTICUT, ILLINOIS, MARYLAND, MASSACHUSETTS, NEW MEXICO,
OREGON, AND VERMONT AND THE DISTRICT OF COLUMBIA IN SUPPORT OF
THE UNITED STATES' MOTION FOR PRELIMINARY INJUNCTION**

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The States of New York, Washington, California, Connecticut, Illinois, Maryland, Massachusetts, New Mexico, Oregon, and Vermont and the District of Columbia submit this brief as amici curiae in support of plaintiff United States' motion for a preliminary injunction against enforcement of North Carolina's Public Facilities and Security Act, Sess. L. 2016-3 ("H.B. 2").

STATEMENT OF INTEREST

The amici States strongly support the right of transgender persons to live with dignity, free from discrimination. To that end, each of the amici States has adopted policies to protect transgender individuals against discrimination on the basis of their gender identities. The amici States also have a strong interest in ensuring that our residents who are transgender or otherwise gender non-conforming do not experience indignity and discrimination when they travel to other States.

North Carolina's H.B. 2 requires public agencies and local boards of education in that State to ensure that their single-sex multiple-occupancy restrooms and changing facilities are used in accordance with a person's "physical condition of being male or female" as purportedly reflected by the gender marker on the person's birth certificate. H.B. 2, § 1.2 (codified at N.C. Gen. Stat. § 115C-521.2) & § 1.3 (codified at N.C. Gen. Stat. § 143-760). Enforcement of H.B. 2 will require transgender persons to use facilities that are inconsistent with their gender identity, as perceived by themselves and by others, thereby demeaning those persons and subjecting them to hostile encounters with other users of those facilities.

The effects of this law will be felt not only by residents of North Carolina, but by all who have reason to travel to North Carolina. The residents of the amici States, including those who are transgender, often travel to North Carolina. Our workers may be called upon to meet with colleagues or prospective business partners in offices in North Carolina. Our students may travel to North Carolina to study or compete in sporting events, and our scholars may collaborate with researchers at North Carolina's universities. And others may wish to enjoy North Carolina's tourist attractions, or to visit family members who reside in the State. In making these trips, our residents will visit many institutions regulated by this law, including state universities, public-transportation terminals, parks, and beaches. *See* H.B. 2, § 1.3. These trips may be important to our residents' personal fulfillment and their ability to advance their professional lives within our States.

If allowed to stand, the law will make travel to North Carolina more difficult for residents of our States who are transgender or who do not conform to traditional sex stereotypes. And the law may dissuade them from such travel altogether. Those residents may thus face barriers in their personal or professional lives that are not faced by other residents of our States—precisely the sort of disparate treatment on the basis of gender identity that the United States and amici States have sought to prevent.

Amici States accordingly file this brief to protect our interests and those of our residents. We show that H.B. 2 is unlawful because it is enforceable only by means of reliance on sex stereotypes that the Supreme Court has long recognized as an impermissible basis for disparate treatment. And we show that the equities

overwhelmingly favor entry of the preliminary injunction sought by the United States. First, the experience of the amici States confirms that the privacy and public-safety concerns cited by North Carolina officials in enacting the legislation are unfounded. And second, the law’s reliance on birth certificates is irrational because the gender marker on a transgender person’s birth certificate may have little relationship to his or her “physical condition of being male or female” as contemplated by H.B. 2.

BACKGROUND¹

After the city of Charlotte amended its nondiscrimination ordinance to include protections against discrimination on the basis of gender identity, the North Carolina General Assembly convened a special legislative session during which it passed H.B. 2.² The law mandates that local boards of education and public agencies require single-sex multiple-occupancy bathrooms or changing facilities to be designated for use by—and used only by—persons based on their “biological sex.” The law defines “biological sex” as “[t]he physical condition of being male or female, which is stated on a person’s birth certificate.”

¹ Amici adopt and incorporate by reference the background discussion in the United States’ brief in support of its motion for a preliminary injunction. *See* Br. at 3–10, ECF No. 76. This summary is provided for the Court’s convenience.

² *See* Michael Gordon, Mark S. Price & Katie Peralta, *Understanding H.B. 2: North Carolina’s newest law solidifies state’s role in defining discrimination*, Charlotte Observer, Mar. 26, 2016 (www.charlotteobserver.com). For internet-sourced citations, full URLs appear in the table of authorities.

In May 2016, the United States sued the State of North Carolina, its Governor, the North Carolina Department of Public Safety, the University of North Carolina (UNC), and the UNC Board of Governors (collectively, “the defendants”), alleging that implementation and enforcement of H.B. 2 would violate three federal antidiscrimination statutes—Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, and its implementing regulations, 28 C.F.R. pt. 54, 34 C.F.R. pt. 106; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e; and the Violence Against Women Act, 42 U.S.C. § 13925(b)(13). On July 6, 2016, the United States moved for a preliminary injunction against defendants’ enforcement of H.B. 2.

ARGUMENT

“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

I. THE UNITED STATES IS LIKELY TO SUCCEED ON ITS CLAIMS BECAUSE ENFORCEMENT OF H.B. 2 REQUIRES RELIANCE ON IMPERMISSIBLE SEX STEREOTYPES

H.B. 2 requires boards of education and public agencies to bar transgender persons from the restrooms and changing facilities that correspond to their gender identity unless those persons can demonstrate that their gender identity is accurately reflected on their birth certificate. Yet enforcing H.B. 2 would require government actors—and encourage

private citizens—to resort to sex stereotyping: a form of sex discrimination that has long been recognized as unlawful under federal antidiscrimination statutes.

Indeed, H.B. 2 creates a regime that is unworkable in practice without reliance upon invidious sex-based stereotypes. As a practical matter, government actors attempting to enforce H.B. 2 have two main choices: (a) to require all facility users to present birth certificates at the door to any restroom or changing room, or (b) to resort to the types of gender stereotypes that violate federal antidiscrimination statutes under longstanding Supreme Court precedent.

Since *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)—a watershed Title VII decision—there can be no doubt that statutes prohibiting sex discrimination cover more than just discrimination based on an individual’s biological status as “male” or “female.” See *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 651 (1999) (looking to Title VII case law in evaluating Title IX sex discrimination claim); *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007) (same). Rather, “Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes” by prohibiting an employer from objecting to characteristics in one gender that the employer would not object to in the other. *Price Waterhouse*, 490 U.S. at 251 (plurality op.) (quotation marks omitted). In *Price Waterhouse*, the Court held that the plaintiff’s employer had discriminated against her on the basis of gender by declining to promote her to partnership based upon the partners’ assessments that she was “macho,” should “take a course at charm school,” and should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear

jewelry.” *Id.* at 235 (plurality op.). The Court emphasized that “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.” *Id.* at 251 (plurality op.).

As the courts of appeals have increasingly recognized, disadvantaging someone because of gender nonconformity is equally impermissible regardless of the birth-assigned gender or current gender identity of the person involved.³ In each case, “the victim has suffered discrimination because of his or her gender non-conformity” in violation of federal sex discrimination law. *See Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004).

H.B. 2 invites precisely such discrimination. Because the law does not require the presentation of birth certificates at the door to restrooms or changing facilities—which would in any event be irrational for the reasons explained in Section II.B., *infra*—any public official seeking to ensure that restrooms are “only used by persons based on their biological sex” would necessarily make appearance-based determinations about whether someone is male or female. Such determinations might include impermissible

³ *See, e.g., Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000) (transgender individuals may state a claim under the Gender Motivated Violence Act); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000) (biological male dressed in feminine attire may have a viable claim under Equal Credit Opportunity Act when bank refused to provide him a loan); *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004) (Title VII encompasses gender nonconformity and applies to transgender individual); *Glenn v. Brumby*, 663 F.3d 1312, 20 (11th Cir. 2011) (Equal Protection Clause’s prohibition of sex-based discrimination violated when transgender employee fired because of gender nonconformity).

assumptions about how men and women look or wear their hair, how they act, or what type of clothes they wear. *See Price Waterhouse*, 490 U.S. at 235. But acting upon such stereotypes is precisely what sex-discrimination law prohibits. *Id.*; *see, e.g., Lewis v. Heartland Inns of Am., L.L.C.*, 591 F.3d 1033, 1038-39 (8th Cir. 2010).

By empowering members of the public to make complaints about facility use by transgender and gender-nonconforming individuals, H.B. 2 also invites members of the public to become gender monitors in restrooms and changing facilities, thereby threatening the safety and privacy of transgender and other gender-nonconforming individuals.⁴ The regime that H.B. 2 envisions thus threatens to turn public spaces into forums for private harassment and discrimination. And it will enlist state actors—police departments, university administrators, and government officials—in achieving its discriminatory ends. Neither the transgender residents of the amici States, nor any other individual, should have to endure such unlawful treatment.

⁴ *See, e.g., Lewis*, 591 F.3d at 1036 (“tomboyish” woman reported sometimes being “mistaken for a male”); Matt DeRienzo, *Woman mistaken for transgender harassed in Walmart bathroom*, News-Times (Danbury, CT), May 16, 2016 (www.newstimes.com) (non-transgender woman with short haircut, wearing a t-shirt and baseball cap, accosted in women’s bathroom and told “[Y]ou’re disgusting!” and “You don’t belong here!”).

II. THE EXPERIENCE OF THE AMICI STATES SHOWS THAT THE OTHER PRELIMINARY INJUNCTION FACTORS ALSO WARRANT ENTRY OF A PRELIMINARY INJUNCTION

The harm that transgender and other gender-nonconforming individuals will experience if H.B. 2 is not enjoined is not offset by any corresponding benefit to North Carolina or the public interest.⁵ To the contrary, as the experience of the amici States confirms, the privacy and public-safety concerns that assertedly motivated the statute's enactment⁶ are unfounded. And in any event, because of differing State policies regarding gender markers on birth certificates, H.B. 2's reliance on such markers is irrational.

A. North Carolina's Purported Safety and Privacy Concerns Are Unfounded.

Nearly 1.5 million people in the United States identify as transgender.⁷ Beginning nearly a quarter century ago, States began providing explicit civil rights protections for transgender people. Currently, nineteen States and the District of Columbia offer such protections, either through their definitions of sex discrimination or by prohibiting discrimination based on gender identity: New York, Washington, California, Colorado,

⁵ The amici States adopt and incorporate the discussion of irreparable harm to transgender individuals and the public interest in the United States' brief in support of the motion for a preliminary injunction. *See* Br. at 52–60, ECF No. 76.

⁶ *See* Jim Morrill, *NC House speaker weighs special session on Charlotte LGBT ordinance*, News & Observer, Feb. 25, 2106 (newsobserver.com); N.C. Office of the Governor, Press Release: Governor McCrory Takes Action to Ensure Privacy in Bathrooms and Locker Rooms (Mar. 23, 2016) (governor.nc.gov).

⁷ Andrew R. Flores et al., *How Many Adults Identify as Transgender in the United States?* 3-4 (2016) (www.williamsinstitute.law.ucla.edu).

Connecticut, Delaware, Hawai‘i, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, and Vermont.⁸ At

⁸ **California:** Cal. Educ. Code §§ 220, 221.5 (Deering) (education and school restrooms); Cal. Gov’t Code §§ 12926, 12940, 12946 (Deering) (employment); Cal. Gov’t Code § 12955 (Deering) (housing); Cal. Civ. Code § 51(b) (Deering) (public accommodations); Cal. Penal Code § 422.76 (hate crimes). **Colorado:** Colo. Rev. Stat. § 24-34-301(7) (definition); Colo. Rev. Stat. § 24-34-402 (employment); Colo. Rev. Stat. § 24-34-502 (housing); Colo. Rev. Stat. § 24-34-601 (public accommodations). **Connecticut:** Conn. Gen. Stat. § 46a-51(21) (definition); Conn. Gen. Stat. § 46a-60 (employment); Conn. Gen. Stat. § 46a-64 (public accommodations); Conn. Gen. Stat. § 46a-64c (housing); Conn. Gen. Stat. § 10-15c (schools). **Delaware:** Del. Code Ann. tit. 6, § 4501 (public accommodations); Del. Code Ann. tit. 6 § 4603(b) (housing); Del. Code Ann. tit. 19, § 711 (employment). **Hawai‘i:** Haw. Rev. Stat. § 515-2 (definition); Haw. Rev. Stat. § 515-3 (housing); Haw. Rev. Stat. § 489-2 (definition); Haw. Rev. Stat. § 489-3 (public accommodations). **Illinois:** 775 Ill. Comp. Stat. 5/1-102(A) (housing, employment, access to financial credit, public accommodations); 775 Ill. Comp. Stat. 5/1-103(O-1) (definition). **Iowa:** Iowa Code § 216.2(10) (definition); Iowa Code § 216.6 (employment); Iowa Code § 216.8 (housing); Iowa Code § 216.9 (education); Iowa Code § 216.7 (public accommodations). **Maine:** Me. Stat. tit. 5, § 4553(9-C) (definition); Me. Stat. tit. 5 § 4571 (employment); Me. Stat. tit. 5 § 4581 (housing); Me. Stat. Ann. tit. 5 § 4591 (public accommodations); Me. Stat. Ann. tit. 5 § 4601 (education). **Maryland:** Md. Code Ann., State Gov’t § 20-304 (public accommodations); Md. Code Ann., State Gov’t § 20-606 (employment); Md. Code Ann., State Gov’t § 20-705 (housing). **Massachusetts:** Mass. Gen. Laws ch. 4, § 7, fifty-ninth (definition); Mass. Gen. Laws ch. 151B, § 4 (employment, housing, credit); Mass. Gen. Laws ch. 76, § 5 (schools); Mass. Gen. Laws ch. 272, §§ 92A, 98 (public accommodations) (as amended by Mass. Acts ch. 134 (2016)). **Minnesota:** Minn. Stat. § 363A.03(44) (definition); Minn. Stat. § 363A.09 (housing); Minn. Stat. § 363A.13 (education); Minn. Stat. § 363A.08 (employment); Minn. Stat. § 363A.11 (public accommodations). **Nevada:** Nev. Rev. Stat. §§ 651.050, 651.070 (public accommodations); Nev. Rev. Stat. § 118.100 (housing); Nev. Rev. Stat. §§ 613.310(4), 613.330 (employment). **New Jersey:** N.J. Stat. Ann. § 10:5-5(rr) (definition); N.J. Stat. Ann. § 10:5-12 (employment); N.J. Stat. Ann. § 10:5-4 (public accommodations, employment, housing). **New Mexico:** N.M. Stat. Ann. § 28-1-2(Q) (definition); N.M. Stat. Ann. § 28-1-7(A) (employment); N.M. Stat. Ann. § 28-1-7(F) (public accommodations); N.M. Stat. Ann. § 28-1-7(G) (housing). **New York:** N.Y. Comp. Codes R. & Regs. tit. 9, § 466.13 (interpreting the N.Y. Exec. Law § 296 (Human Rights Law) definition of “sex” to include gender identity). **Oregon:** Or. Rev. Stat. § 174.100(7) (definition); Or. Rev. Stat. § 659A.006 (employment, housing,

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least 225 local governments also prohibit discrimination based on gender identity or expression.⁹

In those States where antidiscrimination protections are already the law, the supposed privacy and public-safety concerns cited in support of H.B.2 have not materialized.¹⁰ The experience of the National Task Force to End Sexual and Domestic Violence Against Women (NTF) bears this out. NTF is an organization of more than 200 rape-crisis centers, shelters, and other service providers in forty-three States that works to reduce sexual assault and domestic violence.¹¹ It has member providers in each of the nineteen jurisdictions with antidiscrimination laws covering transgender people. NTF

public accommodations); Or. Rev. Stat. § 659.850 (education). **Rhode Island:** 28 R.I. Gen. Laws §§ 28-5-6(11), 28-5-7 (employment); 34 R.I. Gen. Laws §§ 34-37-3(9), 34-37-4 (housing); 11 R.I. Gen. Laws § 11-24-2 (public accommodations). **Vermont:** Vt. Stat. Ann. tit. 1, § 144 (definition); Vt. Stat. Ann. tit. 21, § 495 (employment); Vt. Stat. Ann. tit. 9, § 4502 (public accommodations); Vt. Stat. Ann. tit. 9, § 4503 (housing). **Washington:** Wash. Rev. Code § 49.60.040(26) (definition); Wash. Rev. Code § 49.60.180 (employment); Wash. Rev. Code § 49.60.215 (public accommodations); Wash. Rev. Code § 49.60.222 (housing); Wash. Rev. Code § 28A.642.010 (schools). **District of Columbia:** D.C. Code § 2-1401.02(12A) (definition); D.C. Code § 2-1402.41 (education); D.C. Code § 2-1402.21 (housing); D.C. Code § 2-1402.11 (employment); D.C. Code § 2-1402.31 (public accommodations).

⁹ Human Rights Campaign, *Cities and Counties with Non-Discrimination Ordinances that Include Gender Identity* (current as of Jan. 28, 2016) (www.hrc.org).

¹⁰ For example, four large California school districts have had policies protecting the rights of transgender students in place for many years, and none have reported any incidents or problems with the policies. Media Matters, *California School Officials Debunk Right-Wing Lies About Transgender Student Law* (Feb. 11, 2014) (mediamatters.org).

¹¹ See NTF, *Full and Equal Access for the Transgender Community* (Apr. 21, 2016) (<http://4vawa.org/>).

affirms that service providers in “[n]one of those jurisdictions have seen a rise in sexual violence or other public safety issues due to nondiscrimination laws.”¹² Similarly, North Carolina’s Governor McCrory has acknowledged that he knows of no case in North Carolina of a person being convicted of committing crimes in a restroom under the cover of protections provided to transgender individuals.¹³ Moreover, nothing in the United States’ position would preclude defendants or the amici States from taking appropriate steps to address any actual misconduct, without regard to a perpetrator’s gender identity.

State experiences show that the privacy concerns raised by supporters of H.B. 2 are similarly unfounded. For example, employers and school districts in the amici States have identified a variety of cost-effective options to maximize privacy for all users of restrooms and changing facilities while avoiding discrimination. These measures include offering privacy curtains as well as separate restroom and changing spaces to all who desire them—a group that might include both transgender and non-transgender individuals.¹⁴

¹² *Id.*

¹³ See Fox News Sunday, Transcript: Gov. McCrory on showdown over NC’s transgender bathroom law (May 8, 2016) (www.foxnews.com).

¹⁴ See, e.g., N.Y. State Educ. Dep’t, *Guidance to School Districts for Creating a Safe and Supportive School Environment for Transgender and Gender Nonconforming Students*, 10 (July 2015) (www.p12.nysed.gov); Wash. State Human Rights Comm’n, *Frequently Asked Questions Regarding WAC 162-32-060 Gender-segregated Facilities* (Jan. 15, 2016) (www.hum.wa.gov); Cal. Dep’t of Fair Emp. & Hous., *Transgender Rights in the Workplace* (Feb. 2016) (www.dfeh.ca.gov); Chicago Pub. Schs., *Press Release: Chicago Public Schools Introduces New Guidelines to Support Transgender Students, Employees and Adults* (June 13, 2016) (www.cps.edu); Albuquerque Pub. *(continued on next page)*

Thus, North Carolina has not demonstrated any public-safety risk, or any impingement on privacy concerns that cannot be accommodated by affording privacy to the person who desires it. As the Supreme Court has long recognized, “mere negative attitudes, or fear . . . are not permissible bases” for restricting the rights of people viewed as “different.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985).¹⁵

B. H.B. 2’s Reliance on Birth Certificates Is Irrational in Light of the States’ Differing Approaches to Birth-Certificate Gender Markers.

Even if there were a privacy or public-safety justification for assigning individuals to restrooms and changing facilities according to what H.B. 2 refers to as their “biological sex,” rather than their gender identity—and there is not—H.B. 2 would fail to meaningfully achieve that result. H.B. 2 presumes that the gender marker on an individual’s birth certificate corresponds to the “physical condition of being male or female.” H.B. 2, §§ 1.2, 1.3. But States have widely differing policies concerning when or whether individuals may change the gender designation on their birth certificates from the gender to which they were assigned at birth. The gender marker on an individual’s birth certificate is therefore not an accurate proxy for his or her current physical anatomy.

Schs., *Non-Discrimination for Students: Gender Identity and Expression* (May 16, 2016) (www.aps.edu).

¹⁵ See also, e.g., *Glenn*, 663 F.3d at 1312, 1321 (affirming finding of unlawful discrimination by state employer that fired transgender woman over concerns that “other women might object to [the employee’s] restroom use”).

Ten States—New York, Washington, California, Connecticut, Hawai‘i, Maryland, Massachusetts, Oregon, Rhode Island, and Vermont—along with the District of Columbia and New York City (which issues birth certificates separately from New York State)—employ what is known as the “modernized standard” for allowing changes to the gender marker on an individual’s birth certificate.¹⁶ In these States and jurisdictions, individuals need not undergo gender-affirming surgery (e.g., a phalloplasty, vaginoplasty, or other physical alterations) in order to have their birth certificates changed. Moreover, in most of these jurisdictions, no notation appears on the new birth certificate stating that the gender has been amended.¹⁷ Several other States will change gender markers on birth

¹⁶ **New York:** N.Y. Dep’t of Health, Bureau of Vital Records, Letter to Applicants (Sept. 28, 2015) (www.transequality.org). **Washington:** Wash. Dep’t of Health, *Gender Change on a Birth Certificate* (www.doh.wa.gov). **California:** Cal. Health & Safety Code § 103426 (2014). **Connecticut:** Conn. Gen. Stat. § 19a-42. **Hawai‘i:** Hawai‘i, Dep’t of Health, Vital Records, *Establishing a New Birth Certificate for Sex Designation Change* (health.hawaii.gov). **Maryland:** Md. Dep’t of Health & Mental Hygiene, Div. of Vital Records, Fact Sheet: Applying for a New Certificate of Birth (dhmh.maryland.gov), Md. Code, Health-Gen. § 4-211. **Massachusetts:** Mass. Dep’t of Pub. Health, Registry of Vital Records, Fact Sheet: Amending the Sex Designation on a Birth Certificate (www.mass.gov). **Oregon:** Or. Rev. Stat. § 33.460. **Rhode Island:** R.I. Dep’t of Health, *Rules and Regulations Governing Vital Records* R23-3-VR pt. IX, § 35.5. **Vermont:** Vt. Stat. Ann. tit. 18 § 5112. **District of Columbia:** D.C. Code § 7-210.01. **New York City:** Rules of City of N.Y. tit. 24, § 207.05(a)(5), *see also* N.Y. City Dep’t of Health, *Birth Certificate Corrections* (www1.nyc.gov).

¹⁷ **New York:** N.Y. Dep’t of Health, Bureau of Vital Records, Letter to Applicants (Sept. 28, 2015) (www.transequality.org). **California:** Cal. Health & Safety Code § 103440 (2014); **Connecticut:** Conn. Gen. Stat. § 19a-42; **Hawai‘i:** Hawai‘i Dep’t of Health, Vital Records, *Establishing a New Birth Certificate for Sex Designation Change* (health.hawaii.gov); **Maryland:** Md. Code, Health-Gen. § 4-211(f); **Massachusetts:** Mass. Gen. Laws 46, §§ 13-H; **Oregon:** Ore. Health Auth., *Birth Certificate: Court Order of Change of Sex* (public.health.oregon.gov); **Rhode Island:** R.I. Dep’t of Health,

(continued on next page)

certificates, but only after gender-affirming surgery has been completed.¹⁸ In some of these States, the amended certificate will be marked as such.¹⁹ And three States do not change gender markers on birth certificates, even with proof of gender-affirming surgery.²⁰

As the discussion above makes clear, an individual’s so-called “physical condition of being male or female” may have little relationship to the gender marker on his or her birth certificate. Accordingly, H.B. 2’s reliance on birth certificates produces irrational results. For instance, a transgender woman born in New York who has not had gender-affirming surgery, but who has received a new birth certificate, would be required by H.B. 2 to use the women’s restroom at UNC. But a transgender woman born in North Carolina with identical anatomy would be required to use the men’s room, because North Carolina issues a new birth certificate only if a person has had gender-affirming surgery. *See* N.C. Gen. Stat. § 130A-118(b)(4). This would be the case without regard to these

Rules and Regulations Governing Vital Records, pt. IX, § 35.5(e), n.2; **Vermont**: Vt. Stat. Ann. tit. 18 § 5112(c); **District of Columbia**: D.C. Dep’t of Health, Birth Certificate Gender Designation Application Form (doh.dc.gov); **New York City**: Rules of City of N.Y. tit. 24 § 207.05(b).

¹⁸ *See, e.g.*, Ark. Code Ann. § 20-18-307(d).

¹⁹ *See, e.g.*, Ala. Code § 22-9A-19 (certificates shall be marked “AMENDED” and a summary of evidence submitted in support of the amendment will be made a part of the record); Campaign for Southern Equality, LGBT Rights Toolkit (observing that “Alabama will issue an ‘amended’ birth certificate noting change of name and sex, but will not issue a new birth certificate replacing the original”).

²⁰ *See Idaho*: Idaho Code § 39-250, Idaho Admin. Code § 16.02.08.201; **Kansas**: *In re Estate of Gardiner*, 273 Kan. 191 (2002); **Tennessee**: Tenn. Code Ann. § 68-3-203(d).

individuals' outward appearances—*e.g.*, whether their dress or behavior was otherwise stereotypically masculine or feminine.

Similarly, to comply with H.B. 2, a transgender man born in Tennessee (which does not permit alteration of gender markers on birth certificates) who has had a phalloplasty and otherwise manifests a stereotypically masculine appearance would be required to use the woman's room when visiting UNC because his birth certificate would state that he is female. Yet a transgender man with the same anatomy and stereotypically masculine appearance who was born in North Carolina, and has obtained a new North Carolina birth certificate, would be required to use the men's room.

The law likewise creates irrational distinctions between transgender individuals who were born in the same State and have the same physical anatomy, based upon whether they have obtained new birth certificates. People may fail to obtain new birth certificates at the earliest possible moment for many reasons, including the cost of obtaining such documents, the burden of navigating the administrative process, or the possibility that the amended document would have the effect of revealing their transgender status. H.B. 2 would direct individuals to different restrooms based upon the gender marker on their birth certificates, even when there was no relevant difference in their anatomy either at birth or at the present time. These peculiar results of H.B. 2 highlight its discriminatory character.

Moreover, for transgender individuals who are living their gender identities through dress, mannerisms, or other means—but who do not (and sometimes cannot) possess corrected birth certificates—laws such as H.B. 2 create an “intolerable and

impermissible catch 22,” *Price Waterhouse*, 490 U.S. at 251 (plurality op.). These individuals can comply with the law and thereby risk severe recrimination for appearing to be out of place in a facility that nevertheless comports with the gender marker on their birth certificates.²¹ Or they can use restrooms corresponding to their outward appearances at the risk of violating the law, which makes one’s birth certificate conclusive evidence of gender. The hazards of either choice may deter transgender individuals from using such public spaces at all.²²

C. H.B. 2 Compounds the Discrimination Already Experienced by Transgender and Gender Nonconforming Individuals.

As demonstrated above (*see supra* Point I), H.B. 2 will cause transgender and gender-nonconforming individuals substantial harm by subjecting them to scrutiny and harassment in public restrooms and changing facilities. Moreover, this harm will occur against the backdrop of the severe and pervasive discrimination already suffered by such individuals in their daily lives.

In the 2011 National Transgender Discrimination Survey (NTDS), the largest survey of transgender people to date, 78% of respondents who expressed a transgender

²¹ See, e.g., Matt Pearce, *What it’s like to live under North Carolina’s bathroom law if you’re transgender*, Los Angeles Times, June 12, 2016 (www.latimes.com) (transgender man with a full beard stating that “[i]t makes everybody uncomfortable” when he uses the women’s bathroom).

²² See Erin Beck, *Bathroom predator myth has real effect on transgender people’s lives*, Charleston (WV) Gazette-Mail, May 8, 2016 (www.wvgazette.com) (noting that some transgender individuals “purposely avoid[] food and water so they won’t have to use the bathroom in a public place”).

identity or gender nonconformity in grades K–12 reported experiencing harassment by students, teachers, or staff.²³ Nearly half of transgender students (49.5%) reported experiencing physical harassment, and a third (34.1%) reported physical assault.²⁴ Such harassment leads to absenteeism and trouble graduating. In one national survey, 46% of transgender students reported missing at least one day of school in the last month because they felt unsafe or uncomfortable at school.²⁵ In another survey, nearly 60% of lesbian, gay, bisexual, and transgender students who did not expect to graduate from high school said that this expectation was due to a hostile or unsupportive school environment, including hostile peers, unsupportive school staff, and gendered school practices that caused them constant discomfort.²⁶ For transgender students who left school due to harassment, 48% experienced homelessness at some point in their lives.²⁷

²³ Jaime M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* 36, Nat'l Ctr. for Transgender Equality & Nat'l Gay & Lesbian Task Force (2011) (www.transequality.org); see also Emily A. Greytak, Joseph G. Kosciw & Elizabeth M. Diaz, *Harsh Realities: The Experiences of Transgender Youth in our Nation's Schools* xi (Gay, Lesbian & Straight Educ. Network 2009) (www.glsen.org) (finding that number to be even higher: 87% of transgender students were verbally harassed at school due to their gender expression).

²⁴ Tonei Glavinic, *Research Shows Lack of Support for Transgender and Gender-Nonconforming Youth in U.S. School Systems*, 2(1) *Inquiries J.* 1, 1 (2010) (www.inquiriesjournal.com).

²⁵ Greytak, Kosciw & Diaz, *Harsh Realities*, *supra*, at 14.

²⁶ Joseph G. Kosciw et al., *The 2013 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth in our Nation's Schools* 43 (Gay, Lesbian & Straight Educ. Network 2014) (www.glsen.org).

²⁷ Grant et al., *Injustice at Every Turn*, *supra*, at 33.

Discrimination, harassment, and violence also follow transgender people into the workplace. The NTDS found that transgender people report “[n]ear universal harassment on the job”—for example, verbal harassment, inappropriate questions about surgical status, denial of access to restrooms, and physical and sexual assault—all of which H.B. 2 threatens to exacerbate.²⁸ Of those surveyed by NTDS, 90% reported experiencing such mistreatment or taking actions to avoid it.²⁹

Job-related discrimination of this type has negative consequences for transgender people and for the economy. The unemployment rate for transgender individuals is double the national average, and nearly half of transgender individuals report being underemployed due to gender identity or expression.³⁰ Transgender people are also disproportionately likely to live in extreme poverty, and one-fifth of transgender individuals have experienced homelessness at some point in their lives.³¹ All of these factors are even more severe for transgender people of color, who fare worse than others across the board.³²

²⁸ *Id.* at 51, 56. See generally D.C. Office of Human Rights, *Qualified and Transgender* (Nov. 2015) (ohr.dc.gov).

²⁹ *Id.* at 56.

³⁰ *Id.* at 55; see also *id.* (observing that unemployment rates for Black, American Indian, Alaska Native, Latino/a, and multiracial respondents were even higher than the rate among the general transgender population).

³¹ *Id.* at 22; Nat’l Ctr. for Transgender Equality, *Housing & Homelessness* (www.transequality.org).

³² Grant et al., *Injustice at Every Turn*, *supra*, at 2.

In addition to affecting school and work outcomes, harassment on the basis of gender identity can have serious health consequences. The high level of suicide attempts by transgender people has been widely reported.³³ Transgender individuals have a 41% rate of lifetime suicide attempts, a level drastically higher than the rate of suicide attempts for the overall U.S. population (4.6%) or for lesbian, gay, and bisexual people (10–20%).³⁴

A recent study analyzing the relationship between access to college restrooms and suicidality found that transgender people who had been denied access to restroom facilities were nearly 40% more likely to have attempted suicide in their lifetime than transgender people who had not.³⁵ There are also direct links between restroom access and other aspects of health for transgender individuals. Research shows that transgender people often avoid using the restroom because they feel unsafe or uncomfortable. In one recent study, almost two-thirds of transgender students reported avoiding using the

³³ See, e.g., Luke Malone, *Transgender Suicide Attempt Rates are Staggering* (Mar. 5, 2015) (www.vocativ.com); Laura Ungar, *Transgender people face alarmingly high risk of suicide*, USA Today, Aug. 16, 2015 (www.usatoday.com).

³⁴ Ann P. Haas, Philip L. Rodgers & Jody L. Herman, *Suicide Attempts Among Transgender and Gender Non-Conforming Adults: Findings of the National Transgender Discrimination Survey 2* (Am. Found. for Suicide Prevention & Williams Inst. 2014) (williamsinstitute.law.ucla.edu).

³⁵ Kristie L. Seelman, *Transgender Adults' Access to College Bathrooms and Housing and the Relationship to Suicidality*, *J. of Homosexuality* 11, tbl. 2 (2016) (www.tandfonline.com).

restroom at school.³⁶ Attempting to avoid going to the restroom for an entire school day can cause a variety of health problems, including dehydration, urinary tract infection, kidney infection, and other kidney-related problems.³⁷ Indeed, in a recent study of transgender individuals, 54% of respondents reported negative health effects from avoiding public restrooms.³⁸

CONCLUSION

As demonstrated above and in the brief of the United States, H.B. 2, if not enjoined, will cause irreparable harm to transgender individuals, and the statute cannot be justified by any benefit, or prevention of injury, to North Carolina or the public interest. Accordingly, the Court should grant the United States' motion for a preliminary injunction.

³⁶ Kosciw et al., *The 2013 National School Climate Survey*, *supra*, at 85; *see also* Kristie L. Seelman et al., *Invisibilities, Uncertainties, and Unexpected Surprises: The Experiences of Transgender and Gender Non-Conforming Students, Staff, and Faculty at Colleges and Universities in Colorado* 143 (2012) (portfolio.du.edu); *see also, e.g.*, Cal. Assemb. Comm. on Educ., Report on Assemb. Bill No. 1266, at 5 (2013-2014 Reg. Sess.) (as introduced Feb. 22, 2013).

³⁷ *See, e.g., G.G. ex rel. Grimm v. Gloucester County School Board*, 822 F.3d 709, 716-17 (4th Cir.), *reh'g denied*, 2016 WL 3080263 (4th Cir. May 31, 2016); Jody L. Herman, *Gendered Restrooms and Minority Stress: The Public Regulation of Gender and its Impact on Transgender People's Lives*, *J. Pub. Mgmt & Soc. Pol'y* 75 (Spring 2013) (williamsinstitute.law.ucla.edu).

³⁸ Herman, *Gendered Restrooms and Minority Stress*, *supra* at 75.

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