

No. 16-1989

**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

**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.*

---

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

---

**BRIEF OF AMICI CURIAE BAY AREA LAWYERS FOR INDIVIDUAL  
FREEDOM (BALIF), IMPACT FUND, AND 35 BAR ASSOCIATIONS AND  
NON-PROFIT LEGAL ORGANIZATIONS  
IN SUPPORT OF PLAINTIFFS-APPELLANTS**

---

*Counsel for Amici Curiae listed on following page.*

Lindsay Nako  
Lynnette Miner  
IMPACT FUND  
125 University Avenue, Suite 102  
Berkeley, CA 94710  
T: (510) 845-3473  
lnako@impactfund.org  
lminer@impactfund.org

*Counsel for Amici Curiae*

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT  
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 16-1989 Caption: Joaquin Carcano et al. v. Patrick McCrory

Pursuant to FRAP 26.1 and Local Rule 26.1,

Bay Area Lawyers for Individual Freedom ("BALIF"), Impact Fund, et al. (See attached list.)  
(name of party/amicus)

who is Amicus, makes the following disclosure:  
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity?  YES  NO
  
2. Does party/amicus have any parent corporations?  YES  NO  
If yes, identify all parent corporations, including all generations of parent corporations:
  
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?  YES  NO  
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))?  YES  NO  
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question)  YES  NO  
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding?  YES  NO  
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Lindsay Nako

Date: October 25, 2016

Counsel for: Amici BALIF, et al.

**CERTIFICATE OF SERVICE**

\*\*\*\*\*

I certify that on October 25, 2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Lindsay Nako  
(signature)

October 25, 2016  
(date)

**ADDITIONAL AMICI CURIAE**

1. AIDS Legal Referral Panel
2. Alameda Contra Costa Trial Lawyers Association
3. Asian American Bar Association of the Greater Bay Area
4. Asian Americans Advancing Justice – Los Angeles
5. Asian Pacific Islander Legal Outreach
6. Atlanta Women for Equality
7. Bar Association of San Francisco
8. Bet Tzedek Legal Services
9. BiLaw
10. California Rural Legal Assistance, Inc.
11. Centro Legal de la Raza
12. Civil Rights Education and Enforcement Center
13. Dallas LGBT Bar Association
14. East Bay La Raza Lawyers Association
15. Georgia Association for Women Lawyers
16. Hawai'i LGBT Legal Association
17. Kansas City Lesbian, Gay, and Allied Lawyers
18. LatinoJustice PRLDEF
19. Legal Aid Society – Employment Law Center
20. LGBT Bar Association of Greater New York
21. LGBT Bar Association of Wisconsin
22. Massachusetts LGBTQ Bar Association
23. National Employment Law Project
24. National Employment Lawyers Association
25. National Queer Asian Pacific Islander Alliance
26. New Mexico Lesbian and Gay Lawyers Association
27. North Carolina Advocates for Justice
28. Queen's Bench Bar Association
29. SacLEGAL
30. Santa Clara County Bar Association
31. Stonewall Law Association of Greater Houston
32. Tom Homann LGBT Law Association
33. Transgender Legal Defense and Education Fund, Inc.
34. Vietnamese American Bar Association of Northern California
35. Virginia Equality Bar Association

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

IDENTITY AND INTEREST OF AMICI CURIAE .....1

INTRODUCTION AND SUMMARY OF ARGUMENT .....2

ARGUMENT .....5

    I. H.B. 2 Discriminates Against Transgender Individuals on the Basis of Their Failure to Conform to Sex Stereotypes.....5

    II. The District Court Ignored the Significant Body of Law Holding That Sex Stereotyping is Unlawful Sex Discrimination. ....6

        A. Following *Price Waterhouse*, Nearly All Courts to Consider the Issue Have Held That Sex Stereotyping of Transgender People Is a Form of Sex Discrimination. ....9

        B. Equal Employment Opportunity Commission Rulings Involving Federal Employees Also Have Confirmed That Sex Stereotyping of Transgender People Is a Form of Unlawful Sex Discrimination. ....17

        C. Fourth Circuit Case Law Supports the Conclusion That H.B. 2 Unlawfully Discriminates Against Transgender Individuals Because of Sex.....19

    III. No Important Government Interest Is Served by Barring Transgender Individuals From Using Facilities Consistent With Their Gender Identity. ....23

CONCLUSION .....24

APPENDIX – ADDITIONAL AMICI CURIAE ..... A-1

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

APPEARANCE OF COUNSEL

## TABLE OF AUTHORITIES

### Cases

<i>Barnes v. City of Cincinnati</i> , 401 F.3d 729 (6th Cir. 2005) .....	9, 11, 13
<i>Bauer v. Lynch</i> , 812 F.3d 340 (4th Cir. 2016) .....	7
<i>Carcaño v. McCrory</i> , No. 1:16cv236, 2016 WL 4508192 (M.D.N.C. Aug. 26, 2016).....	3, 4, 21, 23
<i>City of L.A., Dep’t of Water &amp; Power v. Manhart</i> , 435 U.S. 702 (1978).....	8
<i>Davis v. Monroe Cty. Bd. of Educ.</i> , 526 U.S. 629 (1999).....	7
<i>Dawson v. H&amp;H Elec., Inc.</i> , No. 4:14CV00583 SWW, 2015 WL 5437101 (E.D. Ark. Sept. 15, 2015) .....	16
<i>Fabian v. Hosp. of Cent. Conn.</i> , --- F. Supp. 3d ----, No. 3:12-cv-1154 (SRU), 2016 WL 1089178 (D. Conn. Mar. 18, 2016) .....	13, 14, 18
<i>Finkle v. Howard Cty.</i> , 12 F. Supp. 3d 780 (D. Md. 2014).....	22
<i>Franklin v. Gwinnett Cty. Pub. Sch.</i> , 503 U.S. 60 (1992).....	7
<i>G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.</i> , 822 F.3d 709 (4th Cir. 2016) .....	6, 19, 20
<i>Glenn v. Brumby</i> , 663 F.3d 1312 (11th Cir. 2011) .....	<i>passim</i>
<i>Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm</i> , 136 S. Ct. 2442 (2016).....	7, 21
<i>J.E.B. v. Alabama ex rel. T.B.</i> , 511 U.S. 127 (1994).....	8

<i>Jennings v. Univ. of N.C.</i> , 482 F.3d 686 (4th Cir. 2007) .....	6, 7
<i>Lopez v. River Oaks Imaging &amp; Diagnostic Grp., Inc.</i> , 542 F. Supp. 2d 653 (S.D. Tex. 2008).....	10, 15
<i>Lusardi v. McHugh</i> , No. 0120133395, 2015 WL 1607756 (EEOC Apr. 1, 2015).....	18, 19
<i>Macy v. Holder</i> , No. 0120120821, 2012 WL 1435995 (EEOC Apr. 20, 2012).....	17, 18
<i>Mitchell v. Axcan Scandipharm, Inc.</i> , No. Civ.A. 05-243, 2006 WL 456173 (W.D. Pa. Feb. 17, 2006).....	16
<i>Price Waterhouse v. Hopkins</i> , 490 U.S. 228 (1989).....	7, 8, 20
<i>Roberts v. Clark Cty. Sch. Dist.</i> , No. 2:15-cv-00388-JAD-PAL, 2016 WL 5843046 (D. Nev. Oct. 4, 2016).....	16
<i>Rosa v. Park W. Bank &amp; Tr. Co.</i> , 214 F.3d 213 (1st Cir. 2000).....	11, 20
<i>Schroer v. Billington</i> , 525 F. Supp. 2d 58 (D.D.C. 2007).....	15
<i>Schroer v. Billington</i> , 577 F. Supp. 2d 293 (D.D.C. 2008).....	10, 14, 15, 18
<i>Schwenk v. Hartford</i> , 204 F.3d 1187 (9th Cir. 2000) .....	<i>passim</i>
<i>Smith v. City of Salem</i> , 378 F.3d 566 (6th Cir. 2004) .....	<i>passim</i>
<i>United States v. Virginia</i> , 518 U.S. 515 (1996).....	4, 8, 24
<b>Statutes</b>	
34 C.F.R. § 106.33 .....	20
N.C. House Bill 2, 2d Extra Sess. (2016) (Sess. Law 2016-3).....	3, 6



**Other Authorities**

Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*,  
95 Cal. L. Rev. 561 (2007) .....6

Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender  
Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 Colum. L.  
Rev. 392 (2001) .....5

## IDENTITY AND INTEREST OF AMICI CURIAE

Bay Area Lawyers for Individual Freedom (“BALIF”), Impact Fund, and 35 fellow bar associations and non-profit legal organizations submit this amicus brief supporting Plaintiffs-Appellants Joaquín Carcaño et al. and urging reversal of the district court’s decision denying preliminary injunctive relief under the Equal Protection Clause.

**Bay Area Lawyers for Individual Freedom (BALIF)** is a bar association of about 500 lesbian, gay, bisexual, and transgender (“LGBT”) members of the San Francisco Bay Area legal community. As the nation’s oldest and one of the largest LGBT bar associations, BALIF promotes the professional interests of its members and the legal interests of the LGBT community at large. To accomplish this mission, BALIF actively participates in public policy debates concerning the rights of LGBT people. For more than thirty years, BALIF has appeared as amicus curiae in cases, like this one, where it believes it can provide valuable perspective and argument that will inform court decisions on matters of broad public importance.

The **Impact Fund** is a non-profit legal foundation that provides strategic leadership and support for impact litigation to achieve economic and social justice. The Impact Fund provides funding, offers innovative training and support, and serves as counsel for impact litigation across the country. The Impact Fund has served as counsel in a number of major civil rights cases, including cases

challenging employment discrimination, wage-and-hour violations, lack of access for those with disabilities, and violations of fair housing laws. Through its work, the Impact Fund seeks to use and support impact litigation to achieve social justice for all communities.

Additional Amici include a broad array of 35 organizations, including national, state, local, and minority bar associations and national and local non-profit legal organizations. Each organization supporting this amicus brief is dedicated to ensuring that its constituents and all others in this country, including LGBT people, receive equal treatment under the law. *See* Appendix. All parties have consented to Amici's submission of this brief.<sup>1</sup>

### **INTRODUCTION AND SUMMARY OF ARGUMENT**

House Bill 2 ("H.B. 2"), North Carolina's sweeping anti-LGBT law, facially discriminates against transgender people based on sex. The portion of H.B. 2 at issue requires all of North Carolina's local boards of education and public agencies to designate multiple-occupancy restrooms and changing facilities to be used only by students and persons based on their "biological sex," which H.B. 2 defines as "[t]he physical condition of being male or female, which is stated on a person's

---

<sup>1</sup> Pursuant to Federal Rule of Appellate Procedure 29(c)(5), Amici affirm that no counsel for any party authored this brief in whole or in part, and no counsel for any party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici, their members, or their counsel made a monetary contribution to its preparation or submission.

birth certificate.” N.C. House Bill 2, 2d Extra Sess. (2016) (Sess. Law 2016-3) (“H.B. 2”), §§ 1.2, 1.3. The law bars many transgender people in North Carolina from using restrooms consistent with their gender identity, because for many transgender people, their gender identity is not consistent with the sex listed on their birth certificates.

Although the district court granted a limited preliminary injunction enjoining enforcement of H.B. 2 by the University of North Carolina against three of the Plaintiffs who are transgender, the court declined to bar broader enforcement of H.B. 2 under the Equal Protection Clause, leaving all transgender people who live in or visit North Carolina vulnerable to the harms imposed by H.B. 2.

The district court mistakenly characterized Plaintiffs’ equal protection challenge as one to H.B. 2’s requirement of sex-segregated multiple-occupancy restrooms and similar facilities. *See Carcaño v. McCrory*, No. 1:16cv236, 2016 WL 4508192, at \*13, \*17 (M.D.N.C. Aug. 26, 2016). But Plaintiffs’ challenge is not to sex-segregated restrooms and facilities in general. Rather, they challenge H.B. 2’s prohibition of transgender people from using the sex-segregated facilities consistent with their gender identity. The court’s mistaken characterization led to its lengthy discussion of what definition of “sex” best promotes the State’s interest in bodily privacy for purposes of sex-segregated facilities in general, rather than—as Plaintiffs had argued—an analysis of whether H.B. 2 discriminates against

transgender individuals on the basis of sex. *Compare id.* at \*18-20, with Mem. Law Supp. Pls' Mot. Prelim. Inj. 16-35, ECF No. 22. As a result, the district court avoided the question of whether a state may bar transgender individuals from using restrooms that correspond with their gender identity to promote an important government interest.

When H.B. 2 is properly understood as discrimination against transgender people based on sex, the government cannot show that it survives any level of scrutiny, let alone the minimum “exceedingly persuasive justification” required to defend gender-based equal protection claims. *United States v. Virginia*, 518 U.S. 515, 531 (1996); *see Glenn v. Brumby*, 663 F.3d 1312, 1321 (11th Cir. 2011) (applying heightened scrutiny to equal protection claims brought by transgender woman in employment discrimination context). H.B. 2 is a classic example of unlawful sex stereotyping. Its restroom provisions are rooted in the stereotype that all people should act in a manner consistent with society’s expectation about the sex they were assigned at birth. Many transgender people do not conform to this stereotype because their gender identity and presentation—and thus which sex-segregated facilities they use—do not match the sex listed on their birth certificates. In a variety of contexts, the Supreme Court and lower courts have long recognized that sex stereotyping like that employed by H.B. 2 is a form of unlawful sex discrimination.

This brief highlights the significant body of law confirming that targeting transgender people for their perceived gender non-conformity is sex stereotyping in violation of constitutional and statutory prohibitions on sex discrimination. H.B. 2 is no different. A broader injunction is thus warranted under the Equal Protection Clause to protect the right of all transgender people who live in or visit North Carolina to be free from sex discrimination in public spaces.

### ARGUMENT

#### **I. H.B. 2 Discriminates Against Transgender Individuals on the Basis of Their Failure to Conform to Sex Stereotypes.**

Sex and gender stereotypes “presume that men and women’s appearance and behavior will be determined by their sex.” *Glenn*, 663 F.3d at 1320. A transgender person is someone whose gender identity is inconsistent with the sex assigned to that person at birth. Thus, transgender persons are “those whose ‘appearance, behavior, or other personal characteristics differ from traditional gender norms.’” *Id.* at 1316 (quoting Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 Colum. L. Rev. 392, 392 (2001)). As the Eleventh Circuit has recognized:

A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. “[T]he very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior.”

*Id.* (alteration in original) (quoting Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 Cal. L. Rev. 561, 563 (2007)).

H.B. 2 codifies sex stereotyping by punishing those who are perceived as diverging from stereotypical gender norms—*i.e.*, those whose gender identity and corresponding behavior are inconsistent with the sex listed on their birth certificates. H.B. 2 requires that public multiple-occupancy restrooms and changing facilities “be designated for and used only by persons based on their biological sex” and requires that people use the restroom that corresponds to the sex on their birth certificates, even when it does not correspond to their gender identity. H.B. 2 § 1.3; *see* § 1.2. By requiring transgender individuals to use restrooms according to the sex listed on their birth certificates rather than the facilities consistent with their gender identity, H.B. 2 punishes transgender individuals who violate sex stereotypes.

## **II. The District Court Ignored the Significant Body of Law Holding That Sex Stereotyping is Unlawful Sex Discrimination.**

This Court and others have long considered case law interpreting Title VII, Title IX, and the Equal Protection Clause to form a shared body of law. *See, e.g., G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 718 (4th Cir. 2016) (citing *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007)) (“We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in

evaluating a claim brought under Title IX.”)), *mandate recalled and stay granted*, *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 136 S. Ct. 2442 (2016); *Bauer v. Lynch*, 812 F.3d 340, 350 (4th Cir. 2016) (recognizing that same principles inform analysis of both Title VII and Equal Protection Clause claims); *Jennings*, 482 F.3d at 695 (citing *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 651 (1999); *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 75 (1992)).

In the long, shared history of Title VII, Title IX, and the Equal Protection Clause, many courts have explored what it means to discriminate “because of sex,” and have determined that sex stereotyping is a form of prohibited sex discrimination. In the watershed case *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), a plurality of the Supreme Court declared that when an employer denied an employee advancement because of her failure to fit sex stereotypes, it acted “because of” sex, *id.* at 241, 250-51. Ann Hopkins—a high-performing candidate for partner at a major accounting firm—was denied promotion because she was “macho.” *Id.* at 235. She was told, among other criticisms, that she would need to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry” before she could be promoted into the firm partnership. *Id.* This stereotyping and reliance on “sex-based considerations,”



the Court concluded, was prohibited discrimination based on sex.<sup>2</sup> *Id.* at 242; *see id.* at 250-51.

The Supreme Court again invoked sex stereotyping in striking down Virginia Military Institute's men-only admissions policy as violating the Constitution's guarantee of equal protection. The Court noted that "generalizations about 'the way women are,' estimates of what is appropriate for *most women*," did not justify excluding women "outside the average description." *Virginia*, 518 U.S. at 550; *see also J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 139 n.11 (1994) ("We have made abundantly clear in past cases that gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization.").

As set forth below, since *Price Waterhouse*, it has been well-established that discrimination against transgender people based on perceived failure to conform to gender-based stereotypes and expectations is a form of unlawful sex discrimination.

//

//

---

<sup>2</sup> Long before *Price Waterhouse*, the Supreme Court observed that it was "well recognized that employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females." *City of L.A., Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 (1978).

**A. Following *Price Waterhouse*, Nearly All Courts to Consider the Issue Have Held That Sex Stereotyping of Transgender People Is a Form of Sex Discrimination.**

*Price Waterhouse* made clear that individuals who fail to conform to sex stereotypes are protected by laws prohibiting sex discrimination. Courts across the country have relied on *Price Waterhouse* and subsequent cases to conclude that transgender individuals can establish sex discrimination claims when they are targeted for their perceived failure to conform to traditional sex stereotypes. *See, e.g., Glenn*, 663 F.3d at 1316-20 (relying on *Price Waterhouse* and progeny to conclude that terminating employee because she is transgender is prohibited sex discrimination under Equal Protection Clause); *Barnes v. City of Cincinnati*, 401 F.3d 729, 737-38 (6th Cir. 2005) (affirming denial of defendant’s motion for judgment as a matter of law when transgender plaintiff brought claim of sex discrimination under the Equal Protection Clause based on a failure to conform to sex stereotypes); *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004) (recognizing in Title VII case that “discrimination against a plaintiff who is a transsexual—and therefore fails to act and/or identify with his or her gender”—constitutes “[s]ex stereotyping based on a person’s gender non-conforming behavior”); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (holding that transwoman prison inmate stated a sex discrimination claim under the Gender Motivated Violence Act where the attempted rape by a prison guard was based on

the guard's belief that the plaintiff failed to conform to gender norms)); *Schroer v. Billington*, 577 F. Supp. 2d 293, 305-06, 308 (D.D.C. 2008) (concluding defendant violated Title VII in its refusal to hire transgender plaintiff based on her gender non-conforming behavior); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653, 667-68 (S.D. Tex. 2008) (recognizing in Title VII case that transgender woman "stated a legally viable claim of discrimination as a male who failed to conform with traditional male stereotypes").

The Eleventh Circuit joined the growing consensus with its decision in *Glenn v. Brumby*, an equal protection case. Vandiver Elizabeth Glenn, a transgender woman and employee of the Georgia General Assembly's Office of Legislative Counsel, brought a claim alleging sex discrimination under the Equal Protection Clause after she was terminated because of her gender transition. *Glenn*, 663 F.3d at 1313-14. While employed, Ms. Glenn informed her supervisor that she would be proceeding with a gender transition, changing her legal name, and coming to work as a woman. *Id.* at 1314. She was subsequently terminated because her employer felt her gender transition "was inappropriate, that it would be disruptive, that some people would view it as a moral issue, and that it would make Glenn's coworkers uncomfortable." *Id.*

In affirming the grant of summary judgment in favor of Ms. Glenn, the Eleventh Circuit cited the long line of circuit and district court cases preceding it,

holding: “[D]iscrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it’s described as being on the basis of sex or gender. Indeed, several circuits have so held.” *Id.* at 1317 (citing and discussing *Schwenk*, 204 F.3d at 1198-1203; *Rosa v. Park W. Bank & Tr. Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000); *Smith*, 378 F.3d at 569, 572; *Barnes v. City of Cincinnati*, 401 F.3d 729). The court went on to hold, “All persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype. . . . An individual cannot be punished because of his or her perceived gender non-conformity.” *Id.* at 1318-19.

The same issue had come before the First Circuit in *Rosa v. Park West Bank & Trust Co.*, a lawsuit claiming discriminatory lending because the defendant bank had refused to provide a loan application to a customer described as a “biological male” who wore “traditionally feminine attire.” *Rosa*, 214 F.3d at 214. The district court granted the defendant bank’s motion to dismiss, holding “the [Equal Credit Opportunity Act] does not prohibit discrimination based on the manner in which someone dresses.” *Id.* On appeal, the First Circuit reversed and remanded, holding that the plaintiff may be able to assert a valid claim for sex discrimination arising from the fact the loan officer turned the plaintiff away “because she thought that Rosa’s attire did not accord with his male gender.” *Id.* at 215; *see id.* at 216.

The same year, in *Schwenk v. Hartford*, the Ninth Circuit also concluded that sex stereotyping was prohibited sex discrimination. The plaintiff was a transgender woman incarcerated in a state prison for men, who sued a prison guard and prison officials under the Gender Motivated Violence Act for attempted rape by the named guard. *Schwenk*, 204 F.3d at 1192-93. The court concluded that the prison guard's crime was committed "because of gender," looking to Title VII case law, including "the logic and language of *Price Waterhouse*."<sup>3</sup> *Id.* at 1201. It stated:

What matters, for purposes of this part of the *Price Waterhouse* analysis, is that in the mind of the perpetrator the discrimination is related to the sex of the victim: here, for example, the perpetrator's actions stem from the fact that he believed that the victim was a man who "failed to act like" one. . . . Discrimination because one fails to act in the way expected of a man or woman is forbidden . . . .

*Id.* at 1202.

The Sixth Circuit soon followed suit in *Smith v. City of Salem*. In *Smith*, a transgender employee of the city fire department was suspended after disclosing a diagnosis of Gender Identity Disorder and plans for treatment. *Smith*, 378 F.3d at 568. Reversing the district court's order dismissing the plaintiff's claims under Title VII, the Sixth Circuit declared that earlier case law holding transgender individuals were not protected under Title VII "has been eviscerated by *Price Waterhouse*." *Id.* at 573 (citing *Schwenk*, 204 F.3d at 1201). It continued:

---

<sup>3</sup> "Congress intended proof of gender motivation under the [Gender Motivated Violence Act] to proceed in the same way that proof of discrimination on the basis of sex or race is shown under Title VII." *Schwenk*, 204 F.3d at 1200-01.

By holding that Title VII protected a woman who failed to conform to social expectations concerning how a woman should look and behave, the Supreme Court established that Title VII's reference to "sex" encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms.

*Id.*

The Sixth Circuit confirmed its position in *Barnes v. City of Cincinnati*, when it affirmed a jury verdict in favor of a transgender police officer alleging demotion based on a failure to conform to male stereotypes. *Barnes*, 401 F.3d at 733, 747. Relying on its previous holding in *Smith*, the court concluded that the plaintiff stated a claim for sex discrimination under Title VII based on "his failure to conform to sex stereotypes." *Id.* at 737 (citing *Smith*, 378 F.3d at 573, 575) ("By alleging that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind defendant's actions, Smith stated a claim for relief pursuant to Title VII's prohibition of sex discrimination.").

In addition to the circuit courts above, the overwhelming majority of courts at the district level have confirmed that sex stereotyping of transgender people is a form of sex discrimination. For example, the District of Connecticut recently confirmed that sex stereotyping of transgender plaintiffs is a viable means of demonstrating sex discrimination under Title VII. *Fabian v. Hosp. of Cent. Conn.*, --- F. Supp. 3d ----, No. 3:12-cv-1154 (SRU), 2016 WL 1089178, at \*1, \*10 (D. Conn. Mar. 18, 2016). Dr. Deborah Fabian was on the verge of being hired as an

on-call orthopedic surgeon at the Hospital of Central Connecticut, but the hospital declined to hire her after she disclosed her identity as a transgender woman and her intent to begin work as a woman. *Id.* at \*1.

In denying the hospital's motion for summary judgment, the court held:

*Price Waterhouse* shows that gender-stereotyping discrimination is sex discrimination *per se*. That is, the plurality and concurrences do not create a fundamentally new cause of action, but rather rely on an understanding of the scope of Title VII's prohibition against discrimination "because of sex" that reaches discrimination based on stereotypical ideas about sex.

*Id.* at \*9.

The District Court for the District of Columbia earlier held that a transgender plaintiff may successfully establish unlawful sex discrimination under Title VII based on both a sex stereotyping theory and a *per se*, "literal" sex discrimination theory. *Schroer*, 577 F. Supp. 2d at 300. Diane Schroer, a transgender job applicant who was offered a job at the Library of Congress when she presented as male, had the offer revoked after notifying the Library she intended to start work as a woman. *Id.* at 295-99. Following a four-day bench trial, the court concluded that Ms. Schroer had successfully proven that she was discriminated based on a sex stereotyping theory:

Ultimately, I do not think that it matters for purposes of Title VII liability whether the Library withdrew its offer of employment because it perceived Schroer to be an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual. One or more of [the decision-maker's]

comments could be parsed in each of these three ways. . . . I would therefore conclude that Schroer is entitled to judgment based on a *Price Waterhouse*-type claim for sex stereotyping[[]]. . . .

*Id.* at 305. The court went on to hold that Ms. Schroer also was discriminated against because of sex on the basis of her gender identity in violation of the plain language of Title VII.<sup>4</sup> *Id.* at 306-08.

The Southern District of Texas also affirmed the viability of the sex stereotyping theory for transgender plaintiffs alleging claims of sex discrimination. *Lopez*, 542 F. Supp. 2d at 660. Plaintiff Izza Lopez, a transgender woman, completed the job application process for an administrative position at a private medical clinic and was offered the position, but had the job offer revoked after a background check showed that she was male. *Id.* at 655-56. The court held, “Title VII is violated when an employer discriminates against any employee, transsexual or not, because he or she has failed to act or appear sufficiently masculine or feminine enough for an employer.” *Id.* at 660 (quoting *Schroer v. Billington*, 525 F. Supp. 2d 58, 63 (D.D.C. 2007) (denying defendant’s motion to dismiss or, in the alternative, judgment on the pleadings)).

---

<sup>4</sup> As discussed elsewhere in this brief, sex stereotyping is just one form of sex discrimination. Courts and federal agencies, including the *Schroer* court, have determined that discrimination based on a person’s transgender status, regardless of any evidence of stereotyping, is also unlawful sex discrimination. *See infra* note 5. Amici agree with Plaintiffs that H.B. 2 discriminates against transgender people not only because it is based on sex stereotypes, but also because it discriminates based on transgender status itself. *See Appellants’ Br.* 33-37.



These are just a few of the district courts that have held transgender individuals can state claims for discrimination because of sex, based on a theory of sex stereotyping, following the First, Sixth, Ninth, and Eleventh Circuits. *See also, e.g., Roberts v. Clark Cty. Sch. Dist.*, No. 2:15-cv-00388-JAD-PAL, 2016 WL 5843046, at \*1 (D. Nev. Oct. 4, 2016) (concluding that school district’s prohibition of transgender employee from using either the men’s or women’s restrooms “was based on precisely the sort of stereotyping that the Ninth Circuit has found Title VII to prohibit”); *Dawson v. H&H Elec., Inc.*, No. 4:14CV00583 SWW, 2015 WL 5437101, at \*2-3 (E.D. Ark. Sept. 15, 2015) (granting summary judgment to transgender woman terminated after wearing makeup and feminine attire, noting that it is “well settled” that Title VII “prohibits an employer from taking adverse action because an employee’s behavior or appearance fails to conform to gender stereotypes”); *Mitchell v. Axcan Scandipharm, Inc.*, No. Civ.A. 05-243, 2006 WL 456173, at \*2 (W.D. Pa. Feb. 17, 2006) (finding transgender plaintiff properly alleged sex discrimination claims under Title VII and Pennsylvania law based on “facts showing that his failure to conform to sex stereotypes of how a man should look and behave was the catalyst behind defendant’s actions”).

//

//

**B. Equal Employment Opportunity Commission Rulings Involving Federal Employees Also Have Confirmed That Sex Stereotyping of Transgender People Is a Form of Unlawful Sex Discrimination.**

Rulings from the Equal Employment Opportunity Commission (“EEOC”) further complement the significant body of case law recognizing that discrimination against a transgender person based on a failure to conform with sex stereotypes is sex discrimination. In *Macy v. Holder*, the EEOC reviewed the appeal of Mia Macy, a transgender woman who applied for a position with the Bureau of Alcohol, Tobacco, Firearms, and Explosives. *Macy v. Holder*, No. 0120120821, 2012 WL 1435995, at \*1 (EEOC Apr. 20, 2012). Ms. Macy applied through a third-party contractor and discussed the position with the Bureau’s local director while presenting as a man. *Id.* After the director confirmed that she had been accepted to fill the open position, pending a background check, Ms. Macy informed the third-party contractor that she was transitioning from male to female and would be changing her name and gender. *Id.* Within days, she received an email stating that the position had been eliminated, although she later learned someone else had been hired for the position. *Id.* at \*1-2. The EEOC found in Ms. Macy’s favor based on *Price Waterhouse* and the circuit court opinions discussed above. *Id.* at \*11. It concluded that “gender discrimination occurs any time an

employer treats an employee differently for failing to conform to any gender-based expectations or norms.”<sup>5</sup> *Id.* at \*6.

The EEOC reached the same conclusion in a case involving a transgender federal employee’s access to restrooms consistent with her gender identity. Complainant Tamara Lusardi, a transgender woman and civilian employee of the Army, alleged she was discriminated against based on sex when the Army restricted her access to the women’s multi-user restroom and referred to her by her former male name and by male pronouns. *Lusardi v. McHugh*, No. 0120133395, 2015 WL 1607756, at \*1-3 (EEOC Apr. 1, 2015). In response to the employer’s explanation that “co-workers would feel uncomfortable” with Ms. Lusardi using the common women’s restroom, the EEOC stated:

[S]upervisory or co-worker confusion or anxiety cannot justify discriminatory terms and conditions of employment. Title VII prohibits discrimination based on sex whether motivated by hostility, by a desire to protect people of a certain gender, by gender stereotypes, or by the desire to accommodate other people’s prejudices or discomfort.

---

<sup>5</sup> The EEOC noted that sex stereotyping is “simply one means of proving sex discrimination” and acknowledged there are “different ways of describing sex discrimination” against a transgender person. *Macy*, 2012 WL 1435995, at \*10. Thus, a transgender person who has experienced discrimination based on gender identity need not establish evidence that the defendant was engaging in sex stereotyping. *Id.*; *see also Fabian*, 2016 WL 1089178, at \*12 (“Similarly, discrimination on the basis of gender stereotypes, or on the basis of being transgender, . . . is literally discrimination ‘because of sex.’”); *Schroer*, 577 F. Supp. 2d at 308 (“[T]he Library’s refusal to hire Schroer after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery was *literally* discrimination ‘because of . . . sex.’”).

*Id.* at \*9. Similarly, here, lawmakers’ unfounded concerns about “possible danger from deviant actions,” “m[e]n with nefarious motives,” and “perverts,” First Am. Compl. ¶¶ 143, 156, ECF No. 9, do not justify discriminating against transgender individuals, leaving them vulnerable to actual and imminent harm, and limiting their access to public spaces. Federal law does not permit the State of North Carolina to discriminate in order “to accommodate other people’s prejudices or discomfort.” *Lusardi*, 2015 WL 1607756, at \*9.

**C. Fourth Circuit Case Law Supports the Conclusion That H.B. 2 Unlawfully Discriminates Against Transgender Individuals Because of Sex.**

This Court concluded in *G.G. v. Gloucester County School Board* that a transgender boy barred from using the boy’s restroom properly stated a claim for sex discrimination, and vacated the district court’s denial of a preliminary injunction to the student. *G.G.*, 822 F.3d at 714-15. While the Fourth Circuit did not explicitly address stereotyping in *G.G.*, at least one district court in the Circuit has recognized and joined the growing consensus that sex stereotyping is a form of prohibited sex discrimination against transgender people.

In *G.G. v. Gloucester County School Board*, a transgender boy alleged that his school discriminated against him in violation of Title IX and the Equal Protection Clause when it banned him from using the boys’ restroom. *Id.* This Court reversed the dismissal of the plaintiff’s Title IX claim because the district

court did not give appropriate deference to the Department of Education's interpretation of its regulations regarding access to restrooms, 34 C.F.R. § 106.33. *Id.* at 715. The Department opinion letter stated, "When a school elects to separate or treat students differently on the basis of sex . . . a school generally must treat transgender students consistent with their gender identity." *Id.* This Court also concluded that the district court applied the incorrect evidentiary standard in denying the plaintiff's motion for a preliminary injunction and remanded for consideration under the correct standard. *Id.*

While the majority did not directly address the *Price Waterhouse* line of cases regarding sex stereotyping, Judge Davis wrote in his concurrence that the Fourth Circuit "would be on sound ground in granting the requested preliminary injunction on the undisputed facts in the record" because of the bounty of circuit authority on this issue:

In light of the weight of circuit authority concluding that discrimination against transgender individuals constitutes discrimination "on the basis of sex" in the context of analogous statutes and our holding here that the Department's interpretation of 34 C.F.R. § 106.33 is to be given controlling weight, G.G. has surely demonstrated a likelihood of success on the merits of his Title IX claim.

*Id.* at 727 (Davis, J., concurring) (citing *Price Waterhouse*, 490 U.S. at 250-51; *Glenn*, 663 F.3d at 1316-19; *Smith*, 378 F.3d at 573-75; *Rosa*, 214 F.3d at 215-16; *Schwenk*, 204 F.3d at 1201-02).

As in *G.G.*, here, the district court gave “controlling weight” to the January 7, 2015, opinion letter from the Department of Education’s Office for Civil Rights requested by the plaintiff in *G.G. Carcaño*, 2016 WL 4508192, at \*13. In doing so, however, it failed to acknowledge the parallel circuit authority concluding that discrimination against transgender people is discrimination on the basis of sex. The Department of Education opinion letter reflects the substantial body of law described above, which supports granting a preliminary injunction in this case under *both* Title IX *and* the Equal Protection Clause. By focusing on the Department of Education’s interpretation of its regulations, the district court limited the principle that schools must treat transgender students in a manner consistent with their gender identity to Plaintiffs’ Title IX claim, when a growing consensus of courts have expressed similar positions under Title IX, Title VII, and the Equal Protection Clause. There is no logical reason for the district court to reach different outcomes with regard to Plaintiffs’ Title IX and equal protection claims.

As the district court in this case properly noted, the Fourth Circuit’s opinion in *G.G.* “remains the law in this circuit” despite the fact that the Supreme Court has stayed the court’s mandate and the district court’s preliminary injunction pending a petition for a writ of certiorari. *Id.*; see *Gloucester Cty. Sch. Bd.*, 136 S. Ct. 2442.

At least one district court in this Circuit has joined the emerging consensus that transgender people are protected under anti-discrimination laws because they do not conform to sex stereotypes. In *Finkle v. Howard County*, 12 F. Supp. 3d 780 (D. Md. 2014), the court denied the defendants' motion to dismiss sex discrimination claims under Title VII and Maryland law brought by a transgender woman, a retired police officer who sought a county law enforcement position, *id.* at 782-83, 790. In denying the defendant's motion to dismiss and motion for summary judgment, the district court rejected cases that relied on pre-*Price Waterhouse* reasoning to conclude that Title VII's prohibition on sex discrimination did not protect transgender individuals. *Id.* at 788. Instead, the court concluded that, under *Price Waterhouse*, transgender individuals are protected under Title VII:

Indeed, it would seem that any discrimination against transsexuals (as transsexuals)—individuals who, by definition, do not conform to gender stereotypes—is proscribed by Title VII's proscription of discrimination on the basis of sex as interpreted by *Price Waterhouse*.

*Id.*

In sum, under similar facts, this Court ruled in favor of a transgender student who sought to be treated the same as non-transgender students and use restrooms consistent with his gender identity. Previously, the district court in *Finkle* added to the growing national consensus that treating a transgender person less favorably based on perceived gender non-conformity is a form of unlawful sex

discrimination. The existing law in the Fourth Circuit thus supports the conclusion that discrimination against transgender people based on sex stereotyping, like that employed by H.B. 2, constitutes unlawful sex discrimination.

### **III. No Important Government Interest Is Served by Barring Transgender Individuals From Using Facilities Consistent With Their Gender Identity.**

The district court proceeded from a false premise, which resulted in a flawed analysis of whether the sex discrimination codified by H.B. 2 was substantially related to an important government interest. *See Carcaño*, 2016 WL 4508192, at \*17-21. Plaintiffs are not challenging H.B. 2's requirement that each sex use separate restrooms, nor are they challenging "the time-honored practice of sex-segregated bathrooms and showers." *Id.* at \*18 n.31; *see id.* at \*17. Rather, Plaintiffs challenge H.B. 2's exclusion of transgender individuals from multi-user restrooms and other facilities consistent with their gender identity. This exclusion forces transgender individuals to behave in accordance with discriminatory sex stereotypes, and exposes them to the risk of psychological and physical harm.

As explained in the Brief of Plaintiffs-Appellants, the record demonstrates that neither safety nor privacy motivated H.B. 2's passage, nor are they sufficient to now justify the law. *See Appellants' Br.* 40-55. Requiring transgender individuals to act in accordance with sex stereotypes and punishing them when they do not cannot be justified by a government interest in either safety or privacy.



The State has identified no government interest, let alone an “exceedingly persuasive” one, *Virginia*, 518 U.S. at 531, that requires intentionally targeting transgender individuals for differential and harmful treatment.

### **CONCLUSION**

For the reasons above, Amici urge this Court to reverse the district court’s order denying preliminary injunctive relief beyond prohibiting the University of North Carolina’s enforcement of H.B. 2 against three of the Plaintiffs-Appellants.

Dated: October 25, 2016

Respectfully submitted,

/s/ Lindsay Nako

Lindsay Nako

Lynnette Miner

IMPACT FUND

125 University Avenue, Suite 102

Berkeley, CA 94710

T: (510) 845-3473

lnako@impactfund.org

lminer@impactfund.org

*Counsel for Amici Curiae*

### **Appendix – Additional Amici Curiae**

The **AIDS Legal Referral Panel (ALRP)** provides legal services to people living with HIV/AIDS in the San Francisco Bay Area. ALRP is committed to ensuring justice for our clients in facing discrimination. Since roughly 80% of ALRP's clients are LGBT, discrimination against LGBT people directly impacts our clients.

The **Alameda Contra Costa Trial Lawyers Association (ACCTLA)** was established in 1970 in San Leandro, California, to serve the trial lawyers in Alameda and Contra Costa counties through education, networking, business development, and liaisons with the local judges and courts as well as other bar associations. To bridge the gap between past and future, ACCTLA's Board of Governors includes 25 practicing trial attorneys and all of its past presidents. ACCTLA has always advocated for its members at the local, state, and national levels, and our members have successfully advocated for changes in the courts. ACCTLA believes in equal access and justice for all. We strongly urge this Court to reverse the district court's order.

The **Asian American Bar Association of the Greater Bay Area (AABA)** is one of the largest Asian American bar associations in the nation and one of the largest minority bar associations in the State of California. From its inception in 1976, AABA and its attorneys have been actively involved in civil rights issues

and community service. AABA members filed an amicus brief in the *Bakke* affirmative action case, filed a successful petition overturning the conviction of Fred Korematsu in the landmark *Korematsu v. United States* case, worked on the successful campaign to release Chol Soo Lee from prison, and were involved in efforts to release Wen Ho Lee and to unseal documents in his case.

**Asian Americans Advancing Justice | Los Angeles (Advancing Justice-LA)** is the nation's largest legal and civil rights organization for Asian Americans, Native Hawaiians, and Pacific Islanders. As part of its mission to advance civil rights, Advancing Justice-LA is committed to challenging discrimination in all its pernicious forms, and has championed equal rights for the lesbian, gay, bisexual, and transgender community.

**Asian Pacific Islander Legal Outreach (API Legal Outreach)** is a community-based, social justice organization serving the Asian and Pacific Islander communities of the Greater Bay Area with offices in San Francisco and Oakland. Founded in 1975, our mission is to promote culturally and linguistically appropriate services for the most marginalized segments of the API community. Our work is currently focused in the areas domestic violence, violence against women, immigration and immigrant rights, senior law and elder abuse, human trafficking, public benefits, and social justice issues. API Legal Outreach has been fighting against all forms of discrimination, especially against

the LGBTQ community, for many years. API Legal Outreach is a member of API Equality, and was also the lead author of an amicus brief for the 2006 *Woo v. Lockyer* case advocating for the rights of same-sex marriage. The brief represented 28 Asian American organizations and was joined by over 60 other Asian American organizations.

**Atlanta Women for Equality** is a non-profit organization dedicated to providing free legal advocacy to women and girls facing sex discrimination in the workplace or school and to helping our community build employment and educational environments according to true standards of equal treatment. Our central goal is to use the law to overcome the oppressive power differentials that socially predetermined gender roles impose and to empower those who suffer adverse treatment because they do not fit within the confines of sex-based stereotypes.

The **Bar Association of San Francisco (BASF)** is a non-profit voluntary membership organization of attorneys, law students, and legal professionals in the San Francisco Bay Area. Founded in 1872, BASF enjoys the support of more than 7,300 individuals, law firms, corporate legal departments, and law schools. Through its board of directors, its committees, and its volunteer legal services programs and other community efforts, BASF has worked actively to promote and achieve equal justice for all and oppose discrimination in all its forms, including,

but not limited to, discrimination based on race, sex, disability, and sexual orientation. BASF provides a collective voice for public advocacy, advances professional growth and education, and attempts to elevate the standards of integrity, honor, and respect in the practice of law.

Since 1974, **Bet Tzedek Legal Services** (Bet Tzedek is Hebrew for “House of Justice”) has advocated for low-income and vulnerable individuals throughout Southern California. Consistent with this mandate, Bet Tzedek provides free legal assistance to all eligible low-income residents, regardless of their racial, religious, or ethnic background. Bet Tzedek attorneys, advocates, and support staff, along with our vast network of volunteer and pro bono attorneys, are dedicated to using law and public policy to protect and promote equality and justice for all individuals. Among other things, Bet Tzedek seeks to support the health and well-being of low-income transgender and gender non-conforming individuals in Los Angeles through a transgender medical-legal partnership focused on alleviating individuals’ health-harming legal needs and addressing systemic inequalities. Bet Tzedek strongly opposes laws and policies that legitimize discrimination against transgender persons.

**BiLaw** is a group of professors and practitioners of law who specialize in gender and sexuality, including the discrimination faced by and the rights afforded to transgender individuals, many of whom identify as bisexual. BiLaw has an

interest in ensuring that all people living in the United States and subject to state law, including LGBT people and in this instance, transgender and gender non-conforming people, are treated fairly and equally, without prejudice based on their sex and gender identity. In its work supporting legal rights and representation of bisexuals, BiLaw's work supports a significant portion of the transgender community. Indeed, more transgender individuals—25%—identify as bisexual than as lesbian, gay, or heterosexual.

**California Rural Legal Assistance, Inc.** is a non-profit legal aid organization dedicated to helping California's rural low-income individuals and their families, including vulnerable transgender youth and employees.

**Centro Legal de la Raza (Centro Legal)** was founded in 1969 to provide culturally and linguistically appropriate legal aid services to low-income, predominantly Spanish-speaking residents of the San Francisco Bay Area. Centro Legal assists several thousand clients annually with support ranging from advice and referrals to full representation in court, in the areas of immigration, housing law, employment law, family law, and consumer protection. Centro Legal's Youth Law Academy also provides educational and career assistance to low-income Bay Area students. In addition, Centro Legal advocates for policies and practices on a state and national level to support our client and student communities. In providing such services, Centro Legal regularly represents members of the LGBT

community, including clients seeking asylum or facing workplace or housing discrimination as a result of their gender identity or sexual orientation. Centro Legal therefore has a significant interest in protecting the Equal Protection and Due Process rights of the LGBT community.

The **Civil Rights Education and Enforcement Center (CREEC)** is a national non-profit membership organization whose mission is to defend human and civil rights secured by law, including laws prohibiting discrimination on the basis of gender identity. CREEC's efforts to defend human and civil rights extend to all walks of life, including ensuring that transgender and gender non-conforming individuals can participate fully in our nation's civic life without fear of discrimination.

The **Dallas LGBT Bar Association** consists of approximately 55 lawyers, law students, paralegals, and related professional allies who share an interest in the laws that affect and protect the LGBTQ community. The Dallas LGBT Bar Association issues an electronic newsletter several times a month to nearly 200 subscribers on current topics of interest to the LGBTQ community and legal communities, and has over 1,300 Facebook followers. The Dallas LGBT Bar Association holds monthly luncheon meetings for its members where speakers provide continuing legal education on a broad range of topics affecting lawyers who represent LGBTQ clients. The Dallas LGBT Bar Association also holds

networking events, has given scholarships to deserving law students, profiles its members on its website, and educates and promotes legal issues affecting the LGBTQ community.

Founded in 1978, the **East Bay La Raza Lawyers Association (EBLRLA)** is the county bar association of Latina/o lawyer in Alameda and Contra Costa counties. Affiliated with La Raza Lawyers of California, the EBLRLA is dedicated to expanding legal access to the Latina/o community, provides annual scholarships to Latina/o law students, supports Latina/o attorneys with a local professional network, and advocates for increased Latina/o representation in the judiciary. EBLRLA often participates in public policy debates regarding issues affecting the Latina/o community, including LGBT rights. The association appears as amicus curiae in cases where it believes it can provide valuable perspective to the court and help inform court decisions on matters of public importance.

The mission of **Georgia Association for Women Lawyers (GAWL)** is to enhance the welfare and development of women lawyers and to support their interests. GAWL's Amicus Policy provides for filing or joining amicus briefs in cases that will advance or clarify the law regarding issues that fall within our mission or that relate to the administration of justice. GAWL has found this brief to fall within these categories and is pleased to support this effort.



The **Hawai`i LGBT Legal Association (HLLA)** is a voluntary professional organization of lesbian, gay, bisexual, transgender, intersex, and queer judges, lawyers, legal workers, legislative advocates, law students and allies supportive of HLLA's purposes. HLLA's mission is to establish and maintain a group to support, assist, and encourage LGBT legal professionals and to provide support and resources to the people of Hawai`i on LGBT issues. HLLA's specific purposes include, among others: to educate the public regarding the legal rights of, and issues faced by, LGBT individuals; to be available to the legal community, including judges, governmental officials, and others for comment regarding rights and issues that may affect the LGBT community, with the goal of assuring fair and just treatment of Hawaii's LGBT community and the LGBT community at large; and to work with LGBT organizations and community groups, as well as other minority bar associations and community groups, to achieve human and civil rights for all people.

**Kansas City Lesbian, Gay, and Allied Lawyers (KC LEGAL)** is a bar association serving the lesbian, gay, bisexual, transgender, and allied legal community in the Greater Kansas City Metropolitan Area in both Missouri and Kansas. KC LEGAL aims to unite legal professionals around issues facing LGBTQIA individuals, to promote solidarity and support for LGBTQIA

individuals in the law, and to educate the general public, the legal profession, and the courts about legal issues facing LGBTQIA individuals.

**LatinoJustice PRLDEF**, formerly known as the Puerto Rican Legal Defense & Education Fund, is a national non-profit civil rights legal defense fund that has advocated for and defended the constitutional rights of all Latinos to ensure their equal protection under the law since 1972. As part of our continuing mission to protect and advance the civil rights of the greater pan-Latino community in the United States, LatinoJustice has engaged in and supported law reform litigation across the country combatting discriminatory policies & practices in areas such as criminal justice, education, employment, fair housing, immigrants' rights, language rights, redistricting, telecommunications, and voting rights.

The **Legal Aid Society – Employment Law Center (LAS-ELC)** is a non-profit public interest law firm whose mission is to protect, preserve, and advance the employment and education rights of individuals from traditionally under-represented communities. LAS-ELC has represented plaintiffs in cases of special import to communities of color, women, recent immigrants, individuals with disabilities, the LGBT community, and the working poor. LAS-ELC has litigated a number of cases under Title IX of the Education Amendments of 1972 as well as Title VII of the Civil Rights Act of 1964. LAS-ELC has appeared in discrimination cases on numerous occasions both as counsel for plaintiffs, *see, e.g., Nat'l R.R.*

*Passenger Corp. v. Morgan*, 536 U.S. 101 (2002); *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002); *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987) (counsel for real party in interest), as well as in an amicus curiae capacity, *see, e.g., United States v. Virginia*, 518 U.S. 515 (1996); *Harris v. Forklift Sys.*, 510 U.S. 17 (1993); *Int'l Union, UAW v. Johnson Controls*, 499 U.S. 187 (1991); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986). LAS-ELC's interest in preserving the protections afforded to employees and students by this country's antidiscrimination laws is longstanding.

The **LGBT Bar Association of Greater New York (LeGaL)** was one of the nation's first bar associations of the lesbian, gay, bisexual, and transgender legal community and remains one of the largest and most active organizations of its kind in the country. Serving the New York metropolitan area, LeGaL is dedicated to improving the administration of the law, ensuring full equality for members of the LGBT community, and promoting the expertise and advancement of LGBT legal professionals.

The **LGBT Bar Association of Wisconsin** is a non-profit legal bar association comprised of over 50 members, which include LGBT and allied legal professionals in Wisconsin. Part of our mission is to advance the elimination of discrimination based upon actual or perceived homosexuality, bisexuality, transgender, transsexuality, gender-related identity, race, color, religion, sex,

national origin, ancestry, citizenship, age, marital status, disability, or military status in the community at large through educational initiatives, training programs, and collaboration with organizations committed to the same. The Bar is familiar with the issues being presented to the Court in *Carcaño v. McCrory*, and we believe the outcome of this case could have an extremely detrimental impact on transgender and LGB-identifying individuals in North Carolina and throughout the United States. Therefore, the LGBT Bar Association signs onto this amicus brief in support of Plaintiffs-Appellants Joaquín Carcaño et al. and urging reversal of the district court's decision denying preliminary injunctive relief under the Equal Protection Clause.

Founded in 1985, the **Massachusetts LGBTQ Bar Association (Mass LGBTQ Bar)** is a voluntary statewide professional association of lesbian, gay, bisexual, transgender, and queer lawyers and our allies, providing a visible LGBTQ presence within the Massachusetts legal community. Our work focuses on leadership, education, support, and the promotion of the administration of justice throughout Massachusetts for all persons without regard to their sexual orientation or gender identity or expression. The Mass LGBTQ Bar regularly participates in amicus briefs addressing LGBTQ equality, most recently as amicus curiae on briefs submitted in *Fisher v. University of Texas*, *Partanen v. Gallagher*, *United*

*States v. Windsor, Hollingsworth v. Perry, and Gill v. Office of Personnel Management.*

The **National Employment Law Project (NELP)** is a non-profit legal organization with 45 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive the full protection of employment laws, including the right to be free from discrimination in the workplace.

The **National Employment Lawyers Association (NELA)** is the largest professional membership organization in the country comprising lawyers who represent workers in labor, employment, and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

The **National Queer Asian Pacific Islander Alliance (NQAPIA)** is a federation of lesbian, gay, bisexual, and transgender Asian American, South Asian, Southeast Asian, and Pacific Islander (APIs) organizations. NQAPIA builds the organizational capacity of local LGBT API groups, develops leadership, promotes visibility, educates the community, invigorates grassroots organizing, encourages collaborations, and challenges anti-LGBT bias and racism. NQAPIA advocates for the full inclusion of people of transgender experience in all walks of life.

The **New Mexico Lesbian and Gay Lawyers Association (NMLGLA)**, formed in 1995, is a non-profit, voluntary bar organization committed to promoting and protecting the interests of lesbian, gay, bisexual, and transgender lawyers and to achieving their full participation in all rights, privileges, and benefits of the legal profession. The NMLGLA also strives to promote the efficient administration of justice and the constant improvement of the law, especially as it relates to lesbians, gay men, and bisexual and transgender individuals.

**North Carolina Advocates for Justice (NCAJ)** is a non-profit organization of over 2,700 private and public-interest North Carolina lawyers who represent individuals in civil and criminal cases and advocate for their interests in court, at the legislature, and through public and continuing legal education. NCAJ has a strong interest in ensuring that all people in North Carolina receive equal protection under the law.

**Queen's Bench Bar Association** is a non-profit voluntary membership organization made up of judges, lawyers, and law students in the San Francisco Bay Area. Established in 1921, Queen's Bench is one of the oldest women's bar associations in the country. Queen's Bench seeks to advance the interests of women in law and society, and to serve the professional needs of women lawyers, judges, and law students. Queen's Bench has a strong and demonstrated interest in the preservation of the constitutional right to equal protection of the laws. We are pleased to join with BALIF in their amicus brief in *Carcaño v. McCrory*, pending in the Fourth Circuit. We support the amici brief and join fully in supporting their efforts in this case.

**SacLEGAL**, Sacramento's LGBT Bar Association, is comprised of attorneys, professionals, and legislative advocates affiliated with the Sacramento County Bar Association. Our mission is to promote equality for members of the LGBT community through strong leadership, legislative advocacy, education, and participation in civic and social activities within the legal community and community at large. We aim to defend and expand the legal rights of LGBT people to ensure equality, and to secure for LGBT individuals basic human and civil rights, such as the right to be free from discrimination. These rights are directly threatened by H.B. 2.

Founded in 1917, the **Santa Clara County Bar Association** is a non-profit, non-regulatory professional organization working to provide training and support to member attorneys to improve and streamline local administration of justice, and to serve the public by fostering improved public understanding of and access to the legal system. The Santa Clara County Bar Association is the oldest and largest bar association in Santa Clara County. The Santa Clara County Bar Association has a longstanding tradition of advocating for the civil rights of minorities and individuals of differing sexual orientations, both in the public interest and in the interest of members of the legal profession who may be impacted by unconstitutional actions of government. The issues raised in *Carcaño v. McCrory* go to the very essence of ensuring that all people are treated equally under the law.

**Stonewall Law Association of Greater Houston (SLAGH)** is a voluntary professional association of gay, lesbian, bisexual, transgender, and ally attorneys, judges, paralegals, and law students who provide an LGBT presence within the greater Houston legal community. We encourage the recognition of civil and human rights; promote sensitivity to legal issues faced by the LGBT community and those living with HIV; assure the fair and just treatment of members of the LGBT community; provide opportunities for LGBT attorneys, judges, law students, and allies to interact in a professional setting; build alliances with other minority bar associations and legal organizations; and enhance the practice and



professional expertise of lawyers who serve or are members of the LGBT community. SLAGH appears as amicus curiae in cases, such as this one, where the organization believes it can provide a valuable perspective that will inform the decisions of the court on matters of public importance.

The **Tom Homann LGBT Law Association (THLA)** is a non-profit, voluntary membership bar association of attorneys, law students, judges, and other legal professionals and community members dedicated to the advancement of gay, lesbian, bisexual, and transgender issues throughout California and the nation. We are the place for San Diego's LGBT lawyers to network, build friendships, and develop their careers. THLA members are also committed to establishing and maintaining personal connections with the local law student community through mentorship and networking. The THLA Board of Directors has expressed its interest in being listed as amicus for this brief.

**Transgender Legal Defense and Education Fund, Inc. (TLDEF)** is a national civil rights organization committed to achieving full recognition of civil rights of transgender persons in the United States. Since its founding in 2003, TLDEF has represented transgender persons who have been discriminated against in a broad array of contexts in state and federal impact litigation throughout the country.

The **Vietnamese American Bar Association of Northern California (VABANC)**, founded in 1998, is the nation's oldest and most established Vietnamese-American non-profit bar association. The mission of VABANC is to provide Vietnamese-American attorneys with a vehicle for the unified expression of opinions and positions on matters of concern to all Vietnamese-American attorneys. As such, VABANC has a strong sense of community responsibility. We strive not only to meet the professional needs of our members, but also to use our resources and expertise to serve the public interest. We stand with and support other community groups on issues that affect our members and our community.

The **Virginia Equality Bar Association (VEBA)** is a professional organization of independent, non-partisan, voluntary lesbian, gay, bisexual, and transgender legal professionals and their allies in the legal community. VEBA seeks to secure equality for LGBT people and opposes discrimination based on sexual orientation or gender identity. VEBA provides a forum for education and advocacy on LGBT-related issues. VEBA is proud to join BALIF's amicus brief in *Carcaño v. McCrory*, pending in the Fourth Circuit.

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

No. 16-1989

Caption: Joaquin Carcano et al. v. Patrick McCrory

---

**CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e) or 32(a)**

Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. **Type-Volume Limitation:** Appellant's Opening Brief, Appellee's Response Brief, and Appellant's Response/Reply Brief may not exceed 14,000 words or 1,300 lines. Appellee's Opening/Response Brief may not exceed 16,500 words or 1,500 lines. Any Reply or Amicus Brief may not exceed 7,000 words or 650 lines. Counsel may rely on the word or line count of the word processing program used to prepare the document. The word-processing program must be set to include footnotes in the count. Line count is used only with monospaced type.

This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because:

- this brief contains 5641 [state number of] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*
- this brief uses a monospaced typeface and contains \_\_\_\_\_ [state number of] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. **Typeface and Type Style Requirements:** A proportionally spaced typeface (such as Times New Roman) must include serifs and must be 14-point or larger. A monospaced typeface (such as Courier New) must be 12-point or larger (at least 10½ characters per inch).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

- this brief has been prepared in a proportionally spaced typeface using Microsoft Word [identify word processing program] in 14 point font, Times New Roman [identify font size and type style]; **or**
- this brief has been prepared in a monospaced typeface using \_\_\_\_\_ [identify word processing program] in \_\_\_\_\_ [identify font size and type style].

(s) Lindsay Nako

Attorney for Amicus Curiae

Dated: 10/25/2016

**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/ Lindsay Nako

Lindsay Nako

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
APPEARANCE OF COUNSEL FORM

BAR ADMISSION & ECF REGISTRATION: If you have not been admitted to practice before the Fourth Circuit, you must complete and return an Application for Admission before filing this form. If you were admitted to practice under a different name than you are now using, you must include your former name when completing this form so that we can locate you on the attorney roll. Electronic filing by counsel is required in all Fourth Circuit cases. If you have not registered as a Fourth Circuit ECF Filer, please complete the required steps at Register for eFiling.

THE CLERK WILL ENTER MY APPEARANCE IN APPEAL NO. 16-1989 as

[X] Retained [ ] Court-appointed(CJA) [ ] Court-assigned(non-CJA) [ ] Federal Defender [ ] Pro Bono [ ] Government

COUNSEL FOR: Bay Area Lawyers for Individual Freedom (BALIF) et al.

as the (party name)

[ ] appellant(s) [ ] appellee(s) [ ] petitioner(s) [ ] respondent(s) [X] amicus curiae [ ] intervenor(s) [ ] movant(s)

/s/ Lindsay Nako (signature)

Lindsay Nako Name (printed or typed)

510-845-3473 Voice Phone

Impact Fund Firm Name (if applicable)

510-845-3654 Fax Number

125 University Avenue Suite 102

Berkeley, CA 94710 Address

lnako@impactfund.org E-mail address (print or type)

CERTIFICATE OF SERVICE

I certify that on October 25, 2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

[Empty box for address]

[Empty box for address]

/s/ Lindsay Nako Signature

October 25, 2016 Date

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
APPEARANCE OF COUNSEL FORM

BAR ADMISSION & ECF REGISTRATION: If you have not been admitted to practice before the Fourth Circuit, you must complete and return an Application for Admission before filing this form. If you were admitted to practice under a different name than you are now using, you must include your former name when completing this form so that we can locate you on the attorney roll. Electronic filing by counsel is required in all Fourth Circuit cases. If you have not registered as a Fourth Circuit ECF Filer, please complete the required steps at Register for eFiling.

THE CLERK WILL ENTER MY APPEARANCE IN APPEAL NO. 16-1989 as

[X] Retained [ ] Court-appointed(CJA) [ ] Court-assigned(non-CJA) [ ] Federal Defender [ ] Pro Bono [ ] Government

COUNSEL FOR: Bay Area Lawyers for Individual Freedom (BALIF) et al.

(party name) as the

[ ] appellant(s) [ ] appellee(s) [ ] petitioner(s) [ ] respondent(s) [X] amicus curiae [ ] intervenor(s) [ ] movant(s)

/s/ Lynnette Miner (signature)

Lynnette Miner Name (printed or typed)

510-845-3473 Voice Phone

Impact Fund Firm Name (if applicable)

510-845-3654 Fax Number

125 University Avenue Suite 102

Berkeley, CA 94710 Address

lminer@impactfund.org E-mail address (print or type)

CERTIFICATE OF SERVICE

I certify that on October 25, 2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

[Empty box for address]

[Empty box for address]

/s/ Lynnette Miner Signature

October 25, 2016 Date