

No. 16-1989

IN THE

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

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

v.

PATRICK MCCRORY, in his official capacity as Governor of North Carolina,*Defendant-Appellee,**and***PHILIP E. 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.*

Appeal from the United States District Court
for the Middle District Of North Carolina
No. 1:15-cv-00236-TDS-JEP

**BRIEF OF SCHOLARS WHO STUDY THE TRANSGENDER POPULATION AS
AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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INTEREST OF AMICI CURIAE¹

Amici curiae are twenty-one scholars of demographics, economics, law, psychology, political science, public health, public policy, and other disciplines. Many *amici* are affiliated with the Williams Institute, an academic research center at UCLA School of Law dedicated to the study of sexual orientation and gender identity law and public policy. *Amici* Scholars have conducted extensive research and authored numerous studies regarding the transgender population in the United States, as well as law and policy affecting transgender people. The appended list of scholars identifies each of the individual *amici*.

As scholars who specialize in issues related to transgender people, *Amici* Scholars have a substantial interest in this matter. *Amici* Scholars have testified as expert witnesses in federal district courts and have submitted *amicus curiae* briefs on related issues in the various courts of appeals and the U.S. Supreme Court. *See, e.g., Obergefell v. Hodges*, No. 14-556 (U.S. 2015); *United States v. Windsor*, No. 12-307 (U.S. 2013). In *Obergefell v. Hodges*, the Supreme Court expressly relied on Williams Institute research, 135 S. Ct. 2584, 2600 (2015) (citing Brief of Gary J. Gates as *Amicus Curiae*). *Amici* Scholars believe that their expertise and

¹ In accordance with Federal Rule of Appellate Procedure 29(c)(5), *amici* certify that no counsel for either party authored this brief in whole or in part, and that no party or other person other than *amici* or their counsel made a monetary contribution to the brief's preparation or submission. All parties consent to the filing of this brief.

perspective as academic scholars will also help this Court evaluate the constitutionality of North Carolina's Public Facilities Privacy & Security Act, N.C. House Bill 2, 2d Extra Sess. (2016) (Sess. Law 2016-3) ("HB2").

SUMMARY OF ARGUMENT

The Constitution guarantees all people equal protection of the laws. Because similarly situated people must be treated alike under the law, laws that divide people along "suspect" (or "quasi-suspect") lines are deserving of heightened judicial scrutiny. To determine whether a law targeting a group triggers heightened scrutiny, courts traditionally consider four factors: (1) whether the group shares characteristics that distinguish it as a discrete minority group; (2) whether the group has experienced a history of discrimination; (3) whether the group lacks the capacity adequately to protect itself within the political process; and (4) whether the group faces discrimination based on stereotyped characteristics not truly indicative of the abilities of the group's members.

Amici Scholars agree with Appellants that Part I of HB2 discriminates on the basis of sex *and* on the basis of transgender status. This brief addresses the second basis (transgender status). *Amici* Scholars herein provide the Court with relevant demographic data, social science research, and legal authority to assist the Court in determining whether laws targeting transgender people create suspect classifications under the four factors the Supreme Court has historically

considered. As scholars who specialize in studying the transgender population, *amici* are uniquely suited to offer such research to the Court.

In *Amici* Scholars' view, all four considerations demonstrate that laws (like HB2) that discriminate against transgender people or classify on the basis of transgender status trigger strict scrutiny.

First, the approximately 1.4 million transgender adults in the United States (or 0.6% of the adult population) share characteristics that distinguish them as an identifiable, discrete minority group.

Second, overwhelming evidence demonstrates that transgender people have long been the victims of public and private discrimination. From modern statutes like HB2 to historical laws that criminalized cross-dressing, for decades legislation has targeted transgender people for discriminatory treatment. Transgender people also have been mistreated by the justice system—as civil litigants and criminal defendants, as prisoners, and as victims of crimes that transgender people suffer at disproportionately high rates. Studies show that discrimination also permeates many other aspects of transgender peoples' lives, including at work, in school, in housing and public accommodations, and when receiving healthcare. Courts have historically not only refused to protect transgender people from these forms of discrimination, but have treated transgender litigants with scorn, ridicule, and

disdain. And this discrimination has costs: Transgender people suffer higher rates of poverty, unemployment, and a range of physical and mental health conditions.

Third, as the enactment of laws like HB2 demonstrates, transgender people—a tiny minority group in our society—lack political power to protect themselves within the political process. Legislatures continue to enact discriminatory laws and a majority of states refuse to extend anti-discrimination protections to transgender people. This problem is exacerbated by the lack of any openly transgender officials elected to state or federal office. In the United States, only three transgender individuals currently hold elected office, and all of them serve at a city or county level.

Finally, as courts and scholars agree, being transgender bears no relation to a person's ability to contribute to society.

Because all four considerations support the same conclusion—and especially in light of the tiny size of the transgender population and the persistent and pervasive discrimination faced by transgender people—*Amici* Scholars submit that this Court should recognize that laws that discriminate against transgender people, such as Part I of HB2, trigger strict scrutiny.

ARGUMENT

LAWS THAT DISCRIMINATE AGAINST TRANSGENDER PEOPLE TRIGGER HEIGHTENED JUDICIAL SCRUTINY.

“The Equal Protection Clause of the Fourteenth Amendment commands that no State shall ‘deny to any person within its jurisdiction the equal protection of the laws,’ which is essentially a direction that all persons similarly situated should be treated alike.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (quoting *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). Although the law presumes the validity of classifications that are “rationally related to a legitimate state interest,” that “general rule gives way . . . when a statute classifies” groups that have historically been subject to discrimination or “impinge[s] on personal rights protected by the Constitution.” *Id.* Thus, certain laws discriminating based on a “suspect” classification (such as race) or a “quasi-suspect” classification (such as gender) receive heightened judicial scrutiny. *See Bostic v. Schaefer*, 760 F.3d 352, 374 (4th Cir. 2015) (noting that Supreme Court has already “identified sex-based classifications as quasi-suspect,” and in recent cases “has meaningfully altered the way it views both sex and sexual orientation through the equal protection lens”).

Neither the Supreme Court nor this Court has determined the appropriate level of scrutiny for laws that discriminate against transgender people. The Supreme Court has historically looked to four considerations to determine whether certain classifications are suspect: (1) whether members of the classified group

have “obvious, immutable, or distinguishing characteristics that define them as a discrete group,” *Lyng v. Castillo*, 477 U.S. 635, 638 (1986); (2) whether the group has experienced a history of discrimination, *City of Cleburne*, 473 U.S. at 440-41; (3) whether the group lacks the capacity adequately to protect itself within the political process, *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987); and (4) whether the discrimination is based on “stereotyped characteristics not truly indicative” of the group’s abilities, *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (per curiam).

The presence of any of the considerations is a signal that the classification is “more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective,” *Plyler*, 457 U.S. at 216 n.14, and no single factor is dispositive, *Murgia*, 427 U.S. at 321. Of the four considerations, a history of discrimination and whether the discrimination is based on stereotyped abilities are the most significant; “[i]mmutability and lack of political power are not strictly necessary factors to identify a suspect class.” *Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012), *aff’d* 133 S. Ct. 2675 (2013); *see also City of Cleburne*, 473 U.S. at 472 n.24 (Marshall, J., concurring in part and dissenting in part) (“The ‘political powerlessness’ of a group may be relevant, but that factor is neither necessary, as the gender cases demonstrate, nor sufficient, as the example of minors illustrates.”); *Nyquist v. Mauclet*, 432 U.S. 1, 9

n.11 (1977) (rejecting the argument that alienage did not trigger strict scrutiny because it was not immutable).

Although this Court has stated a general “reluctan[ce] to establish[ing] new suspect classes,” *Thomasson v. Perry*, 80 F.3d 915, 927-28 (4th Cir. 1996), all four considerations lead to the conclusion that the Court should strictly scrutinize laws, like HB2, that discriminate against transgender people.

A. The Transgender Population Constitutes A Discrete And Identifiable Minority Group In The United States.

Research demonstrates that the transgender population is an identifiable and “discrete” minority group in the United States. *Lyng*, 477 U.S. at 638. The term “transgender” generally “describes individuals whose current gender identity is not fully congruent with their assigned sex at birth.”² “Gender identity” “refers to a person’s internal sense of gender (*e.g.*, being a man, a woman, or genderqueer [*i.e.*, non-binary identity]).”³ “Transgender” individuals are thus distinguished from “cisgender” individuals, *i.e.*, those “whose gender identity matches their sex assigned at birth.”⁴

² Gender Identity in U.S. Surveillance Group, The Williams Institute, *Best Practices for Asking Questions to Identify Transgender and Other Gender Minority Respondents on Population-Based Surveys*, at ix (2014), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/geniuss-report-sep-2014.pdf>.

³ *Id.*

⁴ *Id.*

According to *amici*'s recent analyses of data managed by the Centers for Disease Control and Prevention (CDC), the United States is home to approximately 1.4 million adults who identify as transgender, or 0.6% of the U.S. adult population.⁵ North Carolina is home to approximately 44,460 transgender adults, 0.6% of the adult population in the state. Nationally and in North Carolina, younger adults (aged 18-24) are somewhat more likely to identify themselves as transgender than older people.⁶ Although estimates of the proportion of the adolescent population that is transgender are difficult to obtain, available research suggests that between 1.4 and 3.2% may be transgender.⁷

Although only a tiny subset of the U.S. population, transgender people reflect the general U.S. population in many respects. For example, transgender people reflect the country's racial/ethnic diversity, live in every state, identify as

⁵ Flores et al., The Williams Institute, *How Many Adults Identify as Transgender in the United States?* (2016), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf>.

⁶ *Id.* at 5-6.

⁷ Wilson et al., The Williams Institute, *Sexual and Gender Minority Youth In Foster Care: Assessing Disproportionality and Disparities in Los Angeles*, at 36-37 (2014), http://williamsinstitute.law.ucla.edu/wp-content/uploads/LAFYS_report_final-aug-2014.pdf.

straight, lesbian, gay, or bisexual, and many transgender people are military veterans and are parents.⁸

The foregoing data indicate that transgender people are a “discrete” minority group that self-identifies according to a distinguishing characteristic: a lack of congruence between their gender identity and their assigned sex at birth. *Lyng*, 477 U.S. at 638; *see Adkins v. City of N.Y.*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015) (“transgender status is a sufficiently discernible characteristic to define a discrete minority class”); *see also Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) (gender identity is “so fundamental” to identity that individuals “should not be required to abandon” it), *overruled on other grounds, Thomas v. Gonzalez*, 409 F.3d 1777 (9th Cir. 2005). Moreover, as will be explained in the following section, the group’s distinguishing characteristic “calls down discrimination when it is manifest.” *Adkins*, 143 F. Supp. 3d at 139-40 (finding

⁸ *See* Flores et al., The Williams Institute, *Race and Ethnicity of Adults Who Identify as Transgender in the U.S.* (2016), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Race-and-Ethnicity-of-Transgender-Identified-Adults-in-the-US.pdf>; Herman, “LGB within the T: sexual orientation in the National Transgender Discrimination Survey,” *Trans Studies: Beyond Hetero/Homo Normativities* (2016); Gates & Herman, The Williams Institute, *Transgender Military Service in the United States* (2014), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Transgender-Military-Service-May-2014.pdf>; Stotzer et al., The Williams Institute, *Transgender Parenting: A Review of Existing Research* (2014), <http://williamsinstitute.law.ucla.edu/research/parenting/transgender-parenting-oct-2014>.

this factor relevant because transgender people “face backlash in everyday life when their status is discovered”) (quoting *Windsor*, 699 F.3d at 181-82).

B. Transgender People Have Experienced A Long History Of Discrimination.

It is well documented that transgender people have long faced persistent and pervasive discrimination in the United States. As one court remarked this year, “there is not much doubt that transgender people have historically been subject to discrimination including in education, employment, housing, and access to healthcare.” *Bd. of Educ. v. U.S. Dep’t of Educ.*, No. 2:16-CV-524, 2016 U.S. Dist. LEXIS 131474, at *58 (S.D. Ohio Sept. 26, 2016); *see, e.g., Adkins*, 143 F. Supp. 3d at 140 (that “transgender people have suffered a history of persecution and discrimination . . . is not much in debate”) (internal quotation marks omitted); *Brocksmith v. United States*, 99 A.3d 690, 698 n.8 (D.C. 2014) (“The hostility and discrimination that transgender individuals face in our society today is well-documented.”). Historical discrimination against transgender people can readily be seen in state and federal law, the justice system, criminal victimization of transgender people, employment, housing, and other vital areas of life, and that discrimination is linked to deleterious consequences for the health and well-being of transgender people.

1. *Discrimination under state and federal law.*

Transgender individuals have historically faced discrimination under federal, state, and local laws. *Amici* agree with Appellants that North Carolina's HB2 is an example of such a discriminatory law, given that there is no dispute that it was passed in direct response to a Charlotte ordinance designed to *protect* transgender individuals from discrimination. And Part I of HB2 discriminates against transgender people because it forbids them, and them alone, from using single-sex facilities that match their gender identity. Nor is North Carolina alone: Mississippi earlier this year enacted legislation explicitly permitting religious- or morality-based discrimination premised on the belief that “[m]ale (man) or female (woman) refer to an individual’s immutable biological sex as objectively determined by anatomy and genetics at time of birth.”⁹

Transgender people have faced discrimination under federal law, too. As a recent example, only this year the U.S. military lifted its prohibition on service by transgender soldiers.¹⁰ In 1988, Congress excluded “transvestites” from the Fair

⁹ See 2016 Miss. Laws Ch. 334 (H. B. 1523), § 2(c) (2016).

¹⁰ U.S. Department of Defense, *Transgender Service in the U.S. Military: An Implementation Handbook*, at 10 (2016), http://www.defense.gov/Portals/1/features/2016/0616_policy/DoDTGHandbook_093016.pdf?ver=2016-09-30-160933-837.

Housing Act.¹¹ In 1990, when enacting the Americans with Disabilities Act, Congress expressly defined “disability” to exclude “transvestism” and “transsexualism.”¹² And these same exclusions were incorporated into the Rehabilitation Act in 1992.¹³

Indeed, laws discriminating against transgender people run deep in our nation’s history. For example, many cities enacted laws criminalizing cross-dressing beginning in the nineteenth century.¹⁴ Such laws unsurprisingly led to arrests: In *People v. Archibald*, 296 N.Y.S.2d 834, 836 (App. Div. 1968), an intermediate appellate court affirmed the conviction of a transgender defendant under a law forbidding “a disguise ‘in a manner calculated to conceal his being identified,” and in 1977, 53 people were arrested under a Houston ordinance that criminalized “dress[ing] with the designed intent to disguise his or her true sex as that of the opposite sex,” *Doe v. McConn*, 489 F. Supp. 76, 79 (S.D. Tex. 1980) (holding ordinance unconstitutional as applied to transsexuals). While most of these anti-cross-dressing laws were held unconstitutional or repealed, *see, e.g., City*

¹¹ Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause* (“*Bare Desire*”), 57 B.C.L. Rev. 507, 527-29 (2016), <http://lawdigitalcommons.bc.edu/bclr/vol57/iss2/4>.

¹² 42 U.S.C. § 12211(b); Barry, et al., *Bare Desire*, at 529-40.

¹³ 29 U.S.C. § 705(20)(F); *see also* Pub. L. No. 102-569, 106 Stat. 4344 (1992).

¹⁴ Ballard, *Sex Change: Changing the Face of Transgender Policy in the United States*, 18 Cardozo J.L. & Gender 775 (2012); *see also* Capers, *Cross Dressing and the Criminal*, 20 Yale J.L. & Human. 1, 8-9 (2008).

of *Columbus v. Rogers*, 324 N.E.2d 563, 565 (Ohio 1975),¹⁵ some courts upheld anti-cross-dressing laws against constitutional challenges¹⁶ and, either way, these laws had the effect of harassing transgender people and sweeping them into the criminal justice system.

Media reporting on one noteworthy case in North Carolina in the 1960s demonstrates how these laws can compound discrimination against transgender people.¹⁷ Maxine Doyle Perkins, a transgender woman, was convicted of violating North Carolina's anti-sodomy law and sentenced to serve 20 to 30 years—even though her consenting partner was sentenced to only 5 years.¹⁸ Before that, Perkins had been arrested and served sentences for offenses stemming from her cross-dressing. One local judge offered to suspend Perkins's jail term if she cut her hair and stopped wearing women's clothes, but Perkins refused. Her conviction under the anti-sodomy law was eventually overturned on appeal due to

¹⁵ Eskridge, *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961-1981*, 25 Hofstra L. Rev. 817, 861-62 (1997).

¹⁶ *Id.* at 862 & n.197 (discussing conviction of transsexual for cross-dressing in Houston, Texas and denial of certiorari in *Mayes v. Texas*, 416 U.S. 909 (1974)).

¹⁷ *The Law: Out of the Briar Patch*, Time (Dec 25, 1964), www.time.com/time/magazine/article/0,9171,830980,00.html.

¹⁸ Dwayne Walls, *Maxine Will Get New Trial Here in Vice Case*, Charlotte Observer (Dec. 10, 1964), http://farm3.static.flickr.com/2156/2475130060_fe95c5fb88_b.jpg.

ineffective assistance of counsel and she was acquitted at retrial—but only after “doing her best to dress, look, and act like a man in court.”¹⁹

Beyond such facially discriminatory laws, many laws disparately impact transgender people. For example, laws requiring voters to have a certain form of identification in order to vote risks disenfranchising many transgender individuals, who face administrative obstacles to obtaining identification that that reflects their correct gender identity. According to one recent study, the strictest of these laws (requiring government-issued photo identification) risks disenfranchising over 34,000 transgender people in eight states during the November 2016 election.²⁰

2. *Discrimination in the judicial system and by law enforcement.*

Transgender people have also suffered discrimination throughout the judicial system. Nineteen percent of the respondents to the 2011 National Transgender Discrimination Survey (NTDS)—the largest published survey of the transgender community to date—reported being denied equal treatment by a government agency or official, and 13% reported such treatment by a judge or court official.²¹

¹⁹ Stein, *North Carolina’s Brutal Tradition of Sexual and Gender Discrimination*, History News Network (Apr. 4, 2016), <http://historynewsnetwork.org/article/162473>.

²⁰ Herman, The Williams Institute, *Potential Impact of Voter Identification Laws on Transgender Voters in the 2016 General Election* (2016), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/2016-Voter-ID.pdf>.

²¹ Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey (“Injustice”)* (2011), http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf.

In family law proceedings, transgender litigants have been mistreated and repeatedly deprived of fundamental rights. Courts have refused to recognize their marriages, *see, e.g., Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (N.Y. Sup. Ct. 1971); denied them the right to inherit from deceased spouses, *see, e.g., In re Estate of Gardine*, 42 P.3d 120 (Kan. 2002); and revoked parental rights, *see, e.g., Kantaras v. Kantaras*, 884 So.2d 155 (Fla. App. 2004) (reversing lower court's granting custody to transgender man because he was born female). For instance, in *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999), a Texas appellate court refused to recognize a marriage between a man and a transgender woman, despite her completing all necessary medical treatment, undergoing gender reassignment surgery, and amending her legal documents, including her birth certificate, to reflect her female gender. Because the court held, "as a matter of law, that Christie Littleton is a male," "[h]er marriage to Jonathon was invalid, and she cannot bring a cause of action as his surviving spouse." *Id.* at 231.

The Supreme Court of Nevada upheld stripping a transgender parent of custody because her decision to transition from male to female showed that she was "a very selfish person whose own needs, desires and wishes were paramount and were indulged without regard to their impact on the life and psyche of the daughter." *Daly v. Daly*, 715 P.2d 56, 59 (Nev. 1986). The court concluded that, "in a very real sense, [she] has terminated her own parental rights as a father. It

was strictly [the parent's] choice to discard his fatherhood and assume the role of a female who could never be either mother or sister to his daughter.” *Id.*

One federal court justified discriminating against a transgender woman by stating she was “impersonating” a woman and “pretend[ing]” in order to “disguise himself.” *Oiler v. Winn-Dixie Louisiana, Inc.*, No. 00-3114, 2002 U.S. Dist. LEXIS 17417, at *28 (E.D. La. Sept. 16, 2002). Another court likened a transgender litigant to a man trying to change himself “into a donkey.” *Ashlie v. Chester Upland School District*, No. 78-4037, U.S. Dist. LEXIS 12516, at *13 (E.D. Pa. May 9, 1979). And another found no cognizable discrimination even though an employer asked a transgender woman employee “where she was in the sex change process” and whether “she still had male genitalia” before firing her. *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1218-19 (10th Cir. 2007).

As this last decision illustrates, courts historically interpreted sex discrimination laws as not protecting transgender people. *See, e.g., Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1087 (7th Cir. 1984) (concluding that discrimination against transgender people is not prohibited by Title VII). Some courts continue to adhere to the view that Title VII does not protect against discrimination on the basis of transgender status or gender transition, *see, e.g., E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 14-13710, 2016 U.S. Dist. LEXIS 109716, at *60 (E.D. Mich. Aug. 18, 2016), although an increasing number have revisited or

rejected such views. *See G.G. v. Gloucester Cty. Sch. Bd.*, No. 16-1733, 2016 WL 3743189, at *1 (4th Cir. July 12, 2016) (“The First, Sixth, Ninth, and Eleventh Circuits have all recognized that discrimination against a transgender individual based on that person’s transgender status is discrimination because of sex under federal civil rights statutes and the Equal Protection Clause of the Constitution.”); *see, e.g., Roberts v. Clark Cty. Sch. Dist.*, No. 215CV00388JADPAL, 2016 WL 5843046, at *9 (D. Nev. Oct. 4, 2016) (reviewing authority finding “that gender-identity discrimination is actionable under Title VII” and concluding that “I see no reason to depart from the heavy weight of this authority”).

Courts historically also subjected transgender litigants to humiliation while attempting to change their names. What is meant to be a routine administrative process has become at times a platform for judges to express hostility and bias. In one case, a court likened transgender people to “gargoyles,” and then characterized a transgender person’s name-change petition as “being asked to lend the dignity of the court and the sanctity of the law to [a] freakish rechristening” that would “pervert the judicial process.” *In re Petition of Richardson to Change Name*, 23 Pa. D. & C.3d 199, 201 (1982). In another, a court denied a transgender woman’s attempt to change her legal name based on a finding that the change would be “fraudulent” because she would still have male DNA. *In re Harvey*, No. CV-2011-1075, slip op. at 1, 5, 6 (Dist. Ct. Okla. Sept. 2, 2011). Other courts have

interrogated transgender litigants about their dedication to living as a particular gender, *In re Harris*, 707 A.2d 225, 228 (Pa. Super. Ct. 1997) (evaluating the petitioner's commitment to living full-time as woman before granting name change); considered the relevance of the applicant's genitalia, *In re Anonymous*, 293 N.Y.S.2d 834, 838 (N.Y. Civ. Ct. 1968) (name change permitted if sought by postoperative, as opposed to preoperative, transsexual); and expressed concern that changing one's name to correspond with his or her gender identity would constitute fraud, *In re Eck*, 584 A.2d 859, 860-61 (N.J. Super. Ct. App. Div. 1991).

Transgender prisoners have historically suffered discrimination as well. They have been incarcerated in facilities inconsistent with their gender identities, *see, e.g., Kosilek v. Maloney*, 221 F. Supp. 2d 156, 160 (D. Mass. 2002), and have been denied appropriate treatment (such as access to hormone therapy) or even requested clothing and grooming items. For example, in *Long v. Nix*, 86 F.3d 761 (8th Cir. 1996), the Eighth Circuit referred to a prisoner's request to be allowed to wear women's clothing as "demand[ing] the privilege of cross dressing" and characterized the prisoner as "[h]aving no apparent interest in overcoming his gender-identity disorder." *Id.* at 766. Incarcerated transgender people also face high levels of sexual abuse in prison from prison staff and other inmates.²²

²² Beck, Bureau of Justice Statistics, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011-12—Supplemental Tables: Prevalence of Sexual*

Finally, transgender people report high levels of harassment and abuse by law enforcement officers. Of the respondents to the NTDS, 20% reported unequal treatment by a police officer, 29% reported being harassed or disrespected by officers, 6% reported being physically assaulted by officers, and nearly half reported being uncomfortable seeking police assistance.²³

3. *Discrimination in the workplace.*

Overwhelming evidence documents pervasive and persistent discrimination against transgender workers. Of the respondents to the NTDS, fully 78% of respondents reported experiencing at least one form of harassment or mistreatment at work because of their gender identity.²⁴ Half reported being harassed at work.²⁵ Nearly half (47%) reported that they suffered an adverse employment action due to their gender identity—either not getting a job for which they applied (44%), being denied a promotion (23%), or losing their job (26%).²⁶ Of the North Carolina respondents to the NTDS, 77% reported experiencing harassment or mistreatment

Victimization Among Transgender Adult Inmates (2014),
http://www.bjs.gov/content/pub/pdf/svpjri1112_st.pdf.

²³ Grant et al., *Injustice*, at 6; see also Mallory et al., The Williams Institute, *Harassment by Law Enforcement Officers in the LGBT Community* (2015),
<http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Discrimination-and-Harassment-in-Law-Enforcement-March-2015.pdf>.

²⁴ Grant et al., *Injustice*, at 56.

²⁵ *Id.*

²⁶ *Id.* at 53-54.

on the job, 16% losing a job, 16% being denied a promotion, and 47% not being hired for jobs for which they applied because of their transgender identity.²⁷

The discrimination that transgender people face in employment is connected to high rates of unemployment or underemployment among transgender people. In the NTDS, 14% of respondents reported being unemployed, double the then-current national average.²⁸ Another 19% of respondents were out of the workforce and “not looking.”²⁹ Transgender people of color had even higher unemployment rates: 28% of black respondents and 18% of Latino and multiracial respondents were jobless.³⁰ Finally, 44% of the total respondents identified themselves as underemployed, *e.g.*, working in a field they should not be in or in positions for which they considered themselves overqualified.³¹

Related to discrimination and un- or under-employment, many transgender people are living in poverty. Fully 15% of the NTDS respondents reported annual earnings of under \$10,000—a rate four times higher than that of the general

²⁷ National Center for Transgender Equality and the National Gay and Lesbian Task Force, *Findings of the National Transgender Discrimination Survey: North Carolina Results* (2016) (“*North Carolina Results*”), http://www.endtransdiscrimination.org/PDFs/ntds_state_nc.pdf.

²⁸ Grant, et al., *Injustice*, at 55; *see also* Sears & Mallory, The Williams Institute, *Documented Evidence of Employment Discrimination and its Effects* (2011), <http://williamsinstitute.law.ucla.edu/research/workplace/documentevidence-of-employment-discrimination-its-effects-on-lgbt-people/>.

²⁹ Grant, et al., *Injustice*, at 55.

³⁰ *Id.*

³¹ *Id.*

population.³² Even those transgender individuals with higher incomes reported lower household incomes than the general population: 59% had household incomes under \$50,000 per year (compared to 41% of the general population),³³ while only 14% reported earning more than \$100,000 (compared to 25% of the general population).³⁴ With regard to North Carolina specifically, 17% of respondents had a household income of \$10,000 or less, compared to 4% of the general population.³⁵

These figures are consistent with a forthcoming study by several *amici*, based on representative data from 27 states, finding “clear evidence that self-identified transgender individuals have significantly lower employment rates and household incomes and significantly higher poverty rates than non-transgender individuals.”³⁶ The study concludes that transgender adults suffer a “household income penalty” equivalent to 12% of annual household income.³⁷

³² *Id.*

³³ *Id.* at 22.

³⁴ *Id.*

³⁵ *North Carolina Results*, at 1.

³⁶ Carpenter et al., *Transgender Status, Employment, and Income* (forthcoming 2016), at 9 (on file with counsel).

³⁷ *Id.*

4. *Discrimination in housing, education, public accommodations, and health care.*

Discrimination against transgender people extends to other important aspects of life, such as housing. In the NTDS, 19% of the respondents nationally and 20% in North Carolina reported being denied a home or apartment, 11% nationally and 19% in North Carolina reported being evicted because of their gender identity, and 19% nationally and 18% in North Carolina reported becoming homeless.³⁸

Discrimination against transgender people in education settings is widespread as well. Respondents to the NTDS reported “alarming rates of harassment (78%), physical assault (35%) and sexual violence (12%)” in grades K-12.³⁹ Thirty-five percent of respondents reported abuse at post-secondary institutions.⁴⁰ Harassment was so severe that nearly one in six respondents (15%) left school.⁴¹ The North Carolina results are roughly consistent with the national data: 88% of respondents reported harassment and 28% reported physical assault while in grades K-12, and nearly one in ten left school or higher education to escape harassment.⁴²

³⁸ Grant, et al., *Injustice*, at 106-113; *North Carolina Results*, at 1.

³⁹ Grant, et al., *Injustice*, at 33, 35-38.

⁴⁰ *Id.* at 39-40.

⁴¹ *Id.* at 40; *see also id.* (6% of respondents were expelled in grades K-12 for their gender identity/expression).

⁴² *North Carolina Results*, at 1.

Forty-four percent of respondents to the NTDS survey reported being denied equal treatment or service at least once at a place of public accommodation (*e.g.*, retail stores, hotels and restaurants, doctors' offices, hospitals, etc.).⁴³ More than half reported being verbally harassed and 8% reported being physically attacked or assaulted in a place of public accommodation.⁴⁴ Of the North Carolina respondents, 50% reported being verbally harassed or disrespected in a place of public accommodation or service.⁴⁵

Finally, transgender people face significant hurdles to accessing health care: 19% of the NTDS respondents nationwide reported that they were denied care, 28% reported being verbally harassed in a doctor's office, emergency room, or other medical setting, and 50% experienced health care providers who were ignorant of basic aspects of transgender health and had to teach their health care provider about some aspect of their health care needs.⁴⁶ Still others reported postponing medical care due to discrimination and disrespect from providers.⁴⁷

5. *Greater likelihood of facing violence and other crimes.*

Transgender people face high levels of physical violence and other crimes. In 2013 alone, the National Council of Anti-Violence Programs reported 13 hate-

⁴³ Grant, et al., *Injustice*, at 124-135.

⁴⁴ *Id.* at 126-28.

⁴⁵ *North Carolina Results*, at 1.

⁴⁶ Grant, et al., *Injustice*, at 72-76.

⁴⁷ *Id.*

motivated murders of transgender women.⁴⁸ In its 2009 report in support of Local Law Enforcement Hate Crimes Prevention Act of 2009, Congress recognized that over 400 people were murdered due to anti-transgender bias in the preceding decade, including 21 in 2008 alone.⁴⁹ Transgender individuals also suffer “a high prevalence of sexual assault and rape starting at a young age.”⁵⁰ One 2006 survey found that 59% of transgender respondents reported a history of forced sex or rape.⁵¹ Moreover, transgender victims of sexual assault rarely report the crimes. In one study, 83% of victims of sexual assaults had not reported any of the incidents to the police.⁵² Mistrust of police (as noted above) likely contributed to the lack of reporting, as significant numbers of the victims reported suffering unjust arrests, verbal abuse, and even physical assault by police.⁵³

⁴⁸ Nat’l Coalition of Anti-Violence Programs, *Lesbian, Gay, Bisexual, Transgender, Queer and HIV-Affected Hate Violence in 2013*, at 8, 22–23 (2014), http://avp.org/storage/documents/2013_ncavp_hvreport_final.pdf.

⁴⁹ H.R. Rep. No. 111-86, at 11 (2009).

⁵⁰ Stotzer, *Aggression and Violent Behavior* 14, at 170–72 (2009).

⁵¹ *Id.* (citing Clements-Nolle, et al., *Attempted suicide among transgender persons: The influence of gender-based discrimination and victimization*, *Journal of Homosexuality*, 51(3), 53-69 (2006)).

⁵² *Id.*

⁵³ *Id.* at 176.

6. *Discrimination against transgender people is linked to adverse health and welfare consequences.*

Prejudice and stigma against transgender people leads to various stressors referred to as “minority stress.”⁵⁴ In turn, this stress leads to an array of adverse effects on welfare that is reflected in disparities in health outcomes between transgender and cisgender populations in the United States.⁵⁵ Such welfare problems extend even beyond the criminal victimization and higher rates of unemployment and poverty discussed above.

For example, 35% of the NTDS respondents who reported being verbally harassed, physically or sexually assaulted, or expelled because they were transgender or gender non-conforming, reported using drugs or alcohol to cope with mistreatment they faced.⁵⁶ The transgender population is also recognized as the most at-risk population for HIV/AIDS.⁵⁷ And fully 41% of NTDS respondents reported a suicide attempt—a rate much higher than the national average of

⁵⁴ See, e.g., Hendricks & Testa, *A conceptual framework for clinical work with transgender and gender nonconforming clients: An adaptation of the minority stress model*, *Professional Psychology Research and Practice* 43(5), 460 (2012); Bockting et al., *Adult development and quality of life of transgender and gender nonconforming people*, *Current Opinion in Endocrinology, Diabetes, and Obesity*, 23(2), 188-97 (2016).

⁵⁵ See Bockting et al., *Stigma, mental health, and resilience in an online sample of the US transgender population*, *American Journal of Public Health*, 103(5), 943-51 (2013).

⁵⁶ Grant, et al., *Injustice*, at 44.

⁵⁷ CDC Issue Brief, *HIV and Transgender Communities* (2016), <https://www.cdc.gov/hiv/pdf/policies/cdc-hiv-transgender-brief.pdf>.

4.6%.⁵⁸ Notably, these high suicide rates are associated with discrimination: They are much higher for transgender respondents who had lost a job due to discrimination, were unemployed, suffered abuse (particularly physical abuse) in school, or performed sex work.⁵⁹

C. Transgender People Lack Political Power To Eliminate Significant Constitutional And Statutory Disadvantages.

As a small minority that comprises just 0.6% of the total adult population, there is little question that transgender people lack political power to fully protect themselves in the political process against a hostile majority. *Bd. of Educ.*, 2016 U.S. Dist. LEXIS 131474, at *59-60 (finding transgender community politically powerless “as a tiny minority of the population, whose members are stigmatized for their gender non-conformity in a variety of settings”); *see also Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 989-90 (S.D. Ohio 2013) (citing “small population size” as factor establishing powerlessness of LGBT community), *rev’d DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *rev’d Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

North Carolina’s adoption of HB2 in a single day, including a House vote of 82-26, a 32-0 Senate vote, and immediate signing of the bill by Governor

⁵⁸ Hass et al., The Williams Institute, *Suicide Attempts among Transgender and Gender Non-Conforming Adults* (2014), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/AFSP-Williams-Suicide-Report-Final.pdf>.

⁵⁹ Grant, et al., *Injustice*, at 45, 65.

McCrorry, highlights how little political power the transgender community possesses.⁶⁰ At the same time (and as noted), federal law and a majority of states do not expressly prohibit discrimination on the basis of gender identity in employment, housing, and other settings.⁶¹ Some jurisdictions are repealing protections against gender identity discrimination, as North Carolina did with HB2 and as Houston voters did in 2015 when they repealed “by a wide margin” a measure called the Houston Equal Rights Ordinance, which had banned discrimination on the basis of gender identity and sexual orientation (among other bases, such as race and national origin).⁶² And of the 45 states that have passed hate crimes legislation, only 17 (and the District of Columbia) extend those protections to transgender victims.⁶³

Further evidence that the transgender community lacks political power is reflected by the lack of openly transgender elected or appointed political officials.

⁶⁰ That is consistent with the lack of political power that the LGBT community has historically possessed in North Carolina, perhaps best illustrated by the passage of a 2012 constitutional amendment prohibiting marriage equality that received overwhelming support in the House (75-42), the Senate (30-16), and the electorate (61.04% to 38.96%). S.B. 514, 2011-2012 Gen. Assem. Reg. Sess, S.L. 2011-409 (N.C. 2011).

⁶¹ Transgender Law Center, *National Equality Map: Non-Discrimination Laws* (“*National Equality Map*”), <http://transgenderlawcenter.org/equalitymap>.

⁶² Katherin Driessen, *Houston Equal Rights Ordinance fails by wide margin*, Houston Chronicle (Nov. 4, 2015), <http://www.chron.com/politics/election/local/article/HERO-results-6608562.php>

⁶³ National Equality Map; *see also* Carpenter, et al., *Transgender Status*, at 4.

Amici are aware of only three openly transgender elected officials, all at local levels.⁶⁴ See *Adkins*, 143 F. Supp. 3d at 140 (recognizing the absence of openly transgender members of the United States Congress or federal judiciary). Three transgender officials have been appointed to government positions.⁶⁵ An out transgender person has never been sworn in as a legislator at the state or federal level.⁶⁶ *Amici* are aware of two transgender candidates who ran for state legislative office in 2016, but one lost in a primary and the other withdrew from the race after fearing for her personal safety.⁶⁷ Another two transgender candidates are running for the U.S. Congress this November, though neither is expected to win.⁶⁸

⁶⁴ See Casey & Reynolds, *Standing Out: Transgender and Gender Variant Candidates and Elected Officials Around the World*, App. 2 (2015), https://lgbtqrightsrep.files.wordpress.com/2015/10/lgbt_report_trans_v4.pdf.

⁶⁵ Casey, et al., *Standing Out*, at App. 2.

⁶⁶ Cleis Abeni, *Our 18 Greatest Allies for Trans Equality in Office*, *The Advocate* (Feb. 25, 2016), <http://www.advocate.com/transgender/2016/2/25/our-18-greatest-allies-trans-equality-office>; Carol Robinson, *It's Final: Laughton Resigns State Rep Seat*, *Nashua Patch* (Nov. 20, 2012), <http://patch.com/new-hampshire/nashua/it-s-final-laughton-to-resign>.

⁶⁷ *Primary Election Results*, *Honolulu Star-Advertiser* (Aug. 14, 2016), <http://www.staradvertiser.com/2016/08/14/hawaii-news/primary-election-results/> (results for Senate District 13); Josh Feit, *Transgender Candidate Danni Askini Drops Out of State House Race*, *Seattle Met* (May 23, 2016), <http://www.seattlemet.com/articles/2016/5/13/transgender-candidate-danni-askini-drops-out-of-state-house-race>.

⁶⁸ Drew Katchen, *On the Campaign Trail With Trans Senate Candidate Misty Snow*, *NBC News* (Oct. 12, 2016), <http://www.nbcnews.com/feature/nbc-out/campaign-trail-trans-senate-candidate-misty-snow-n665146>; Maria L. La Ganga, *Transgender nominee for Congress: 'It's about damn time' politics got*

The UNC LGBT Representation and Rights Research Initiative identified 55 out transgender or gender non-conforming Americans who ran for office between 1989 and October 2016.⁶⁹ Only 13 of the 55 candidates were successful.⁷⁰ That is an infinitesimal fraction of the hundreds of thousands of seats up for election across the nation during that same time period.

Although there are no conclusive answers as to why transgender individuals are underrepresented in elected and appointed office, research suggests that the greatest hurdle is getting such candidates—who may have to overcome fears of violence, discrimination, or backlash—to run.⁷¹ Transgender individuals also may lack the support needed to get elected if political parties and influential donors do not believe transgender candidates can win elections or are otherwise reluctant to give their support to transgender candidates.⁷²

D. Being Transgender Bears No Relationship To A Person's Ability To Contribute To Society.

The final factor in the Court's heightened scrutiny analysis is whether the group in question is distinctively different from other groups in a way that “frequently bears [a] relation to ability to perform or contribute to society.” *City*

inclusive, The Guardian (July 4, 2016), <https://www.theguardian.com/society/2016/jul/04/transgender-nominee-congress-misty-plowright>.

⁶⁹ Casey, et al., *Standing Out*, at App. 2.

⁷⁰ *Id.*

⁷¹ *Id.*, at 19-21.

⁷² *Id.*

of *Cleburne*, 473 U.S. at 440-41 (quoting *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality op.) (distinguishing gender from non-suspect classes like intelligence or physical disability)). Courts have held that “transgender status bears no relation to ability to contribute to society.” *Adkins*, 143 F. Supp. 3d at 139; *see also Bd. of Educ.*, 2016 U.S. Dist. LEXIS 131474, at *59. As one court recently explained:

Some transgender people experience debilitating dysphoria while living as the gender they were assigned at birth, but this is the product of a long history of persecution forcing transgender people to live as those who they are not. The Court is not aware of any data or argument suggesting that a transgender person, simply by virtue of transgender status, is any less productive than any other member of society.

Adkins, 143 F. Supp. 3d at 139.

Such cases are consistent with repeated findings by courts, individual judges, state officials, and legal scholars that gender identity is not related to a person’s ability to contribute to society or in the workplace.⁷³ Arguments that LGBT people did not belong in the workplace because of mental illness, physical illness, immorality, or criminality were more common before the 1980s, but had

⁷³ *See, e.g.,* Sears et al., *Relationship of Sexual Orientation and Gender Identity to Performance in the Workplace*, Documenting Discrimination on the Basis of Sexual Orientation and Gender Identity in State Employment (2009), http://williamsinstitute.law.ucla.edu/wp-content/uploads/4_PerformanceInWorkplace.pdf.

completely vanished from academic discourse by the mid-1990s.⁷⁴ *Amici* are aware of no contemporary research that identifies an aspect of transgender identity that, in and of itself, affects transgender individuals' ability to contribute to society.

CONCLUSION

In accordance with the foregoing, *Amici* Scholars respectfully request that this Court apply strict scrutiny to Part I of HB2.

October 25, 2016

Respectfully submitted,

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⁷⁴ *Id.* at 4-2.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because this brief contains 6,642 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 Word 2007 in 14-point Times New Roman.

October 25, 2016

s/ James E. Tysse

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CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2016, I electronically filed the foregoing *amici curiae* brief using the court's CM/ECF system. All of the participants are registered CM/ECF users and will be served copies of the foregoing Brief via the CM/ECF system.

Dated: October 25, 2016

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