

No. 16-1989

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IN THE 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-236  
Hon. Thomas D. Schroeder, United States District Judge

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**BRIEF OF THE NATIONAL EDUCATION ASSOCIATION AND NORTH  
CAROLINA ASSOCIATION OF EDUCATORS AS AMICI CURIAE IN  
SUPPORT OF PLAINTIFFS-APPELLANTS**

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**STATEMENT PURSUANT TO FED. R. APP. P. 29(C)(5)**

Amici states that no party's counsel authored the brief in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than amici, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 29(C)(1) and Fed. R. App. 26.1, the undersigned counsel for amici hereby discloses that amici have no parent corporations and that no corporation directly or indirectly holds ten (10) percent or more of the ownership interest in the amici.

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## **INTRODUCTION AND STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE**

This amici curiae brief is submitted on behalf of the National Education Association (“NEA”) and the North Carolina Association of Educators (“NCAE”). NEA is the nation’s largest professional association representing approximately three million members, the vast majority of whom serve as educators, counselors, and education support professionals in our nation’s public schools. NEA has a deep and longstanding commitment to ensuring that every child has access to a high-quality public education regardless of zip code.

NEA knows that students are more likely to learn and succeed in safe, supportive environments. And NEA has long recognized that discrimination against LGBT students profoundly harms them and degrades the educational environment for all students, and that LGBT-inclusive policies are required to promote a safe and supportive learning environment for all students and ensure that all students have equal educational opportunities.

NCAE is the North Carolina state affiliate of NEA and represents the interests of public school educators in all 100 counties of North Carolina. NCAE is committed to equal access to a quality public education for all children and recognizes that a high-quality education depends on students being treated with mutual respect, dignity, and equality. In particular, NCAE recognizes H.B. 2’s harmful impacts on the education and well-being of North Carolina’s public school

children. From the perspective of educators who teach children throughout North Carolina, NCAE sees how H.B. 2 disrespects transgender students and their classmates by creating a discriminatory and degrading learning environment. These impacts extend beyond the schools: H.B. 2's legislated discrimination disrespects the worth and dignity of transgender individuals, including our students, throughout North Carolina society.

NEA and NCAE write to urge this Court to rule in favor of the preliminary injunction sought by the Plaintiffs. When considering a preliminary injunction, this Court considers, among other factors, whether the proposed relief accords with the public interest. *See, e.g., G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 724 (4th Cir. 2016). This brief addresses the stigmatizing, degrading, and discriminatory effects of H.B. 2 on transgender students, and indeed all students, across North Carolina and the United States; the lack of evidence to support North Carolina's proffered justification for the law; and the reality that trans-inclusive policies in schools work for transgender and non-transgender students. By stigmatizing and demeaning transgender students and placing the imprimatur of the State behind discrimination against them, H.B. 2 promotes bullying, denies students equal access to educational programs, and undermines educators' efforts to build safe and supportive learning environments for their students. In light of these significant adverse effects—and the absence of any evidence that possibly

could justify such measures—NEA and NCAE respectfully submit that the public interest weighs heavily in favor of the preliminary injunction sought by the Plaintiffs.

NEA and NCAE counsel have formally interviewed fifteen educators from across the country. Among these are high school and middle school teachers, as well as school counselors and psychologists. This brief reflects both the specific experiences of these fifteen educators as well as the views of NEA and NCAE's membership as a whole. Some of the interviewees work in schools that have adopted inclusive transgender student policies; others work in schools that have not. Collectively, they represent a variety of experiences with transgender educational policies (and access to sex-segregated facilities in particular) and as such have valuable perspectives to share with the Court about the needs of transgender students, and, indeed, all students, in our nation's schools.

NEA and NCAE has the authority to file this amici curiae brief because all parties have consented to the filing of this and other amicus curiae briefs. *See* 4th Cir. Dkt. 43; *see also* Fed. R. App. 29(a).

## STATEMENT OF FACTS<sup>1</sup>

### I. Background on H.B. 2

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<sup>1</sup> Amici adopt and specifically incorporate the Statement of Facts contained in the Plaintiffs-Appellants' Brief.

In 2016, the North Carolina legislature passed and Governor Patrick McCrory signed H.B. 2, a sweeping law intended to reverse a Charlotte ordinance that, in part, permitted transgender people to use public restrooms and changing facilities based on their gender identity, rather than their birth-assigned sex. H.B. 2, among other things, prohibits transgender students in North Carolina's public schools from using sex-segregated facilities consistent with their gender identity, and appears to require school officials, including educators, to discriminate against transgender or gender nonconforming students pertaining to accessing sex-segregated facilities. The law prohibits students from using any single-sex bathroom or changing facility that does not conform to their "biological sex" (defined as the sex listed on their birth certificate) in school, and prohibits local actions that would allow specific accommodations of some transgender or gender nonconforming students. N.C. Gen. Stat. § 115C-521.2; *see also* N.C. Gen. Stat. §§ 143-422.2(c), 143-422.11.4.

Before H.B. 2, North Carolina schools could and did accommodate specific transgender students, allowing them to use sex-segregated facilities consistent with their gender identity. *See* R.127, at 8 (Memorandum Opinion, Order And Preliminary Injunction, August 26, 2016) (hereinafter "Order") (noting that before H.B. 2, "educational institutions [in North Carolina] generally permit[ted] [transgender students] to use bathrooms and other facilities that correspond with

their gender identity unless particular circumstances weigh in favor of some other form of accommodation”). But H.B. 2 prohibits such accommodation, specifically providing that “in no event shall [an] accommodation [to a student] result in the local boards of education allowing a student to use a multiple occupancy bathroom or changing facility designated . . . for a sex other than the student's biological sex.” N.C. Gen. Stat. § 115C-521.2(c). While H.B. 2 permits transgender students to use a single occupancy bathroom, it does not require such an accommodation.

*Id.*

## **II. Background on transgender students**

A transgender person is a person whose gender identity, or internal sense of being male or female, differs from that person's birth-assigned sex. Stephanie Brill & Rachel Pepper, *The Transgender Child* 5 (2008). Transgender boys were designated female at birth but identify as boys; transgender girls were designated male but identify as girls. Gender identity refers to an internal sense of where one falls on the spectrum from male to female. *Id.* at 4. “Gender identity is often established in young toddlerhood.” *See* Am. Psychological Ass'n, *Guidelines for Psychological Practice With Transgender and Gender Nonconforming People*, 70 *Am. Psychologist* 832, 835 (Dec. 2015), <http://www.apa.org/practice/guidelines/transgender.pdf>. Gender nonconformity



occurs when a person's gender expression differs from the stereotypical behaviors and interests exhibited by people of their birth-assigned sex. *See Brill, supra*, at 5.

Estimates vary as to just how many children are transgender or gender nonconforming and no one really knows for sure. One working number is that one in 500 children is transgender, and that nearly ten percent of children may be gender nonconforming. *See Brill, supra*, at 2; Joel Baum et al., Support And Caring For Our Gender Expansive Youth: Lessons from the Human Rights Campaign's Youth Survey 4 (2014). Others estimate that more than one in 200 children may be transgender, and in some localities, upwards of two percent of children are transgender. *See Andrew F. Flores et al., The Williams Inst., How Many Adults Identify as Transgender in the United States? 2* (June 2016), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf>; Jan Hoffman, *As Attention Grows, Transgender Children's Numbers Are Elusive*, N.Y. Times, May 17, 2016, <http://www.nytimes.com/2016/05/18/science/transgender-children.html>.

Gender dysphoria is the medical term used to describe individuals who experience distress due to an ongoing "marked difference between the individual's expressed/experienced gender and the gender others would assign him or her, and it must continue for at least six months." Am. Psychiatric Ass'n, Gender Dysphoria at 1 (2013),

<http://www.dsm5.org/documents/gender%20dysphoria%20fact%20sheet.pdf>.

“[G]ender nonconformity is not in itself a mental disorder.” *Id.* Rather, the critical element of gender dysphoria is the “presence of clinically significant distress associated with the condition.” *Id.* This distress is exacerbated by the fear and harassment that many transgender individuals face. *See* Am. Psychological Ass’n, *supra*, at 845. And the distress to transgender children in particular is often caused by the victimization, stigmatization, and bullying they face in school. Russell B. Toomey et al., *Gender-Nonconforming Lesbian, Gay, Bisexual, and Transgender Youth: School Victimization and Young Adult Psychosocial Adjustment*, 46 *Dev. Psychol.* 1580, 1585 (2010).

To alleviate this psychological stress, transgender individuals, including children, often engage in some form of social transition so that their external gender expression aligns with their internal gender identity. Social transition, that is, when a transgender person begins to live full-time in accordance with their gender identity, is important for the wellbeing of transgender students. *See* Brill, *supra*, at 113. This transition often “includes coming out to partners, family, friends, and community members (e.g., at school, work, other settings).” Eli Coleman et al., *World Prof’l Ass’n for Transgend. Health (WPATH), Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* 61 (2011),

[https://s3.amazonaws.com/amo\\_hub\\_content/Association140/files/Standards%20of%20Care%20V7%20-%202011%20WPATH%20\(2\)\(1\).pdf](https://s3.amazonaws.com/amo_hub_content/Association140/files/Standards%20of%20Care%20V7%20-%202011%20WPATH%20(2)(1).pdf); *see also id.* at 68 (“[B]athroom facilities for transsexual, transgender, and gender-nonconforming people ... should take into account their gender identity[.]”).

Gender transition may ultimately include surgical or medical transition, but often it does not. *See* Jaime M. Grant et al., Nat’l Ctr. for Transgend. Equal. & Nat’l Gay and Lesbian Task Force, *Injustice At Every Turn: A Report of the National Transgender Discrimination Survey 26* (2011), [http://www.thetaskforce.org/static\\_html/downloads/reports/reports/ntds\\_full.pdf](http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf) (only 33% of 6,450 surveyed transgender and gender nonconforming adults had surgically transitioned and only 61% had undergone any type of medical transition). And transgender children are generally not able to undergo sex reassignment surgery at all. *See* WPATH, *supra*, at 13–21, 59–60; Brill, *supra*, at 220–21.

A key component of a positive social transition for transgender students is support from the school: students must be allowed to access the facilities and programs that correspond with their gender identity and be recognized by their appropriately-gendered name and pronoun. Consistent with this, transgender children engage in social transition every day in our nation’s schools. They wear clothing corresponding with their gender identity, are called by pronouns

corresponding with their gender identity by their teachers and classmates, use sex-segregated facilities that correspond with their gender identity, and so on. *See* Asaf Orr et al., *Schools in Transition: A Guide for Supporting Transgender Students in K-12 Schools* (2015), <http://nclrights.org/wp-content/uploads/2015/08/Schools-in-Transition-2015.pdf>. Denying students the freedom to do this interferes with their ability to relate to and engage with their peers, causes distress that interferes with their ability to learn, and puts them at a higher risk for dropping out of school, drug and alcohol abuse, mental illness, and suicide. *Id.* at 8. On the other hand, a positive, supported social transition leads to better academic, social, and emotional outcomes for transgender students. *Id.* at 9.

It bears emphasizing that “conversion” or “reparative” therapies that seek to alter a transgender person’s gender identity have been universally discredited by leading medical and psychological associations.<sup>2</sup> “Such [‘therapies’] are against

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<sup>2</sup> *See, e.g.*, Am. Sch. Counselor Ass’n, *The Professional School Counselor and LGBTQ Youth* 37 (2016), [https://www.schoolcounselor.org/asca/media/asca/PositionStatements/PS\\_LGBTQ.pdf](https://www.schoolcounselor.org/asca/media/asca/PositionStatements/PS_LGBTQ.pdf) (“School counselors recognize the profound harm intrinsic to therapies alleging to change an individual’s sexual orientation or gender identity . . . and advocate to protect LGBTQ students from this harm.”); Hilary Daniel & Renee Butkus, *Lesbian, Gay, Bisexual, and Transgender Health Disparities: Executive Summary of a Policy Position Paper From the American College of Physicians*, 163 *Annals of Internal Med.* 135, 136, app. 8 (2015) (“The College opposes the use of ‘conversion,’ ‘reorientation,’ or ‘reparative’ therapy for the treatment of LGBT persons. . . . Available research does not support the use of reparative therapy as an effective method in the treatment of LGBT persons. Evidence shows that the

fundamental principles of psychoanalytic treatment and often result in substantial psychological pain by reinforcing damaging internalized attitudes.” Am.

Psychoanalytic Ass’n, Position Statement on Attempts to Change Sexual Orientation, Gender Identity, or Gender Expression (June 2012),

<http://www.apsa.org/content/2012-position-statement-attempts-change-sexual-orientation-gender-identity-or-gender>.

### **ARGUMENT**

Transgender people cannot be wished away. Being transgender or gender nonconforming is not a fad. It is innate. No one chooses it. Transgender youth, in particular, face difficult obstacles. Being transgender can challenge their closest relationships, including with their parents and friends; it can subject children to harassment, bullying, and violence; and the social pressure to live according to their birth-assigned sex can be intense. Those profound challenges and pressures can lead to serious psychosocial problems.

Given this reality, educators and education policy makers understand that schools work best when they fully welcome transgender and gender nonconforming students into the educational community. The North Carolina legislature and Gov. McCrory have emphatically chosen a different path. They have chosen to make transgender and gender nonconforming students’ lives worse

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practice may actually cause emotional or physical harm to LGBT individuals, particularly adolescents or young persons.”).

by stigmatizing them, ostracizing them, denying them equal educational opportunities, and pressuring them to deny their very existence. NEA and NCAE and its members file this amici brief to explain, based on their experience as educators, the unjustified and unjustifiable harm that H.B. 2 does to students.

**I. H.B. 2 stigmatizes transgender students, signals that intentional discrimination against them is acceptable, promotes bullying, and degrades the school climate for all students**

“The Constitution’s guarantee of equality must at the very least mean that a bare [legislative] desire to harm a politically unpopular group cannot justify disparate treatment of that group.” *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (internal quotations and citations omitted).

H.B. 2 was specifically passed to overturn a Charlotte ordinance that, among other things, allowed transgender individuals to use single-sex facilities consistent with their gender identity, regardless of a person’s birth-assigned sex. *See* Charlotte, N.C., Ordinance No. 7056 (Feb. 22, 2016); Press Release, Gov. Pat McCrory, Governor McCrory Takes Action to Ensure Privacy in Bathrooms and Locker Rooms (Mar. 23, 2016). The Charlotte ordinance did not specifically address educational facilities, but H.B. 2 nonetheless singled out transgender youth, making clear that, under H.B. 2, transgender students would be denied access to sex-segregated facilities consistent with their gender identity.

The purpose and effect of H.B. 2 is clear: It sends a strong message that transgender students are not worthy of society's equal respect; that transgender individuals are outcasts and pariahs who ought to be feared by the larger community; and that the larger community, including public school students, must be protected from them.

The "necessary consequence" of H.B. 2 is to demean and stigmatize transgender students. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015). While all non-transgender students can live according to their gender identity, North Carolina singles out transgender students for disparate treatment because their gender identity does not correspond with their genitalia. This is so, despite the fact that no matter what they do, transgender students' internal gender identity will never comply with the legislature's conception of who they should be. This is cruel. These children will forever "suffer the stigma of knowing" that in the eyes of the state, they are "somehow lesser." *See id.* at 2600. That, after all, is precisely the point of the legislation.

This stigmatization is deeply harmful to transgender students. NEA and NCAE's members educate and counsel many transgender and gender nonconforming students. They work with students grappling with their gender identity. They see students struggle with accepting who they are; coming out to

parents, teachers, and friends; enduring abuse and bullying; and also, overcoming all that, to thrive and prosper.

For many transgender students, school can too often be a dangerous and stigmatizing place. H.B. 2 makes what is already a difficult problem only worse. Transgender and gender nonconforming students are often harassed and bullied at school, and H.B. 2 makes that worse by legitimizing such hostility. Ninety percent of transgender students have heard both homophobic remarks and derogatory remarks about their gender identity at school, and ninety-five percent of transgender students have heard sexist remarks. Emily A. Greytak et al., GLSEN, *Harsh Realities: The Experience of Transgender Youth in Our Nation's Schools* 10 (2009), <https://www.glsen.org/sites/default/files/Harsh%20Realities.pdf>. Eighty-two percent of transgender students feel unsafe because of their sexual orientation and/or gender expression. *Id.* at 14. Over three-fourths of transgender students have been sexually harassed at school. *Id.* at 21. More than half of transgender students have been physically harassed at school because of their gender identity, and forty-four percent of transgender students report being physically assaulted at school. *Id.* at 18–19. Only forty-six percent of transgender students who were bullied or harassed reported it to school officials, and only one-third of the reporting students felt that the school responded effectively. *Id.* at 22. Students who come from small towns and rural areas experience even higher levels of



victimization based on gender expression than students in suburban or urban areas.

Joseph G. Kosciw et al., GLSEN, 2007 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual and Transgender Youth in Our Nation's Schools 71–72 (2008).

Such pervasive bullying and harassment lead to negative educational outcomes for students. Fifteen percent of transgender individuals have reported that they have transferred schools or quit school as a result of harassment. Grant, *supra*, at 3. Almost half of transgender students have missed school because they felt unsafe. Greytak, *supra*, at 14. Transgender students subject to gender-based verbal harassment have, on average, worse grades than their peers. *Id.* at 27. Those who face frequent harassment are less likely to pursue post-secondary education than those who are not harassed. *Id.* And transgender individuals are at a higher risk for suicide than their non-transgender peers because of this harassment. Grant, *supra*, at 2.

NEA and NCAE members bear witness to how this hostility is promoted when the government seeks to ostracize transgender youth. Commonly, transgender students are allowed to participate in school activities consistent with their gender identity by local educators, and they do so—often for some time—without incident. But all too often, school officials—prodded by community members who have disdain and animosity for transgender individuals—decide to

single a student out to enforce local analogues to H.B. 2. The school then denies the student access to facilities and programs that others have access to, telling the student that she is less than others. Scorn and abuse from students and the larger school community often follow. *See, e.g.*, Brief of Plaintiff-Appellant at 11–12, *G.G. v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016) (No. 15-2056), 2015 WL 6440329 (noting that at a school board meeting, certain speakers called a transgender boy a “‘freak’ and compared him to a person who thinks he is a dog and wants to urinate on fire hydrants”). This scorn and abuse is wrong, harmful, and without any justification.

## **II. H.B. 2 denies equal educational opportunities to transgender students**

One of our nation’s fundamental guarantees is that students have equal access to educational opportunities regardless of gender differences. *See, e.g.*, Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*; *United States v. Virginia*, 518 U.S. 515, 531 (1996). But H.B. 2 denies transgender students precisely that. “Parties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action.” *Virginia*, 518 U.S. at 531.

By prohibiting transgender students from accessing the facilities consistent with their gender identity, transgender students are denied access to the same quality of education granted to their non-transgender peers. When transgender

students cannot access a locker room commensurate with their gender identity, they often avoid participating in gym class or sports. When they cannot use the bathroom commensurate with their gender identity, they often attempt to avoid using the bathroom altogether.

Bathroom avoidance is a common and deep problem for transgender students. A Michigan teacher, who was formally interviewed in the preparation of this brief, shared the story of a transgender student who has not been given access to the bathroom commensurate with his gender identity. This student avoids eating breakfast and lunch so that he will not need to relieve himself during the school day. Thirst and hunger make it difficult for him to concentrate. A gender-neutral bathroom in the office at the other end of the building was made available to him, but using it requires him to out himself to his teachers in order to explain why he will be gone from the classroom for an extended period of time. The anxiety this student faces every day over his basic human need to use the bathroom detracts from his education. And his diminished educational performance is directly related to the school's refusal to simply acknowledge and respect his gender identity.

Another teacher, who was also interviewed, shared a similar story. A middle school transgender boy at her school was only allowed to access the girls' room. He ate neither breakfast nor lunch and avoided drinking so that he did not have to use the bathroom during the day. Because he is biologically female and has not

undergone a medical transition, he has a monthly menstrual cycle. During the week of his menstrual cycle, he did not come to school because he was not comfortable using a bathroom inconsistent with his gender identity. Starting this year, he is finally being appropriately accommodated and has much less anxiety about attending school, resulting in better attendance and better educational outcomes.

Another interviewed teacher described how, in response to a group of parents complaining about a transgender boy using the boys' bathroom, the school administration required the transgender boy to use the girls' bathroom. But parents and students are also uncomfortable with him using the girls' bathroom, because, by all outwardly measures, he expresses himself as a boy. This student suffers the cruel fate of being squeezed from both sides and feeling that he belongs nowhere at school. These experiences, sadly, are not unique.

### **III. H.B. 2's stated concerns about the safety of non-transgender students are baseless, and the stated concerns themselves evince a discriminatory and stigmatizing intent**

Supporters of H.B. 2 contend that it is necessary to protect "men[,] women[,] and children when they use a public restroom, shower or locker-room," and without H.B. 2, men would take advantage of laws like Charlotte's that allowed transgender persons to "use a woman's bathroom, shower, or locker room," to "do harm to others." *See* Press Release, Gov. Pat McCrory, Governor McCrory Releases Video Message (Mar. 29, 2016); Press Release, Gov. Pat McCrory,

Myths vs. Facts (Mar. 25, 2016); Press Release, Gov. Pat McCrory, Governor McCrory Takes Action to Ensure Privacy in Bathrooms and Locker Rooms (Mar. 23, 2016).

None of the jurisdictions that allow transgender people to use facilities consistent with their gender identity has experienced sex crimes as a result of those laws, and victims' advocacy groups, police departments, and government representatives from these jurisdictions have repeatedly verified this. Stevie Borrello, *Sexual Assault and Domestic Violence Organizations Debunk 'Bathroom Predator Myth,'* ABC News (Apr. 22, 2016), <http://abcnews.go.com/US/sexual-assault-domestic-violence-organizations-debunk-bathroom-predator/story?id=38604019>; Carlos Maza & Luke Brinker, *15 Experts Debunk Right-Wing Transgender Bathroom Myth,* Media Matters for America (Mar. 20, 2014), <http://mediamatters.org/research/2014/03/20/15-experts-debunk-right-wing-transgender-bathro/198533>.

Even in this case, although the “Defendants argue that a preliminary injunction will thwart enforcement of such safety laws by allowing non-transgender predators to exploit the opportunity to cross-dress and prey on others, the unrefuted evidence in the current record suggests that jurisdictions that have adopted accommodating bathroom access policies have not observed subsequent increases in crime.” R.127, at 78 (Order). This paucity of evidence is expected. It is

preposterous to believe that a male sexual predator is undeterred by felony sexual assault laws from entering womens' restrooms to assault girls and women but would be deterred by a trespassing law that prohibits transgender people from using a restroom consistent with their gender identity.

Educators find the idea that boys will pretend to be transgender to engage in sexual ogling of girls to be nonsense. The idea that a teenage boy would come out to his peers and teachers as transgender and face all that such an announcement is freighted with in order to gain access to the girls' bathroom to engage in voyeurism is ludicrous. NEA, NCAE, and the members interviewed for this brief are unaware of *any* misconduct in a bathroom that is related to or caused by an inclusive transgender policy. Students of course misbehave in school bathrooms, for reasons that have nothing to do with transgender students, and schools and educators take various measures to address misconduct as it arises. But banning transgender students from using bathrooms consistent with their gender identity will do nothing to combat bathroom misbehavior and assaults.

There is absolutely no evidence that inclusive transgender policies lead to increased sexual assaults—and certainly not on the part of transgender individuals. *See id.* at 77 (Order) (“[T]here is no evidence that transgender individuals overall are any more likely to engage in predatory behaviors than other segments of the population.”). Being transgender does not make a person more likely to commit a

violent act, much less a sexually violent one. A contrary assertion does not justify animus toward transgender people but is itself another offensive form of discrimination that stigmatizes transgender people. It perpetuates a harmful stereotype against transgender people that has no basis in fact. Sadly, H.B. 2 fits well into our nation’s shameful history of labeling certain minorities as dangerous—and sexually dangerous in particular—as a justification for their oppression.<sup>3</sup>

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<sup>3</sup> See, e.g., *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 449 (1985) (holding that “vague, undifferentiated fears” of people with disabilities could not justify discrimination against them); Ruth Thompson-Miller et al., *Jim Crow’s Legacy: The Lasting Impact of Segregation* 22–23, 89 (2015) (discussing that scores of black men were lynched for crimes ranging from looking at a white woman to alleged rape of a white woman during the Jim Crow era, pursuant to a still-present stereotype that black men are particularly criminal and dangerous for white women); Anthony Niedwiecki, *Save Our Children: Overcoming the Narrative that Gays and Lesbians are Harmful to Children*, 21 *Duke J. Gender L. & Pol’y* 125, 142–52, 161–63 (2013) (discussing how gay rights opponents have historically used a narrative equating homosexuality with pedophilia to defeat proposed anti-discrimination laws, ban gay couples from adopting, attempt to ban gays and lesbians from teaching in public schools, and argue against allowing gay Boy Scout troop leaders); Tobias Barrington Wolff, *Civil Rights Reform and the Body*, 6 *Harv. L. & Pol’y Rev.* 201, 219 (2012) (“The fear of sexual predation by Black men toward White women—the familiar stereotype that defined so much of the received understanding of race relations in post-Civil War America—was the dominant justification relied upon by forces opposed to the integration of municipal pools”); Phoebe Godfrey, *Bayonets, Brainwashing, and Bathrooms: The Discourse of Race, Gender, and Sexuality in the Desegregation of Little Rock’s Central High*, 62 *Ark. Hist. Q.* 42, 43–46, 51–52 (2003) (discussing how white parents’ fears that black boys and girls would harm their daughters was a driving force in the fight against school integration).

Not only do transgender individuals have no greater proclivity for physical or sexual assault than anyone else, they, in fact, are much more likely to be victims of both physical and sexual assaults. *See, e.g., Grant, supra*, at 3 (“Those who expressed a transgender identity or gender non-conformity while in grades K-12 reported alarming rates of harassment (78%), physical assault (35%) and sexual violence (12%)”).

Even if North Carolina’s stated purpose of protecting girls from male predators posing as transgender females to engage in sexual assault or voyeurism were somehow justified, H.B. 2 would still have a serious tailoring problem. *See, e.g., Romer v. Evans*, 517 U.S. 620, 632 (1996) (concluding that a Colorado constitutional provision that prohibited any legislative, executive, or judicial protection for LGBT people was too disconnected from the stated purpose of protecting associational rights of landlords to be constitutional). A law designed to combat school restroom sexual assault and protect privacy in particular would look very different than H.B. 2. It would not seek to discriminate and stigmatize transgender children; it would instead address seriously the security and privacy interests of all students.

Indeed, students’ privacy interests can be addressed without discriminating against transgender students. In schools that permit transgender students to use the facilities commensurate with their gender identity, gender-neutral facilities are



commonly open to any student who would rather not use a sex-segregated facility, and installations that increase the privacy of everyone in sex-segregated facilities are beneficial to all students. That said, it is our members' experience that other students rarely have problems with transgender students accessing sex-segregated facilities consistent with their gender identity. Most objections to transgender students using sex-segregated facilities are raised not by other students but by political leaders and adults who act out of fear and disdain for transgender students.

#### **IV. Schools that operate with trans-inclusive policies have better outcomes for transgender students as well as all students**

##### **A. Trans-inclusive policies lead to significantly better outcomes for transgender students**

In May 2016, the United States Departments of Education and Justice released a Dear Colleague Letter on Transgender Students along with an Examples of Policies and Emerging Practices for Supporting Transgender Students, asserting that in the Departments' view, discrimination against transgender students violates Title IX of the Education Amendments Act of 1972, and offering examples of local policies throughout the country that recognize and respect the rights of transgender students. *See* Civil Rights Div., U.S. Dep't of Justice & Office for Civil Rights, U.S. Dep't of Educ., Dear Colleague Letter, Transgender Students (May 13, 2016), <https://www.justice.gov/opa/file/850986/download>; Office of Elementary and

Secondary Educ., Office of Safe and Healthy Students, U.S. Dep't of Educ.,  
Examples of Policies and Emerging Practices for Supporting Transgender Students  
(May 13, 2016),

<http://www2.ed.gov/about/offices/list/oese/oshs/emergingpractices.pdf>.

NEA agrees with the legal conclusions in the Dear Colleague Letter<sup>4</sup> and  
applauded the release of the Letter and Examples. As NEA President Lily Eskelsen  
García put it:

Every student matters, and every child has the right to  
feel safe, welcomed, and valued in our schools. As  
educators, we are responsible for our students' education  
and safety, including transgender students. We know that  
students are more likely to learn and succeed in safe,  
supportive environments.

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Educators welcome and support the guidance issued by  
the Obama administration today. The joint letter issued  
by the federal Departments of Education and Justice is  
not only timely and right but necessary to ensure that  
everyone – regardless of gender identity – has the  
opportunity to thrive and achieve.

Statement of Lily Eskelsen García, President, Nat'l Educ. Ass'n (May 13, 2016),

<http://www.nea.org/home/66709.htm>.

NEA and NCAE can tell this Court unequivocally that the model policies  
offered by the Departments of Education and Justice work. Indeed, at least

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<sup>4</sup> See Nat'l Educ. Ass'n, Legal Guidance on Transgender Students' Rights (June 2016), [https://www.nea.org/assets/docs/20184\\_Transgender%20Guide\\_v4.pdf](https://www.nea.org/assets/docs/20184_Transgender%20Guide_v4.pdf).

fourteen states and the District of Columbia explicitly prohibit gender identity-based discrimination in education.<sup>5</sup> Likewise, numerous school districts and individual schools have adopted gender-affirming policies that protect the rights of transgender students and create safe learning environments.<sup>6</sup> These policies protect the rights of transgender students by, among other things, ensuring that transgender students are allowed to use sex-segregated facilities consistent with their gender identity and that students are referred to by names and pronouns consistent with their gender identity.

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<sup>5</sup> See Cal. Educ. Code §§ 220, 221.5(f); Colo. Rev. Stat. §§ 24-34-301, 24-34-601; Conn. Gen. Stat. §§ 1-1n, 10-15c; 775 Ill. Comp. Stat. 5/5-102, 5/5-103(O-1); Iowa Code § 216.9; Me. Rev. Stat. tit. 5, §§ 4553(8)(j), 4553(9-C), 4592; Mass. Gen. Laws ch.76, § 5; Minn. Stat. §§ 363A.03(44), 363A.13; Nev. Rev. Stat. §§ 651.050(3)(k), 651.070; N.J. Stat. Ann. §§ 10:5-4, 10:5-5(l); N.Y. Educ. Law §§ 11(6), 12; Or. Rev. Stat. §§ 174.100(7), 659.850; Vt. Stat. Ann. tit. 9, §§ 4501(1), 4502; Wash. Rev. Code § 28a.642.010; D.C. Code § 2-1402.4(1); *see also* Del. Code Ann. tit. 6, § 4503 (prohibiting gender-identity based discrimination in places of public accommodation); N.M. Stat. Ann. § 28-1-7(f) (same); R.I. Gen. Laws § 11-24-2 (same).

<sup>6</sup> See *e.g.*, Boulder Valley Sch. Dist., Guidelines Regarding the Support of Students and Staff who are Transgender and/or Gender Nonconforming (2016); Anchorage Sch. Dist., Administrative Guidelines: Working with Transgender and Gender Nonconforming Students and Employees (2015); Chicago Pub. Sch., Guidelines Regarding the Support of Transgender and Gender Nonconforming Students (2016); District of Columbia Pub. Sch., Transgender and Gender-Nonconforming Policy Guidance (2015); El Rancho Unified School District, Transgender and Gender-Nonconforming Students (AR 5145.3) (2014); Kansas City 33 Sch. Dist. (MO), Prohibition Against Discrimination, Harassment and Retaliation (Transgender and Gender Nonconforming Employee and Students) (2013); Los Angeles Unified Sch. Dist. (CA), Transgender Students – Ensuring Equity and Nondiscrimination (2014); Cumberland Sch. Dep’t (RI), Policy Affecting Students Who Identify as Transgender or Gender Non-conforming (J-23) (2016).

In schools where students' right to gender expression is respected, students are subjected to less bullying and have better outcomes. In schools with anti-LGBT bullying policies, students have better relationships with staff and as a result feel safer in the school. Nat'l Ass'n of Sch. Psych. & Gender Spectrum, *Gender Inclusive Schools: Policy, Law, and Practice 2* (2016) (citing Jenifer K. McGuire et al., *School Climate for Transgender Youth: A Mixed Method Investigation of Student Experiences and School Responses*, 39 *J. Youth & Adolesc.* 1175 (2010)). In schools that have an academic curriculum that positively represents LGBT individuals, there is less bullying and harassment. Gay, Lesbian & Straight Educ. Network, *Teaching Respect: LGBT-Inclusive Curriculum and School Climate 1–2* (Research Brief) (2011). In schools with LGBT inclusive environments, LGBT students have more academic success than those at schools with negative environments. Stephen T. Russell et al., *Safe Schools Policy for LGBTQ Students*, 24 *Social Policy Report*, no. 4, at 6–7 (2010). And when schools support transgender students who come out and socially transition at school, transgender students feel more included in the school community than those who are closeted. *See* Greytak, *supra*, at 30–31. This sense of belonging correlates with higher academic achievement. *Id.* at 29. In short, when transgender students are supported, they have higher grade point averages, better attendance records,

increased self-esteem, and are bullied at lower rates than peers at other schools.

Kosciw, *supra*, at 121.

Educators interviewed for this brief likewise affirm the reality that trans-inclusive policies work. In each of the following instances, in school districts that have such policies in place, educators have affirmed that transgender students are active and valued participants in the school community who:

- Participate in school government (La Crescenta, California);
- Do not have notable attendance or disciplinary issues (Farmingdale, Maine);
- Participate on school athletic teams (Evanston, Illinois);
- Run for homecoming court (Indianapolis, Indiana); and
- Have supportive peer groups and are academically engaged (Federal Way, Washington).

The value of inclusive policies for transgender student outcomes is pronounced even in schools that only recently adopted supportive policies. An educator in Rhode Island spoke of a student who was formerly doing poorly in school and feeling suicidal, but now, following the adoption of an inclusive transgender student policy, is on track to graduate. A Nebraska educator described that before the educator's school adopted a trans-inclusive policy a transgender student had behavioral difficulties, including an expulsion and a suicide attempt, but now that the school has adopted an inclusive transgender policy, transgender

students feel supported, accepted, and respected. Many educators report students crying tears of joy when their schools adopt inclusive policies because when that happens, transgender students feel—often for the first time—that they are valued members of the school community.

B. All students benefit from an inclusive school environment.

Overall school climate has an impact on safety, child development, mental health, peer relationships, academic achievement, and classroom engagement for all students. Comprehensive LGBT policies are vital to a positive school climate. Greytak, *supra*, at 4. As noted, schools with trans-inclusive policies have less bullying, and bullying has a negative impact not only on victims, but also on other students and witnesses to the bullying in particular. *See* Amrit Thapa et al., Nat'l Sch. Climate Ctr., School Climate Research Summary: August 2012, at 4 (2012), <https://www.schoolclimate.org/climate/documents/policy/sc-brief-v3.pdf>. A positive school climate helps all students learn, achieve, and mature. *See id.* at 11.

Our members' experiences align with this social science research. A teacher at a diverse California high school shared that the inclusive school climate extends not only to transgender students, but to students with disabilities as well. She explained that with increased acceptance of transgender students, other subgroups feel protected and valued. Similarly, a Nebraska teacher believes her school's inclusive transgender policy demonstrates to all students that they deserve to be

treated with dignity and respect by both teachers and peers. An affirming transgender policy helps create a safe school environment for students from all backgrounds.

### CONCLUSION

When transgender students are respected in the educational environment, they are able to engage fully and equitably with the educational experience, and when that happens transgender students, like all students, are able to thrive. But when their school or their State singles them out for stigmatization and scorn, they suffer psychosocial harms that deprive them of the opportunity to become their best selves. H.B. 2 is the most overt stigmatization of transgender students any State has ever passed. NEA and NCAE respectfully request that the Court reverse the district court and direct entry of a preliminary injunction enjoining Part I of H.B. 2 in full.

Respectfully submitted,

/s/ Eric A. Harrington

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,206 words from the Introduction and Statement of Interest through the Conclusion, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(ii).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word with Times New Roman 14-point font.

/s/ Eric A. Harrington  
ERIC A. HARRINGTON



**CERTIFICATE OF SERVICE**

I hereby certify that on October 25, 2016, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

/s/ Eric A. Harrington  
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