

16-1989

UNITED STATES COURT OF APPEALS
FOR THE
FOURTH CIRCUIT

JOAQUÍN CARCAÑO, ET AL.,
Plaintiffs-Appellants,

v.

PATRICK MCCRORY, ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of North Carolina

**BRIEF OF *AMICI CURIAE* ANTI-SEXUAL ASSAULT, DOMESTIC
VIOLENCE, AND GENDER-BASED VIOLENCE ORGANIZATIONS
IN SUPPORT OF PLAINTIFFS-APPELLANTS' SEEKING REVERSAL**

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CORPORATE DISCLOSURE STATEMENT

Amici curiae are anti-sexual assault and domestic violence organizations. Each certifies that it is a not-for-profit organization or corporation, with no parent corporation or publicly-traded stock.

TABLE OF CONTENTS

	Page
STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE.....	1
INTRODUCTION	2
ARGUMENT	5
I. Nondiscrimination Laws Do Not Create Safety Risks to Women and Children	7
A. Nondiscrimination laws do not permit men to enter women’s restrooms	8
B. Transgender-inclusive restrooms and changing facilities do not increase the risk of sexual violence.....	11
II. Transgender Individuals Are More Likely to be Victims of Sexual Assault and Other Violent Crimes.....	16
A. Transgender People Experience Violence in Public Facilities with Staggering Frequency.....	19
B. H.B. 2 Increases the Risk That Transgender Individuals Will Be the Victims of Sexual Assault and Other Crimes.....	21
CONCLUSION	26

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Farmer v. Brennan</i> , 511 U.S. 825 (1994).....	23
<i>In re S.M.S.</i> , 675 S.E.2d 44 (N.C. Ct. App. 2009).....	9
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Defendant Patrick L. McCrory’s Initial Response in Opposition to Plaintiffs’ Motion For Preliminary Injunction, <i>Joaquin Carcano, et al. v. Patrick McCrory et al.</i> , Case No. 1:16-cv-00236-TDS-JEP, Doc. No. 55 (M.D.N.C. Jun. 9, 2016) 14, 22	
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Statutes

Charlotte Ordinance No. 7056	9
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STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE¹

Amici curiae anti-sexual assault and domestic violence organizations²

respectfully submit this *amicus curiae* brief in support of Plaintiffs-Appellants.

This brief addresses issues of sexual assault, domestic violence, and other gender-based violence of which *amici* have knowledge and expertise.

As organizations whose purpose is to support, empower, and advocate for victims of sexual assault, domestic violence, and other gender-based violence, we reject Appellees' attempts to co-opt victims of sexual assault as a justification for a discriminatory law. We urge the Court to reverse the trial court's denial of a preliminary injunction on Plaintiffs-Appellants' equal protection claim. As set forth below, *amici* submit this brief to highlight factors demonstrating that H.B. 2 lacks the required "reasonable fit" with the North Carolina General Assembly's safety goals because (1) there is no evidence that nondiscrimination laws like Charlotte Ordinance No. 7056 increase risks to women and children in public restrooms; (2) transgender individuals, and the LGBT community generally, experience sexual assault, harassment, and abuse at greater rates than the rest of the population; and (3) H.B. 2, by forcing transgender individuals to use restrooms that

¹ No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund preparing or submitting the brief.

² A full list of *amici curiae* is attached as Appendix A.

do not correspond with their gender identity, increases the risk that both transgender and non-transgender individuals will be victims of violence that H.B. 2 purportedly aims to curtail. H.B. 2 cannot, therefore, survive Equal Protection scrutiny.

All parties have consented to the filing of this *amicus* brief.

INTRODUCTION

Amici are one hundred and forty three (144) organizations that advocate for victims of sexual assault, domestic violence, and other gender-based violence. The form of advocacy varies, but the purposes are uniform: to eliminate sexual assault, domestic violence, and other gender-based violence, and to support and empower all survivors of these crimes. The North Carolina General Assembly (“NCGA”), Legislator-Intervenors, and Governor McCrory (collectively, the “State”) have put sexual assault, domestic violence, and other gender-based violence at the forefront of their defense of House Bill 2 (“H.B. 2”) by arguing that H.B. 2 is necessary to protect the safety and privacy of women and children in public facilities. That argument is inconsistent with the experience and expertise of *amici* in combating these kinds of crimes.

Laws like H.B. 2 do nothing to reduce incidents of sexual assault. Quite the opposite, H.B. 2 targets transgender individuals—a group of people who are victims of sexual assault, domestic violence, and other gender-based violence at

significantly higher rates than the rest of the population—and places them in harm’s way. H.B. 2’s proponents justify this increased risk to transgender people as the price of “safety and privacy,” but H.B. 2 provides neither safety nor privacy to transgender people. Nor does it provide safety or privacy to non-transgender people.

H.B. 2 was drafted, in large part, in reaction to Charlotte Ordinance No. 7056, a nondiscrimination ordinance extending protections on the basis of gender identity. This type of law has existed for decades in other jurisdictions. To date, eighteen states and more than two hundred municipalities have enacted nondiscrimination laws that prohibit discrimination based on gender identity and protect the right of transgender people to use facilities (including restrooms) consistent with their gender identity. None have reported a rise in sexual violence or other public safety issues after the enactment of these laws. In addition, despite the Appellees’ unsupported arguments to the contrary, nondiscrimination laws in no way promote sexual violence. Assaulting another person in a restroom or other gender-specific facility (or anywhere else) is illegal in every state.

In light of this background, *amici* submit this brief to aid the Court in distinguishing fact from fiction. Transgender nondiscrimination laws do not harm safety or privacy. Such laws protect individuals who, but for such protections, must risk safety and privacy to attend to the most basic of human needs. H.B. 2

also strips transgender individuals of important legal protections afforded non-transgender people. Claims that H.B. 2 protects the safety and privacy of North Carolinians are unsubstantiated and contrary to the experience and expertise of organizations such as *amici* whose mission is to eliminate sexual assault, domestic violence, and other gender-based violence.

H.B. 2's supporters justify the law by arguing that criminals will use nondiscrimination laws to pretend they are transgender and illegally access facilities in order to assault women and children. But there is no evidence that offenders rely on nondiscrimination laws to escape liability for their crimes. As advocates for victims of sexual assault, domestic violence, and other gender-based violence, *amici* condemn arguments based on fictions about either sexual assault or transgender people. These fictions hinge on misconceptions about and prejudices against transgender persons, and they are supported neither by statistics nor by the experience of organizations that work with sexual assault survivors every day.

ARGUMENT

H.B. 2 prevents transgender people from using facilities (including restrooms) consistent with their gender identity, unless that gender is reflected on their birth certificate. The State has justified this law under the pretense of protecting residents of North Carolina from assaults in restrooms and locker rooms. The State further argues that nondiscrimination laws like Charlotte Ordinance No. 7056 embolden offenders to engage in criminal acts by pretending to be transgender. Decades of facts, empirical data, and the expertise and experience of *amici* refute this contention. The facts show that nondiscrimination laws do not increase the risk of sexual assault anywhere—including in facilities such as restrooms. Thus, the only effect of H.B. 2 is to increase the risks of sexual assault and other criminal harassment and violence against transgender individuals, while doing nothing to stop sexual assault against non-transgender individuals.

As the District Court acknowledged, before the enactment of H.B. 2, at least “some transgender individuals have been quietly using facilities corresponding with their gender identity and that, in recent years, State educational institutions have been accommodating such students where possible.” Memorandum Opinion, Order and Preliminary Injunction (“Op. Below”), *Joaquin Carcano, et al. v. Patrick McCrory et al.*, Case No. 1:16-cv-00236-TDS-JEP, slip op. at 11 (M.D.N.C. Aug. 26, 2016); JA921. Moreover, “in more recent years, transgender

individuals who dress and otherwise present themselves in accordance with their gender identity have generally been accommodated on a case-by-case basis with educational institutions” from the University of North Carolina to public school districts in the State and around the nation. *Id.*, JA918-20. With these practices in place, “no one has reported any incident or complaint” *Id.*, JA920.

H.B. 2 criminalizes these sensible and just procedures and replaces them with a draconian blanket prohibition.

[A]ny person who uses a covered facility that does not align with his or her birth certificate commits a misdemeanor trespass. Similarly, unless school administrators . . . wish to openly defy the law, they cannot give students permission to enter facilities that do not correspond with the sex on their birth certificates and presumably must discipline or punish students who disobey this directive.

Id., JA929. Defendants-Appellees assert that these measures are necessary to protect non-transgender women from sexual assault.

Yet the residents of North Carolina who face the greatest risk of sexual violence are transgender. Rather than protect any North Carolinians, H.B. 2 exposes transgender North Carolinians to an increased risk of sexual assault and violence. *Amici* urge the Court to recognize Plaintiffs-Appellants’ likelihood of success in demonstrating that H.B. 2 violates basic Equal Protection principles.

I. Nondiscrimination Laws Do Not Create Safety Risks to Women and Children

One of the State's primary justifications for H.B. 2 has been that it serves a "prophylactic function" to ensure "sexual predators do not enter" a public shower or locker room, focusing on non-transgender men masquerading as women with lewd intent. *See* Intervenor-Defendants' Answer to First Amended Complaint and Counterclaims ("Intervenor-Defendants' Answer"), *Joaquin Carcano, et al. v. Patrick McCrory et al.*, Case No. 1:16-cv-00236-TDS-JEP, Doc. No. 54, ¶ 91 (M.D.N.C. Jun. 9, 2016). Laws against sex crimes serve such a prophylactic function. The idea that nondiscrimination laws or policies embolden criminal offenders to break the law is not grounded in reality.

The State also admits that "[c]riminal laws governing assault, battery and sexual crimes" allow law enforcement to protect individuals from all forms of sexual assault in restrooms.³ But they further argue that H.B. 2 will advance the goals of these laws by "enabl[ing] police and other public officials to ensure that sexual predators do not enter those facilities at all, or, if they do enter, they can be removed before they attack." *Id.*, ¶ 91. Such measures can only be truly

³ As the District Court acknowledged, these laws include peeping laws that make it illegal to "peep secretly into any room occupied by another person," N.C. Gen. Stat. § 14-202; public exposure laws that make it illegal to "willfully expose the private parts of [a] person in any public place and in the presence of any other person or persons," N.C. Gen. Stat. § 14-190.9(a); and criminal trespassing statutes. *See* N.C. Gen. Stat. § 14-159.13. More serious sexual assault offenses are also criminalized in North Carolina.

prophylactic if North Carolina checks birth certificates at every public restroom in the State. And nothing enshrined in North Carolina law before the enactment of H.B. 2 prevented law enforcement from barring criminal offenders from entering restrooms or removing them once discovered. More importantly, the telltale sign of such unlawful conduct is not a person's gender identity or anatomy—it is the illegal conduct itself. Transgender-inclusive restrooms have existed for years. Where they do, they have not been associated with any increase in sexual predation or violence.

A. Nondiscrimination laws do not permit men to enter women's restrooms

H.B. 2 was drafted, in part, as a response to the passage of Charlotte Ordinance No. 7056.⁴ Charlotte's nondiscrimination ordinance would have allowed transgender men to use men's facilities and transgender women to use women's facilities. It would have remained illegal for men to trespass in women's

⁴ See *Myths vs Facts: What New York Times, Huffington Post and other media outlets aren't saying about common-sense privacy law*, Governor Pat McCrory (Mar. 25, 2016), <https://governor.nc.gov/press-release/myths-vs-facts-what-new-york-times-huffington-post-and-other-media-outlets-arent-0> (“The bill [(H.B. 2)] was passed after the Charlotte City Council voted to impose a regulation requiring businesses to allow a man into a women's restroom, shower, or locker room if they choose.”). Not so. Ordinance No. 7056 does not allow a man into a women's restroom. It prevents businesses from refusing accommodations to individuals based on their gender identity.

restrooms, as well as to engage in a range of conduct in them.⁵ Nondiscrimination simply means that transgender people cannot be blocked from using the facilities corresponding to their gender. Charlotte’s ordinance was drafted to achieve this purpose.

It shall be unlawful to deny any person the full and equal enjoyment of the . . . accommodations of a place of public accommodation because of . . . sexual orientation, gender identity, [or] gender expression.

Charlotte Ordinance No. 7056.⁶ The State misreads the statute, arguing that “an ostensibly male sexual predator would have a legal right to enter a public women’s shower or locker room simply by claiming to identify as female—whether that claim is true or false.” Intervenor-Defendants’ Answer, *Carcano*, Case No. 1:16-cv-00236-TDS-JEP, ¶ 112. But nothing in a nondiscrimination law protects criminal conduct, and the law prohibits individuals from entering a restroom that does not correspond with the person’s actual gender identity.

The State’s contrary argument rests on the assumption that there is no way to identify the unlawful activities of non-transgender male predators posing as transgender women to gain access to public, sex-segregated facilities. In other

⁵ See, e.g., *In re S.M.S.*, 675 S.E.2d 44, 46 (N.C. Ct. App. 2009) (affirming adjudication of a second-degree trespass case because “[t]he sign marked ‘Girl’s Locker Room’ was reasonably likely to give respondent notice that he was not authorized to go into the girls’ locker room”) (citing N.C. Gen. Stat. § 14-159.13).

⁶ <http://charlottenc.gov/NonDiscrimination/Documents/NDO%20Ordinance%207056.pdf#search=ordinance%207056>.

words, the State credits the myth that gender identity is a fleeting, inauthentic expression ripe for abuse. In reality, gender identity is a deeply ingrained, innate characteristic that often manifests itself in early childhood. *See, e.g.,* Kristina Olson, et al., *Gender Cognition in Transgender Children*, 26 *Psych. Sci.* 467, 468, 672 (2015) (finding sample of 5-12 year-old transgender children's Implicit Association Test results were as consistent with their expressed gender identity as their 5-12 year-old non-transgender peers' results). The State's argument that non-transgender men will exploit nondiscrimination laws for criminal purposes thus misunderstands gender identity and incorrectly presupposes that nondiscrimination laws prevent law enforcement officers from carrying out their duties.

The Defendants-Appellees' own examples do nothing to contradict this point. Of the instances they cite, one was a political protest by a man who did not claim to be transgender, as the trial court recognized.⁷ *See* Intervenor-Defendants' Brief in Response to Plaintiffs' Motion for Preliminary Injunction and in Support of Governor McCrory's Motion for Expedited Discovery, *Joaquin Carcano, et al. v. Patrick McCrory et al.*, Case No. 1:16-cv-00236-TDS-JEP, Doc. No. 61 at 21 (M.D.N.C. Jun. 9, 2016). Of the other examples cited, three of the perpetrators

⁷ The Washington State Human Rights Commission observed that the man was trying to make "some kind of misguided point" about transgender-inclusive laws. Washington State Human Rights Commission Statement Regarding Seattle Locker Room Incident (Feb. 26, 2016), http://www.hum.wa.gov/media/dynamic/files/320_Press%20Release%20pool%20locker%20room.pdf.

were arrested despite California's inclusion of gender identity in its public accommodation laws, and in the other three there was no nondiscrimination law on the books at the time of the incident. Put simply, the State has failed to show that nondiscrimination laws have any rational relationship to North Carolina's purported interest in preventing sexual assault.

B. Transgender-inclusive restrooms and changing facilities do not increase the risk of sexual violence

The experience of over two hundred localities, eighteen states, and the District of Columbia show that such nondiscrimination laws do not result in increased criminal activity in restrooms. Each of these jurisdictions has passed a nondiscrimination law permitting transgender individuals to use the facilities that correspond to their gender identity. *See* ACLU, *Transgender People and the Law*;⁸ National Center for Transgender Equality, *Public Accommodations*⁹ The first of these laws has been in effect since 1993. *See* Minn. Stat. § 363A.11. None of these jurisdictions have reported a rise in sexual violence or other public safety issues as a result of transgender individuals using the restrooms, locker rooms, or other sex-segregated facilities that correspond with their gender identity. *Cf.* Michael Scherer, *Battle of the Bathrooms*, Time Magazine (May 30, 2016) at 35 (“[T]here is not yet any anecdotal evidence that trans-friendly rules have been

⁸ <https://www.aclu.org/know-your-rights/transgender-people-and-law>.

⁹ <http://www.transequality.org/know-your-rights/public-accommodations>.

abused by predators, or that incidents of violence or sexual assault have increased.”).

Indeed, when asked, public officials, law enforcement, and anti-sexual assault organizations from jurisdictions across the country with transgender-inclusive laws all state that they have not experienced any of the problems North Carolina now seeks to avoid.

A law enforcement official from Baltimore stated in response to an email survey about the safety effects of gender identity nondiscrimination laws that “[i]t’s the most ridiculous thing I’ve ever heard I’m more concerned in going to the bathroom about someone reaching under and trying to snatch my purse.” See Lou Chibbaro Jr., *Predictions of Trans Bathroom Harassment Unfounded*, *Washington Blade* (Mar. 31, 2016).¹⁰ A school official in St. Paul, Minnesota noted that, in the nearly 25 years since the Minnesota Human Rights Act was amended to protect transgender individuals, there was “no correlation between the Act and incidences of bullying or harassment.” Rachel Percelay, *17 School Districts Debunk Right-Wing Lies About Protections for Transgender Students*, *Media Matters for America* (June 3, 2015).¹¹ The CEO of the Dallas Area Rape Crisis Center not only denied any problems, but noted that “those that cite this

¹⁰ <http://www.washingtonblade.com/2016/03/31/predictions-of-trans-bathroom-harassment-unfounded/>.

¹¹ <http://mediamatters.org/research/2015/06/03/17-school-districts-debunk-right-wing-lies-abou/203867>.

proposition as an ‘opportunity’ to victimize someone are simply doing so in ignorance; not understanding the mentality of perpetrators.” Carlos Maza & Rachel Percelay, *Texas Experts Debunk The Transgender “Bathroom Predator” Myth Ahead of HERO Referendum*, Media Matters for America (Oct. 15, 2015).^{12,13}

There is also no support, statistical or sociological, for the proposition that restrooms and locker rooms need to be singled out for additional protection against sexual assault at the expense of nondiscrimination protections that shield

¹² <http://mediamatters.org/research/2015/10/15/texas-experts-debunk-the-transgender-bathroom-p/206178>.

¹³ See also Carlos Maza & Luke Brinker, *15 Experts Debunk Right-Wing Transgender Bathroom Myth*, Media Matters for America (Mar. 20, 2014, 10:01 AM), <http://mediamatters.org/research/2014/03/20/15-experts-debunk-right-wing-transgender-bathro/198533>; Rachel Percelay, *Florida Experts Debunk the Transgender “Bathroom Predator” Myth*, Media Matters for America (Jan. 12, 2016), <http://mediamatters.org/research/2016/01/12/florida-experts-debunk-the-transgender-bathroom/207916>; Joe Garofoli, *Texan needs to be schooled in San Francisco on transgender rights*, San Francisco Chronicle (May 15, 2016), <http://www.sfchronicle.com/politics/article/Texan-needs-to-be-schooled-in-San-Francisco-on-7469979.php>; Michael Scherer, *Battle of the Bathrooms*, Time Magazine, May 30, 2016; National Task Force to End Sexual and Domestic Violence Against Women, *National Consensus Statement of Anti-Sexual Assault and Domestic Violence Organizations in Support of Full and Equal Access for the Transgender Community* (Apr. 21, 2016), <https://www.scribd.com/doc/309946430/National-Consensus-Statement-of-Anti-Sexual-Assault-and-Domestic-Violence-Organizations-in-Support-of-Full-and-Equal-Access-for-the-Transgender-Commun>; Rachel Percelay, *National Expert: Anti-LGBT “Bathroom Predator” Fears Are “Very Misinformed,”* Media Matters for America (Apr. 21, 2016), <http://mediamatters.org/blog/2016/04/21/national-expert-anti-lgbt-bathroom-predator-fears-are-very-misinformed/210001>; Carlos Maza, *An Expert Explains Why The Right-Wing “Bathroom Predator” Myth is Wrong and Dangerous*, Media Matters for America (Oct. 15, 2015), <http://mediamatters.org/blog/2015/10/15/an-expert-explains-why-the-right-wing-bathroom/206163>.

transgender people from the threat of assault. Data from the National Crime Victimization Survey suggest that between 2005 and 2010, over two-thirds of sexual assaults of female victims occurred either at or near the victim's home or the home of the victim's friend, relative, or acquaintance. *See* Michael Planty, et al., *Female Victims of Sexual Violence, 1994-2010* (March 2013) at p. 4.¹⁴

Bathrooms are not, as Appellees suggest, fertile ground for such criminal conduct.

The vast majority of perpetrators are not the strangers the State envisions lying in wait in restrooms, but rather someone who knows the victim. *See id.* (concluding from National Crime Victimization Survey data that between 2005-2010, female victims knew 78% of rape or sexual assault perpetrators); *accord* Michele C. Black, et al., *The National Intimate Partner and Sexual Violence Survey: 2010 Summary Report* (NISVS; National Center for Injury Prevention and Control, Centers for Disease Control and Prevention, at 23 (2011)).

It is unsurprising, then, that the sole case the State cited below in support of its “safety” argument involves the criminal conviction of a stepfather for child abuse in a shared restroom in a private home—a situation utterly outside the purview of H.B. 2. *See* Defendant Patrick L. McCrory's Initial Response in Opposition to Plaintiffs' Motion For Preliminary Injunction, *Joaquin Carcano, et al. v. Patrick McCrory et al.*, Case No. 1:16-cv-00236-TDS-JEP, Doc. No. 55 at 4

¹⁴ <http://www.bjs.gov/content/pub/pdf/fvsv9410.pdf>.

(M.D.N.C. Jun. 9, 2016) (citing *State v. Rhodes*, No. M2009-00077-CCA-R3-CD, 2010 WL 5061016, at *5-6, *16 (Tenn. Crim. App. Dec. 8, 2010)).

Nevertheless, *amici* are keenly aware that restrooms and locker rooms—like any location—can be sites for sexual violence. See Will Doran, *Equality NC director: No public safety risks in cities with transgender anti-discrimination rules* (April 1, 2016) (confirming three convictions by men in women’s restrooms for sexual crimes from reporter’s searches).¹⁵ *Amici* are also sensitive to the fact that survivors of sexual assault and domestic violence may, based on their traumatic experiences, fear that sexual predators might hide behind transgender-inclusive nondiscrimination laws. The consequences of sexual assault, including post-traumatic stress disorder and severe anxiety, can profoundly impact how survivors engage with the outside world. Many of the *amici* work directly with survivors to help them navigate their daily lives after a sexual assault and recognize that increased fear and anxiety may persist for many years.

Amici point out, however, that transgender people, particularly survivors of sexual assault, may experience similar stress upon being forced to use restrooms and other facilities that do not correspond with their gender identity—places where they know they are at increased risk of harassment and violence. See *infra* at p. 16-19 (describing the disproportionately high rates of violence against transgender

¹⁵ <http://www.politifact.com/north-carolina/statements/2016/apr/01/chris-sgro/equality-nc-director-no-public-safety-risks-cities/>

people). While the State claims that it is working to protect survivors of sexual assault, H.B. 2 makes clear that—in the mind of North Carolina legislators—transgender survivors are undeserving of such protection.

While *amici* welcome policies that will reduce sexual assault, H.B. 2 will do nothing to prevent these sexual predators from harming innocent citizens in North Carolina and elsewhere. Instead, H.B. 2 mandates discrimination against transgender individuals with no evidence to support the foundational premise of the law.

Put simply, the State's supposed safety concerns are based on imagined fears borne out of prejudicial stereotypes that cast transgender individuals as sexual deviants and predators.

II. Transgender Individuals Are More Likely to be Victims of Sexual Assault and Other Violent Crimes

In stark contrast to the State's illusory concerns, *amici* believe that H.B. 2's only practical effect is to mandate discrimination against some of the most vulnerable citizens of North Carolina. Crimes against transgender people, including sexual assault and other sex crimes, are on the rise. In 2013, the nationwide majority (72%) of the victims of LGBT hate-violence homicides were transgender women. *Hate Violence Against Transgender Communities*, supra, p. 3. In 2014, while overall violence against LGBT individuals decreased by 32%, crimes against transgender people *increased* by 13%. Hayley Miller, *Violence*

Against Transgender Community Continues to Increase, Human Rights Campaign (Jun. 9, 2015).¹⁶ And in 2015, the National Coalition of Anti-Violence Programs reported that 26% of all reported incidents of anti-LGBTQ hate violence involved anti-transgender bias. See National Coalition of Anti-Violence Programs, *Lesbian, Gay, Bisexual, Transgender, Queer and HIV-Affected Hate Violence in 2015* (2016).^{17, 18}

More generally, sexual and gender minorities in the United States are exposed to staggeringly high levels of violence. Recent analysis of criminal data shows that “lesbian, gay, bisexual, and transgender (LGBT) victims were more

¹⁶ <http://www.hrc.org/blog/violence-against-transgender-community-continues-to-increase> (citing NCVAP 2014, supra at p. 18).

¹⁷ http://www.avp.org/storage/documents/ncavp_hvreport_2015_final.pdf.

¹⁸ Even with the high rates reported here, experts believe the existing statistics *underestimate* the actual rates of crime against transgender people. Transgender people underreport violence because they are more likely to be the victims of police violence than other survivors of sexual assault, domestic violence, and other gender-based violence. In fact, transgender people have been found to be 3.7 times more likely to experience police violence and seven times more likely to experience physical violence in interactions with the police than other survivors of assault and abuse. See NCVAP 2014, supra, p. 18. A national survey of transgender individuals found that almost half of the respondents (46%) were “uncomfortable seeking police assistance.” J. Grant, et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, National Center for Transgender Equality (2011) at p. 6, http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf. Because of this uneasiness, many of the crimes suffered by transgender people go unreported. See C. Kruttschnitt, et al., *Estimating the Incidence of Rape and Sexual Assault*, National Research Council, National Academies Press (2014) at p. 37 (noting that 65% of all sexual assault crimes in the U.S. go unreported and that 13% of those crimes are not reported because of the belief that the police would not help).

likely to be victims of sexual assault” than others. Robert J. Cramer, Dale E. McNeil, Sarah R. Holley, Martha Shumway, and Alicia Boccellari, *Mental Health and Violent Crime Victims, Does Sexual Orientation Matter?*, Law and Human Behavior, 36(2) (2012), p. 87. These high rates of hate crimes, sexual assault crimes, and crimes of violence are well-documented. *See, e.g., id.* at 90 (finding that “LGBT victims were 2.3 times more likely to be victims of sexual assault than heterosexual victims.”); National Coalition of Anti-Violence Programs, *Lesbian, Gay, Bisexual, Transgender, Queer, And HIV-Affected Hate Violence In 2014* (2015) (“NCVAP 2014”) (finding that “transgender women were almost twice as likely (1.6) to experience sexual violence [than other hate-violence victims surveyed], highlighting a disproportionate impact of sexual violence against transgender women.”).¹⁹ As reported in 2009, “anti-LGBT crimes have increased over the last decade, with particular increases in both sexual assault and murder.” Boccellari, *Mental Health and Violent Crime Victims* at 88 (citing National Coalition of Anti-Violence Programs, *Hate violence against Lesbian, Gay, Bisexual, and Transgendered People in the United States: 2008, (2009)*.²⁰ These disquieting statistics are likely only the tip of the iceberg. “Existing official crime statistics, victim surveys, and self-report surveys provide a very limited glimpse of

¹⁹ http://www.avp.org/storage/documents/Reports/2014_HV_Report-Final.pdf.

²⁰ http://www.ncavp.org/common/document_files/Reports/2008%20HV%20Report%20smaller%20file.pdf.

LGBTQ people’s victimization and offending because they exclude sexual orientation and gender identity as key variables” J. B. Woods, “*Queering Criminology*”: *Overview of the State of the Field, Handbook of LGBT Communities, Crime, and Justice*, D. Peterson and V. R. Panfil (eds.), Springer Science & Business Media (2013), p. 18. In other words, it is likely that LGBT individuals, and transgender people in particular, experience these crimes at higher rates than these statistics suggest.

A. Transgender People Experience Violence in Public Facilities with Staggering Frequency

As already discussed, transgender people experience far more violence than the population at large, even when compared with lesbian, gay, and bisexual individuals. Restrooms in particular are a common site of violence against transgender people. In a recent survey of transgender residents of Washington, D.C., for instance, nearly 70% of all respondents reported that they had been verbally harassed or physically assaulted in public restrooms. Jody L. Herman, *Gendered Restrooms and Minority Stress* (2013), p. 71.²¹ The findings of this study are also borne out in anecdotal reporting. *See* Edecio Martinez, *Suspects in beating of transgender woman Chrissy Lee Polis could face hate crime charges*, CBS News (Apr. 26, 2011) (Chrissy Lee Polis, a 22-year-old Maryland

²¹ <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Herman-Gendered-Restrooms-and-Minority-Stress-June-2013.pdf>.

transgender woman, was brutally attacked by two teenage girls when she attempted to use a McDonald's restroom; the girls spit in her face, ripped her hair, threw her to the floor, and kicked her in her face while others stood by laughing);²² *see also*, e.g., The Associated Press, *Report: Transgender teen attacked in bathroom of Northern California high school*, The Oregonian (Mar. 4, 2014) (student whose sex assigned at birth was female "but identifies as male, told officers he was leaving a boy's bathroom at Hercules Middle/High School when three teenage boys pushed him inside a large stall and assailed him").²³

Prejudice against transgender people and violence motivated by anti-transgender animus threaten the safety of all citizens in the private confines of restrooms. Even non-transgender women have been victims of the anti-transgender animus that H.B. 2 encourages. *See* Jon Levine, *Connecticut Woman Who Donated Hair to Cancer Patients is Victim of Transphobic Attack*, News Mic (May 17, 2016) (Aimee Toms, a 22-year-old non-transgender Connecticut woman who had recently donated her hair to cancer patients, was physically attacked when washing her hands in a Walmart restroom because the assailant mistakenly thought

²² <http://www.cbsnews.com/news/suspects-in-beating-of-transgender-woman-chrissy-lee-polis-could-face-hate-crime-charges/>.

²³ http://www.oregonlive.com/today/index.ssf/2014/03/report_transgender_teen_att_ack.html.

she was transgender).²⁴ In short, transgender people, and those victimized by anti-transgender animus, are the frequent victims, not assailants, in restrooms. H.B. 2 exacerbates, rather than remedies, this problem.

B. H.B. 2 Increases the Risk That Transgender Individuals Will Be the Victims of Sexual Assault and Other Crimes

As the foregoing discussion shows, violence against transgender people—including sexual assault—is a real, documented concern, especially in restrooms. H.B. 2 does not remedy these real, documented sexual assaults—nor do Appellees claim it does. What H.B. 2 does accomplish, however, is to give credence to those who would act on prejudicial feelings toward others. In this way, H.B. 2 increases the risk of sexual and non-sexual violence and harassment in restrooms. It does so by making restrooms a space in which citizens who harbor transgender prejudice feel entitled to enforce H.B. 2 on their own, resulting in harm to transgender and non-transgender individuals and a reduction in the safety and privacy that H.B. 2's supporters claim to protect.

Amici, academic commentators, and others recognized in the community of organizations who advocate against sexual violence all recognize that legislation like H.B. 2 is the **cause of**, not the solution to, the transphobia that results in such violence. “[S]exual minority victimization experiences are hypothesized to be a

²⁴ <https://mic.com/articles/143607/connecticut-woman-who-donated-hair-to-cancer-patients-is-victim-of-transphobic-attack#.HqZ1bSDJu>.

function of **society-induced stigma** . . . [that is] continually reinforced through subtle and overt means such as anti-LGBT legislation” Cramer, et al. supra at p. 18, at 87 (emphasis added) (citing Herek, G. M., *Hate crimes and stigma-related experiences among sexual minority adults in the United States*, Journal of Interpersonal Violence, 24(1) (Jan. 2009) at p. 54–74). In other words, H.B. 2 reinforces the very prejudice that precipitated its passage and feeds the stigma that makes sexual assault and violence in restrooms a legitimate fear for many of North Carolina’s transgender residents and visitors.²⁵

The State’s justification for H.B. 2—that there is a relationship between transgender identity, restroom selection, and sexual assault—is not a hypothesis that has been subject to any legitimate academic scrutiny. Historically, transgender identity has not been the subject of significant study. *See, e.g.*, J. B. Woods, “*Queering Criminology*”, supra at p. 19, at 18. (“[e]xisting official crime statistics, victim surveys, and self-report surveys provide a very limited glimpse of LGBTQ people’s victimization and offending because they exclude sexual orientation and gender identity as key variables”). While the reasons for the

²⁵ This is one reason why *amici* are confounded by Defendant McCrory’s argument that North Carolina needs a discriminatory law to protect itself from liability as an employer and property owner for failing to take “appropriate steps to protect . . . safety.” *See* Defendant Patrick L. McCrory’s Initial Response in Opposition to Plaintiffs’ Motion for Preliminary Injunction, Carcano, Case No. 1:16-cv-00236-TDS-JEP, Doc. No. 55 at 5. Surely, increasing a known vulnerable population’s risk of sexual assault and other violence will increase, not decrease, the State’s potential liability.

lack of academic and criminological focus are many, the result is that there is limited data on the relationship between transgender identity and victimization rates. The primary area in which legitimate statistics do exist is the prison population. While not wholly analogous, these statistics are representative of the ways in which transgender individuals experience victimization compared to a general population. These surveys and studies lead to one conclusion: there is an elevated risk of sexual assault to transgender women required to use facilities inconsistent with their gender identities.

“Correctional officers, courts, prisoners, advocates, and survey data agree: Gay, bisexual, transgender, and effeminate prisoners face greatly elevated risks of sexual abuse.” Kim Shayo Buchanan, *Our Prisons, Ourselves: Race, Gender, and the Rule of Law*, Yale Law & Policy Review, 29(1), 1-82; *see also generally Farmer v. Brennan*, 511 U.S. 825, 848 (1994) (recounting how the petitioner’s transgender status and feminine appearance alerted prison officials to the risk of sexual abuse).

A study of California state prison inmates found that transgender inmates are **thirteen times more likely** to be sexually assaulted in prison; 59% reported sexual assault.²⁶ Valerie Jenness, et al., *Violence in California Correctional Facilities: An*

²⁶ “In California state prisons, transgender inmates are housed with members of their gender at birth, not the gender they identify with, unless they have had sexual reassignment surgery.” Maureen Cavanaugh, *Transgender In Prison: How*

Empirical Examination of Sexual Assault (2007) at p. 2.²⁷ Like many transgender inmates, this was the case for Janetta Johnson, a transgender woman who was forced into a men's prison in California. She "experienced sustained sexual assault, including resorting to oral sex to avoid penetrative rape. She also endured harassment from guards" Zoe Greenberg, *Sentenced to Abuse: Trans People in Prison Suffer Rape, Coercion, Denial of Medical Treatment*, Rewire (May 12, 2015).²⁸ Forcing transgender women into men's restrooms, like forcing transgender women into men's prisons, will only increase the risk that they will be the victims of the assault the State purportedly aims to curtail.

In spite of these facts, North Carolina purports to protect the "expectations of privacy and safety that have long prevailed in the State." *See* Intervenor-Defendants' Answer, Doc. No. 54, ¶ 139. In truth, North Carolina ignores the very real risks that more harm, not less, will occur because of H.B. 2's enactment.

California's New Guidelines Will Be Implemented, KPBS (Oct. 26, 2015), <http://www.kpbs.org/news/2015/oct/26/transgender-prison-how-californias-new-guidelines-/>; *see also* California Department of Corrections and Rehabilitation Operations Manual (Jan. 31, 2016) at p. 574 (recommending that transgender inmates be placed in prisons consistent with their gender at birth), http://www.cdcr.ca.gov/Regulations/Adult_Operations/docs/DOM/DOM%202016/2016_DOM.PDF.

²⁷ <http://ucicorrections.seweb.uci.edu/files/2013/06/BulletinVol2Issue2.pdf>.

²⁸ <https://rewire.news/article/2015/05/12/sentenced-abuse-trans-people-prison-suffer-rape-coercion-denial-medical-treatment/>.

CONCLUSION

Discriminating against transgender people does not give anyone more control over their body or security. *Amici* cannot stand by while the needs of survivors, both those who are transgender and those who are not, are obscured in order to push a political agenda that does nothing to serve and protect victims and potential victims of sexual assault. We will only achieve our goal of ending sexual violence if we treat all people, including those who are transgender, with fairness and respect. For the foregoing reasons, we respectfully request that the court reverse the denial of Plaintiffs' motion for preliminary injunction on their equal protection claim.

Dated: October 25, 2016

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APPENDIX: LIST OF AMICI CURIAE

National Organizations
1. Asian Pacific Institute on Gender-Based Violence
2. Battered Women's Justice Project
3. Casa de Esperanza
4. FORGE, Inc.
5. Futures Without Violence
6. National Alliance for Partnerships in Equity (NAPE)
7. National Alliance to End Sexual Violence
8. National Coalition Against Domestic Violence
9. National Coalition of Anti-Violence Programs
10. National Council of Jewish Women
11. National Domestic Violence Hotline
12. National Network to End Domestic Violence
13. National Organization of API Ending Sexual Violence
14. National Resource Center on Domestic Violence
15. National Women's Law Center
16. Praxis International
17. Stop It Now!
18. The NW Network of Bisexual, Trans, Lesbian & Gay Survivors of Abuse
19. Tribal Coalition & Tribal Technical Assistance Provider
20. Women of Color Network, Inc.
21. YWCA USA
Statewide Organizations
22. ADAPT Montana
23. Alabama Coalition Against Domestic Violence
24. Arizona Coalition to End Sexual and Domestic Violence
25. California Coalition Against Sexual Assault
26. California Partnership to End Domestic Violence
27. Colorado Coalition Against Domestic Violence
28. Colorado Coalition Against Sexual Assault
29. Connecticut Alliance to End Sexual Violence
30. CT Coalition Against Domestic Violence
31. DAWN
32. DC Coalition Against Domestic Violence
33. DCADV
34. End Domestic Abuse Wisconsin
35. Florida Council Against Sexual Violence
36. Gender Justice

37.Georgia Coalition Against Domestic Violence
38.Hawaii State Coalition Against Domestic Violence
39.Idaho Coalition Against Sexual & Domestic Violence
40.Illinois Accountability Initiative
41.Illinois Coalition Against Domestic Violence
42.Illinois Coalition Against Sexual Assault
43.Indiana Coalition Against Domestic Violence Inc.
44.Iowa Coalition Against Domestic Violence
45.Jane Doe Inc., the MA Coalition Against Sexual Assault and Domestic Violence
46.Kansas Coalition Against Sexual and Domestic Violence
47.Kentucky Coalition Against Domestic Violence
48.Legal Voice
49.Maine Coalition Against Sexual Assault
50.Maine Coalition to End Domestic Violence
51.Maryland Coalition Against Sexual Assault
52.Minnesota Coalition Against Sexual Assault
53.Minnesota Coalition for Battered Women
54.Missouri Coalition Against Domestic and Sexual Violence
55.Monsoon United Asian Women of Iowa
56.Montana Coalition Against Domestic and Sexual Violence
57.National Assn. of Social Workers, SC Chapter
58.National Organization for Women, Missouri
59.Native Alliance Against Violence
60.Nebraska Coalition to End Sexual and Domestic Violence
61.Nevada Network Against Domestic Violence
62.New Hampshire Coalition Against Domestic and Sexual Violence
63.New Jersey Coalition to End Domestic Violence
64.New Mexico Coalition Against Domestic Violence
65.New York State Coalition Against Domestic Violence
66.New York State Coalition Against Sexual Assault
67.North Carolina Coalition Against Domestic Violence
68.North Carolina Coalition Against Sexual Assault
69.Ohio Domestic Violence Network
70.Oregon Coalition Against Domestic & Sexual Violence
71.Pennsylvania Coalition Against Domestic Violence (PCADV)
72.Pennsylvania Coalition Against Rape
73.Puerto Rico Coalition Against Domestic Violence and Sexual Assault, Coordinadora Paz para las Mujeres

74.Raksha, Inc
75.South Carolina Coalition Against Domestic Violence and Sexual Assault
76.Tennessee Coalition to End Domestic and Sexual Violence
77.Texas Association Against Sexual Assault
78.Uniting Three Fires Against Violence
79.Vermont Network Against Domestic and Sexual Violence
80.Violence Recovery Program at Fenway Health
81.Virginia Sexual and Domestic Violence Action Alliance
82.Washington Coalition of Sexual Assault Programs
83.Washington State Coalition Against Domestic Violence
84.Washington State National Organization for Women
85.West Virginia Coalition Against Domestic Violence
86.Wisconsin Coalition Against Sexual Assault
Local Organizations
87.Advocacy Center of Tompkins County
88.Alle-Kiski Area HOPE Center, Inc.
89.Alternatives to Violence
90.API Chaya
91.Asian Women's Shelter
92.Brevard NOW
93.Caring Unlimited-York County's Domestic Violence Program
94.Casa Myrna Vazquez
95.Chicago Metropolitan Battered Women's Network
96.Chrysalis Domestic Violence Services
97.Coalition Ending Gender-Based Violence
98.Coburn Place Safe Haven
99.Crisis Center, Inc.
100. Crisis Intervention Services
101. DC Rape Crisis Center
102. Domestic Abuse & Sexual Assault Crisis Center of Warren County
103. DOVE, Inc.
104. Family Service Agency of Burbank
105. Family Violence Project
106. HAVIN
107. Help, Incorporated: Center Against Violence
108. HOPE of Ogle County
109. Hope's Door
110. HopeWorks of Howard County, Inc.
111. Jewish Coalition Against Domestic Abuse

112. Lake County Crisis Center
113. Los Angeles LGBT Center (Domestic and Sexual Assault Programs)
114. Minnesota Indian Women's Resource Center
115. Morongo Basin Unity Home, Inc
116. Mujeres Latinas en Accion
117. National Organization for Women, Columbia Area
118. New Hope Inc
119. New York City Anti-Violence Project
120. Ponca Tribe Domestic Violence Program
121. Project Safeguard
122. Rainbow House Domestic Abuse Services
123. Rape Victim Advocates
124. REACH Beyond Domestic Violence
125. S.A.F.E. House, Inc.
126. SAFE Homes-Rape Crisis Coalition
127. Safe Horizon
128. SafeHouse Denver
129. Safehouse Progressive Alliance for Nonviolence
130. Seattle Chapter National Organization for Women
131. Strong Hearted Native Women's Coalition, Inc.
132. The Abuse Network, Inc.
133. The Association for Prevention of Family Violence
134. The Bridge to Hope
135. Tubman
136. Vera House, Inc.
137. Victims' Intervention Program
138. Walnut Avenue Family & Women's Center
139. Women In Transition
140. Women's Coalition of St. Croix
141. Women's Resource Center
142. YWCA Clark County
143. YWCA Seattle King Snohomish
144. YWCA Yakima

CERTIFICATE OF SERVICE

I, Dimitri D. Portnoi, hereby certify that on this date, October 25, 2016, I caused the foregoing brief to be filed via the Court's CM/ECF system, which caused that document to be served on all parties or their counsel.

Dated: October 25, 2016

/s/ Dimitri D. Portnoi

CERTIFICATE OF COMPLIANCE

I, Dimitri D. Portnoi, hereby certify that the foregoing brief contains 5,529 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman.

Dated: October 25, 2016

/s/ Dimitri D. Portnoi