**No. 16-1989**

**UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

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**JOAQUÍN CARCAÑO**, *et al.*,
*Plaintiffs-Appellants*,

v.

**PATRICK McCRORY**, in his official capacity as Governor of North Carolina,
*Defendant-Appellee*,
and
**PHIL BERGER,** in his official capacity as President *pro tempore* of the North Carolina Senate, and **TIM MOORE**, in his official capacity as Speaker of the North Carolina House of Representatives,
*Intervenors/Defendants-Appellees*.

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On Appeal from the United States District Court
for the Middle District of North Carolina No. 1:16-cv-00236-TDS-JEP

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# BRIEF OF *AMICUS CURIAE* COLUMBIA LAW SCHOOL SEXUALITY AND GENDER LAW CLINIC IN SUPPORT OF PLAINTIFFS-APPELLANTS

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Suzanne B. Goldberg
SEXUALITY AND GENDER LAW CLINIC
COLUMBIA LAW SCHOOL
435 West 116th Street
New York, New York 10027
Phone: (212) 854-0411
sgoldb1@law.columbia.edu
*Counsel for Amicus Curiae*

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## INTEREST OF AMICUS CURIAE

The Columbia Law School Sexuality and Gender Law Clinic (the Clinic or Amicus), founded in 2006, is the first such clinical law program at an American law school. The Clinic has extensive expertise in the law, including constitutional jurisprudence, related to gender, gender identity, and sexual orientation and it regularly submits amicus briefs on these issues to both federal and state courts. The Clinic previously submitted an amicus brief to this Court on issues related to discrimination against transgender people in *G.G. v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016), *petition for cert. filed*, 85 U.S.L.W. 3086 (U.S. Sept. 1, 2016) (No. 16-273). The Clinic also previously submitted an amicus brief to this Court regarding family recognition and marriage in *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014).

The Clinic's interest here is in addressing the proper application of equal protection review and, in particular, heightened scrutiny when a law impacts only a small percentage of the broader population. As this amicus brief shows, the equal protection inquiry properly focuses on the fit between the government's justification and the law's impact on the affected group. It is not concerned with the fit between that justification and those who are not subject to the law's burden.

In the instant case, therefore, HB2 can survive equal protection review only if the state's interest in privacy can adequately justify the exclusion of transgender men and women from bathrooms that are consistent with their gender identity. Although the Clinic does not perform this analysis in order to avoid duplication of others' arguments, it concurs with Plaintiffs-Appellants that the state's justification is inadequate here for the profound harm it imposes on those the law directly affects.[1]

## SUMMARY OF ARGUMENT

The primary purpose of this amicus brief is to address one important misconception in the district court's equal protection analysis of HB2 – that sex discrimination is permissible if a law burdens only a small subset of men or women so long as there is a reasonable fit in serving an important governmental interest for most others.[2] *Carcaño v. McCrory*, No. 1:16-cv-236, 2016 WL 4508192, at *20 (M.D.N.C. Aug. 26, 2016) (discussing the "reasonable fit"

[1] No counsel for a party authored this brief in whole or in part, and no one other than amicus, its members, or its counsel made any monetary contribution toward the brief's preparation or submission. In addition, all parties have consented to the filing of this and other amicus curiae briefs. See 4th Cir. Dkt. 43; Fed. R. App. 29(a).

[2] The analysis presented here applies regardless of whether the heightened scrutiny applied by the court is intermediate or strict.

requirement and concluding that "it seems unlikely that a law that classifies individuals with 99.7% accuracy is insufficient to survive intermediate scrutiny").

*Equal protection jurisprudence and common sense both make clear that a constitutional violation does not become tolerable if its harms are isolated to a minority of the population.* Instead, equal protection review turns on whether the government's discrimination can be appropriately justified as to the group of people it affects. As the Supreme Court has explained, "[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 894 (1992).

This focus runs through the Supreme Court's heightened scrutiny jurisprudence, which rejects classifications that impermissibly burden a small group of people, even when important state interests are served as a general matter. The protection of needy spouses or the provision of specialized education, for example, did not lead the Court to sustain sex-based laws that affected only a small number of dependent husbands or women interested in military-style education. Significant government interests in promoting families and insuring proof of paternity were similarly inadequate to sustain laws that burdened nonmarital children. *See infra.*

Likewise here, all parties agree that the state's asserted interest in privacy is important and that HB2 imposes no burden on most people. But that is not the relevant question.

Instead, at issue is whether the state's interest in privacy is served substantially by requiring men who are transgender to use bathrooms designated for women and by requiring women who are transgender to use men's bathrooms. It is transgender people whose gender identity and birth certificates do not align; this is "the group for whom the law is a restriction." And it is the burden on this group that cannot be satisfied by the state's asserted interest in maintaining restroom privacy as between men and women more generally.

## ARGUMENT

### A State May Not Discriminate Without An Important Interest That Justifies Burdening Those Affected, Even When The Number Of People Affected Is Small.

The Supreme Court has made clear that classifications can satisfy heightened equal protection review *only* if their burden on the affected population can be justified by the state's important or exceedingly persuasive interest. As the Court has written, "[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction." *Casey*, 505 U.S. at 894; *see also United States v.*

*Virginia*, 518 U.S. 515, 533 (1996) (requiring that states have an important and exceedingly persuasive justification for sex-based burdens they seek to impose).

The district court misconceived this means-ends analysis. Contrary to settled law, it concluded that the restroom restriction imposed by North Carolina House Bill 2 ("HB2") could satisfy constitutional review because the law's sex-based classification – a requirement that individuals use bathrooms consistent with the sex classification on their birth certificate – burdened only the very small number of people for whom birth certificate and gender identity are not aligned. *See Carcaño*, 2016 WL 4508192, at *21 ("Although the correlation between genitalia and the sex listed on a person's birth certificate is not perfect in every case, there is certainly a reasonable fit between these characteristics, which is what the law requires.").

When the Court affirmed in *Casey* that "[l]egislation is measured for consistency with the Constitution by its impact on those whose conduct it affects," it was responding to the claim that the spousal-notification provision of the law at issue there could be upheld because it had only limited impact. 505 U.S. at 894. Specifically, the *Casey* respondents had argued, as here, that the challenged provision was permissible because its burden fell on "fewer than one percent" of those whose conduct it reached and that nearly all women could safely comply with the requirement that they inform their husbands before obtaining an abortion.

*Id.* Yet, as the *Casey* Court stated, "[t]he analysis does not end with the one percent of women upon whom the statute operates; it begins there." *Id.*

Had the Court focused on all of the women covered by the statute, it might have found that the challenged restriction adequately served the government's interest in "potential life," which the Court described as "profound." *Id.* at 878. Yet it did not. Instead, the Court rejected the respondents' "attempt to avoid the conclusion that [the statute] is invalid by pointing out that it imposes almost no burden at all for the vast majority of women seeking abortions." *Id.* Applying the means-ends analysis to the women whose conduct would actually be burdened (i.e. women with abusive spouses), the Court then invalidated the spousal-notification rule because its burden on those women lacked a sufficient fit with the government's profound interest.

* * *

The Court's heightened scrutiny discrimination jurisprudence affirms, repeatedly, the appropriateness of this analytic frame, particularly in cases like the one at issue here, where HB2 affects only a small percentage of the population – but does so in a deeply injurious way without adequate justification. Indeed, if the Court's leading sex discrimination cases had been assessed under the district court's approach, most, if not all, would have yielded decisions at odds with how the Supreme Court actually ruled.

In *United States v. Virginia*, for example, all parties agreed that few women would want to seek out the Virginia Military Institute's approach to education. 518 U.S. at 542 ("It may be assumed . . . that most women would not choose VMI's adversative method."). Yet that assumption did not determine the constitutional analysis. As the Court wrote, "[t]he issue . . . is not whether 'women – or men –should be forced to attend VMI'; rather, the question is whether the Commonwealth can constitutionally deny [attendance] to women who have the will and capacity" to be educated there. *Id.* at 542 (citation omitted).

Likewise here, the issue is not whether most people are adversely affected by HB2's requirement of alignment between their birth certificate and their gender identity. Instead, the issue is whether the men and women who need to use the bathroom consistent with their gender identity, for safety and related reasons addressed by the Plaintiffs-Appellants, can be prohibited from doing so by HB2's birth certificate requirement.

This same type of focus – on those adversely affected by the provision at issue rather than on a larger number of people whose conduct is not restricted by the challenged measure – is used throughout the Court's heightened scrutiny jurisprudence. In *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), for example, the Court rejected the state's exclusion of men from a specific nursing school even though there was no evidence that the exclusion affected men

beyond the individual plaintiff in the case. *Id.* at 735-36 (Powell, J., dissenting) (noting that "[n]o other male" had joined the complaint). Indeed, the dissenters also noted that the male plaintiff already had the opportunity to attend other state-run nursing programs that were open to men. *Id.* at 734 (Blackmun, J., dissenting); *id.* at 735-36 (Powell, J., dissenting).

Similarly, in *Frontiero v. Richardson*, 411 U.S. 677 (1973), where a plurality of the Court first applied heightened scrutiny, at issue was whether the federal government could maintain a benefits rule that required servicewomen to prove that their husbands were dependent on them while servicemen could receive benefits for their wives automatically. The government supported the rule on empirical grounds, making the point that "husbands rarely are dependent upon their wives." *Id.* at 688-89. Yet the small number of men adversely affected did not end the analysis, and the Court found, instead, that the state's interest in "efficacious administration of governmental programs" could not justify the differential treatment. *Id.* at 690.

Indeed, it has often been the case that "some statistical support can be conjured up" to show that a government's reliance on sex will impose its burden on only a small subset of the population. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 139 n.11 (1994). In *Weinberger v. Wiesenfeld*, for example, the Court invalidated a federal social security rule that provided additional childcare-related

benefits for widows but not widowers even though relatively few men were actually affected by the classification. 420 U.S. 636, 645 (1975) ("Obviously, the notion that men are more likely than women to be the primary supporters of their spouses and children is not entirely without empirical support.").

The same was true in *Wengler v. Druggists Mutual Insurance Co.*, where the Court struck down a Missouri law that paid a deceased spouse's workers' compensation benefits to all surviving female spouses but only to surviving male spouses who could prove their dependency on their wives. The Court accepted that the government's objective of "[p]roviding for needy spouses" was important and recognized that the state's benefits rule was linked to that goal. *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 151 (1980). Yet that general linkage did not satisfy the equal protection inquiry:

> But the question remains whether the discriminatory means employed—discrimination against women wage earners and surviving male spouses—itself substantially serves the statutory end. Surely the needs of surviving widows and widowers would be completely served either by paying benefits to all members of both classes or by paying benefits only to those members of either class who can demonstrate their need. Why, then, employ the discriminatory means of paying all surviving widows without requiring proof of dependency, but paying only those widowers who make the required demonstration?

*Id.* Continuing this analysis, the Court held that although men may be more likely to provide the primary financial support for their families, the "discriminatory

means employed" did not substantially serve the government's interest. *Id.* at 151-52.

* * *

Heightened scrutiny of illegitimacy classifications likewise turns on whether the state has an adequate justification for burdening the affected group, rather than on whether the restriction generally serves an important governmental interest. In *Clark v. Jeter*, 486 U.S. 456 (1988), for example, the state's asserted interest in "avoiding the litigation of stale or fraudulent claims" was surely important. However, the Court invalidated Pennsylvania's six-year limitations period for paternity actions by nonmarital children who had not previously received support because the restriction's impact on those who were affected could not be adequately justified by that interest. *Id.* at 464-65.

Likewise, in *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), the Court considered a provision that denied to unacknowledged nonmarital children the same workmen's compensation recovery rights as other children could receive. In proceedings below, the state supreme court had "emphasized strongly the State's interest in protecting 'legitimate family relationships,'" *id.* at 173 (citation omitted). The U.S. Supreme Court agreed, recognizing that "the regulation and protection of the family unit have indeed been a venerable state concern." *Id.*

Most relevant for purposes here, the Court added: "We do not question the importance of that interest; what we do question is how the challenged statute will promote it." *Id.* It then struck down the provision because its burden "bears, *in this instance*, no significant relationship to those recognized purposes of recovery which workmen's compensation statutes commendably serve." *Id.* at 175 (emphasis added).

Again, in *Trimble v. Gordon*, 430 U.S. 762 (1977), the Court struck down a probate rule that burdened nonmarital children even while recognizing the state's general interests in family promotion and proof of paternity. "No one disputes the appropriateness of Illinois' concern with the family unit, perhaps the most fundamental social institution of our society. The flaw in the analysis lies elsewhere," the Court wrote. *Id.* at 769. In other words, the equal protection problem was not the absence of a generally valid government interest but instead an insufficient link between the state's interests in family and proof and the law's burden on children whose parents had not married.

* * *

In short, as the Court's heightened scrutiny cases show, identifying an important or exceedingly persuasive government interest is only one part of the

analysis. The other, essential question is whether that interest can justify the law's burden on the group of people whose lives it restricts.

As applied to the instant case, this means that the government's general interest in the privacy of bathroom facilities does not adequately respond to the equal protection inquiry here. Instead, the central inquiry is whether the government can adequately link its interest in privacy to excluding transgender men and women from bathrooms that are consistent with their gender identity. This, as the Plaintiffs-Appellants have shown in their submissions, North Carolina has not done and cannot do.

## CONCLUSION

For the foregoing reasons, the district court erred in holding that the small percentage of the population that is transgender and affected by HB2 enabled the law to survive equal protection review. As equal protection jurisprudence demonstrates, the state's proffered interest must be substantially related to the law's burden on transgender men and women whose sex designation on their birth certificate does not match their gender identity. When properly analyzed, the Plaintiffs-Appellants' equal protection claim prevails. Amicus therefore respectfully asks that this Court reverse the district court's ruling rejecting the broader preliminary injunction sought by the Plaintiffs-Appellants on their equal protection claim.

Dated: October 25, 2016

Respectfully submitted,

/s/ Suzanne B. Goldberg
Suzanne B. Goldberg
Sexuality and Gender Law Clinic*
Columbia Law School
435 West 116th Street
New York, New York 10027
Tel: (212) 854-4291
Fax: (212) 854-7946
sgoldb1@columbia.edu
*Counsel of Record for Amicus Curiae*

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 2,811 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. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman type style.

Dated: October 25, 2016

By: /s/ Suzanne B. Goldberg
*Counsel for Amicus Curiae*

## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system on October 25, 2016.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: October 25, 2016

By: /s/ Suzanne B. Goldberg
*Counsel for Amicus Curiae*