No. 16-1989

In the United States Court of Appeals for the Fourth Circuit

JOAQUÌN CARCAÑO, *et al.*

Plaintiffs – Appellants,

v.

PATRICK L. MCCRORY, in his official capacity as Governor of North Carolina,

Defendant – Appellee,

and

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

Intervenor/Defendants – Appellees.

On Interlocutory Appeal from the United States District Court
For the Middle District of North Carolina at Winston-Salem
No. 1:16-cv-00236-TDS-JEP

BRIEF OF DEFENDANT-APPELLEE AND INTERVENOR/DEFENDANTS-APPELLEES

Counsel for Appellees listed on following page

Robert C. Stephens
General Counsel
OFFICE OF THE GOVERNOR OF NORTH CAROLINA
20301 Mail Service Center
Raleigh, NC 27699
(919) 814-2027
bob.stephens@nc.gov

Karl S. Bowers, Jr.
BOWERS LAW OFFICE LLC
P.O. Box 50549
Columbia, SC 29250
(803) 260-4124
butch@butchbowers.com

William W. Stewart, Jr.
Frank J. Gordon
B. Tyler Brooks
MILLBERG GORDON STEWART PLLC
1101 Haynes Street, Suite 104
Raleigh, NC 27604
(919) 836-0090
bstewart@mgsattorneys.com
fgordon@mgsattorneys.com
tbrooks@mgsattorneys.com

Robert N. Driscoll
McGLINCHEY STAFFORD
1275 Pennsylvania Avenue NW
Suite 420
Washington, DC 20004
(202) 802-9950
rdriscoll@mcglinchey.com

Counsel for Appellee Governor Patrick L. McCrory

S. Kyle Duncan
Gene C. Schaerr
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 714-9492
kduncan@schaerr-duncan.com

Robert D. Potter, Jr.
2820 Selwyn Avenue, #840
Charlotte, NC 28209
(704) 552-7742
rdpotter@rdpotterlaw.com

Counsel for Appellees Senator Phil Berger and Representative Tim Moore

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INTRODUCTION

"There are both real and fictional differences between women and men." *City of Los Angeles, Dep't of Water and Power v. Manhart*, 435 U.S. 702, 707 (1978). This case involves one of the real differences—namely, the physiological difference between men and women that has always allowed certain facilities to be separated for the sake of privacy. That is precisely what North Carolina did by enacting the law commonly known as HB2. Recognizing that "[p]hysical differences between men and women are enduring," *Virginia v. United States*, 518 U.S. 515, 533 (1996), HB2 requires public restrooms, locker rooms, and showers to be separated by biological sex. In other words, HB2 enacted the same regime that has been approved by Title IX for the past four decades and that has never been thought to transgress the prohibition on sex discrimination in the Equal Protection Clause. The district court therefore correctly concluded that HB2 meets heightened scrutiny as an effective means of "afford[ing] members of each sex privacy from the other sex" in intimate settings. *Id.* at 550 n.19.

This Court should affirm.

STATEMENT OF JURISDICTION

As explained in Appellees' pending motion to dismiss, ECF No 44, this Court lacks jurisdiction under 28 U.S.C. § 1291(a)(1). Additionally, as explained in Appellees' pending motion to hold this appeal in abeyance, ECF No. 84, the Court should stay this appeal pending the Supreme Court's decision in *Gloucester County School Board v. G.G.*, 822 F.3d 709 (4th Cir. 2016), *stay granted,* 136 S. Ct. 2442 (2016), *cert. granted in part,* No. 16-273, 2016 WL 4565643 (Oct. 28, 2016).

STATEMENT OF ISSUES

Assuming there is jurisdiction over this appeal and the appeal is not held in abeyance pending the Supreme Court's decision in *G.G.*, the following issues are presented:

1. Whether the district court abused its discretion in denying Appellants a preliminary injunction on the basis of their equal protection claim.

2. Whether the district court abused its discretion in concluding preliminarily that HB2 substantially furthers important interests in protecting bodily privacy by designating public multiple-

occupancy restrooms, locker rooms, and shower facilities based on a person's biological sex as reflected on his or her birth certificate.

STATEMENT OF THE CASE

A. The Public Facilities Privacy and Security Act

On March 23, 2016, the Public Facilities Privacy and Security Act (the "Act" or "HB2") was passed by the North Carolina General Assembly and signed into law by Governor Patrick McCrory. 2016 N.C. Sess. Laws 3, amending N.C. Gen. Stat. § 115C-47. JA610-14. In relevant part, the Act requires public schools and public agencies to designate multiple-occupancy restrooms, changing facilities, and showers for use only by persons "based on their biological sex," *id.* §§ 1.2(b), 1.3(b)), and defines "biological sex" as "[t]he physical condition of being male or female, which is stated on a person's birth certificate." *Id.* §§1.2(a)(1), 1.3(a)(1). The Act allows for the provision of single-occupancy facilities to persons who need an accommodation, *id.* §§ 1.2(c), 1.3(c), and allows development of different policies in privately-owned restrooms, changing facilities, and showers. *Id.* §1.3(a)(4) (defining "public agency").

On April 12, 2016, Governor McCrory issued "Executive Order 93 to Protect Privacy and Equality" ("EO 93"). JA440-42. The order affirmed anti-discrimination protections for state employees on the basis of, *inter alia*, "sex, sexual orientation, [and] gender identity." *Id.* § 2. The order also affirmed that under North Carolina law cabinet agencies must require multiple-occupancy bathroom and changing facilities to be designated by biological sex; that "[a]gencies may make reasonable accommodations upon a person's request due to special circumstances"; and that North Carolina "private businesses can set their own rules for their own restroom, locker room and shower facilities, free from government interference." *Id.* § 3. Finally, the order directed all agencies to "provide a reasonable accommodation of a single occupancy restroom, locker room or shower facility upon request due to special circumstances," when practicable, and also "invited and encouraged" provision of similar accommodations by "[a]ll council of state agencies, cities, counties, the University of North Carolina System and the North Carolina Community College System." *Id.*

HB2 was passed in response to the Charlotte City Council's adoption of an ordinance on February 22, 2016, adding, *inter alia*,

"gender identity" and "gender expression" to non-discrimination provisions governing public accommodations, contracting, and vehicle permitting. Charlotte City Council Ord. No. 7056 (proposed amendments to Charlotte City Code Chs. 2, 12 & 22). JA305-09. The ordinance would have expressly removed existing exemptions for "[r]estrooms, shower rooms, bathhouses and similar facilities which are in their nature private," for "YMCA, YWCA and similar types of dormitory lodging facilities," and for "[a] private club or other establishment not, in fact, open to the public." *Id.* § 3 (proposing amendments to Charlotte City Code, Art. III, ch. 2, § 12-59(b)). Consequently, the ordinance would have created a new anti-discrimination provision requiring access to restrooms, shower rooms, dormitory lodging, and similar facilities on the basis of "gender identity" and "gender expression," and would have applied that requirement to public and private entities in Charlotte, as well as anyone contracting with the City.[1] The ordinance was to take effect on April 1, 2016. *Id.* § 5. The Act preempted the ordinance by providing that such anti-

[1] *See* JA305, § 1 (proposed amendments to Charlotte City Code, Art. V, Ch. 2, §§ 2-151—2-153, § 2-166—2-167); *id.* § 3 (Charlotte City Code, Art. III, Ch. 2, §§ 12-58—12-59); *id.* § 4 (Charlotte City Code, Art. II, Ch. 22, § 22-31).

discrimination measures are "properly an issue of general, statewide concern," and by establishing statewide measures prohibiting discrimination in public accommodations "because of race, religion, color, national origin, or biological sex"—specifying, however, that designating restrooms or locker rooms "according to biological sex … shall not be deemed to constitute discrimination." JA615-621 §§ 2.1(c), 3.1(a), 3.1(c), 3.3(a).

The legislative debate prior to HB2's passage reflected the serious concerns with privacy and safety that would be created by the Charlotte Ordinance.[2] For example, Representative Stam introduced the bill in the House by stating "this is a common sense bill that protects the privacy expectations of our citizens." House Floor Debate at 3. Similarly, Representative Arp explained that he "d[id] not think counties and municipalities and local governments have the authority

[2] At the time of the preliminary injunction order, the legislative transcripts concerning HB2's passage were not publicly available, JA921 & n.4, but are now available on the North Carolina General Assembly's website. *See* http://www.ncleg.net/gascripts/billsummaries/billsummaries.pl?Session=2015E2&BillID=H2 (containing links to transcripts of the March 23, 2016 Senate Floor Debate, House Floor Debate, Senate Judiciary II Committee and House Judiciary IV Committee). Additionally, Appellees have filed the transcripts in the record of the 425 case. JA921 n.4. This Court can take judicial notice of HB2's legislative history. *See, e.g., Territory of Alaska v. Am. Can Co.,* 358 U.S. 224, 226-27 (1959); *Carolene Prods. Co. v. United States,* 323 U.S. 18, 28 n.13 (1944). Citations to these materials will reference the respective transcript and page number.

to strip all North Carolina citizens of their right to privacy in showers, bathrooms and locker rooms." *Id.* at 48. He added that the Act "actually provides the authority, broad authority, of the schools to accommodate any student in any manner without stripping other students of their right to privacy in showers, in locker rooms and bathrooms." *Id.*[3] Similar concerns were expressed in the Senate. For instance, Senator Newton noted that by removing exemptions for restrooms, locker rooms, or showers, the Charlotte City Council "created … a real public safety risk [for] the citizens of this state that … may choose to visit Charlotte; or that live in Charlotte[.]" Senate Floor Debate at 14-15.[4]

B. Procedural History

On March 28, 2016, Appellants filed suit against Governor McCrory, the North Carolina Department of Public Safety, and the

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[3] *See also, e.g.*, *id.* at 85 (Rep. Martin) ("It's common sense. It protects the privacy for every citizen in this state, and that's important."); *id.* at 114 (Rep. McElraft) ("But I will let you know, that as a mother and a grandmother of a fourteen-year-old grandchild, this is about common sense.")

[4] These privacy and safety concerns were also expressed in committee hearings. *See, e.g.*, House Judiciary Committee at 5 (Rep. Bishop) ("I think what we're doing is preserving sense of privacy that people have long expected in private facilities."); Senate Judiciary Committee at 3-4 (Sen. Newton) (noting that others in the state have "refuse[d] to take action to protect the safety and privacy of women and children"); *id.* at 5 (Sen. Newton) (noting view of county sheriff that the ordinance would "put [law enforcement officers] in the awkward position of determining who is entitled to be in the bathroom").

University of North Carolina (the "*Carcaño*" or "236" case), alleging that HB2 violates Title IX as well as the Equal Protection and Due Process Clauses of the Fourteenth Amendment. JA929. On May 9, 2016, the United States also sued (the "United States" or "425" case), alleging that HB2 violates Title IX, Title VII, and the Violence Against Women Reauthorization Act of 2013. JA930. On May 16, 2016, Appellants moved for a preliminary injunction as to Part I of HB2. JA931. Appellees Berger and Moore, as leaders of the respective chambers of the North Carolina General Assembly were allowed to permissively intervene in both cases on June 6, 2016. JA931.

As the parties began discussions with the district court regarding the schedule for a hearing on Appellants' preliminary injunction motion, Appellees requested time to conduct limited discovery and collect evidence in advance of that hearing. JA931; Doc. 52; Doc. 61 at 27-29. While those discussions were proceeding, the United States filed its preliminary injunction motion in the 425 case on July 5, 2016, and Appellees likewise asked for limited discovery to respond to that motion. JA932. In response to these developments, the district court decided to hear Appellants' preliminary injunction motion in the 236

case on August 1, 2016, while at the same time advancing trial in the United States suit and consolidating it with hearing on the United States' preliminary injunction motion, which was then scheduled for November 14, 2016. JA932. The preliminary injunction motion in the *Carcaño* case was heard on August 1, 2016. *Id.*

Two days after that hearing, on August 3, 2016, the Supreme Court stayed and recalled this Court's mandate in *G.G.* and also stayed the preliminary injunction which had been subsequently issued by the district court in that case. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 716-17 (4th Cir. 2016), *stay and recall of mandate granted*, 136 S. Ct. 2442. Appellees then moved to stay all proceedings in both the 236 and 425 cases Doc. 113. On August 17, 2016, Appellees filed their opposition to the United States' preliminary injunction motion in the 425 case, attaching over 400 pages of evidence including legislative transcripts concerning HB2's passage as well as expert medical and public safety evidence. *See* JA962 at n.12; *see* 425 Doc. 149-9 through 149-12.

On August 26, 2016, the district court entered an order on Appellants' preliminary injunction motion in the 236 case. The order

granted a preliminary injunction to the named individual plaintiffs against UNC on the Title IX claim, JA991-92; denied a preliminary injunction on the equal protection claim, JA992; and reserved ruling on the due process claim and requested supplemental briefing, JA992-93, which has now been completed. Doc. 173, 176. Appellants filed their notice of appeal from the district court's August 26 order on August 29, 2016. JA994.

In light of the Supreme Court's stay in *G.G.*, the parties agreed to postpone trial from November 2016 to May 2017. Doc. 138 at 3-6. The parties then engaged in pretrial proceedings, including some written discovery and motions practice. Just as depositions were beginning, however, on October 28, 2016, the Supreme Court granted certiorari in *G.G. See Gloucester County School Board v. G.G.,* No. 16-273, 2016 WL 4565643 (U.S. Oct. 28, 2016). The parties subsequently agreed to postpone trial and all discovery in the 236 and 425 cases and to stay all proceedings for 90 days in anticipation of a ruling on *G.G.* (with the exception of the United States' pending preliminary injunction motion and the *Carcaño* plaintiffs' pending preliminary injunction motion on due process grounds). Doc. 177 at 2-4, 6-7.

C. Plaintiffs' Contentions

In the district court, Plaintiffs asserted equal protection claims against Part I of HB2 on behalf of three individuals described as "transgender," JA1004 at ¶22 (Carcaño); JA 1011 at ¶59 (McGarry); JA 1015 at ¶86 (H.S.), as well as "transgender members of the ACLU of North Carolina," allegedly representing "some of the more than 44,000 transgender people estimated to be living in the state." Br. at 2; JA1000-01 at ¶9. The individual plaintiffs either work at UNC (Carcaño, JA1003 at ¶19) or attend UNC schools (McGarry, JA1010 at ¶56; H.S., JA1015 at ¶83).

Plaintiffs define a "transgender individual" as someone whose "gender identity differs from their birth-assigned sex, giving rise to a sense of being 'wrongly embodied.'" Br. at 4. They define "gender identity" as "the person's internal sense of belonging to a particular gender." JA1004 at ¶23; *see also* Br. at 4 ("[g]ender identity" is an "elemental, internal view of belonging to a particular gender"). Appellants explain further that "[t]he medical diagnosis for this condition"—*i.e.,* the condition of being "wrongly embodied"—is called "gender dysphoria," Br. at 4, which according to their complaint is a

"condition recognized in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fifth ed. (2013) (DSM-V)." JA1004 at ¶28. Plaintiffs allege that medical treatment for gender dysphoria "must be individualized for the medical needs of each patient," but also allege that treatment includes living consistently with one's gender identity, "including when accessing single-sex spaces such as restrooms and locker rooms." JA1005 at ¶¶29-30.

With respect to the individual Plaintiffs, Carcaño and McGarry were born females but internally identify as males; H.S. was born male but internally identifies as female.[5] Despite their birth sex, the individual Plaintiffs have altered their bodies and appearance through hormone treatments, surgery, or both. McGarry and H.S. both began hormone therapy while in high school, JA1012, 1016; Carcaño has also received hormone treatment and, in addition, underwent "a bilateral mastectomy and nipple reconstruction" in January 2016. JA1006-07.

[5] Br. at 1 (stating the "sex assigned to [Carcaño] at birth was female" but Carcaño's "gender identity is male"); *id.* at 5 (stating that McGarry's "birth certificate has a female gender marker" but McGarry's "gender identity is male"); *id.* at 6 (stating H.S.'s "birth certificate has a male gender marker" but H.S.'s "gender identity is female"); *see also, e.g.,* JA1004, 1011, 1015 (allegations with respect to individual Plaintiffs' birth sex versus gender identity).

Plaintiffs allege equal protection claims not only on behalf of these individuals but also on behalf of potentially thousands of "transgender members of the Plaintiff ACLU of North Carolina." Br. at 2; JA1000-01. Plaintiffs make no specific allegations regarding those persons' condition—for instance, whether those persons identify with the sex opposite their birth sex or with some alternative gender or genders; whether they have received a medical diagnosis of gender dysphoria and, if so, on what basis; whether they are receiving "individualized" treatment for their condition and, if so, what it consists in, *see* JA1005; and whether any have altered or will alter their bodies or appearance through hormones or surgery. Additionally, Plaintiffs have not sought to certify any class of transgender individuals on any basis.

Plaintiffs' complaint and preliminary injunction motion relied extensively on the discussion of gender dysphoria and related concepts in the DSM-V. *See, e.g.,* JA1004 (complaint); JA133-34 (declaration supporting preliminary injunction). According to the DSM-V, the term "transgender" refers to the "broad spectrum" of persons who "transiently or persistently" identify with a gender different from their birth sex. DSM-V at 451. "Gender identity" refers to a person's

"identification as male, female, or, occasionally, some category other than male or female." *Id.* Accordingly, the DSM-V explains that a person with gender dysphoria may experience "alternative gender identities beyond binary stereotypes," and that the condition may lead a person to desire "to be of an alternative gender" beyond the gender opposite their birth sex. *Id.* at 453. Finally, the DSM-V reports that the "[r]ates of persistence" of gender dysphoria from childhood to adulthood "range[] from 2.2% to 30%" for "natal males" and "from 12% to 50%" for "natal females." *Id.* at 455.

Consistent with the DSM-V's treatment of these issues, the American Psychological Association ("APA") also emphasizes the breadth and flexibility of the term "transgender." *See generally* AMERICAN PSYCHOLOGICAL ASS'N, ANSWERS TO YOUR QUESTIONS ABOUT TRANSGENDER PEOPLE, GENDER IDENTITY, AND GENDER EXPRESSION ("*APA Answers*"), http://www.apa.org/topics/lgbt/transgender.aspx (last visited Nov. 21, 2016) (stating that "*[t]ransgender* is an umbrella term for persons whose gender identity, gender expression or behavior does not conform to that typically associated with [birth sex]"). Thus, the APA explains that "[m]any identities fall under the transgender

umbrella," including "transsexuals," "cross-dressers," and "drag queens and drag kings." *APA Answers*, *supra* ("What are some categories or types of transgender people?"). According to the APA, the term also embraces persons with more fluid conceptions of gender, such as "genderqueer" (*i.e.*, persons who "define their gender as falling somewhere on a continuum between male and female" or "as wholly different from these terms"), as well as "androgynous, multigendered, gender nonconforming, third gender, and two-spirit people," terms whose "[e]xact definitions … vary from person to person and may change over time, but often include a sense of blending or alternating genders." *Id.*

D. District Court Ruling

In its August 26, 2016 order, the district court granted preliminary injunctive relief to the named individual plaintiffs in the *Carcaño* suit based on their Title IX claims against UNC. JA955-56 & n.29. Despite recognizing that the Supreme Court's stay made "the fate of *G.G.* … uncertain," JA945, the court's order was based entirely on this Court's holding in *G.G.* that courts must defer to a Department of Education letter interpreting Title IX to treat students "consistent with

their gender identity." JA943, 947-48; *see also* JA955 ("*G.G.* compels the conclusion that the individual transgender plaintiffs are likely to succeed on the merits of their Title IX claim."). The court declined to award broader relief beyond the individual plaintiffs, however, because at that time the Title IX claim had been brought only on behalf of the individual plaintiffs. *See* JA956 n.29 (observing "there is no class-wide claim presently pending, and ACLU-NC did not allege a Title IX claim"). Appellants have not appealed the scope of the district court's Title IX injunction. They have since amended their complaint to allege a Title IX claim on behalf of the ACLU of North Carolina. JA1000-01, 1047.

The district court denied a preliminary injunction based on Appellants' equal protection claim, however. Finding that HB2 classifies on the basis of sex, the court applied intermediate scrutiny, which requires the government to show that HB2 "serves important governmental objectives" and employs means "substantially related to the achievement of those objectives." JA958-59 (quoting *United States v. Virginia*, 518 U.S. 515, 532-33 (1996)) (internal quotations and citation omitted). First, the court concluded that "the protection of bodily

privacy is an important government interest" and that "the practice of segregating bathrooms and other similar facilities on the basis of sex promotes this interest." JA959, 960. Indeed, the court observed that Appellants "acknowledged" and "agreed" with those conclusions. JA 960 (citing Doc. 103 at 15-19).

Second, recognizing that the parties disagreed over which "definition of 'sex'" promotes the State's bodily privacy interests, the court reasoned that both Supreme Court and Fourth Circuit law support the conclusion that "the sexes are primarily defined by their differing physiologies," and not by "differences in gender identity." JA961-66 (and collecting cases).

Third, the court had "little doubt" that the means chosen by HB2—using the gender marker on birth certificates "as a proxy for sex"—were "substantially related" to protecting bodily privacy in restrooms and similar facilities. JA966. The court observed that Appellants' own evidence showed that birth certificates accurately reflect a person's anatomical sex for approximately 99.7% of the population. JA966-67; *see also* JA969 (noting "Plaintiffs admit that the vast majority of birth certificates accurately reflect an individual's

external genitalia"). And even this near-100% figure assumes that the approximately 0.3% of the population who are transgender are *never* able to alter their birth certificates to "accurately reflect[ ] [their] external physiology," which as the court pointed out is "contrary to the evidence in the record." JA967; *see also* JA927 n.13 (noting HB2 "necessarily contemplates that transgender individuals may use facilities consistent with their gender identity … as long as their current birth certificate has been changed to reflect their gender identity, a practice permitted in some States"). Consequently, the court concluded it was "unlikely that a law that classified individuals with 99.7% accuracy is insufficient to survive intermediate scrutiny." *Id.*

Finally, the court concluded that North Carolina's interests in protecting bodily privacy "do not appear to represent a *post hoc* rationalization" for HB2. JA967. Despite having little information at the time about the legislative history of HB2, the court observed that even the limited record contained "many statements" by legislators and the governor "reflecting an apparently genuine concern for the privacy and safety of North Carolina's citizens." JA968. In light of those "contemporaneous statements by State leaders regarding privacy," the

court concluded that Appellants "have not clearly shown that privacy was an afterthought or a pretext invented after the fact solely for litigation purposes." JA969.

SUMMARY OF THE ARGUMENT

This Court should affirm the district court's ruling that HB2 satisfies intermediate scrutiny and that Appellants are therefore unlikely to succeed on their equal protection claim.

First, Appellants *conceded* below—and do not contest here—that separating restrooms, locker rooms, and showers by "sex" substantially furthers important interests in bodily privacy. That should end the equal protection analysis. HB2 separates those facilities by biological sex, and the biological differences between men and women are precisely why privacy needs to be protected in those facilities.

Appellants say this was the wrong question; the right question, they argue, is to ask why HB2 "excludes" transgender people from facilities matching their gender identities. But those two questions are exactly the same. For equal protection purposes there is no difference between asking whether facilities may be separated by biological sex (which is what the district court did) and asking whether transgender

persons may be "excluded" from facilities that do not match their biological sex (which is what Appellants say the district court should have done). By answering "yes" to the first question, the district court *by definition* answered "yes" to the second. Appellants' argument on appeal merely changes the wording of the question, not its answer.

Second, Appellants ignore the significance of Supreme Court and Fourth Circuit cases *expressly* teaching that the government may (and indeed should) provide sex-separated facilities in order to protect privacy. The only coherent way to understand the concept of "sex" in those cases is grounded on the physiological differences between men and women. Again, that should end the equal protection analysis, because HB2 deploys exactly the same physiological concept of "sex" to provide for sex-separated restrooms, locker rooms and showers. If *that* violates the Equal Protection Clause, then several decades worth of precedent—including the landmark decision in *Virginia v. United States* allowing women to attend the Virginia Military Institute—will have to be reconsidered.

Third, the district court correctly found that HB2 chose a nearly perfect means of furthering North Carolina's interests in bodily privacy.

It chose the sex-marker on a person's birth certificate which—as Appellants conceded below—corresponds to physiological sex in over 99% of all cases. The few hypothetical exceptions identified by Appellants—such as people born with rare genetic anomalies or people who have sex change surgery but are not allowed to alter their birth certificates—cannot obscure the fact that HB2 easily meets the tailoring standards for intermediate scrutiny.

ARGUMENT

Denial of a preliminary injunction is reviewed for abuse of discretion, recognizing that "preliminary injunctions are extraordinary remedies involving the exercise of very far-reaching power to be granted only sparingly and in limited circumstances." *MicroStrategy Inc. v. Motorola, Inc.,* 245 F.3d 335, 339 (4th Cir. 2001) (internal citation and quotes omitted); *see also, e.g., Winter v. Nat. Res. Def. Council, Inc.,* 555 U.S. 7, 21 (2008) (noting preliminary injunctive relief is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff if entitled to such relief") (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)). Moreover, courts should avoid

deciding "substantial issues of constitutional dimension" on a preliminary basis. *Wetzel v. Edwards*, 635 F.2d 283, 291 (4th Cir. 1980).

I. As the district court correctly concluded, HB2 satisfies heightened equal protection scrutiny by substantially furthering the protection of bodily privacy.

A. The district court already applied intermediate scrutiny to HB2, and Appellants have waived any argument that strict scrutiny should apply.

In evaluating Appellants' equal protection claims, the district court reasoned that, "[b]ecause Part I [of HB2] facially classifies and discriminates among citizens on the basis of sex, intermediate scrutiny applies." JA958-59 (citing *Virginia*, 518 U.S. at 532-33). Even under Appellants' alternative theories that HB2 discriminates on the basis of "transgender status" or "sex stereotyping," the district court noted that intermediate scrutiny would still apply.[6] The court then concluded that HB2 satisfies intermediate scrutiny because it is "substantially related" to the government's important interest in the "protection of bodily

[6] At the hearing, Appellants' counsel argued: "So on the constitutional equal protection claim, we have made a number of different arguments which we think are why that this form of discrimination, this law, which basically singles out one group of people, transgender people, and says we are going to treat you differently than everybody else – *why that needs to be subjected to heightened, kind of intermediate, equal protection scrutiny* of the kind that is given to gender discrimination." JA800-02 (emphasis added).

privacy." JA960, 969-70. As discussed at length, *infra*, the district court's conclusion that HB2 satisfies intermediate scrutiny is correct.

Puzzlingly, however, Appellants spend a large portion of their opening brief arguing for the same standard of scrutiny that the district court *already* applied to HB2. In 13 pages of their brief they argue that, for various reasons, HB2 "must be tested under … heightened scrutiny," Br. at 27, because it "discriminates … on the basis of sex," *id.* at 28-29, on the basis of "sex stereotypes," *id.* at 29-33, or on the basis of "transgender status, gender identity, and birth-assigned sex," *id.* at 33-37. These arguments—aside from being incorrect in many respects, *see infra* B.3, B.4— are entirely beside the point because the district court *already* applied "heightened scrutiny" by assessing whether HB2 substantially furthers an important government interest. JA958 ("It is well settled that classifications based on sex are subject to intermediate scrutiny.") (citing *Virginia*, 518 U.S. at 532-33); *see also id.* at 533 (noting "[t]he heightened standard our precedent establishes" for classifications based on "sex"); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 137 (1994) (observing that "'our Nation has had a long and unfortunate history of sex discrimination,' … a history which warrants

the heightened scrutiny we afford all gender-based classifications today") (quoting *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973) (plurality op.)).

To be sure, Appellants *now* separately argue that HB2 should be subjected to *strict* scrutiny because it discriminates on the basis of "transgender status." Br. at 37. Appellants never raised that argument below, however, and in any event provide no reason for this Court to become the first in the nation ever to recognize "transgender status" as meriting strict scrutiny. At the preliminary injunction hearing—when asked directly by the district court what level of scrutiny they were urging—Appellants' counsel agreed that the court should "apply intermediate scrutiny." *See* JA800-01; *see also id.* at 807-08 (plaintiffs' counsel agreeing with court that "intermediate scrutiny" is the "framework" for the equal protection analysis); JA1039 (Second Amended Complaint: "Under the Equal Protection Clause of the Fourteenth Amendment, discrimination based on sex is presumptively unconstitutional and subject to heightened scrutiny.... H.B. 2 discriminates against transgender people on the basis of sex.").

In addition, Appellants' counsel plainly stated that intermediate scrutiny should apply to *all* of their discrimination theories, whether based on "sex," "sex stereotyping," or "transgender status."[7] As the district court's order noted, that is precisely why the court declined even to consider Appellants' suspect class and *Price Waterhouse* arguments. JA959 n.30 (observing "Plaintiffs acknowledge" that success on either their suspect class or *Price Waterhouse* arguments "would result in the court applying the same intermediate level of scrutiny" applied to sex-based classifications). Nowhere in their preliminary injunction motion or briefing did Appellants argue that strict scrutiny should apply. The district court applied intermediate scrutiny just as Appellants requested, and Appellants therefore waived any argument for strict scrutiny on appeal. *See Holland v. Big River Minerals Corp.*, 181 F.3d 597, 605 (4th Cir. 1999) ("Generally, issues that were not raised in the district court will not be addressed on appeal.") (citations omitted).

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[7] Although Appellants now attempt to skirt their previous position, Br. at 40 n.9, the hearing transcript confirms that they *expressly* acknowledged that each of their equal protection theories would result in applying the same intermediate level of scrutiny. The district court asked Appellants' counsel directly: "Is that the argument of the Plaintiffs, that I should apply intermediate scrutiny?" Counsel responded, "Yes, Your Honor," and then proceeded to describe why "transgender discrimination," as "a separate thing" from sex discrimination, should receive intermediate scrutiny. JA801-02.

Even if not waived, however, "transgender status" does not bear the marks of a discrete class and has never been recognized as such by any decision cited by Appellants. None of the recent transgender decisions Appellants cite from other jurisdictions applies strict scrutiny; most do not even involve equal protection claims.[8] According to Appellants' own assertions and authorities, transgender individuals compose a diverse group that does not share any common objective characteristic—whether medical diagnosis, genetic or hormonal traits, bodily characteristics, required treatment, outward physical appearance, or even a universally shared need to access sex-segregated

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[8] *See Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, No. 2:16-CV-524, 2016 WL 5372349 (S.D. Ohio Sept. 26, 2016) (applying heightened scrutiny); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (applying intermediate scrutiny); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104 (N.D. Cal. 2015) (applying intermediate scrutiny); *Adkins v. City of New York*, 143 F. Supp. 3d 134 (S.D.N.Y. 2015) (applying intermediate scrutiny); *Whitaker v. Kenosha USD No. 1 Bd. Of Educ.*, No. 16-cv-943, 2016 WL 5239829 (E.D. Wis. Sept. 22, 2016) (court did not reach scrutiny); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) (court did not reach scrutiny); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (GMVA claim); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (Equal Credit Opportunity Act claim); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008) (Title VII claim); *Myers v. Cuyahoga Cty.*, 182 F. App'x 510 (6th Cir. 2006) (Title VII claim); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864 (9th Cir. 2001) (Title VII claim); *Roberts v. Clark Cty. Sch. Dist.*, No. 2:15-cv-00388, 2016 WL 5843046 (D. Nev. Oct. 4, 2016) (Title VII claim); *Fabian v. Hosp. of Cent. Conn.*, No. 3:12-cv-1154 (D. Conn. Mar. 18, 2016) (Title VII claim); *Rumble v. Fairview Health Servs.*, No. 14-cv-2037, 2015 WL 1197415 (D. Minn. Mar. 16, 2015) (Affordable Care Act claim); *Brocksmith v. United States*, 99 A.3d 690 (D.C. 2014) (criminal sentencing claim); *Hernandez-Montiel, v. INS*, 225 F.3d 1084 (9th Cir. 2000) (Immigration and Nationality Act claim), *overruled by Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005).

facilities corresponding to their gender identity.[9] According to the DSM-V, on which Appellants rely, transgender individuals do not always or consistently identify with the opposite birth sex and may even identify with an "alternative gender" corresponding to *neither* their birth sex *nor* the opposite sex.[10] Furthermore, the DSM-V reports that gender dysphoria does not persist from childhood into adolescence or adulthood in high percentages of persons who initially suffer from the condition. DSM-V at 455 (reporting persistence rate of 2.2% to 30% for natal males and 12% to 50% for natal females).

Accordingly, Appellants' strict scrutiny argument is foreclosed by *City of Cleburne v. Cleburne Living Ctr.*, where the Supreme Court declined to extend even "quasi-suspect" classification to the mentally

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[9] To the contrary, Appellants insist that treatment for transgender individuals must be individualized, and assert only that such treatment "often" includes changing one's gender expression and role, including in the use of sex-separated spaces. Br. at 11; *see also* JA1003 (Second Amended Complaint: "Medical treatment for gender dysphoria must be individualized for the medical needs of each patient"); JA135 (declaration of Appellants' expert Dr. Ettner stating that treatment plan based on "an individualized assessment of the medical needs of the patient").

[10] *See* DSM-V at 451 (defining "transgender" as "the broad spectrum of individuals who *transiently* or persistently identify with a gender different from their natal gender"); *id.* (defining "gender identity" as "a category of social identity [that] refers to an individual's identification as male, female, *or occasionally, some other category other than male or female*") (emphases added); *id.* at 453 (stating that gender dysphoria may lead a person to desire "to be of an alternative gender" beyond the gender opposite their birth sex).

disabled persons involved in that case. That is because the individuals in that "large and diversified group" were "different, immutably so, in relevant respects"; because they were not "all cut from the same pattern"; because they ranged in disability from those whose disability was "not immediately evident" to those who required constant care; and because their treatment was "a difficult and often a technical matter" requiring the guidance of "qualified professionals" rather than a one-size-fits-all judicial solution. 473 U.S. 432, 442-43 (1985); *see also Bowen v. Gilliard,* 483 U.S. 587, 602 (1987) (no heightened scrutiny where alleged class did not exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group); *Hadacheck v. Sebastian*, 239 U.S. 394, 404, 36 S. Ct. 143, 143 (1915) (rejecting equal protection claim as "too illusive" where "based upon disputable considerations of classification and on a comparison of conditions of which there is no means of judicial determination"). According to Appellants' own assertions, transgender individuals likewise have differing needs that require professional care, and individualized treatment. Br. at 11-12.

In sum, strict scrutiny has no application here, both because Appellants have waived the argument and because Appellants' arguments are mistaken. Consequently, this appeal turns on whether the district court correctly applied intermediate scrutiny to HB2. As shown below, it did.

B. As Appellants conceded below and do not contest here, separating restrooms and similar facilities by sex substantially furthers important privacy interests.

To determine whether the district court properly applied intermediate scrutiny, it is important to note, first, what is not at issue in this appeal. As the district court pointed out, Appellants "acknowledged" below that (1) "the protection of bodily privacy is an important government interest" (JA959-60), and (2) "the practice of segregating bathrooms and other similar facilities on the basis of sex promotes this government interest" and is "substantially related to that interest" (JA960). Appellants were wise to concede these commonsense propositions—which, as discussed below, have long been established in federal anti-discrimination law and in the decisions of the Supreme Court and this Court—and they do not contest them in this appeal. Indeed, Appellants insist in their brief that they "never challenged the

existence of sex-separated facilities" and vigorously deny that they seek "the abolition of sex-segregated facilities." Br. at 27, 46.

What Appellants *do* contest are three discrete aspects of the district court's order, namely (1) whether the district court erred by analyzing the permissibility of sex-separated facilities "as a general matter," instead of focusing on the permissibility of "excluding transgender individuals" from facilities corresponding to their gender identities (Br. at 18); (2) relatedly, whether the district court erred in giving analytical significance to Supreme Court and Fourth Circuit cases treating the concept of "sex" in terms of physiological characteristics (rather than gender identity), especially when privacy interests are at stake (Br. at 48-51); and (3) whether the district court erred in its analysis that HB2 is sufficiently tailored to the State's privacy interests under intermediate scrutiny (Br. at 51-55). As explained below, *see infra* B.2, B.3, & C, Appellants are mistaken on all three points.

1. Appellants do not contest the district court's central conclusions, which are controlling here.

It is helpful first to briefly explore the district court's reasoning on the points Appellants do *not* contest.

First, the district court concluded that "[t]here is no question that the protection of bodily privacy is an important government interest." JA959. This is plainly correct. For instance, this Court has remarked that—given people's "special sense of privacy in their genitals"—they may find "especially demeaning and humiliating" the prospect of "involuntary exposure … in the presence of people of the other sex," *Lee v. Downs*, 641 F.2d 1117, 1119 (4th Cir. 1989). For the same reason, this Court has noted "society's undisputed approval of separate public rest rooms for men and women based on privacy concerns." *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993). Other circuits have reached the same conclusions, ranking this interest in bodily privacy as "fundamental," *Sepulveda v. Ramirez*, 967 F.2d 1413, 1416 (9th Cir. 2012), and "impelled by elementary self-respect and personal dignity." *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963); *see also* JA959-60 (citing *Doe v. Luzerne Cty.*, 660 F.3d 169, 176-77 (3rd Cir. 2011)). Unsurprisingly, courts have found that "[t]his interest is particularly strong with regard to minors." JA960 (citing *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 604 (6th Cir. 2005); *Doe v. Renfrow*, 631 F.2d 91, 92-93 (7th Cir. 1980)). As the district court pointed out—and as

Appellants do not contest here—Appellants "agree[d]" that safeguarding bodily privacy is "an important State interest." JA960.

Second, the district court concluded that the government "may promote this interest by excluding members of the opposite sex from places in which individuals are likely to engage in intimate bodily functions," such as restrooms and changing rooms. JA959. Again, the district court was plainly correct. *See, e.g., Faulkner*, 10 F.3d at 232; *Lee*, 641 F.2d at 1119. The concept of sex-separated living facilities—especially including restrooms, changing rooms, and showers—has been explicitly recognized by federal law for over four decades. *See* 20 U.S.C. § 1686 (allowing Title IX covered institutions to "maintain[ ] separate living facilities for the different sexes"); 34 C.F.R. § 106.33 (allowing provision of comparable "separate toilet, locker rooms, and shower facilities on the basis of sex"). The Supreme Court has accepted the practice as a matter of basic privacy: even as the Court allowed women to enroll at the Virginia Military Institute, the Court observed that "[a]dmitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements[.]" *Virginia*, 518 U.S. at 550 n.18. Appellants have

explicitly disclaimed any intention of challenging this longstanding practice of separating the sexes in intimate facilities. *See, e.g.*, Br. at 27, 46. Consequently, as the district court observed, Appellants "acknowledge[d] that the practice of segregating bathrooms and other similar facilities on the basis of sex promotes this government interest [in privacy]" and indeed "is substantially related" to it. JA960.

Appellants contest none of these conclusions in this appeal. To the contrary, Appellants accept that preserving bodily privacy is an important government interest; that the separation of restrooms, locker rooms, and shower facilities by "sex" is substantially related to that interest; and that the practice of official sex-separation in those facilities can and should continue. *See, e.g.*, Br. at 46 ("Defendants would have the Court believe that Plaintiffs seek nothing less that the abolition of sex-segregated facilities. But Plaintiffs seek *nothing other* than to continue being able to access those facilities equally.") (emphasis added).

2. The district court properly analyzed the permissibility "as a general matter" of separating facilities based on male and female physiologies.

Instead of engaging with the district court's conclusions, Appellants insist that the district court asked the wrong question. They claim the court erred by analyzing whether the Equal Protection Clause permits sex-separated facilities "as a general matter," instead of analyzing whether the Clause permits "excluding only transgender individuals from facilities that others who identify as the same sex are allowed to use." Br. at 18. They say this is so because HB2 "does not discriminate against everyone," but "solely against transgender individuals," *id.* at 14, and that for non-transgender individuals HB2 is "irrelevant," *id.* at 20. Appellants are badly mistaken.

The starting premise of Appellants' argument is fundamentally flawed: for equal protection purposes there is no difference between asking whether facilities may permissibly be separated on the basis of biological sex (which is what the district court did) and asking whether transgender individuals may be "excluded" from facilities that do not match their biological sex (which is what Appellants say the district court should have done). The two questions amount to the same thing.

Both turn on whether the government has an important interest in protecting bodily privacy, and *both* turn on whether the government substantially furthers that interest by separating facilities on the basis of biological sex. *See* JA959-60 (asking and answering these two questions). By answering "yes," to the first question, the district court *by definition* answered "yes" to the second. Appellants' argument on appeal merely changes the wording of the question, not its answer.

Moreover, the way Appellants have framed the question—focusing solely on HB2's "discrimination" against the transgendered—is inaccurate. Appellants ignore that HB2 requires *everyone* to use public multiple-occupancy facilities corresponding to their biological sex, regardless of gender identity. Thus, contrary to Appellants' strange assertion that "HB2 does not discriminate against everyone," Br. at 14, the plain fact is that HB2 *applies* to *everyone*, because its biologically-based classification extends to *everyone*, whether or not a particular person's gender identity may differ from his birth sex. Consequently, it would make little sense for an equal protection analysis to focus *only* on

whether HB2 permissibly classifies the transgendered, since on its face HB2 classifies *everyone* on the basis of biological characteristics.[11]

For similar reasons, Appellants are flatly wrong that HB2 is "irrelevant" to non-transgender persons. Br. at 20. The district court painstakingly explained why *all* persons—and especially all *minors*—have a fundamental interest in protecting their bodily privacy in the intimate settings addressed by HB2. JA959-60. Indeed, Appellants "agree[d]" with this commonsense point below, JA960, and even "acknowledged that the practice of segregating bathrooms and other similar facilities on the basis of sex promotes this government interest." *Id.* They do not explain why they have abandoned that view on appeal and now maintain that HB2's sex-separation of restrooms, locker rooms, and showers is "irrelevant" to anyone but transgender people.

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[11] Appellants' argument is not helped by any distinction between "facial" and "as-applied" challenges. *See* Br. at 24 (arguing HB2 "facially" discriminates against the transgendered); *id.* at 26 (arguing HB2 discriminates "as applied" to transgender individuals). First, HB2 does not "facially" discriminate against transgender people; it "facially" classifies *everyone* on the basis of biological characteristics. Second, even if HB2 *did* "facially" discriminate against transgender people, the level of scrutiny would be the same intermediate scrutiny applied by the district court. *See* JA959 n.30. Third, analyzing HB2 "as applied" to transgender individuals is no different from facial analysis: "as applied" to transgender individuals HB2 substantially furthers the same privacy interests by separating individuals of different biological sexes in intimate public facilities.

Do Appellants seriously contend it is "irrelevant" to a 12-year-old girl (or to her parents) whether a 17-year-old physiological male who identifies as a female occupies the same public school shower as she does? The district court pointedly asked that question to Appellants' counsel, who after some hesitation conceded "it would be a legitimate concern" if "you've got 12-year-old girls who are not familiar with male anatomy and somebody older who's showing that to them, a mature adult." JA790-91. According to the cases cited by the district court—which Appellants make no attempt to distinguish—such a situation would not only present a "legitimate concern" but would violate the 12-year-old's "fundamental" right to bodily privacy "impelled by elementary self-respect and personal dignity." JA960 (quoting *Sepulveda*, 967 F.2d at 1416; *York*, 324 F.2d at 455). Below, Appellants were at least willing to admit this situation presents a "legitimate concern."[12] Now they apparently contend that the only "relevant" concerns are those of transgender people and no one else.[13]

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[12] Even then, however, Appellants' counsel insisted that "the transgender woman" (*i.e.*, the 17-year-old physiological male who identifies as a female) "needs to be allowed access to that facility." JA791.

[13] Appellants also support their argument that equal protection analysis should focus only on the transgendered by mistakenly citing cases *outside* the equal protection context. *See* Br. at 19-21 (citing *City of Los Angeles v. Patel*, 135 S. Ct.

Furthermore, contrary to Appellants' argument, such a situation is not remotely remedied by existing nuisance laws. *See* Br. at 23 (discussing trespass laws). For instance, a second-degree trespass under North Carolina law must involve someone's entering or remaining on premises "without authorization." N.C. Gen. Stat. § 14-159.13(a). As Appellants insisted below, however, under their legal theory the 17-year-old physiological male/transgender female is "authorized" to be in the girls' restroom, locker room, or shower because his gender *identity* is female. *See* JA791 (Appellants' counsel insisting "that the transgender woman needs to be allowed access to that facility"). Moreover, as the district court pointed out, North Carolina's indecent exposure law—which forbids "willfully exposing [one's] private parts … in any public place and in the presence of any other person"—makes an exception for "those places … where the same sex exposure is incidental to a

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2443 (2015) (involving a Fourth Amendment challenge to warrantless searches); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (involving a substantive due process challenge to abortion law requiring spousal notification); *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (involving a substantive due process challenge to abortion statute requiring physician to have hospital admitting privileges). Nor does *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015), support Appellants' argument. Br. at 20 Although *Obergefell* partially involved equal protection along with due process, the Supreme Court clarified that its equal protection analysis was dependent on the due process violation involving the fundamental right to marry. 135 S. Ct. at 2603-04.

permitted activity." N.C. Gen. Stat. § 14-190.9(a). Again, as Appellants insisted below, under their theory the 17-year-old physiological male/transgender female is "permitted" to shower in the girls' shower or change clothes in the girls' locker room because his gender identity is female. *See* JA791 (Appellants' counsel insisting "that the transgender woman needs to be allowed access to that facility").[14]

3. The district court correctly understood "sex" in equal protection analysis as based on the physiological differences between men and women.

While conceding below that sex-separated restrooms and similar facilities substantially further important bodily privacy interests, Appellants argued that "sex" includes the concept of "gender identity" (meaning one's internal identity as a man or a woman), and, moreover, that when gender identity diverges from physiology, gender identity

[14] Appellants' argument also appears to conflate a transgender person's *standing* to contest HB2 with the proper equal protection analysis. *See* Br. at 21-22 (arguing what constitutes "cognizable injury" under equal protection analysis). But Appellants' standing to contest Part I of HB2—which no one has contested—has nothing to do with how equal protection analysis treats their claim. Moreover—although it is also irrelevant to equal protection analysis—it is far from clear that Appellants are correct in suggesting that a man excluded from a women's restroom would lack *standing* to contest the exclusion. Br. at 22; *cf., e.g., NE Fla. Chap. of Assoc. Gen. Contractors of America v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (observing that "[t]he 'injury in fact' in an equal protection case … is the denial of equal treatment resulting from the imposition of the barrier"). To be sure, the man should *lose* his equal protection claim for the reasons discussed by the district court's order explaining why sex-separated restrooms satisfy intermediate scrutiny.

determines "sex" for equal protection analysis. *See* Doc. 22 at 10. Appellants continue to press those arguments on appeal. *See* Br. at 35-38. But the district court correctly rejected those arguments as a matter of law. *See generally* JA962-66.[15]

Contrary to Appellants' view, both Supreme Court and Fourth Circuit precedent have consistently treated the concept of "sex" in both the Constitution and federal law as concerning the "differing physiologies" of men and women. *See* JA962-66 (relying on *Virginia*, 518 U.S. at 540-46, 533, 550 n.19; *Tuan Anh Nguyen v. Immigration and Naturalization Serv.*, 533 U.S. 53, 59-60, 64, 68, 73 (2001); *Bauer v. Lynch*, 812 F.3d 340, 350 (4th Cir. 2016), *cert. denied*, No. 15-1489, 2016 WL 3219060 (U.S. Oct. 31, 2016); *Faulkner*, 10 F.3d at 232). In particular, this bodily conception of sex is critical when the issue is whether the government may appropriately separate the sexes in

[15] The district court did not rely on Appellants' expert declarations purporting to show that "gender identity is the only 'appropriate' characteristic for distinguishing between males and females." JA961-62. The district court was correct not to rely on this speculative evidence because, among other reasons, the court accurately concluded that "Supreme Court and Fourth Circuit precedent supports [Appellees'] position that physiological characteristics distinguish men and women for the purposes of bodily privacy." JA962. In any event, as the district court noted, Appellees have now offered countervailing expert evidence demonstrating that Appellants' medical evidence is flawed. *See* JA962 n.32. However, should this Court determine that such evidence should be considered in evaluating the equal protection claims in this case, the Court should remand to the district court for further consideration of the parties' conflicting medical claims.

intimate settings such as living facilities and restrooms in order to protect privacy. *See* JA965.

For instance, in *Virginia v. United States*, the Supreme Court held that the equal protection clause required the Virginia Military Institute to admit women. 518 U.S. at 540-46. Yet even as it rejected "stereotypical assumptions about the supposed 'inherent differences' between men and women," JA962, the Court nonetheless emphasized that "[p]hysical differences between men and women are enduring," and explained that "[a]dmitting women to VMI would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs." *Virginia* 518 U.S. at 533, 550 n.19. Thus, the Court's analysis of its "privacy" concerns was grounded in objective, "physical differences," not in subjective factors like gender identity.

Even more pointedly, in *Tuan Anh Nguyen* the Court upheld against equal protection challenge a federal immigration standard that made it easier to establish citizenship if a person had an unwed citizen mother, as opposed to an unwed citizen father. 533 U.S. at 59-60. The easier standard for persons with citizen mothers was explicitly justified

on *biological* grounds—namely that "[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood." *Id.* at 63. The Court rejected the argument that this distinction "embodies a gender-based stereotype," explaining that "[t]here is nothing irrational or improper in the recognition that at the moment of birth … the mother's knowledge of the child and the fact of parenthood have been established in a way not guaranteed in the case of the unwed father." *Id.* at 68. In its conclusion, the Court added these observations:

> To fail to acknowledge even our most basic biological differences—such as the fact that a mother must be present at birth but the father need not be—risks making the guarantee of equal protection superficial, and so disserving it. Mechanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real. […] The difference between men and women in relation to the birth process is a real one, and the principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender.

Id. at 73; *see also* JA963-64 (discussing *Tuan Anh Nguyen*). Here again, the Court's analysis of these issues was driven by objective, physiological differences between the sexes, not by subjective factors such as gender identity.

As the district court recognized, the physiological conception of sex on display in *Virginia* and *Tuan Anh Nguyen* has been recently echoed by this Court. JA964-65. In *Bauer v. Lynch*, 812 F.3d 340, this Court rejected the argument that differing FBI fitness standards for men and women—based on their "innate physiological differences"—constituted impermissible sex discrimination under Title VII. *Id.* at 343. Relying on *Virginia*, *Bauer* held that the different standards were justified because "[m]en and women simply are not physiologically the same for the purposes of physical fitness programs," and, despite *Virginia*'s rejection of sex stereotypes, "some differences between the sexes [are] real, not perceived[.]" *Id.* at 350. As the district court correctly concluded, these authorities squarely support the conclusion that the "privacy interests" justifying HB2's provision of sex-separated facilities "arise from physiological differences between men and women, rather than differences in gender identity." JA965 (citing *Virginia*, 518 U.S. at 533; *Nguyen*, 533 U.S. at 73; *Bauer*, 812 F.2d at 350).

Indeed, the district court pointed out that this Court already foreshadowed this conclusion in its *Faulkner* decision. JA965-66. In that case, the Court noted that sex separation in intimate facilities can be

justified by "acknowledged differences" between the sexes and observed that "[t]he point is illustrated by society's undisputed approval of separate public rest rooms for men and women based on privacy concerns." *Faulkner*, 10 F.3d at 232.

Appellants' attempt to distinguish these authorities fails. First, Appellants note that "none of these cases involved transgender people." Br. at 48. No one ever claimed they did. As the district court explained, however, those cases are directly applicable here because they show that equal protection permits *biologically-based* distinctions between men and women (like the distinctions drawn by HB2) and especially where the law seeks to preserve privacy between the sexes (as HB2 does). *See* JA965 (relying on these cases to conclude that the "privacy interests" justifying HB2 "arise from physiological differences between men and women, rather than differences in gender identity").

Second, Appellants claim that the "theme" of those four cases "is that where the government can provide equal access, it must do so." Br. at 48. That is absurd. Those cases explicitly approved *different* facilities (*Virginia*; *Faulkner*) or *different* standards (*Nguyen*; *Bauer*) for men and women based on biological differences between the sexes, even though

the governmental bodies at issue obviously *could* have "provide[d] equal access" if they had thought it wise to do so. In seeking to avoid that obvious point, Appellants twist those decisions beyond recognition.

For instance, Appellants contend that *Virginia* teaches only that "privacy concerns" between the sexes may be "addressed through any necessary alterations" to facilities. Br. at 49. But they leave out that the Court specified that the "alterations" it had in mind were "alterations *necessary to afford members of each sex privacy from the other sex in living arrangements*." 518 U.S. at 550 n.19 (emphasis added). Appellants also quote the phrase "physiological differences" from the same footnote and argue that such differences cannot "trump the obligation to provide 'genuinely equal protection.'" Br. at 49 (quoting *Virginia*, 518 U.S. at 550 n.19 & 557). Again, however, Appellants fail to provide the full context: in that footnote, the Court was relying on language *permitting* adjustments to military standards "because of *physiological differences between male and female individuals*." *Id.* (quoting note following 10 U.S.C. § 4342) (emphasis added).[16]

[16] Appellants do not seriously attempt to distinguish *Faulkner* and *Bauer*. They admit that both decisions expressly approved "separate public restrooms for men and women based on privacy concerns," Br. at 49 (addressing *Faulkner*), and "gender-normed standards … which required fewer push-ups for female trainees

With respect to *Nguyen*, Appellants are forced to concede that the decision upheld a biologically-based citizenship standard based on women's "ability to demonstrate parentage through giving birth," and that the Supreme Court "held that this differential treatment was not based on a stereotype." Br. at 50 (citing *Nguyen*, 533 U.S. at 64, 68). Attempting to avoid the analysis in that decision, however, Appellants offer only the feeble distinction that—unlike the biological rationale in that case—HB2 is "premised on the bias-based stereotype that transgender individuals like Plaintiffs are not 'real' men and women" unless they change their birth certificates. Br. at 50. That entirely misunderstands how *Nguyen* is applicable here. In that case, the Supreme Court held that a law distinguishing men from women based on *biological* characteristics was *not* based on impermissible sex stereotypes, and for that reason among others satisfied intermediate

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than male trainees," Br. at 50 (addressing *Bauer*). With respect to *Faulkner*, Appellants vaguely argue that the "decision's overarching conclusion was that equality is required where it is achievable." Br. at 49. Whatever that means, it does not affect *Faulkner*'s view that "equality" is not offended by sex-separated restrooms. With respect to *Bauer*, Appellants assert that the FBI's gender-normed fitness requirements were "upheld … because they furthered rather than hindered equal access by women." Br. at 50. That is not an accurate description of *Bauer*'s holding, which turned on men and women's "innate physiological differences." 812 F.3d at 343. In any event, HB2's sex-separated facilities should be upheld under the same rationale as *Bauer*, because the "innate physiological differences" between men and women justifying separating them in intimate facilities like those addressed by HB2.

scrutiny. Like the law at issue in *Nguyen*, HB2 is explicitly based on the biological differences between men and women. As Appellants must realize, *Nguyen* virtually compels the district court's conclusion that HB2 meets intermediate scrutiny. Indeed, *Nguyen*'s conclusion could have been written with this case in mind: "To fail to acknowledge even our most basic biological differences … risks making the guarantee of equal protection superficial, and so disserving it. […] The difference between men and women in relation to [privacy concerns in restrooms, locker rooms, and showers] is a real one, and the principle of equal protection does not forbid [HB2] to address the problem at hand in a manner specific to each gender." 533 U.S. at 73 (brackets added). In short, *Nguyen* compels affirmance.

4. HB2 is the opposite of "sex stereotyping" under *Price Waterhouse*.

As they did below, Appellants also rely heavily on the "sex stereotyping" theory from *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), to justify their view that "sex" in equal protection analysis includes the concept of gender identity. *See, e.g.*, Br. at 29-32. The district court correctly explained that the applicability *vel non* of *Price Waterhouse* to this case is immaterial—that is, even assuming HB2

triggers sex stereotyping under *Price Waterhouse*, that "would result in the court applying the same intermediate level of scrutiny" already applied by the district court. JA959 n.30. Nonetheless, because Appellants appear to rely on *Price Waterhouse* to argue that gender identity discrimination is encompassed by the Equal Protection Clause, *see, e.g.,* Br. at 29 (relying on *Price Waterhouse* to claim that HB2 discriminates on the basis of "perceived nonconformity to gender-based stereotypes and expectations"), Appellees address whether *Price Waterhouse* had any application to HB2. In short, *Price Waterhouse* has no application here because a person's biological sex cannot plausibly be considered a "sex stereotype." To the contrary, HB2 constitutes the *opposite* of sex stereotyping because it requires persons to use facilities according to their biological sex regardless of whether they meet any preconceived notion of masculinity or femininity.

Price Waterhouse found sex stereotyping where evidence showed a woman was not promoted because, in her employer's view, she was too "macho," "overly aggressive [and] unduly harsh" for a woman, and should have walked, talked, dressed, and styled her hair and make-up "more femininely." 490 U.S. at 235. *Price Waterhouse* thus teaches that

"sex stereotyping claims are based on behaviors, mannerisms, and appearances," such as when a male employee is fired because he "'wear[s] jewelry … considered too effeminate, carr[ies] a serving tray too gracefully, or tak[es] too active a role in child rearing.'" *Johnston v. Univ. of Pittsburgh*, 97 F.Supp.3d 657, 680 (W.D. Pa. 2015) (quoting *Glenn v. Brumby*, 663 F.3d 1312, 1318-19 (11th Cir. 2011)); *see also, e.g., Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004) (recognizing a sex stereotyping claim where plaintiff alleges his "conduct and mannerisms … did not conform with his employers' and co-workers' sex stereotypes of how a man should look and behave").

Appellants' claim that HB2 engages in sex stereotyping fundamentally misconceives the nature of sex stereotyping under *Price Waterhouse*. *See* Br. at 31 (asserting that "the vision of manhood or womanhood decreed by HB2 is a form of sex stereotyping"). The Act does not distinguish men or women based on how "masculine" or "feminine" they look, act, talk, dress, or style their hair. It does not allow only "masculine" men in the men's bathroom, but require more "effeminate" men to use the women's bathroom. It does not allow only "feminine" women in the women's locker room, but require more

"macho" women to use the men's locker room. *Those* access policies—as admittedly absurd as they would be—would indeed qualify as sex stereotypes under *Price Waterhouse*.

But HB2 does nothing of the sort. Instead, it designates public restrooms and other facilities for men or women based on *biology*, period—regardless of how a man or a woman looks, acts, talks, dresses, or does their hair—in other words, regardless of whether a man or a woman satisfies some stereotypical notion of masculinity or femininity. Far from violating *Price Waterhouse*, the Act is the *opposite* of the kind of sex stereotyping prohibited by that decision.

Thus, Appellants' theory fails even to state an intelligible claim for sex stereotyping under *Price Waterhouse*. As the *Johnston* court reasoned in rejecting precisely the same theory, Appellants "ha[ve] not alleged that Defendants discriminated against [them] because of the way [they] looked, acted, or spoke. Instead, [Appellants] allege[ ] only that [Defendants] refused to permit [employees] to use the bathrooms and locker rooms consistent with [their] gender identity rather than [their] birth sex. Such an allegation is insufficient to state a claim for discrimination under a sex stereotyping theory." *Johnston*, 97

F.Supp.3d at 680-81 (citing *Eure v. Sage Corp.*, 61 F.Supp.3d 651, 2014 U.S. Dist. LEXIS 163151 (W.D. Tex. Nov. 19, 2014); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224 (10th Cir. 2007); *Johnson v. Fresh Mark, Inc.*, 337 F.Supp.2d 996, 1000 (N.D. Ohio 2003), *aff'd*, 98 F. App'x 461 (6th Cir. 2004)). As the Tenth Circuit has also explained, *Price Waterhouse* does not require "employers to allow biological males to use women's restrooms," because "[u]se of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes." *Etsitty*, 502 F.3d at 1224. Instead, it constitutes a rejection of settled norms based on biology and physiology. [17]

Appellants' attempt to avoid this obvious conclusion would render the concept of sex stereotyping incoherent. They argue that HB2's

[17] Appellants mistakenly cite several circuit cases for the proposition that there is an "inextricable link between discrimination on the basis of transgender status and … gender nonconformity." Br. at 30 (citing *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000)). Appellants misunderstand those cases, which stand for the far narrower proposition that transgender persons may state a claim for sex discrimination if they suffer an adverse action—such as being fired or targeted for violence—specifically because their appearance is insufficiently masculine or feminine. *See, e.g., Glenn*, 663 F.3d at 1314 (transgender plaintiff was fired because "her appearance was not appropriate" for a man); *Schwenk*, 204 F.3d at 1201-02 (transsexual plaintiff targeted for violence for "fail[ing] to act like" a man stated claim for "gender-motivated" violence under federal law). Contrary to Appellants' suggestion, virtually every federal court to consider the issue has held that "transgender status" is not a protected class under the Equal Protection Clause or Title VII. *See Johnston*, 97 F.Supp.2d at 668-72, 674-77 (collecting cases).

distinction between biological males and females constitutes sex stereotyping "in its most extreme form" because it "decree[s]" a "vision of manhood or womanhood" and imposes "standards for what constitutes a 'real' man or a 'real' woman according to North Carolina lawmakers." Br. at 30, 31. To be clear, Appellants are asserting that *biology* is a "stereotypical notion" of what makes someone a man or a woman. Merely stating the argument refutes it. And a passing glance at the *Price Waterhouse* opinion refutes it as well because nothing there supports the Appellants' revolutionary argument that *biology* is a form of sex stereotyping. Appellants' only attempt to ground that novel theory in the actual language of the decision is to argue that *Price Waterhouse* forbids discrimination based on "sex-based considerations." Br. at 29 (quoting *Price Waterhouse*, 490 U.S. at 241-42, 251). But, by invoking "sex-based considerations," the Court was obviously referring to sex-based aspects of behavior or appearance such as an employer's "belief that a woman cannot be aggressive," *id.* at 250, or its insistence that a woman's "flawed 'interpersonal skills' can be corrected by a soft-hued suit or a new shade of lipstick," *id.* at 256. Conflating these sex-based considerations with an employee's biological status as a woman

or a man is to press the Supreme Court's reasoning beyond the point of coherence.

To put it plainly, distinguishing men from women by whether they have male or female genitals, or by whether they have an XY or an XX chromosome, is not, as Appellants staggeringly assert, "sex stereotyping in its most extreme form." *Id.* at 26. To the contrary, when the Constitution or federal law prohibit "sex" discrimination, this "means nothing more than male and female, under the traditional binary conception of sex consistent with one's birth or biological sex." *Johnston*, 97 F.Supp.3d at 676 (citing *Etsitty*, 502 F.3d at 1222). As *Price Waterhouse* aptly remarked, "[w]e need not leave our common sense at the doorstep when we interpret a statute," 490 U.S. at 241, and this Court need not do so when it interprets the Equal Protection Clause.

C. As the district court correctly determined, HB2 easily satisfies the tailoring requirements of intermediate scrutiny.

Having determined that HB2 serves important government interests in protecting bodily privacy, the district court correctly

determined that "there is little doubt" that the Act is substantially related to that interest. JA822,

First, HB2 is substantially tailored to protecting *bodily* privacy because, as Appellants acknowledge, in well over 99% of cases one's birth certificate correctly corresponds to biological sex.[18] Br. at 19. (The district court cited this figure in response to Appellants' contention that birth certificates are an "inaccurate proxy for an individual's anatomy," JA966-67, not, as Appellants claim, to justify the law on the rationale that "transgender people are only a small minority of the population" or that "the law does not harm the 99.7% of people who are not transgender." Br. at 3, 13.) Although "a perfect fit" is not required, *United States v. Staten,* 666 F. 3d 154, 159 (4th Cir. 2011), 99% is as close as it gets, and in any event easily meets the tailoring required by intermediate scrutiny. *Cf. Craig v. Boren*, 429 U.S. 190, 201 (1976) ("Certainly if maleness is to serve as a proxy for drinking and driving, a correlation of 2% must be considered an unduly tenuous 'fit.'"). In fact, had HB2 attempted to promote bodily privacy by segregating people on

[18] Appellants point out a discrepancy in transgender population estimates, Br. at 10 n.2, but under either number (0.03% or 0.06%) HB2's tailoring would be more than sufficient.

the basis of "gender identity" instead of "biological sex" (as Appellants propose) the statute *would have been less tailored to the goal*. That is because bodily privacy necessarily depends on the *physiological* differences between males and females. *See, e.g. Faulkner,* 10 F.3d at 232 ("The need for privacy justifies separation and the differences between the genders demand a facility for each that is different."). By contrast, a person's internal sense of being male or female has no necessary connection with his external physiology and, indeed, the very concept of "transgender" turns on the fact that the two aspects—external physiology and internal gender identity—are in conflict.

Appellants attempt to criticize the extremely close "fit" between HB2 and bodily privacy by arguing that 42% of North Carolinians are born out of state, Br. at 54, but the 99% correspondence rate is based on a national figure and is not limited to birth certificates issued in North Carolina. JA967. Appellants further point to various anomalies—some of them purely hypothetical—such as a soldier who might have had his genitals cut off,[19] Br. at 36, individuals with very rare disorders of

[19] Appellants claim that such a man would be banned from the men's restroom as a logical result of Appellees' position. Br. at 35. That is absurd. HB2 would require nothing of the sort, and there is no basis for Appellants' apparent contention

sexual development, *id.*, and individuals born out of state who may have been permitted to change their birth certificate without sex reassignment surgery, *id.* at 43. Any such exceptions, however, would be exceedingly rare and could not plausibly mar the near-perfect correspondence between birth certificates and physiological sex. Indeed, Appellants implicitly acknowledge this close fit when they point out that HB2 "affects only transgender individuals" because the "mismatch" between gender identity and birth sex is "precisely what defines" them as transgender. Br. at 24. And even that assertion is overstated since, as the district court pointed out, the record refutes the notion that *every* transgender person lacks a birth certificate that accurately reflects their external physiology. JA967.

Second, HB2 is substantially related to protecting bodily privacy because it is limited to "multi-occupancy" facilities where people might encounter one another in various stages of undress or engaging in what the district court described as "intimate bodily functions." JA917, 959. If the purpose of the statute were merely to "send a message of disapproval of transgender people," as Appellants contended below,

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that North Carolina law would require a man who tragically lost his genitals in an accident to change his birth certificate to the opposite sex.

JA807, and not to protect bodily privacy, *all* public restrooms and changing facilities would have been designated for use only on the basis of biological sex, including single-occupancy facilities. Or, if the purpose had been to "stigmatize" transgender individuals as "unfit to share communal spaces with everyone else," Br. at 59, then the statute would have required transgender individuals to use *only* single-occupancy facilities.

Appellants further contend that "non-discriminatory alternatives to H.B.2 abound," but they point only to "partitions and curtains" and existing criminal laws. Br. at 52. Appellants also suggested in district court that people wishing to maintain their privacy should go into a bathroom stall to change clothes rather than doing so in an open locker room, but as the district court recognized, that would be akin to abolishing locker rooms and multi-user facilities altogether. JA960 at n.31. Curtains and partitions are not solid and are obviously different in *kind* from the separate facilities HB2 provides. *See also, e.g.,* JA917 (recognizing "embarrassment from engaging in intimate bodily functions in the immediate vicinity of the opposite sex, regardless of whether one's body is subject to view."). And as already explained,

Appellants' position would effectively *nullify* the operation of criminal trespass and indecent exposure laws. *See supra* B.2 (explaining that Appellants' own position would *allow* physiological males to be present in a state of undress in intimate public facilities with women).

Third, HB2 is carefully tailored because it is limited to public facilities and does *not* prevent private businesses from creating different policies. Of course, Appellants draw the opposite conclusion, complaining that HB2 "leaves thousands of non-government facilities … wholly untouched." Br. at 54. But HB2's limited scope instead demonstrates that the North Carolina legislature exercised *restraint* by limiting the law to places of public accommodation and allowing private businesses to experiment with different policies if they wish. As Representative Bishop explained when he presented the bill in the House Judiciary Committee: "Notice there is no mandate on private business in this law. Businesses are free to regulate their own facilities as they see fit, and we believe that's consistent with a good, favorable business environment and appropriate freedom of choice." House Judiciary Committee at 9.

Fourth, HB2 is substantially related to protecting bodily privacy because North Carolina law permits individuals who have undergone sex change surgery to alter their birth certificates and thereafter use the facilities that correspond to their altered physiologies. *See* N.C. Gen. Stat. § 130A-118(b)(4). This is no *post-hoc* justification: when HB2 was first introduced in the House Judiciary Committee, Representative Bishop explained how the Act's interaction with the birth certificate statute was purposely designed to accommodate transgender individuals.[20] *See, e.g., Virginia,* 518 U.S. at 535-36 (explaining that facts supporting a governmental concern expressed on the legislative record at the time the statute was passed does not constitute a "post hoc" rationalization). And the relationship to bodily privacy should be obvious: Sex-change surgery ensures, for example, that a man who has become a "transgender woman" will not have male sex organs when

[20] Representative Bishop stated: "Biological sex is to be designated on the birth certificate. And for those that may not know, North Carolina already has in statute a provision that if someone has sex reassignment surgery, then they can amend their birth certificate so that it is the—so that it has the other gender. And so this is consistent with that." House Judiciary Committee at 7. He repeated the point during the debate on the House floor: "I made the point in committee and will make it again here, that our existing laws concerning the content of birth certificates provides that if someone has sex-reassignment surgery and that's certified by a physician, their birth certificate can be amended as to the gender." House Floor Debate at 6.

present in a public bathroom designated for women. The presence of such a person will therefore not violate the privacy expectations of women who use a women-only bathroom precisely to avoid sharing private spaces with people of the opposite sex.

Finally, the legislative record makes clear that the Charlotte Ordinance represented a *change* in existing law and practice, and that HB2 was designed to preserve the status quo or, at a minimum, clarify what the proper standards are for access to public restrooms, locker rooms, and showers. *See, e.g.,* Senate Floor Debate at 14 (arguing that the Charlotte Ordinance created "a real public safety risk with the citizens of this state");); House Floor Debate at 95 (stating that "the Charlotte ordinance absolutely went beyond what was already permitted by law, and we're just making it clear, what that law that already exists is"). Contrary to Appellants' assertion, counsel for Appellees never stated that transgender individuals were using opposite-sex restrooms on a widespread basis without incident, and certainly never stated that was the official pre-HB2 practice in North Carolina. The district court' observation that the state "had no problems with *that* pre-2016 legal regime" (emphasis added) was based only on

the declarations of the three individual plaintiffs and on statements made at the hearing by counsel for UNC, which has declined to enforce HB2 and who is not a party to this appeal. Counsel for the Intervenor-Defendants maintained that there was no evidence that transgender people were using opposite-sex facilities on a large scale, and repeatedly denied that HB2 in any way changed the status quo. JA844-47. Counsel for Governor McCrory acknowledged only that it was "probably the case" that some transgender individuals had used opposite-sex restrooms before HB2, but when asked about any associated problems with the pre-HB2 regime he specifically deferred to the legislative record and to counsel for Intervenor-Defendant Appellees. JA832. Regardless, whether transgender individuals routinely used opposite-sex public restrooms and changing facilities before HB2 was enacted would not affect the state's authority to enact legislation to prevent it—and is therefore beside the point.[21]

[21] Evidence at the preliminary injunction hearing regarding pre-HB2 practice was sparse and inconclusive and failed to remotely demonstrate any widespread or official practice of allowing facility use according to gender identity. *See, e.g.,* JA920, 921 (district court pointing to "admittedly anecdotal" evidence regarding "some transgender individuals … quietly using facilities corresponding with their gender identity"). For instance, the district court pointed to the declaration by the Guilford County Diversity Office, Monica Walker, who reported having worked with a mere

In sum, the district court correctly found that neither the State's privacy or public safety rationales for HB2 were disingenuous or *post hoc*. The district court found ample evidence to support them,[22] and the legislative record makes clear that privacy and public safety were of primary concern.[23]

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three transgender students in her district over the past five years, and, moreover, concerning access to restrooms, not locker rooms or showers. JA919; 283-87.

[22] Appellants mischaracterize the record when they state that "the district court credited that lawmakers had privacy concerns about transgender people using facilities consistent with their gender identity," which they conclude "confirms that transgender people were the intended target of H.B.2 and not mere collateral damage in service of other goals." Br. at 26. At the cited page, however, the district court stated only that "the record also contains many statements . . . reflecting an apparently genuine concern for the privacy and safety of North Carolina's citizens," but said nothing about transgender individuals. JA968.

[23] The legislative history is replete with references to concern about privacy and safety. *See* House Floor Debate at 3 (Rep. Stam introducing the bill on the House floor: "Members of the House, this is a common sense bill that protects the privacy expectations of our citizens, while clarifying local authority."); *id.* at 47 (Rep. Arp: "All North Carolina citizens expect bodily privacy in showers, locker rooms and bathrooms. Make no mistake, this bill ensures all North Carolina citizens the privacy, protections they in fact have."); *id.* at 76 (Rep. Stevens: "So this is truly about one [sic] privacy. That is an overreaching concern that we've had, people's right to privacy in completing a private function."); *id.* at 85 (Rep. Martin: "It protects the privacy for every citizen in this state, and that's important."); Senate Judiciary Committee at 28-29 (Sen. Berger: "We have—we have a bill that makes it clear that we are not going to put our citizens in further danger because of the recklessness of the Charlotte City Council."); Senate Floor Debate at 16 (Sen. Newton: "It's a matter of public safety."); Senate Judiciary Committee at 6 (Sen. Newton criticizing North Carolina Attorney General for "refus[ing] to take action to protect the safety and privacy of women and children" and concluded: "So we have a solution. We have it in this bill that's before us. This bill addresses these serious public safety concerns."). Even the comments of Senator Blue, who opposed the bill, revolved around the issue of safety. *See* Senate Floor Debate at 22-27.

II. The remaining preliminary injunction factors are irrelevant to this appeal.

Appellants' arguments concerning the remaining preliminary injunction factors, Br. at 56-61, are irrelevant because their failure to make a "clear showing" of likely success on their equal protection claim means that they are not entitled to preliminary injunctive relief. *See Winter*, 555 U.S. at 20, 22 (requiring "clear showing" on all four injunction factors); *Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 575 F.3d 342, 346-47 (4th Cir. 2009) (movants must "clearly" demonstrate they are "likely" to succeed on the merits), *vacated on other grounds*, 559 U.S. 1089 (2010). Wrongly anticipating reversal on equal protection, however, Appellants urge the Court to "direct entry" of a preliminary injunction as to Part I of HB2 based on the remaining factors. Br. at 62. But even assuming the Court reverses the district court's equal protection analysis—which it should not—the Court should instead remand to the district court for the following reasons.

First, the district court's application of the three equitable factors was based only "[o]n the current record." JA980. As the district court noted, the record in the 425 case has since been supplemented with voluminous fact and expert evidence contesting Appellants' medical

claims about the nature and treatment of gender dysphoria, as well as evidence demonstrating the serious harms to safety that would be caused by a restroom, locker rooms, and shower access policy such as the one urged by Appellants. *See* JA921 n.4 (noting that, following preliminary injunction hearing, Appellees filed HB2 legislative transcripts in the 425 case); JA962 n.32 (noting that Appellees have offered medical evidence in the 425 case). All of that evidence is now included in the 236 case as well. *See* Docs. 173-1 to 173-18 (exhibits to Defendants' supplemental due process brief). Consequently, any consideration of the remaining injunction factors should occur below in light of the more fully developed record.

Second, considering those factors in light of *all* of the preliminary evidence is critical given the district court's recognition that "the State clearly has an important interest in protecting the privacy rights of all citizens" in the "intimate" facilities addressed by HB2. JA984-85. Indeed, the court found that "[t]he privacy and safety concerns raised by [the State] are significant, and this is particularly so as they pertain to the protection of minors." JA985. The record below now contains extensive evidence (1) refuting Appellants' contention that gender-

identity-based access policies do not create privacy and safety concerns in restrooms, locker rooms, and showers (*see* Docs. 173-11, 173-12); (2) demonstrating that such policies severely undermine the ability of law enforcement to investigate, prosecute, and prevent a range of dangerous sex crimes (*id.*); and (3) showing how such policies expose vulnerable persons—such as sex abuse survivors—to intolerable distress (Docs. 173-13 to 173-15; 173-17 to 173-18).

Third, the district court's irreparable harm findings overwhelmingly concern the individual Plaintiffs' purported inability to access single-user facilities at UNC, where they work or go to school. *See* JA981. But those individual Plaintiffs have already received preliminary injunctive relief with respect to UNC. JA991-92. Any consideration of whether the individual Plaintiffs—not to mention the thousands of transgender members of the ACLU-NC—can show broader irreparable harm with respect to state agencies beyond UNC should be considered in light of the more fully developed record below and not the limited record in the current appeal.

CONCLUSION

The Court should dismiss this appeal for lack of jurisdiction or alternatively hold it in abeyance pending the Supreme Court's *G.G.* decision. If the Court reaches the merits, it should affirm the district court's denial of preliminary injunctive relief.

REQUEST FOR ORAL ARGUMENT

Appellees respectfully request oral argument.

Respectfully submitted,

Robert C. Stephens
General Counsel
OFFICE OF THE GOVERNOR OF NORTH CAROLINA
20301 Mail Service Center
Raleigh, NC 27699
(919) 814-2027
bob.stephens@nc.gov

/s/ Karl S. Bowers, Jr.
Karl S. Bowers, Jr.
BOWERS LAW OFFICE LLC
P.O. Box 50549
Columbia, SC 29250
(803) 260-4124
butch@butchbowers.com

William W. Stewart, Jr.
Frank J. Gordon
B. Tyler Brooks
MILLBERG GORDON STEWART PLLC

/s/ S. Kyle Duncan
S. Kyle Duncan
Gene C. Schaerr
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 714-9492
kduncan@schaerr-duncan.com

Robert D. Potter, Jr.
2820 Selwyn Avenue, #840
Charlotte, NC 28209
(704) 552-7742
rdpotter@rdpotterlaw.com

Counsel for Appellees Senator Phil Berger and Representative Tim Moore

1101 Haynes Street, Suite 104
Raleigh, NC 27604
(919) 836-0090
bstewart@mgsattorneys.com
fgordon@mgsattorneys.com
tbrooks@mgsattorneys.com

Robert N. Driscoll
McGLINCHEY STAFFORD
1275 Pennsylvania Avenue NW
Suite 420
Washington, DC 20004
(202) 802-9950
rdriscoll@mcglinchey.com

Counsel for Appellee Governor Patrick L. McCrory

CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2016, I filed the foregoing document through the Court's CM/ECF system, which will serve an electronic copy on all registered counsel of record.

/s/ S. Kyle Duncan
S. Kyle Duncan
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 714-9492
kduncan@schaerr-duncan.com

Counsel for Appellees Senator Phil Berger and Representative Tim Moore

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because the brief contains **13,961** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. R. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word for Mac 2011 in 14-point Century Schoolbook font.

/s/ S. Kyle Duncan
S. Kyle Duncan
Attorney for Appellees

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