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Individual Rights, Federalism, and the National Battle Over Bathroom Access

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INDIVIDUAL RIGHTS, FEDERALISM, AND THE NATIONAL BATTLE OVER BATHROOM ACCESS*

SCOTT W. GAYLORD** & THOMAS J. MOLONY***

As Justice Brandeis famously explained, under our federal system, states are laboratories for testing “novel social and economic experiments.” These laboratories, however, must operate within constitutional limits. Under the Constitution, certain individual rights are sacrosanct and valid federal laws reign supreme. Accordingly, when a state implements a previously untested social policy—such as prohibiting local governments from adopting ordinances that would dictate restroom policies for private businesses and expressly limiting access to public restrooms based on biological sex—the question arises whether the experiment has gone too far.

When North Carolina enacted legislation that set off a national debate over bathroom access, individuals, various media outlets, and the United States Departments of Justice and Education emphatically stated that the answer is “yes.” Members of the LGBT community charged North Carolina with violating their rights to equal protection. And in a May 2016 Dear Colleague letter, the Departments announced a national policy regarding restrooms, informing states that they must allow students in public schools to use bathrooms consistent with the students’ expressed gender identities or risk losing all Title IX funding. Not surprisingly, given the importance of the issue, as well as the threatened loss of billions of dollars in federal funding, the Departments and numerous states filed competing lawsuits pitting the federal government against twenty-four states in multiple federal lawsuits. To date, federal courts have resolved the complex and novel claims with respect to public bathroom access in inconsistent ways, with the Fourth Circuit deferring to the Departments’ interpretation of Title IX’s requirements and a Texas district court issuing a nationwide injunction precluding enforcement of that interpretation.

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*Yet no federal court has reached the issue that the United States Supreme Court ultimately may need to decide—whether the Constitution permits states to decide how to resolve highly personal and controversial issues such as bathroom access. The issue is of critical national importance given the tension it creates between the individual liberties secured under the Fourteenth Amendment and the principles undergirding our federal system. This Article contends that, within our system of shared governance, states have broad authority to try different approaches when addressing such significant policy issues because (1) laws that regulate bathroom usage based on biological sex and facially neutral laws that do not extend special protection against discrimination based on sexual orientation and gender identity do not violate the equal protection clause of the Fourteenth Amendment; and (2) the Departments lack the authority under the spending clause to impose a national policy for bathroom access. While not taking any position as to the policy that states should adopt, this Article carefully analyzes the central underlying constitutional claims in the lawsuits that North Carolina’s controversial legislation spawned and concludes, consistent with the Supreme Court’s recent decision in *Schuette v. Coalition to Defend Affirmative Action*, that “[o]ur constitutional system embraces . . . the right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times and the course of a nation that must strive always to make freedom ever greater and more secure.”*

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INTRODUCTION

It takes only a spark to start a constitutional firestorm. A short, five-page ordinance adopted by Charlotte, North Carolina’s city council ignited what would soon become a nationwide debate about bathroom access, LGBT rights, privacy rights, and whether the federal government or the states have the authority to set policy in this important and sensitive area. In response to Charlotte’s ordinance, the North Carolina General Assembly passed the Public Facilities Privacy & Security Act, commonly referred to as “H.B. 2,” mandating that public restrooms be separated based on biological sex and precluding local governments from passing public accommodations ordinances.¹ Members of the LGBT community and the American Civil Liberties Union of North Carolina (“ACLU-NC”) immediately sued in federal court, and less than two months later, the United States Departments of Justice and Education (the “Departments”) informed North Carolina²—and public schools

1. Public Facilities Privacy & Security Act, ch. 3, 2016 N.C. Sess. Laws 12, *repealed by Act to Reset*, ch. 4, sec. 1, 2017-2 N.C. Adv. Legis. Serv. 16 (LexisNexis).

2. Complaint for Declaratory and Injunctive Relief, *Carcaño v. McCrory*, No. 1:16-cv-236 (M.D.N.C. Mar. 28, 2016); Letter from Vanita Gupta, Principal Deputy Assistant Attorney Gen., U.S. Dep’t of Justice, to Pat McCrory, Governor, State of N.C. (May 4, 2016) [hereinafter DOJ Letter to McCrory], <http://media.charlotteobserver.com/static/images/misc/HB2050412.pdf> [https://perma.cc/E8NR-3X8Q]; Letter from Vanita Gupta,

across the country³—that Title IX of the Education Amendments of 1972 requires states to allow students to use public restrooms consistent with the students' expressed gender identities. More litigation quickly followed, with the federal government squaring off against twenty-four states in various federal lawsuits.⁴

As the litigation following H.B. 2's enactment demonstrates, the battle over bathroom access raises important constitutional questions not just about LGBT rights, but also regarding individual rights more broadly and the relationship between sovereigns in our federal system. Not surprisingly, given the complexity and novelty of these issues, federal courts have reached conflicting decisions regarding who gets to set the rules for public-school restrooms. The Fourth Circuit deferred to the Departments' interpretation of sex discrimination under Title IX⁵ while a federal district court in Texas issued a nationwide injunction against the Departments that precluded enforcement of their interpretation.⁶ Given the significant constitutional issues raised and the uncertainty as to the proper

Principal Deputy Assistant Attorney Gen., U.S. Dep't of Justice, to Frank L. Perry, Sec'y of Pub. Safety, N.C. Dep't of Pub. Safety (May 4, 2016) [hereinafter DOJ Letter to Perry], <http://online.wsj.com/public/resources/documents/2016.05.04DPSFinal.pdf> [<https://perma.cc/76KN-ZXVB>]; Letter from Vanita Gupta, Principal Deputy Assistant Attorney Gen., U.S. Dep't of Justice, to Margaret Spellings, President, Univ. of N.C., et al. (May 4, 2016) [hereinafter DOJ Letter to Spellings], <http://www.charlotteobserver.com/news/politics-government/article75647942.ece/BINARY/Read:%20DOJ%20letter%20to%20UNC> [<https://perma.cc/QL9M-X932>].

3. See U.S. Dep't of Educ. & U.S. Dep't of Justice, Opinion Letter on Transgender Students (May 13, 2016), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> [<https://perma.cc/5GYC-S626>].

4. See Complaint for Declaratory and Injunctive Relief at 18–33, *Nebraska v. United States*, No. 4:16-cv-03117-JMG-CRZ (D. Neb. July 8, 2016) (including claims by Nebraska, Arkansas, Kansas, Montana, North Dakota, South Carolina, South Dakota, Wyoming, and Michigan's Attorney General); Plaintiffs' First Amended Complaint for Declaratory and Injunctive Relief at 5, *Texas v. United States*, Civil Action No. 7:16-cv-00054-O (N.D. Tex. June 15, 2016) (including claims by Texas, Alabama, Wisconsin, West Virginia, Tennessee, Oklahoma, Louisiana, Utah, Georgia, the Governor of Maine, the Arizona Department of Education, Mississippi, and the Commonwealth of Kentucky as plaintiffs); Complaint for Declaratory Relief at 19–38, *Berger v. U.S. Dep't of Justice*, No. 1:16-cv-00844-TDS-JEP (E.D.N.C. May 9, 2016) (describing claims of the President Pro Tempore of the North Carolina Senate and the Speaker of the North Carolina House of Representatives); Complaint for Declaratory Judgment at 8–9, *McCrary v. United States*, No. 5:16-cv-00238-BO (E.D.N.C. May 9, 2016) (describing requests for declaratory judgment); Complaint at 11–13, *United States v. North Carolina*, No. 1:16-cv-00425 (M.D.N.C. May 9, 2016) (alleging violations of Title VII, Title IX, and VAWA and seeking declaratory and injunctive relief).

5. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 721–23 (4th Cir. 2016), *vacated and remanded*, 137 S. Ct. 1239 (2017) (mem.).

6. *Texas v. United States*, 201 F. Supp. 3d 810, 815 (N.D. Tex. 2016), *order clarified by Order*, No. 7:16-cv-00054-0, 2016 WL 7852331 (N.D. Tex. Oct. 19, 2016).

constitutional standard to apply, the Supreme Court ultimately may need to resolve the conflict.⁷

This Article explores the interplay between individual liberties secured under the Fourteenth Amendment of the Federal Constitution and the right of the citizens of the several states (through their state legislatures) to shape policy regarding important and sometimes controversial issues, such as bathroom access. Part I explains H.B. 2 and the Charlotte ordinance that gave rise to the law. Part I also discusses the lawsuits that ensued after H.B. 2's passage, identifying the central questions those lawsuits posed in regard to federalism and individual rights. Part II analyzes the equal protection claims regarding H.B. 2's employment and public accommodations provisions, which bar local governments from granting protection against discrimination based on sexual orientation and gender identity, and the law's provisions addressing public-bathroom access. Part III then considers the federalism concerns raised by the Departments' interpretation of federal law as requiring that transgender individuals be permitted to use restrooms and changing facilities consistent with their gender identities. In particular, Part III examines whether the federal government has the power under the spending clause to withhold federal funding from states that refuse to comply with the Departments' directives.

Finally, this Article concludes that the Constitution neither allows the federal government to force its policy objectives on states nor confers equal protection rights that preclude states from making the ultimate policy choices in this area. As the United States Supreme Court recently explained in *Schuette v. Coalition to Defend Affirmative Action*,⁸ claims of individual rights sometimes must yield to the democratic process:

The freedom secured by the Constitution consists, in one of its essential dimensions, of the right of the individual not to be injured by the unlawful exercise of governmental power. . . .

7. The United States Supreme Court granted certiorari with respect to the Fourth Circuit's decision in *G.G. ex rel. Grimm* and ordered a stay in the case pending the Court's ultimate judgment. *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 369 (2016) (mem.). After the Departments withdrew their earlier interpretation of Title IX, however, the Court remanded the case for further consideration. *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 1239 (2017) (mem.); see also U.S. Dep't of Educ. & U.S. Dep't of Justice, Opinion Letter on Withdrawal of Title IX Guidance Documents 1–2 (Feb. 22, 2017), <https://www.justice.gov/opa/press-release/file/941551/download> [<https://perma.cc/Z34F-QUD6>] (withdrawing previous Title IX interpretation).

8. *Schuette v. Coal. to Def. Affirmative Action, Integration & Immigrant Rights & Fight for Equal. by Any Means Necessary (BAMN)*, 134 S. Ct. 1623 (2014).

Yet freedom does not stop with individual rights. Our constitutional system embraces, too, the right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times and the course of a nation that must strive always to make freedom ever greater and more secure. . . . [D]emocracy has the capacity—and the duty—to learn from its past mistakes; to discover and confront persisting biases; and by respectful, rational[] deliberation to rise above those flaws and injustices. . . . It is demeaning to the democratic process to presume that the voters are not capable of deciding an issue of . . . sensitivity on decent and rational grounds. . . . Freedom embraces the right, indeed the duty, to engage in a rational, civic discourse in order to determine how best to form a consensus to shape the destiny of the Nation and its people.⁹

Thus, Americans should continue to debate the wisdom and merits of bathroom-access legislation and restricting non-discrimination protections to certain classes. Under the Constitution, states retain the right to decide such issues for themselves, with their citizens making the ultimate policy choices in the voting booth.

I. FROM NORTH CAROLINA TO THE NATION

The most recent battle over LGBT rights began in North Carolina's largest city.¹⁰ On February 22, 2016, after more than two decades of vigorous debate,¹¹ the Charlotte City Council voted 7-4 in favor of an ordinance (the "Charlotte Ordinance") to add "sex, marital status, familial status, sexual orientation, gender identity, [and] gender expression" to the list of classifications included in existing City Code provisions aimed at preventing discrimination in

9. *Id.* at 1636–37.

10. *Largest Cities in North Carolina*, NCPEDIA (Jan. 17, 2013), <http://www.ncpedia.org/geography/cities> [https://perma.cc/BZS9-QRWJ].

11. See Steve Harrison, *Charlotte City Council Approves LGBT Protections in 7-4 Vote*, CHARLOTTE OBSERVER (Feb. 22, 2016, 3:06 PM), <http://www.charlotteobserver.com/news/politics-government/article61786967.html> [https://perma.cc/M8DD-NKYQ] (indicating that 140 people spoke at the 2016 council meeting and that the council chamber was filled to capacity); Ely Portillo & Mark Price, *Charlotte LGBT Ordinance Fails 6-5 in Contentious Meeting*, CHARLOTTE OBSERVER (Mar. 2, 2015, 10:17 AM), <http://www.charlotteobserver.com/news/local/article11908907.html> [https://perma.cc/2YA9-72CE] (indicating that Charlotte's city council first considered a proposal to add "sexual orientation" to the city's public accommodations law in 1992 and that 120 people asked to speak at a 2015 council meeting regarding a proposed ordinance similar to the one ultimately adopted).

public accommodations.¹² That very same ordinance had been proposed and had failed by a narrow margin the year before.¹³ By February 2016, however, the citizens of Charlotte had elected two new city council members, and their votes made the difference.¹⁴

The Charlotte Ordinance not only added new categories to the public accommodations provisions in the City Code, but also eliminated an existing exemption for “[r]estrooms, shower rooms, bathhouses and similar facilities” that applied to the city’s prohibition against sex discrimination.¹⁵ This change meant that private businesses would need to open their men’s rooms to women (regardless of whether they identified as men or not) and their women’s rooms to men (regardless of whether they identified as women or not). State leaders expressed outrage and concern about the public safety and privacy implications of forcing businesses to allow access to their restrooms in this way,¹⁶ and with the Charlotte

12. See Charlotte, N.C., Ordinance 7056 §§ 1–4 (Feb. 22, 2016) (amending various provisions of the City Code); Harrison, *supra* note 11 (indicating that the ordinance was approved in a 7-4 vote). Under Charlotte’s city code, a public accommodation is “a business, accommodation, refreshment, entertainment, recreation, or transportation facility . . . available to the public.” CHARLOTTE, N.C., CODE OF ORDINANCES § 12-57 (2016). Even before the City Council passed the new ordinance, the City Code had a provision prohibiting discrimination based on sex in public accommodations, but it only applied to hotels, motels, and restaurants. See CHARLOTTE, N.C., CODE OF ORDINANCES § 12-59 (2016). Notably, the Charlotte Ordinance did not make any changes to the antidiscrimination provisions in the City Code applicable to housing or employment. See CHARLOTTE, N.C., CODE OF ORDINANCES § 6-59(b) (2016) (providing that “no person shall be discriminated against in employment by the grantee [of a cable communications franchise] because of race, religion, color, sex, national origin, age, physical disability or marital status”); CHARLOTTE, N.C., CODE OF ORDINANCES §§ 12-111, 12-114, 12-115 (2016) (prohibiting discrimination based on various characteristics in real estate transactions and in providing real estate brokerage services); Charlotte, N.C., Ordinance 7056 (Feb. 22, 2016) (not including any amendments to the nondiscrimination provisions in CHARLOTTE, N.C., CODE OF ORDINANCES §§ 6-59(b), 12-111, 12-114, 12-115 (2016)).

13. See *City Council Agenda*, CITY OF CHARLOTTE CITY COUNCIL 212–16 (Mar. 2, 2015), <http://charlottenc.gov/CityClerk/Agendas/March%202015.pdf> [<https://perma.cc/346Z-RSF6>] (including the proposed 2015 ordinance); Portillo & Price, *supra* note 11 (describing the vote by the City Council in 2015).

14. Harrison, *supra* note 11 (“A year ago, the ordinance failed in a 6-5 vote. But two new at-large members . . . were elected to the council in November, and both supported the ordinance.”).

15. See Charlotte, N.C., Ordinance 7056 § 3 (Feb. 22, 2016) (adding “sex” to the list of categories in the public accommodations provisions in CHARLOTTE, N.C., CODE OF ORDINANCES § 12-58 and eliminating CHARLOTTE, N.C., CODE OF ORDINANCES § 12-59 in its entirety).

16. See Tal Kopan & Eugene Scott, *North Carolina Governor Signs Controversial Transgender Bill*, CNN (Mar. 24, 2016, 11:12 AM), <http://www.cnn.com/2016/03/23/politics/north-carolina-gender-bathrooms-bill/> [<https://perma.cc/C6AF-5RF2>] (quoting Speaker of the North Carolina House of Representatives Tim Moore as saying, “[t]he way the ordinance was written by City Council in Charlotte, it would have allowed a man to go

Ordinance's April 1, 2016 effective date looming,¹⁷ the North Carolina General Assembly held a special session¹⁸ and enacted H.B. 2.¹⁹

H.B. 2 had several key features. First, it required multiple occupancy bathrooms and changing facilities in government buildings and public schools, including the University of North Carolina and the state's community colleges, to be designated and used based on biological sex.²⁰ Second, H.B. 2 preempted local employment discrimination measures (except employment practices of local governments with respect to their own employees) and amended the state's employment discrimination statute so that the prohibition against sex discrimination was limited to discrimination based on "biological sex."²¹ Finally, the law preempted local public

into a bathroom, locker or any changing facility, where women are—even if he was a man. We were concerned. Obviously there is the security risk of a sexual predator, but there is the issue of privacy."); Beau Minnick, *Berger Calls Charlotte's Ordinance on Bathrooms 'Crazy'*, WNCN (Mar. 3, 2016, 5:08 PM), <http://wncn.com/2016/03/03/berger-calls-charlottes-ordinance-on-bathrooms-crazy/> [https://perma.cc/PHX6-FSR4] (indicating that North Carolina legislative leaders were concerned with the Charlotte Ordinance's impact on bathroom access); Matt Pearce, *Conservatives Push Back on Transgender Bathroom Rights in North Carolina*, L.A. TIMES, (Feb. 24, 2016, 3:00 AM) <http://www.latimes.com/nation/la-na-0224-transgender-battleground-20160224-story.html> [https://perma.cc/2ESC-62LS] (quoting North Carolina Governor Pat McCrory as saying, "[a]s governor, I will support legislative action to address this regulation and will remain committed to protecting the privacy and safety of all men, women and children of all ages in North Carolina").

17. Charlotte, N.C., Ordinance 7056 § 5 (specifying April 1, 2016 as the effective date for the amendments to the City Code).

18. See Greg Lacour, *HB2: How North Carolina Got Here (Updated)*, CHARLOTTE MAGAZINE (Mar. 30, 2017, 2:29 PM), <http://www.charlottemagazine.com/Charlotte-Magazine/April-2016/HB2-How-North-Carolina-Got-Here/> [https://perma.cc/UY94-CKVB] (indicating that leaders of the North Carolina General Assembly called a special session for March 23, 2016 and that legislation responding to the Charlotte Ordinance was enacted that day).

19. Public Facilities Privacy & Security Act, ch. 3, 2016 N.C. Sess. Laws (repealed 2017).

20. *Id.*, ch. 3, sec. 1.2, § 115C-521.2, 2016 N.C. Sess. Laws at 13 (repealed 2017); *id.*, ch. 3, sec. 1.3, § 143-760, 2016 N.C. Sess. Laws at 14 (repealed 2017). The new law defined "biological sex" as "[t]he physical condition of being male or female, which is stated on a person's birth certificate." *Id.*, ch. 3, sec. 1.2, § 115C-521.2(a)(1), 2016 N.C. Sess. Laws at 12 (repealed 2017); *id.*, ch. 3, sec. 1.3, § 143-760(a)(1), 2016 N.C. Sess. Laws at 13 (repealed 2017). While these provisions applied more broadly to include changing facilities, for the sake of simplicity, they are referred to in this Article as the "bathroom provisions."

21. *Id.*, ch. 3, sec. 3.1, § 143-422.2(a), 2016 N.C. Sess. Laws at 15 (repealed 2017). See *supra* note 20 for an explanation of the meaning of "biological sex." H.B. 2 also contained a number of other employment-related provisions. It prohibited cities and counties from conditioning eligibility to bid or be selected for a city or county contract based on the contractor's employment practices. *Id.*, ch. 3, sec. 2.2, § 153A-449(a), 2016 N.C. Sess. Laws at 14–15 (repealed 2017); *id.*, ch. 3, sec. 2.3, § 160A-20.1(a), 2016 N.C. Sess. Laws at 15

accommodations regulations and adopted a statewide measure that barred discrimination based on “race, religion, color, national origin, or biological sex” in public accommodations but allowed discrimination based on biological sex with respect to bathrooms and changing facilities.²²

On March 28, 2016, just five days after H.B. 2 became effective, members of the LGBT community and ACLU-NC filed a lawsuit challenging the law.²³ In their amended complaint, the plaintiffs claimed that H.B. 2’s public accommodations and employment provisions violated the rights of LGBT persons under the equal protection clause of the Fourteenth Amendment.²⁴ They also raised a host of claims with respect to the law’s bathroom provisions, alleging that those provisions violated the rights of transgender individuals to equal protection, their rights to privacy, liberty, and autonomy under the Fourteenth Amendment’s due process clause, and the nondiscrimination provisions contained in Title IX.²⁵

A chorus demanding repeal arose quickly after North Carolina’s governor signed H.B. 2 into law,²⁶ and in the wake of significant public backlash,²⁷ the governor issued an executive order to confirm

(repealed 2017). With an exception applicable to local government employees, H.B. 2 barred local governments from regulating certain labor conditions, including compensation and benefits. *Id.*, ch. 3, sec. 2.1, § 95-25.1, 2016 N.C. Sess. Laws at 14 (repealed 2017). And the law originally eliminated private causes of action for employment discrimination, *id.*, ch. 3, sec. 3.2, § 143-422.3, 2016 N.C. Sess. Laws at 15, but that provision later was repealed retroactively to the date of H.B. 2’s adoption. Act to Restore the State Tort Claim for Wrongful Discharge, ch. 99, sec. 1.(a), § 143-422.3, 2016 N.C. Sess. Laws 570, 570, *repealed by* Act to Reset, ch. 4, sec. 1, 2017-2 N.C. Adv. Legis. Serv. 16 (LexisNexis).

22. Public Facilities Privacy & Security Act, ch. 3, sec. 3.3, § 143-422.11, 2016 N.C. Sess. Laws at 16. H.B. 2 also prohibited cities and counties from conditioning eligibility to bid or be selected for a city or county contract based on the contractor’s provision of goods, services or accommodations to the public. *Id.*, ch. 3, sec. 2.2, § 153A-449(a), 2016 N.C. Sess. Laws at 14–15; *id.*, ch. 3, sec. 2.3, § 160A-20.1(a), 2016 N.C. Sess. Laws at 15.

23. Complaint for Declaratory and Injunctive Relief, *supra* note 2.

24. See First Amended Complaint for Declaratory and Injunctive Relief at 47–49, Carcaño v. McCrory, No. 1:16-cv-00236-TDS-JEP (M.D.N.C. Apr. 21, 2016) (describing the equal protection claim with respect to the public accommodations and employment provisions).

25. *Id.* at 44–47, 51–55 (describing the various claims related to H.B. 2’s bathroom provisions).

26. See Anne Blythe, *North Carolina’s HB2 Challenge Could Play out in Two Courts*, CHARLOTTE OBSERVER (Apr. 3, 2016, 5:43 PM), <http://www.charlotteobserver.com/news/local/article69752592.html> [<https://perma.cc/M7YX-N7G4>] (noting that the Human Rights Campaign quickly “rallied 120 companies to sign a letter to [the governor] seeking repeal of the law”).

27. See Michelle Ye Hee Lee, *North Carolina Governor’s Misleading Claim About His Executive Order and the LGBT Law*, WASH. POST (Apr. 18, 2016),

the state's commitment to inclusiveness and diversity.²⁸ While the executive order extended new protection against discrimination based on sexual orientation and gender identity to state employees,²⁹ the order otherwise did little more than explain H.B. 2, pointing out in particular that the law did not prevent private entities from adopting their own antidiscrimination policies or setting their own guidelines for the use of restrooms and changing facilities.³⁰

Not surprisingly, the executive order did little to quell the ire of H.B. 2's opponents.³¹ The April 19, 2016 decision of the United States Court of Appeals for the Fourth Circuit in *G.G. ex rel. Grimm v. Gloucester County School Board*,³² however, emboldened them. In January 2015, the Department of Education began interpreting Title IX to require schools to allow transgender students to access restrooms and changing facilities consistent with their gender identities,³³ and the Fourth Circuit ruled that the Department's interpretation was "to be accorded controlling weight" when determining what Title IX demands.³⁴ According to ACLU-NC, the "ruling ma[de] plain that [H.B. 2] violate[d] Title IX."³⁵

And about two weeks after the Fourth Circuit's ruling in *G.G.*, the Department of Justice sent letters to North Carolina's governor, its secretary of public safety, and representatives of the University of North Carolina system to inform them that the Department

<https://www.washingtonpost.com/news/fact-checker/wp/2016/04/18/north-carolina-governors-misleading-claim-about-his-executive-order-and-the-lgbt-law/> [<https://perma.cc/EB6Z-VGCV>] (stating that North Carolina's governor issued his executive order "to assuage the concerns of those who believed the law would legalize rampant discrimination").

28. See N.C. Exec. Order No. 93, Preamble (Apr. 12, 2016) (Governor Pat McCrory's order "To Protect Privacy and Equality").

29. See *id.* § 2 ("I hereby affirm that the State of North Carolina is committed to administering and implementing all State human resources policies, practices and programs . . . without unlawful discrimination . . . on the basis of . . . sexual orientation [or] gender identity . . .").

30. See *id.* §§ 2, 3 (explaining that private businesses may adopt their own policies).

31. David A. Graham, *North Carolina's Nearly Meaningless Executive Order on Discrimination*, ATLANTIC (Apr. 12, 2016), <http://www.theatlantic.com/politics/archive/2016/04/pat-mccrory-north-carolina-hb2/477936/> [<https://perma.cc/CF8G-64UG>] (indicating that the ACLU-NC "quickly dismissed the [executive] order").

32. 822 F.3d 709 (4th Cir. 2016), *vacated and remanded*, 137 S. Ct. 1239 (2017) (mem.).

33. See *id.* at 715 (explaining the Department of Education's interpretation of Title IX).

34. *Id.* at 723.

35. Anne Blythe, *Appeals Court Rules for Transgender Teen in Virginia Bathroom Case*, NEWS & OBSERVER (Apr. 19, 2016, 1:42 PM), <http://www.newsobserver.com/news/politics-government/state-politics/article72637592.html> [<https://perma.cc/A5GG-Y383>] (quoting statement by ACLU-NC).

interpreted not only Title IX but also Title VII of the Civil Rights Act of 1964 and the Violence Against Women Reauthorization Act (“VAWA”) to require that transgender individuals be given access to restrooms and changing facilities consistent with their gender identities and that, therefore, compliance with H.B. 2 violated federal law.³⁶ North Carolina’s governor and secretary of public safety, however, refused to acquiesce and instead responded with a lawsuit against the federal government seeking a declaration that H.B. 2 did not run afoul of either Title VII or VAWA.³⁷ The same day, the Department of Justice filed its own lawsuit to force North Carolina to comply with federal law,³⁸ and the leaders of both houses of the North Carolina General Assembly sued the Department, claiming that the Department’s interpretation of Title VII, Title IX, and VAWA violated the principles of separation of powers and federalism under the United States Constitution.³⁹ A day later, an association of primary, secondary, and post-secondary school students and parents sued for a declaration that maintaining biological sex-specific restrooms and locker rooms does not violate either Title IX or VAWA.⁴⁰

The controversy, however, did not stop in North Carolina. It spread across the country when the Departments of Justice and Education published a “Dear Colleague” letter with “significant guidance” regarding compliance with Title IX on May 13, 2016.⁴¹ The letter stressed that

[t]he Departments treat a student’s gender identity as the student’s sex for purposes of Title IX and its implementing regulations. This means that a school must not treat a transgender student differently from the way it treats other students of the same gender identity. . . . Title IX’s implementing regulations permit a school to provide sex-

36. See DOJ Letter to McCrory, *supra* note 2; DOJ Letter to Perry, *supra* note 2; DOJ Letter to Spellings, *supra* note 2.

37. See Complaint for Declaratory Judgment, *supra* note 4, at 8–9 (describing requests for declaratory judgment).

38. See Complaint, *supra* note 4, at 11–13 (alleging violations of Title VII, Title IX, and VAWA and seeking declaratory and injunctive relief).

39. See Complaint for Declaratory Relief at 19–38, *Berger v. U.S. Dep’t of Justice*, No. 1:16-cv-00844-TDS-JEP (E.D.N.C. May 9, 2016) (describing claims of the President Pro Tempore of the North Carolina Senate and the Speaker of the North Carolina House of Representatives).

40. See Complaint at 48, *North Carolinians for Privacy v. U.S. Dep’t of Justice*, No. 5:16-cv-00245-FL (E.D.N.C. May 10, 2016) (claiming violations of the Administrative Procedure Act and seeking declaratory and injunctive relief).

41. U.S. Dep’t of Educ. & U.S. Dep’t of Justice, *supra* note 3, at 1.

segregated restrooms, locker rooms, shower facilities, housing, and athletic teams, as well as single-sex classes under certain circumstances. When a school provides sex-segregated activities and facilities, transgender students must be allowed to participate in such activities and access such facilities consistent with their gender identity.⁴²

Texas, Alabama, Wisconsin, West Virginia, Tennessee, Oklahoma, Louisiana, Utah, Georgia, the Governor of Maine, the Arizona Department of Education, and school districts in Texas and Arizona responded on May 25, 2016 with yet another lawsuit and claimed that the Departments' "significant guidance" violated the Constitution's spending clause by forcing the states to accept the Departments' new interpretation of Title IX and VAWA or risk losing significant federal education funding.⁴³ Mississippi and Kentucky joined the Texas lawsuit in mid-June,⁴⁴ and in July, Nebraska, Arkansas, Kansas, Montana, North Dakota, South Carolina, South Dakota, Wyoming, Michigan's Attorney General, and the Arkansas Division of Youth Services filed a separate lawsuit with claims similar to those raised in the Texas action.⁴⁵ Thus, in less than five months, Charlotte's five-page ordinance had generated seven federal lawsuits involving not only private plaintiffs but also the federal government and twenty-four different states.

Developments in the *G.G.* case in August kept the Departments' guidance in the spotlight. On August 3, 2016, the United States Supreme Court stayed the injunction that followed the Fourth Circuit's ruling,⁴⁶ and in direct conflict with the *G.G.* decision, the United States District Court for the Northern District of Texas on August 21, 2016 issued a nationwide injunction to prevent the Departments from enforcing their interpretation of Title IX.⁴⁷ By the

42. *Id.* at 2–3.

43. *See* Complaint for Declaratory and Injunctive Relief at 19–32, *Texas v. United States*, Civil Action No. 7:16-cv-00054-O (N.D. Tex. May 25, 2016) (asserting various claims regarding the guidance in the Departments' May 2016 "Dear Colleague" letter and seeking declaratory and injunctive relief).

44. *See* Plaintiffs' First Amended Complaint for Declaratory and Injunctive Relief, *supra* note 4, at 5 (including the State of Mississippi and the Commonwealth of Kentucky as plaintiffs).

45. *See* Complaint for Declaratory and Injunctive Relief, *supra* note 4, at 18–33 (asserting various claims regarding the guidance in the Departments' May 2016 "Dear Colleague" letter and seeking declaratory and injunctive relief).

46. *See* Gloucester Cty. Sch. Bd. v. *G.G. ex rel. Grimm*, 136 S. Ct. 2442, 2442 (2016) (mem.) (granting stay).

47. Preliminary Injunction Order at 36–37, *Texas v. United States*, Civil Action No. 7:16-cv-00054-O (N.D. Tex. Aug. 21, 2016).

end of October, the Supreme Court had granted the Virginia school board's petition for a writ of certiorari in *G.G.*⁴⁸

The election of Donald Trump, however, changed the landscape both for the *G.G.* case and the lawsuits between the federal government and the various states. In February 2017, about a month after President Trump's inauguration, the Departments withdrew their earlier interpretation of Title IX, noting that the May 2016 "Dear Colleague" letter did not "contain extensive legal analysis[,] . . . explain how the [interpretation was] consistent with the express language of Title IX, [or] . . . undergo any formal public process."⁴⁹ As a result of this withdrawal, the Supreme Court remanded the *G.G.* case to the Fourth Circuit for further consideration,⁵⁰ and in March 2017, the states that had sued following publication of the May 2016 letter called off their lawsuits.⁵¹

March 2017 ushered in the demise of H.B. 2 as well. Amid mounting pressure from the NCAA,⁵² the North Carolina General Assembly repealed H.B. 2.⁵³ With H.B. 2 off the books, the duel between North Carolina and the federal government came to an end.⁵⁴

48. See *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 369 (2016) (mem.) (granting certiorari to Questions 2 and 3 of the petition).

49. U.S. Dep't of Educ. & U.S. Dep't of Justice, *supra* note 7, at 1.

50. *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 1239 (2017) (mem.) (vacating judgment and remanding the case back to the Fourth Circuit).

51. Plaintiffs' Notice of Voluntary Dismissal Pursuant to Fed. R. Civ. P. 41(a)(1)(A)(i) at 2, *Nebraska v. United States*, No. 4:16-CV-03117 (D. Neb. Mar. 16, 2017); Plaintiffs' Notice of Voluntary Dismissal Pursuant to Fed. R. Civ. P. 41(a)(1)(A)(i) at 2-3, *Texas v. United States*, No. 7:16-cv-00054-O (N.D. Tex. Mar. 3, 2017).

52. Jim Morrill & Colin Campbell, *NCAA Gives North Carolina a Deadline to Repeal HB2 or Lose Events Until 2022*, CHARLOTTE OBSERVER (Mar. 23, 2017, 4:25 PM), <http://www.charlotteobserver.com/news/politics-government/article140383638.html> [<https://perma.cc/73LY-RFCQ>].

53. Act to Reset, ch. 4, sec. 1, 2017-2 N.C. Adv. Legis. Serv. 16, 16 (LexisNexis).

54. Joint Stipulated Notice of Dismissal at 1, *United States v. North Carolina*, No. 1:16-CV-00425-TDS-JEP (M.D.N.C. Apr. 14, 2017). The lawsuits brought by North Carolina's governor and the leaders of the State's General Assembly concluded earlier as the parties sought to litigate their various claims in the federal government's lawsuit against the State, rather than in individual lawsuits. Plaintiffs' Notice of Voluntary Dismissal Without Prejudice at 1-2, *McCrory v. United States*, No. 5:16-cv-238-BO (E.D.N.C. Sept. 16, 2016); Notice of Voluntary Dismissal, *Berger v. U.S. Dep't of Justice* at 1-2, No. 1:16-cv-00844-TDS-JEP (M.D.N.C. July 28, 2016). The lawsuit brought against the United States Department of Justice by the association of primary, secondary, and post-secondary school students and parents likewise was earlier dismissed. Notice of Voluntary Dismissal Without Prejudice Pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) at 1-2, *North Carolinians for Privacy v. U.S. Dep't of Justice*, No. 1:16-cv-00845-TDS-JEP (M.D.N.C. Aug. 31, 2016).

While the lawsuits between the federal government and the various states are gone, the federalism concerns the lawsuits raised are not; their resolution has just been put on hold until the executive branch again threatens to withhold funding from the states based on a novel interpretation of federal law. And despite H.B. 2's repeal, the underlying controversy is not going away because the legislature did not effect a "clean" repeal of the law. Instead, the repeal reserved to the state the right to regulate access to restrooms and changing facilities and barred local governments from enacting or amending ordinances that regulate private employment practices or public accommodations until December 2020.⁵⁵ Consequently, ACLU-NC has shifted its sights to the repeal bill,⁵⁶ which—at least until the end of 2020—continues to prohibit what Charlotte had tried to achieve in its ordinance and therefore raises some of the same equal protection issues that H.B. 2 raised.⁵⁷ Thus, the nation's eyes are sure to remain on North Carolina, the place where the bathroom bill began.

II. THE EQUAL PROTECTION CHALLENGES TO H.B. 2

The Fourteenth Amendment to the Constitution provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."⁵⁸ Simply put, the equal protection clause requires each state to treat those who are similarly situated in the same manner.⁵⁹

Though the guarantee of equal protection seems demanding, the Court in *Romer v. Evans*⁶⁰ recognized that it must be balanced against "the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or

55. Act to Reset, ch. 4, secs. 2–4, § 143-760, 2017-2 N.C. Adv. Legis. Serv., at 16 (LexisNexis).

56. See *ACLU and Lambda Legal Condemn 'Fake' Repeal of HB 2*, ACLU (Mar. 30, 2017), <https://www.aclu.org/news/aclu-and-lambda-legal-condemn-fake-repeal-hb-2> [<https://perma.cc/B6NL-2USD>] (indicating that ACLU-NC "will seek to amend [its] lawsuit to challenge [the repeal bill]").

57. See *infra* Section II.A (discussing the equal protection challenges to H.B. 2's employment and public accommodations provisions which preempted local employment discrimination and public accommodation measures). Unlike H.B. 2, however, the repeal bill does not preempt existing local employment discrimination and public accommodations measures but merely bars local governments from enacting new regulations or amending existing regulations. Act to Reset, ch. 4, sec 3, 2017-2 N.C. Adv. Legis. Serv., at 16 (LexisNexis).

58. U.S. CONST. amend. XIV, § 1.

59. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985) (explaining that the equal protection clause represents "a direction that all persons similarly situated should be treated alike" (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982))).

60. 517 U.S. 620 (1996).

persons.”⁶¹ In light of this practical reality, a regulation subject to an equal protection challenge normally need only withstand rational basis review, a deferential standard that merely requires a rational relationship between the regulation and a legitimate government interest.⁶² When rational basis review applies, a plaintiff challenging the regulation faces an extremely high burden—“negati[ng] every conceivable basis which might support [the regulation].”⁶³

Rational basis review, though, does not apply in all cases. For example, a regulation that burdens “a fundamental right, such as freedom of speech,”⁶⁴ or “targets a suspect class”⁶⁵ is subject to strict scrutiny, a searching standard of review under which the government must establish that the regulation is narrowly tailored to achieve a compelling state interest.⁶⁶ Similarly, when a law implicates a quasi-suspect class, the government must satisfy an “intermediate” level of scrutiny, which requires a substantial relationship to an important or a legitimate state interest.⁶⁷

The Court, however, has recognized only race, alienage, and national origin as suspect classes and gender and illegitimacy as quasi-suspect classes.⁶⁸ Notwithstanding its landmark decisions with respect

61. *Id.* at 631 (first citing *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 271–72 (1979); and then citing *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

62. *See Heller v. Doe*, 509 U.S. 312, 320 (1993) (“[A] classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.” (first citing *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992); and then citing *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam))); *City of Cleburne*, 473 U.S. at 440 (“The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.” (citations omitted)).

63. *Heller*, 509 U.S. at 320 (citing *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

64. *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 547 (1983) (citing *Harris v. McRae*, 448 U.S. 297, 322 (1980)).

65. *Romer*, 517 U.S. at 631 (citing *Heller*, 509 U.S. at 319–20).

66. *See City of Cleburne*, 473 U.S. at 440 (indicating that, “when a statute classifies by race, alienage, or national origin[,] . . . [it is] subjected to strict scrutiny and will be sustained only if [it is] suitably tailored to serve a compelling state interest” and that a regulation that burdens a personal constitutional right is treated likewise (first citing *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964); and then citing *Graham v. Richardson*, 403 U.S. 365 (1971))).

67. *See id.* at 440–41 (explaining the standards of review applicable to laws making distinctions based on gender and illegitimacy). The government’s interest must be important when a regulation discriminates based on gender, but need only be legitimate if it discriminates based on illegitimacy. *See id.* at 441 (indicating the type of interest required for regulations that discriminate based on gender or illegitimacy).

68. *See City of Cleburne*, 473 U.S. at 440 (addressing the suspect and quasi-suspect classes).

to LGBT rights in *Romer v. Evans*, *Lawrence v. Texas*,⁶⁹ *United States v. Windsor*,⁷⁰ and *Obergefell v. Hodges*,⁷¹ the Court never has defined sexual orientation, gender identity, gender expression, or transgender status as either a suspect or quasi-suspect class. And none of the Court's opinions in those cases bear the marks of strict or intermediate scrutiny. In 1996, when the Court in *Romer* struck down an amendment to Colorado's constitution that barred the state from adopting measures designed to protect those with "homosexual, lesbian or bisexual orientation,"⁷² the Court did so under the rational basis standard: "Amendment 2 . . . lacks a rational relationship to legitimate state interests."⁷³ Again in 2003, the Court in *Lawrence* employed rational basis review, this time to invalidate a Texas law that criminalized homosexual sodomy: "The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."⁷⁴ Just ten years later in *Windsor*, the Court found unconstitutional the federal Defense of Marriage Act ("DOMA"), which defined marriage for purposes of federal law to mean the "legal union between one man and one woman,"⁷⁵ using words that connote the rational basis standard: "The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and injure those whom the State, by its marriage laws, sought to protect in personhood and dignity."⁷⁶ And

69. 539 U.S. 558 (2003).

70. 133 S. Ct. 2675 (2013).

71. 135 S. Ct. 2584 (2015).

72. *Romer v. Evans*, 517 U.S. 620, 623–24 (1996) (quoting COLO. CONST. art. II, § 30b).

73. *Id.* at 632; see *Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008) ("*Romer* nowhere suggested that the Court recognized a new suspect class.>").

74. *Lawrence*, 539 U.S. at 578; see *id.* at 594 (Scalia, J., dissenting) ("The Court today does not . . . subject the Texas statute to strict scrutiny. Instead, . . . the Court concludes that the application of Texas's statute to petitioners' conduct fails the rational-basis test . . ."); see also *Cook*, 528 F.3d at 61 (noting that *Romer* did not identify sexual orientation as a suspect class and stating that *Lawrence* does not alter this conclusion).

75. *Windsor*, 133 S. Ct. at 2683, 2695 (quoting Section 3 of DOMA).

76. *Id.* at 2696. In dissent, however, Justice Scalia noted that the standard of review the Court applied is a bit mysterious:

The opinion does not resolve and indeed does not even mention what had been the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality. That is the issue that divided the parties and the court below. In accord with my previously expressed skepticism about the Court's "tiers of scrutiny" approach, I would review this classification only for its rationality. As nearly as I can tell, the Court agrees with that; its opinion does not apply strict scrutiny, and its central propositions are taken from rational-basis cases But the Court certainly does not *apply* anything that resembles that deferential framework.

finally, in 2015, when the Court in *Obergefell* declared that the fundamental right to marry extends to same-sex couples,⁷⁷ it did so without recourse to heightened scrutiny.⁷⁸

Consequently, under the Court's current jurisprudence,⁷⁹ H.B. 2 should have enjoyed the rational basis standard of review to the extent the equal protection challenges to the law were founded on disparate treatment with respect to sexual orientation, gender identity, or gender expression.⁸⁰ The plaintiffs in *Carcaño v.*

Id. at 2706 (Scalia, J., dissenting) (internal citations omitted). Even though *Windsor* does not contain language that suggests heightened scrutiny, the Ninth Circuit has interpreted the decision as deeming sexual orientation as a quasi-suspect class giving rise to a searching review. *See SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 480–84 (9th Cir. 2014) (concluding that the Court in *Windsor* applied heightened scrutiny). This interpretation, however, seems strained given that the Second Circuit in *Windsor* explicitly applied heightened scrutiny in considering the equal protection challenge to DOMA, *see Windsor v. United States*, 699 F.3d 169, 181–82 (2012) (concluding that sexual orientation represented a suspect class requiring heightened scrutiny), but the Supreme Court did not consider whether DOMA was substantially related to an important or legitimate government interest. Moreover, to suggest that *Windsor* implicitly recognized sexual orientation as a quasi-suspect class is inconsistent with the clarity of decisions in the past addressing whether to recognize a new suspect class. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442 (1985) (“[W]e conclude for several reasons that the Court of Appeals erred in holding mental retardation a quasi-suspect classification calling for a more exacting standard of judicial review than is normally accorded economic and social legislation.”); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (“Nor does the class of uniformed state police officers over 50 constitute a suspect class for purposes of equal protection analysis.” (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973))); *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (concluding that “classifications based upon sex . . . are inherently suspect, and must therefore be subjected to strict judicial scrutiny”); *Reed v. Reed*, 404 U.S. 71, 75 (1971) (“Section 15-314 provides that different treatment be accorded to the applicants on the basis of their sex; it thus establishes a classification subject to scrutiny under the Equal Protection Clause.”).

77. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015) (“The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them.”).

78. *See id.* at 2593–2608 (failing to evaluate whether traditional marriage laws bore any relation to a government interest); *id.* at 2623 (Roberts, C.J., dissenting) (“Absent from [the majority opinion] is anything resembling our usual framework for deciding equal protection cases. It is casebook doctrine that the ‘modern Supreme Court’s treatment of equal protection claims has used a means-ends methodology in which judges ask whether the classification the government is using is sufficiently related to the goals it is pursuing.’” (quoting GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 353 (7th ed. 2013))).

79. The plaintiffs in *Carcaño* implicitly argue that sexual orientation and transgender status should be recognized as suspect or quasi-suspect classes. *See First Amended Complaint for Declaratory and Injunctive Relief*, *supra* note 24, at 49–50 (asserting that discrimination based on sexual orientation and transgender status warrants some level of heightened scrutiny). If they had been successful, sustaining H.B. 2 would have been more difficult for the government.

80. *See Druley v. Patton*, 601 F. App’x 632, 635 (10th Cir. 2015) (“To date, this court has not held that a transsexual plaintiff is a member of a protected suspect class for

McCrary,⁸¹ however, argued that discrimination based on gender identity constitutes sex discrimination,⁸² and if they were able to convince a court to accept this novel argument, the state would have faced the burden of satisfying intermediate scrutiny to the extent that H.B. 2 discriminated based on gender identity.⁸³ Moreover, as *Romer* and *Windsor* demonstrate, the deferential rational basis standard might not always be so deferential.⁸⁴

purposes of Equal Protection claims.” (first citing *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1227–28 (10th Cir. 2007); and then citing *Brown v. Zavaras*, 63 F.3d 967, 972 (10th Cir. 1995)); *Bostic v. Schaefer*, 760 F.3d 352, 397 (4th Cir. 2014) (Niemeyer, J., dissenting) (indicating that the Fourth Circuit has determined that “rational-basis review applies to classifications based on sexual orientation” and that “[t]he vast majority of other courts of appeals have reached the same conclusion” (citations omitted)); *Lofton v. Sec’y of the Dep’t of Child. & Fam. Servs.*, 358 F.3d 804, 818 (11th Cir. 2004) (“[A]ll of our sister circuits that have considered the question have declined to treat homosexuals as a suspect class.” (footnote and citations omitted)); *Gomez v. Maass*, 918 F.2d 181 (9th Cir. 1990) (unpublished table decision), 1990 WL 177776, at *2 (“We have held ‘that homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny under the equal protection component of the Due Process Clause.’ Transsexuals are not a suspect class either.” (first quoting *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990); and then citing *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 663 (9th Cir. 1977))); *Johnston v. Univ. of Pittsburgh*, 97 F. Supp. 3d 657, 668 (W.D. Pa. 2015) (“[N]either the United States Supreme Court nor the Third Circuit Court of Appeals has recognized transgender as a suspect classification under the Equal Protection Clause.”).

81. 203 F. Supp. 3d 615, 641 (M.D.N.C. 2016).

82. First Amended Complaint for Declaratory and Injunctive Relief, *supra* note 24, at 45, 49 (alleging that H.B.2 discriminates based on sex). Courts have found that transgender persons, like everyone else, are entitled to heightened scrutiny when discrimination based on gender stereotyping is involved, but this does not mean that discrimination based on gender identity constitutes sex discrimination *per se*. See *Glenn v. Brumby*, 663 F.3d 1312, 1318, 1320 (11th Cir. 2011) (concluding that “[a]ll persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype” and that the plaintiff was terminated because the plaintiff was perceived “as ‘a man dressed as a woman’”); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221, 1224, 1227–28 (10th Cir. 2007) (stating that “discrimination against a transsexual based on the person’s status as a transsexual is not discrimination because of sex under Title VII[,]” that “[u]se of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes,” and that the plaintiff’s claim under the equal protection clause failed for the same reasons as it failed under Title VII (citation omitted)); *Smith v. City of Salem*, 378 F.3d 566, 575, 577 (6th Cir. 2004) (finding, for purposes of both Title VII and the equal protection clause, that “[s]ex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as ‘transsexual,’ is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity”).

83. See *infra* notes 221–31 and accompanying text (discussing discrimination based on gender identity).

84. See *infra* notes 156–61 and accompanying text (discussing the effect of animus on the rational basis standard).

Yet under the appropriate rational basis standard of review, neither H.B. 2's employment and public accommodations provisions nor its bathroom provisions violated the equal protection clause. As discussed below, H.B. 2's employment and public accommodations provisions were facially neutral and, therefore, distinguishable from Colorado's Amendment 2, which the *Romer* Court struck down as violative of equal protection. These provisions of H.B. 2 neither impermissibly infringed on the ability of members of the LGBT community to participate in the political process nor evidenced the animus that the Court took to violate rational basis review in *Romer*. Similarly, H.B. 2's bathroom provisions do not violate equal protection principles under a rational basis or intermediate scrutiny standard of review. Given the states' important interest in protecting the privacy right of individuals not to be exposed to the naked or partially clothed bodies of members of the opposite biological sex, restricting bathrooms based on biological sex should survive an equal protection challenge.

A. *The Equal Protection Challenge to H.B. 2's Employment and Public Accommodations Provisions*

1. H.B. 2's Employment and Public Accommodations Provisions Were Facially Neutral and Did Not Implicate the Equal Protection Clause

Before applying any standard of review to measure a particular regulation under the equal protection clause, a court must conclude that the regulation is discriminatory, preferring one group over another.⁸⁵ And because H.B. 2's employment and public accommodations provisions are facially neutral and have no preferential effect, they do not face a legitimate equal protection challenge.

a. *Romer v. Evans*

Given that H.B. 2 was enacted in response to a Charlotte ordinance that offered protection against discrimination based on sexual orientation, gender identity, and gender expression in public accommodations, the law's opponents naturally turned to *Romer*. In *Romer*, the Court invalidated a Colorado constitutional amendment whose "immediate objective [was] ... to repeal existing statutes,

85. See *Scarborough v. Morgan Cty. Bd. of Educ.*, 470 F.3d 250, 260 (6th Cir. 2006) ("The threshold element of an equal protection claim is disparate treatment . . .").

regulations, ordinances, and policies of state and local entities that barred discrimination based on sexual orientation.”⁸⁶ H.B. 2, however, was fundamentally different from the Colorado constitutional amendment and therefore should not have suffered the same fate.

The constitutional amendment at issue in *Romer* prohibited the state and its agencies, political subdivisions, and municipalities from “enact[ing], adopt[ing] or enforc[ing] any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships . . . [would] be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.”⁸⁷

Striking down the amendment on equal protection grounds, the Court stated that “[i]t is not within our constitutional tradition to enact laws of this sort.”⁸⁸ According to the Court, the amendment was peculiar in that it created “a broad and undifferentiated disability on a single named group,”⁸⁹ “identif[ying] persons by a single trait and then den[ying] them protection across the board.”⁹⁰ In addition, the Court explained that the amendment resulted not only in the “severe consequence” of prohibiting homosexuals from obtaining protection from discrimination in public accommodations, but also withheld legal protection from them in a wide array of private transactions, including employment, housing, and insurance.⁹¹ Moreover, the Court stressed that the amendment applied to “every level of Colorado government,”⁹² prohibiting such things as protection against employment discrimination by the state and discrimination at state colleges.⁹³ The Court further speculated that the amendment might even extend to generally applicable laws that would “prohibit arbitrary discrimination in governmental and private settings.”⁹⁴

While it is tempting to conclude that H.B. 2’s employment and public accommodations provisions had these very same effects and therefore were invalid under *Romer*, key distinctions insulated

86. *Romer v. Evans*, 517 U.S. 620, 626 (1996) (quoting *Evans v. Romer*, 854 P.2d 1270, 1284 (Colo. 1993) (en banc)).

87. *Id.* at 624 (quoting COLO. CONST. amend. II (repealed 1996)).

88. *Id.* at 633.

89. *Id.* at 632.

90. *Id.* at 633.

91. *Id.* at 629.

92. *Id.*

93. *Id.* at 629–30.

94. *Id.* at 630 (citations omitted).

H.B. 2's employment and public accommodations provisions from attacks raised under the equal protection clause. Unlike the Colorado constitutional amendment, H.B. 2's employment and public accommodations provisions did not discriminate against anyone. They did not put members of the LGBT community "in a solitary class with respect to transactions and relations in both the private and governmental spheres[,] nor did they "withdraw[] from [members of that community], but no others, specific legal protection from the injuries caused by discrimination[] and . . . forbid[] reinstatement of these laws and policies."⁹⁵ Instead, H.B. 2's employment and public accommodations provisions treated everyone in the same way, protecting each person against private discrimination based on race, religion, color, national origin, and biological sex, but not on any other basis—whether sexual orientation, gender identity, gender expression, military service, familial status, pregnancy, or political affiliation.⁹⁶ These provisions treated men the same as women, Muslims the same as Christians, Republicans the same as Democrats, homosexuals the same as heterosexuals, transgender persons the same as non-transgender persons, and those who are married the same as those who are not.⁹⁷ Unlike the amendment in *Romer*, H.B. 2's employment and public accommodations provisions did not

95. *Id.* at 627.

96. It would "contradict central equal protection principles" for a court to consider whether the Charlotte Ordinance would have been more beneficial to those who are homosexual or transgender than those who are not. *See Schuette v. Coal. to Def. Affirmative Action, Integration & Immigrant Rights & Fight for Equality by Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1634 (2014). As the Court stated in *Schuette* with regard to laws that discriminate based on race, the Court "has rejected the assumption that 'members of the same racial group . . . think alike [and] share the same political interests.'" *Id.* at 1634 (first quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993); and then citing *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (Kennedy, J., dissenting)). The assumption is equally inappropriate for those in the LGBT community. *See Shannon Gilreath, The Politics of the Single-minded: Lessons from North Carolina's 'Bathroom Bill'*, HUFFINGTON POST (Mar. 28, 2016, 3:57 PM), http://www.huffingtonpost.com/shannon-gilreath/the-politics-of-the-singl_b_9558682.html [<https://perma.cc/FF97-DHCU>] (noting disagreement with the decision of others in the LGBT community to push the Charlotte Ordinance in the face of the threat of action at the state level).

97. By expressly stating that H.B. 2 prevents discrimination based on biological sex, the North Carolina General Assembly avoided the alleged uncertainty surrounding the meaning of "sex" in Title VII and Title IX. While the Justice Department under the Obama administration contended that "sex" in Titles VII and IX included gender identity, *see, e.g.*, DOJ Letter to Perry, *supra* note 2, at 1–2, the Trump administration has reversed course with regard to these policies, U.S. Dep't of Educ. & U.S. Dep't of Justice, *supra* note 7, at 1. As discussed below, H.B. 2's specific mention of biological sex (and omission of sexual orientation, gender identity, and gender expression) did not violate equal protection principles or *Romer*.

single out homosexuals or transgender persons “and then den[y] them protection across the board.”⁹⁸

Moreover, under H.B. 2’s employment and public accommodations provisions, all North Carolinians seeking protection against private discrimination needed to obtain that protection in the same way—by petitioning the General Assembly to amend its employment-discrimination and public accommodations statutes. This was not the case with respect to the amendment to Colorado’s constitution in *Romer*. Under the amendment, heterosexuals could obtain protection against discrimination based on sexual orientation through laws and ordinances adopted at the state or local level.⁹⁹ Homosexuals, lesbians, and bisexuals (that “single named group”¹⁰⁰), on the other hand, had to appeal to the people of Colorado for a constitutional amendment if they wanted the same type of protection.¹⁰¹ H.B. 2’s employment and public accommodations provisions did not have this effect. Anyone—whether heterosexual, homosexual, transgender, non-transgender, a veteran, a parent, or a senior citizen—who wanted protection against discrimination in employment or public accommodations could appeal to the state for protection, and no one could obtain such protection at the local level.

b. Participation in the Political Process

The *Carcaño* plaintiffs nevertheless contended that, by not allowing local governments to extend to members of the LGBT community protection against discrimination, H.B. 2 “impose[d] a different and more burdensome political process on LGBT people than on non-LGBT people who have state protection against identity-based discrimination.”¹⁰² What the plaintiffs meant by this allegation is a bit unclear, but perhaps one might understand it as a reprise of the reasoning the Colorado Supreme Court employed in *Evans v. Romer*¹⁰³ to invalidate Colorado’s constitutional amendment. The United States Supreme Court in *Romer* seemingly rejected the

98. *Romer*, 517 U.S. at 633.

99. See *infra* note 101 (drawing a distinction between the type of “protection” homosexuals have as a class, which heterosexuals do not have).

100. *Romer*, 517 U.S. at 632.

101. See *id.* at 631 (“Homosexuals . . . can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the State Constitution or perhaps, on the State’s view, by trying to pass helpful laws of general applicability.”).

102. First Amended Complaint for Declaratory and Injunctive Relief, *supra* note 24, at 48.

103. *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993) (en banc).

Colorado Supreme Court's analysis¹⁰⁴—perhaps because the cases on which the state court relied involved racial classifications, which are inherently suspect¹⁰⁵—but even if the Colorado Supreme Court's reasoning were to apply, H.B. 2's employment and public accommodations provisions were still constitutional.

Applying strict scrutiny, the Colorado Supreme Court concluded in *Evans* that Colorado's constitutional amendment impermissibly infringed upon the fundamental right of homosexuals, lesbians, and bisexuals to participate in the political process.¹⁰⁶ In reaching this decision, the court observed that, while the immediate effect of the amendment was to repeal ordinances designed to prohibit discrimination based on sexual orientation, the amendment had the broader effect of prohibiting other ordinances and even state laws from providing similar protection absent further constitutional amendment.¹⁰⁷ The court emphasized:

Rather than attempting to withdraw antidiscrimination issues as a whole from state and local control, Amendment 2 singles out one form of discrimination and removes its redress from consideration by the normal political processes. . . . Amendment 2 singles out that class of persons (namely gay men, lesbians, and bisexuals) who would benefit from laws barring discrimination on the basis of sexual orientation. No other identifiable group faces such a burden—no other group's ability to participate in the political process is restricted and encumbered in a like manner Rather, they, and they alone, must amend the state constitution in order to seek legislation which is beneficial to them.¹⁰⁸

As discussed above, H.B. 2's employment and public accommodations provisions part company with Colorado's constitutional amendment in this respect. Contrary to the Colorado Supreme Court's analysis of Amendment 2, H.B. 2 does not single out "an independently identifiable group"¹⁰⁹ and exclude it from recourse to the normal political processes. Instead, H.B. 2 "withdraw[s]

104. *Romer*, 517 U.S. at 626 ("We . . . now affirm the judgment, but on a rationale different from that adopted by the State Supreme Court.").

105. Sexual orientation has never been recognized as a suspect class. *See supra* notes 68–71 and accompanying text.

106. *See Evans*, 854 P.2d at 1286 (applying strict scrutiny because of the amendment's effect on the political process).

107. *Id.* at 1284–85.

108. *Id.* at 1285.

109. *Id.*

antidiscrimination issues as a whole from . . . local control,”¹¹⁰ which the Colorado Supreme Court indicated is permissible.

This critical difference applies equally when considering the measures at issue in the *Reitman v. Mulkey*,¹¹¹ *Hunter v. Erickson*,¹¹² and *Washington v. Seattle School District No. 1*,¹¹³ federal precedents on which the Colorado Supreme Court relied in reaching its decision in *Evans*.¹¹⁴ In *Reitman*, the United States Supreme Court considered an amendment to the California constitution that prohibited the state from “deny[ing], limit[ing] or abridg[ing] . . . the right of any person . . . to decline to sell, lease or rent [residential real] property to such person or persons as he, in his absolute discretion, chooses.”¹¹⁵ Declaring the amendment unconstitutional under the equal protection clause, the Court focused on the California Supreme Court’s determination that the amendment was adopted in response to state laws designed to bar racial discrimination and concluded that the amendment established a “constitutional right to privately discriminate on grounds which . . . would be unavailable under the Fourteenth Amendment should state action be involved.”¹¹⁶ While the immediate effect of the amendment was to repeal the antidiscrimination measures, the Court pointed out that it went further and encouraged racial discrimination:

The right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State’s basic charter, immune from legislative, executive, or judicial regulation at any level of the state government. Those practicing racial discriminations need no longer rely solely on their personal choice. They could now invoke express constitutional authority, free from censure or interference of any kind from official sources. . . . Here we are dealing with a provision which does not just repeal an existing law forbidding private racial discriminations. Section 26 was intended to authorize, and does authorize, racial discrimination in the housing market. The right to discriminate is now one of the basic policies of the State.¹¹⁷

Like *Reitman*, *Hunter* involved an amendment that was facially neutral. The amendment, though, was not to a state constitution, but

110. *Id.*

111. 387 U.S. 369 (1967).

112. 393 U.S. 385 (1969).

113. 458 U.S. 457 (1982).

114. See *Evans*, 854 P.2d at 1296–1300.

115. 387 U.S. at 371 (quoting CAL. CONST. art. 1, § 26 (1964)).

116. *Id.* at 374, 380–81 (emphasis removed).

117. *Id.* at 377, 380–81.

to Akron, Ohio's city charter, and it reserved to Akron's citizens the right to approve measures prohibiting discrimination in housing based on race, color, religion, national origin, or ancestry.¹¹⁸ The Court in *Hunter* acknowledged that the charter amendment treated individuals in the same manner regardless of race, color, religion, national origin or ancestry (i.e., both whites and African-Americans would need to have voter approval for protection against discrimination based on race)¹¹⁹ but nevertheless concluded that the amendment was subject to strict scrutiny because it contained "an explicitly racial classification treating racial housing matters differently from other racial and housing matters."¹²⁰ Indeed, the amendment impermissibly created a two-tiered system under which those who sought protection from housing discrimination based on race, color, religion, national origin or ancestry needed voter approval while those seeking protection against discrimination on any other basis (e.g., sex, political affiliation, or parental status) merely needed to get the city council's consent in most cases.¹²¹

And *Washington v. Seattle School District No. 1*, another significant case on which the Colorado Supreme Court relied in *Evans*, involved the creation of a similar two-tiered system. In *Washington*, the Court struck down a voter-approved initiative that had nullified a Seattle school district's plan—the "Seattle Plan"—to reduce school segregation through busing.¹²² The statewide initiative reallocated to the state legislature or the state's voters the authority to use busing for that purpose.¹²³ While acknowledging that the mere repeal of an antidiscrimination law by the entity that adopted it would not give rise to an equal protection claim,¹²⁴ the Court indicated that Washington's voters had done more when they "lodg[ed] decisionmaking authority over [school integration decisions] at a new and remote level of government."¹²⁵ According to the Court,

118. *Hunter v. Erickson*, 393 U.S. 385, 387 (1969).

119. *Id.* at 390–91.

120. *Id.* at 389.

121. *Id.* at 390–91.

122. *See Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 461–63 (1982).

123. *Id.* at 474.

124. *See id.* at 483 ("To be sure, 'the simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification.'" (quoting *Crawford v. Los Angeles Bd. of Educ.*, 458 U.S. 527, 539 (1982))); *see also Crawford v. Los Angeles Bd. of Educ.*, 458 U.S. 527, 539 (1982) ("[T]he Equal Protection Clause is not violated by the mere repeal of race-related legislation or policies that were not required by the Federal Constitution in the first place.").

125. *Washington*, 458 U.S. at 483.

Washington had vested in local school boards the principal authority to administer the state's educational system,¹²⁶ and the voter-approved initiative impermissibly “remove[d] the authority to address a racial problem—and only a racial problem—from the existing decisionmaking body”¹²⁷

The dissent in *Washington* accused the majority of intruding on the right of each state to organize its local governments in whatever manner it sees fit¹²⁸ and suggested that the decision was founded on “a strange notion—alien to our system—that local governmental bodies can forever preempt the ability of a State—the sovereign power—to address a matter of compelling concern to the State.”¹²⁹ The majority, however, denied the charge, explaining that its decision did not rest on the fact that the local government had acted first, but instead on “the racial nature of the way in which [the Washington initiative] structure[d] the *process* of decisionmaking.”¹³⁰ Important to H.B. 2's employment and public accommodations provisions, the Court emphasized:

[L]aws structuring political institutions or allocating political power according to “neutral principles” . . . are not subject to equal protection attack, though they may “make it more difficult for minorities to achieve favorable legislation.” Because such laws make it more difficult for *every* group in the community to enact comparable laws, they “provid[e] a just framework within which the diverse political groups in our society may fairly compete.” Thus, the political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action.¹³¹

The *Schuette* decision underscores the point that restructuring the political process in a way that affects everyone is permissible. In *Schuette*, the Court upheld a Michigan constitutional amendment that reallocated from the state and other governmental entities, including

126. *Id.* at 479–80.

127. *Id.* at 474.

128. *See id.* at 492–93 (Powell, J., dissenting).

129. *Id.* at 495.

130. *Id.* at 480 n.23 (majority opinion); *see* *Coal. for Econ. Equal. v. Wilson*, 122 F.3d 692, 707 (9th Cir. 1997) (“The majority [in *Washington*] responded that the ‘horribles paraded by the dissent’ . . . were ‘entirely unrelated to th[e] case.’” (quoting *Washington*, 458 U.S. at 480 n.23)).

131. *Washington*, 458 U.S. at 470 (first quoting *Hunter v. Erickson*, 393 U.S. 385, 394 (1969) (Harlan, J., concurring); and then quoting *Hunter*, 393 U.S. at 393) (internal citations omitted)).

public schools,¹³² to the citizens of Michigan the power to grant preferential treatment based on “race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”¹³³ In reaching its decision, the Court refused to read *Washington* as requiring strict scrutiny whenever a state places decision-making authority over “a government policy [that] ‘inures primarily to the benefit of the minority’ and [that] ‘minorities . . . consider . . . to be ‘in their interest’ . . . at a different level of government.’”¹³⁴ In addition, *Schuette* similarly limited *Hunter*, describing the decision as “rest[ing] on the unremarkable principle that the State may not alter the procedures of government to target racial minorities.”¹³⁵

H.B. 2’s employment and public accommodations provisions, which applied broadly and did not target anyone in particular, are not of the same character as the measures at issue in *Washington*, *Reitman*, and *Hunter*. Granted, H.B. 2 was adopted in response to an ordinance giving special protection against discrimination based on sexual orientation, gender identity, and gender expression, and it left private entities free to discriminate based on those characteristics. H.B. 2 did not, however, authorize discrimination under constitutional authority, which was the specific type of discrimination that the *Schuette* Court emphasized was problematic in *Reitman*,¹³⁶ and the law preserved recourse to state government for protection against discrimination,¹³⁷ protection North Carolina’s governor extended to state employees. Moreover, H.B. 2 did not affirmatively confer the right to discriminate as the California amendment in *Reitman* did by providing that private entities could make certain decisions in their “absolute discretion.”¹³⁸ Furthermore, while H.B. 2 allowed for private discrimination based on sexual orientation, gender identity, and gender expression, it is difficult to conclude that H.B. 2 encouraged such discrimination in light of the fact that the law preserved the ability of local governments to adopt policies that would bar discrimination based on sexual orientation or gender

132. *Schuette v. Coal. to Def. Affirmative Action, Integration & Immigrant Rights & Fight For Equal. By Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1630, 1638 (2014).

133. *Id.* at 1629.

134. *Id.* at 1634 (quoting *Washington*, 458 U.S. at 472).

135. *Id.* at 1632.

136. *Id.* at 1631.

137. See *Reitman v. Mulkey*, 387 U.S. 373, 377 (1967) (“The right to discriminate . . . was now . . . immune from legislative, executive, or judicial regulation at any level of the state government.”).

138. *Id.* at 371.

identity with respect to their own employees and left in place the portions of the Charlotte Ordinance that allowed the city's community relations subcommittee to make "recommendations . . . for legislation or other actions to eliminate or reduce discrimination with respect to . . . sexual orientation, gender identity, [or] gender expression" ¹³⁹

In addition, unlike the charter amendment at issue in *Hunter* and the voter-approved initiative in *Washington*, H.B. 2's employment and public accommodations provisions did not create a complicated, two-tier system for approval of regulations of a similar nature. With H.B. 2 in place, all North Carolinians had to approach the state government if they wanted to secure protection against discrimination by private entities in employment or public accommodations, and to the extent local governments previously had the ability to offer that type of protection, H.B. 2 made it clear that they no longer did. Thus, the law did not burden any particular group more than others, and to the extent it made obtaining protection against discrimination more difficult, it did so "for every group in the community," as *Washington* permits. ¹⁴⁰ Under *Washington*, the North Carolina General Assembly is free to "restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action[.]" and because H.B. 2 allocated power neutrally, it was "not subject to equal protection attack[.]" ¹⁴¹

2. H.B. 2's Employment and Public Accommodations Provisions Would Have Survived Rational Basis Review

Still, even if one could conclude that H.B. 2's employment and public accommodations provisions implicated the equal protection clause, ¹⁴² those provisions should have been subject only to the

139. Charlotte, N.C., Ordinance 7056 § 2 (Feb. 22, 2016).

140. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 470 (1982).

141. *Id.* at 470.

142. Given that H.B. 2's employment and public accommodations provisions had no discriminatory effect, as discussed in Section II.A.1, they should not have been subject to any equal protection review. The remainder of Section II.A nevertheless assumes some basis for requiring review, and because H.B. 2's employment and public accommodations provisions were facially neutral, one would have to have argued that the law had a disparate impact on members of the LGBT community. See *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 259 (1979) (considering a claim that a neutral law had a disparate impact on women). Even a facially neutral regulation having a disparate impact based on race or sex, however, is not subject to heightened scrutiny absent a discriminatory purpose. See *id.* at 274–75 (indicating that a neutral law that has a disparate impact on a protected group is unconstitutional under the equal protection clause if the law represents

rational basis standard of review and therefore were apt to be upheld.¹⁴³ In *Heller v. Doe*, the Court explained the contours of this very deferential standard:

[A] classification neither involving fundamental rights nor proceeding along suspect lines . . . cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. Further, a legislature that creates these categories need not “actually articulate at any time the purpose or rationale supporting its classification.” Instead, a classification “must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. “[A] legislative choice . . . may be based on rational speculation unsupported by evidence or empirical data.” . . . Finally, courts are compelled under rational-basis review to accept a legislature’s generalizations even when there is an imperfect fit between means and ends. . . . “The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.”¹⁴⁴

H.B. 2’s employment and public accommodations provisions easily satisfied this standard. The state has an interest in protecting the bodily privacy of its citizens and visitors,¹⁴⁵ and because an individual has a constitutional right to bodily privacy (as discussed in

purposeful discrimination); *Washington v. Davis*, 426 U.S. 229, 242 (1976) (“Standing alone, [disproportionate impact] does not trigger the rule that racial classifications are to be subjected to the strictest scrutiny. . . .” (citing *McLaughlin v. Florida*, 379 U.S. 184 (1964))). Therefore, a disparate impact claim with respect to H.B. 2’s employment and public accommodations provisions would have been subject to no more than rational basis review under the Court’s current jurisprudence, and if any evaluation of discriminatory purpose were required, it would seem to involve the same types of considerations that are relevant in assessing animus. *See infra* Section II.A.3 (discussing animus).

143. *But see* *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2327 (2016) (Thomas, J., dissenting) (noting the substantial uncertainty the Court has created in applying its various standards of review).

144. *Heller v. Doe*, 509 U.S. 312, 319–21 (1993) (internal citations omitted).

145. The plaintiffs in *Carcaño* even conceded that “bodily privacy qualifies as an important State interest.” *Carcaño v. McCrory*, 203 F. Supp. 3d 615, 641 (M.D.N.C. 2016). In addition, the United States Supreme Court has recognized that protecting against other invasions of personal privacy represents a substantial state interest. *See, e.g.*, *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 625 (1995) (“Our precedents . . . leave no room for doubt that ‘the protection of potential clients’ privacy is a substantial state interest.’” (quoting *Edenfield*, 507 U.S. at 769)); *Edenfield v. Fane*, 507 U.S. 761, 769 (1993) (finding that protecting the privacy of potential CPA clients “is a substantial state interest”).

Part II.B below), this interest is one of the highest order. By requiring private businesses to allow anyone—regardless of biological sex, gender identity, or gender expression—to use the restroom or changing facility of his or her choice,¹⁴⁶ the Charlotte Ordinance threatened this interest, and H.B. 2 responded to this threat.¹⁴⁷ As North Carolina’s governor, Pat McCrory, explained immediately after signing H.B. 2:

The basic expectation of privacy in the most personal of settings, a restroom or locker room, for each gender was violated by government overreach and intrusion by the mayor and city council of Charlotte. This radical breach of trust and security . . . not only impacts the citizens of Charlotte but people who come to Charlotte to work, visit or play. This new government regulation defies common sense and basic community norms by allowing, for example, a man to use a woman’s bathroom, shower or locker room. . . . [T]he mayor and city council took action far out of its core responsibilities.¹⁴⁸

Needless to say, by preempting local employment discrimination and public accommodations measures, H.B. 2 did more than just remedy the Charlotte Ordinance’s threat to the right to bodily privacy. The rational basis standard, however, only requires that there be some conceivable justification for the reach of the law. Under H.B. 2, whether a business is operating in Charlotte, Greensboro, Raleigh, Murphy, or Manteo, the same nondiscrimination rules applied, and the General Assembly reasonably could have concluded that those consistent measures would “improve intrastate commerce” and “attract[] new businesses, organizations, and employers to the State”¹⁴⁹ by reducing the costs associated with monitoring and

146. See *supra* notes 11–15 and accompanying text (explaining the effect of the Charlotte Ordinance).

147. See *Glenn v. Brumby*, 663 F.3d 1312, 1321 (11th Cir. 2011) (suggesting that firing a transgender woman because of safety concerns associated with restroom usage might satisfy rational basis review); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224–25 (10th Cir. 2007) (finding that concern about restroom usage by a transgender woman was a legitimate, nondiscriminatory reason for terminating her employment); *Johnston v. Univ. of Pittsburgh*, 97 F. Supp. 3d 657, 669 (W.D. Pa. 2015) (“[S]egregating . . . bathroom and locker room facilities on the basis of birth sex is ‘substantially related to a sufficiently important government interest.’” (quoting *Glenn*, 663 F.3d at 1316)).

148. Press Release, North Carolina Governor Pat McCrory, Governor McCrory Takes Action to Ensure Privacy in Bathrooms and Locker Rooms (May 23, 2016), <https://web.archive.org/web/20160607184011/https://governor.nc.gov/press-release/governor-mccrory-takes-action-ensure-privacy-bathrooms-and-locker-rooms> [https://perma.cc/69KL-638J].

149. Public Facilities Privacy & Security Act, ch. 3, 2016 N.C. Sess. Laws 12, 12 (repealed 2017); see *Sims v. Kia Motors of Am., Inc.*, 839 F.3d 393, 399 n.9 (5th Cir. 2016)

complying with antidiscrimination policies that vary from place to place. And it is irrelevant whether the employment and public accommodations provisions actually achieved these ends, for “the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.”¹⁵⁰ Therefore, the fact that the legislation may have caused some businesses not to do business in North Carolina did not undermine the legitimacy of the state’s proffered interest. After all, as the Court has acknowledged, legislation frequently does not achieve its desired end: “[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it *might be thought* that the particular legislative measure was a rational way to correct it.”¹⁵¹

In addition, given its experience with Charlotte, the General Assembly could have decided to preempt all local nondiscrimination measures to prevent unknown and unknowable future conflicts of the same type that might otherwise arise. And the North Carolina General Assembly had every right to do this given the relationship of the state to its local governments, a relationship that is fundamentally different than that between the federal government and the states. While federal-state relations involve separate sovereigns deriving power from separate sources,¹⁵² local governments in North Carolina and in other states are agents of the state, derive their power from the state, and are subject to the control of the state, as the Court explained in *Hunter v. City of Pittsburgh*¹⁵³:

Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be [e]ntrusted to them. . . . The number, nature, and duration of the powers

(“Texas probably also has an interest in enacting legislation to attract businesses like Kia to the state.”); *Alliant Energy Corp. v. Bie*, 330 F.3d 904, 915 (7th Cir. 2003) (recognizing that a state has “a legitimate and important state interest in regulating *intra* state commerce” (citing *Eli Lilly & Co. v. Sav-On-Drugs Inc.*, 366 U.S. 276, 279 (1961); *Union Brokerage Co. v. Jensen*, 322 U.S. 202, 211 (1944))).

150. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

151. *Williamson v. Lee Optical Inc.*, 348 U.S. 483, 487–88 (1955) (emphasis added); see also *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952) (“Our recent decisions make it plain that we do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare. . . . [S]tate legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of the public welfare . . .”).

152. See *infra* Part III (explaining the relationship between the federal government and that of the several states).

153. 207 U.S. 161 (1907).

conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state The state, . . . at its pleasure, may modify or withdraw all such powers, . . . repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.¹⁵⁴

Thus, cities and counties in North Carolina generally only have such authority as the General Assembly grants them,¹⁵⁵ and while the General Assembly has bestowed on the state's cities and counties relatively broad authority to regulate public health, safety, and welfare,¹⁵⁶ what the General Assembly has given, the General Assembly may take away.

3. H.B. 2's Employment and Public Accommodations Provisions Did Not Evidence Animus

Despite ostensibly applying the deferential rational basis standard of review to the Colorado constitutional amendment in *Romer* and to DOMA in *Windsor*, the Court struck the two measures down, and it did so because it found that they were motivated by animus—"a bare . . . desire to harm a politically unpopular group."¹⁵⁷

154. *Hunter*, 207 U.S. at 178–79. See generally Frayda S. Bluestein, *Do North Carolina Local Governments Need Home Rule?*, 84 N.C. L. REV. 1983 (2006) (discussing local government power in general and in North Carolina in particular).

155. See *Lanvale Props., LLC v. Cty. of Cabarrus*, 366 N.C. 142, 149, 731 S.E.2d 800, 807 (2012) (observing that the General Assembly controls North Carolina counties); *Homebuilders Ass'n of Charlotte, Inc. v. City of Charlotte*, 336 N.C. 37, 42, 442 S.E.2d 45, 49 (1994) ("The law is well-settled that 'a municipality has only such powers as the legislature confers upon it.'" (quoting *Koontz v. City of Winston-Salem*, 280 N.C. 513, 520, 186 S.E.2d 897, 902 (1972))).

156. See N.C. GEN. STAT. § 153A-121(a) (2015) ("A county may by ordinance define, regulate, prohibit, or abate acts, omissions, or conditions, detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the county, and may define and abate nuisances."); *id.* § 153A-4 (providing that North Carolina statutory law governing counties "shall be broadly construed"); *id.* § 160A-174(a) ("A city may by ordinance define, prohibit, regulate, or abate acts, omissions, or conditions detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the city; and may define and abate nuisances."); *id.* § 160A-4 (providing that North Carolina city charters and North Carolina statutory law governing cities "shall be broadly construed").

157. *Romer v. Evans*, 517 U.S. 620, 634 (1996) (quoting *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)); see *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) ("The Constitution's guarantee of equality 'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot' justify disparate

As a result, one must consider whether H.B. 2's employment and public accommodations provisions were motivated by animus toward those in the LGBT community and therefore "def[y] ... th[e] conventional [rational basis] inquiry."¹⁵⁸

Under *Romer* and *Windsor*, H.B. 2's employment and public accommodations provisions must be "explore[d] ... for signs that they are, as a *structural* matter, aberrational in a way that advantages some and disadvantages others."¹⁵⁹ Granted, the Court in *Windsor* considered legislative history in determining DOMA's purpose, but it did so very briefly, and it devoted the vast majority of its attention to whether DOMA's "operation in practice confirm[ed] th[e] purpose" that the legislative history suggested.¹⁶⁰ Moreover, the Court's summary of why DOMA was unconstitutional focused entirely on the law's effect,¹⁶¹ thereby reinforcing the conclusion that how a law operates is essential in determining whether animus was the sole motivation.

Thus, even if statements by a handful of members of the North Carolina General Assembly¹⁶² might suggest animus, those statements would not have been enough to invalidate H.B. 2. To have been invalid, the structure of H.B. 2's employment and public accommodations provisions would have had to have provided strong evidence of animus; considered in light of *Romer* and *Windsor*, the evidence was scant at best.

H.B. 2's employment and public accommodations provisions differed from the Colorado constitutional amendment and DOMA in a number of significant ways. First, H.B. 2's employment and public accommodations provisions were not of "an unusual character."¹⁶³

treatment of that group." (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534–35 (1973))). The Court has invalidated other measures due to animus. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446, 450 (1985) (applying the rational basis standard to strike down a permitting requirement that "appear[ed] ... to rest on an irrational prejudice against the mentally retarded"); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534, 538 (1973) (applying the rational basis standard and concluding that a provision of the Food Stamp Act was "wholly without any rational basis").

158. *Romer*, 517 U.S. at 632.

159. *Bishop v. Smith*, 760 F.3d 1070, 1100 (10th Cir. 2014) (Holmes, J., concurring); see Susannah W. Pollvogt, *Forgetting Romer*, 65 STAN. L. REV. ONLINE 86, 90 (2013) (indicating that *Romer*'s "animus inquiry ultimately does not focus on the subjective intent motivating a law but on whether the law functions to enforce private bias").

160. *Windsor*, 133 S. Ct. at 2694.

161. See *id.* at 2695–96 (summarizing the Court's analysis).

162. See First Amended Complaint for Declaratory and Injunctive Relief, *supra* note 24, at 30–35 (reciting statements of various legislators regarding H.B. 2).

163. *Romer*, 517 U.S. at 633 (1996) (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37–38 (1928)).

State laws across the country govern discrimination in employment and public accommodations, and many offer no protection against discrimination based on sexual orientation and gender identity.¹⁶⁴ Moreover, North Carolina has many laws that prohibit discrimination statewide,¹⁶⁵ and before H.B. 2, the General Assembly had preempted local laws dealing with other matters.¹⁶⁶ Furthermore, given that the Charlotte Ordinance did not seek to amend the city's housing-related antidiscrimination ordinances, even Charlotte apparently recognized that it does not have plenary authority to adopt antidiscrimination measures.¹⁶⁷

164. See *State Laws on Employment-Related Discrimination*, NAT'L CONF. OF ST. LEGISLATURES (July 2015), <http://www.ncsl.org/research/labor-and-employment/discrimination-employment.aspx> [<https://perma.cc/8U2V-3TQS>] (including a chart detailing statewide employment discrimination laws); *State Public Accommodation Laws*, NAT'L CONF. OF ST. LEGISLATURES (July 13, 2016), <http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx> [<https://perma.cc/TZ62-4P3N>] (including a chart detailing statewide public accommodations laws).

165. See N.C. GEN. STAT. § 18B-1006(k) (2016) (prohibiting granting alcohol licenses to clubs that discriminate on certain bases); *id.* §§ 18B-1202(4), 18B-1215 (prohibiting discrimination on certain bases with respect to wineries); *id.* §§ 41A-4, to -5 (prohibiting discriminatory housing practices); *id.* § 53-180(d) (prohibiting discrimination on certain bases with respect to consumer credit); *id.* § 58-65-85 (addressing discrimination in connection with insurance); *id.* § 58-84-55 (prohibiting trustees of firefighters' relief funds from discriminating based on race); *id.* § 66-356(a) (prohibiting cable service providers from discriminating based on race); *id.* § 90-285.1(17) (allowing Board of Examiners for Nursing Home Administrators to take disciplinary action with respect to discrimination on certain bases); *id.* § 95-151 (prohibiting discrimination in connection with regulation of labor); *id.* § 115C-218.55 (prohibiting charter schools from discriminating on certain bases); *id.* § 115D-77 (declaring a policy of State Board of Community Colleges and local boards of trustees not to discriminate on certain bases); *id.* § 126-16 (prohibiting discrimination on certain bases in employment by state agencies and local governments); *id.* § 131A-8 (requiring facilities financed under Health Care Facilities Finance Act not to discriminate on certain bases); *id.* §§ 131E-8(a), 131E-13(a) (addressing discrimination in hospitals); *id.* § 143-135.5(b) (declaring policy not to do business with businesses who have discriminated on certain bases); *id.* § 143-422.2 (prohibiting discrimination on certain bases by private employers); *id.* § 153A-263(7) (prohibiting counties and cities from accepting real or personal property for a public library if conditioned on discriminating on certain bases); *id.* § 159D-40(a)(4) (requiring facilities financed under Private Capital Facilities Finance Act not to discriminate on certain bases); *id.* § 160A-353(6) (prohibiting counties and cities from accepting real or personal property for a parks and recreation program if conditioned on discriminating on certain bases); *id.* § 166A-19.74 (prohibiting discrimination on certain bases in the provision of emergency services); *id.* § 168A-5 (prohibiting discrimination in employment based on disability).

166. See, e.g., *id.* § 14-409.40(a) (preempting local laws regulating firearms); *id.* § 90-113.60 (preempting local laws regulating the retail sale of pseudoephedrine).

167. Charlotte, N.C., Ordinance 7056 § 3 (Feb. 22, 2016) (not including any amendments to the nondiscrimination provisions in CHARLOTTE, N.C., CODE OF ORDINANCES §§ 6-59(b), 12-111, -114, -115 (2016)); *id.* §§ 12-111, -114, -115 (Feb. 22, 2016) (prohibiting discrimination based on various characteristics in real estate transactions and in providing real estate brokerage services). One member of North

Second, H.B. 2's effect was very modest when compared to the expansive reach of Colorado's constitutional amendment and DOMA. In *Romer*, the Court stated: "the amendment has the peculiar property of imposing a *broad and undifferentiated disability on a single named group* [And] its *sheer breadth* is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects" ¹⁶⁸ And the *Windsor* Court expressed similar alarm: "DOMA writes inequality into the *entire* United States Code." ¹⁶⁹

While the Colorado amendment in *Romer* "identifie[d] persons by a single trait and then denie[d] them protection across the board" ¹⁷⁰—protection from discrimination in the "private sphere" and at "every level of Colorado government" ¹⁷¹—H.B. 2 did no such thing. Though H.B. 2 did not provide LGBT persons with protection from discrimination based on sexual orientation, gender identity, or gender expression in private employment or public accommodations and prevented LGBT persons from obtaining that protection at the local level, it did not single out LGBT persons for different treatment. H.B. 2 treated those who are heterosexual or cisgender in the same way—they likewise had no protection from discrimination based on sexual orientation, gender identity, and gender expression in private employment or public accommodations, and they had to look to state government if they wished to obtain that protection. This was not the case with the Colorado constitutional amendment, which left heterosexuals free to obtain protection against discrimination based on sexual orientation from local governments while making homosexuals seek a new constitutional amendment to secure the same type of protection. Nor was it the case with DOMA, which conferred benefits on those in state-recognized heterosexual marriages, but not state-recognized homosexual marriages.

Carolina's General Assembly indicated that Charlotte did not attempt to amend the housing-related ordinances and that the city attorney determined that the city had no power to do so. See Letter from Rep. Dan Bishop, N.C. Representative, N.C. Gen. Assembly, to Jennifer Roberts, Mayor of Charlotte, N.C., and the Members of the Charlotte City Council 2 (Feb. 1, 2016), <https://www.votedanbishop.com/uploads/content/dan-bishop-letter.pdf> [<http://perma.cc/9C4I-KT83>] (noting that, because Charlotte's charter expressly authorizes the city to adopt housing nondiscrimination ordinances on certain bases, "the City Attorney concluded last year that Council could *not* modify the classifications (by adding sexual orientation, gender identity, gender expression, etc.) to Charlotte's *housing* nondiscrimination ordinance").

168. *Romer v. Evans*, 517 U.S. 620, 632 (1996) (emphasis added).

169. *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) (emphasis added).

170. *Romer*, 517 U.S. at 633.

171. *Id.* at 629.

Third, H.B. 2 allowed for protection of members of the LGBT community in ways that Colorado's constitutional amendment would not have. For example, H.B. 2 specified that local governments could adopt regulations applicable to their own employees to protect against discrimination, whether based on sexual orientation, gender identity, gender expression, or any other characteristic.¹⁷² Moreover, H.B. 2 left LGBT persons, like everyone else, free to petition the General Assembly for protection against both public and private discrimination based on sexual orientation, gender identity, or gender expression, and the General Assembly could grant that protection without a statewide referendum.¹⁷³ Finally, H.B. 2 did nothing to bar state officials from adopting policies that prohibit discrimination based on sexual orientation, gender identity, or gender expression with respect to state government employees, and North Carolina's governor adopted such a policy shortly after H.B. 2's enactment.¹⁷⁴ None of these state and local government measures would have been possible under the constitutional amendment at issue in *Romer*.

Fourth, H.B. 2 did not preempt all of the protections that Charlotte sought to give with respect to sexual orientation, gender identity, and gender expression.¹⁷⁵ The Charlotte Ordinance prohibited the city from entering into contracts with and procuring goods and services from providers that "discriminate on the basis of

172. See Public Facilities Privacy & Security Act, ch. 3, secs. 2.1, 3.1, §§ 95-25.1, 143-422.2, 2016 N.C. Sess. Laws 12, 14, 15 (repealed 2017) (providing that state law preempts local measures with respect to employment discrimination, "except regulations applicable to personnel employed by [a unit of local government or other political subdivision of the state] that are not otherwise in conflict with State law").

173. Cf. N.C. CONST. art. I, § 12. See generally Public Facilities Privacy & Security Act, ch. 3, 2016 N.C. Sess. Laws 12 (repealed 2017) (omitting any reference to statewide referenda).

174. See N.C. Exec. Order No. 93, § 2 (Apr. 12, 2016) (Governor Pat McCrory's order "To Protect Privacy and Equality") (declaring that "North Carolina is committed to administering and implementing all State human resources policies, practices and programs . . . without unlawful discrimination, harassment or retaliation on the basis of . . . sexual orientation [or] gender identity").

175. Arguably, given the statutory definition of place of public accommodation under state law, H.B. 2 had no effect on the Charlotte Ordinance's expansion of the non-discrimination provisions applicable to lawfully operating taxis and other vehicles for hire to include sexual orientation, gender identity, and gender expression. See N.C. GEN. STAT. § 168A-3(8) (2015) (defining "[p]lace of public accommodations" [to] include[] . . . any place, facility, store, other establishment, hotel, or motel, which supplies goods or services on the premises to the public or which solicits or accepts the patronage or trade of any person"); Charlotte, N.C., Ordinance 7056 § 4 (Feb. 22, 2016). One might conclude, on the other hand, that H.B. 2's public accommodation provisions effectively preempted the ordinance in this respect as well. See Public Facilities Privacy & Security Act, ch. 3, sec. 3.3, § 143-422, 2016 N.C. Sess. Laws at 15-16.

... sexual orientation, gender identity, [and] gender expression ... in the solicitation, selection, hiring, or treatment of subcontractors, vendors, suppliers or commercial customers.”¹⁷⁶ H.B. 2, however, limited only the city’s ability to condition contracts based on discrimination with respect to “employment practices or ... the provision of goods, services, or accommodations to any member of the public[.]”¹⁷⁷ thereby leaving Charlotte free not to do business with a provider that discriminates in dealing with subcontractors, vendors, or suppliers. Moreover, subject to limitations under state law, Charlotte’s community relations subcommittee still could have made “recommendations ... for legislation or other actions to eliminate or reduce discrimination with respect to ... sexual orientation, gender identity, [or] gender expression,” and the subcommittee’s conciliation division could have approved plans for that purpose, as the Charlotte Ordinance provided.¹⁷⁸ Thus, while the city could not force private entities to refrain from discriminating in employment and public accommodations, it could have, for example, initiated campaigns encouraging private entities to do so voluntarily.

Finally, whereas the Court criticized Colorado’s Amendment 2 for being at once too narrow and too broad, H.B. 2’s provisions were precisely tailored to accomplish its goals¹⁷⁹: to change a Charlotte policy the state’s lawmakers believed went too far and to provide “consistent statewide [laws and obligations] for all businesses, organizations, and employers doing business in the State”¹⁸⁰ with respect to employment practices and service of customers. Nevertheless, the *Carcaño* plaintiffs indicated that the legislature’s stated justifications for H.B. 2 were a mere pretext for discriminating against members of the LGBT community because H.B. 2 did not extend across the state the protection against discrimination with respect to sexual orientation, gender identity, and gender expression that Charlotte sought to give.¹⁸¹ This argument suggests that Charlotte’s granting the protection for the LGBT community tied the General Assembly’s hands and left the legislature no choice but to

176. Charlotte, N.C., Ordinance 7056 § 1 (Feb. 22, 2016) (amending contracting provisions in CHARLOTTE, N.C., CODE OF ORDINANCES §§ 2-151, 2-152, 2-153, 2-166, 2-167 (2016)).

177. Public Facilities Privacy & Security Act, ch. 3, sec. 2.2, § 153A-449(a) 2016 N.C. Sess. Laws at 14–15.

178. Charlotte, N.C., Ordinance 7056 § 2 (Feb. 22, 2016).

179. *Romer v. Evans*, 517 U.S. 620, 633 (1996).

180. Public Facilities Privacy & Security Act, ch. 3, 2016 N.C. Sess. Laws at 12.

181. First Amended Complaint for Declaratory and Injunctive Relief, *supra* note 24, at 48.

extend the same protection if it wanted to adopt a preemptive statewide policy that would not violate the equal protection clause. If this were true, it would mean that Charlotte, by acting first, could effectively dictate the scope of a statewide policy that the equal protection clause does not require¹⁸²—a result that would disenfranchise the scores of North Carolinians who have no voice in the election of Charlotte’s city officials.

For all of the foregoing reasons, H.B. 2’s employment and public accommodations provisions did not defy the conventional rational basis inquiry.¹⁸³ In *Romer*, the Court stated that, “in making a general announcement that gays and lesbians shall not have any particular protections from the law, [the amendment] inflict[ed] on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it.”¹⁸⁴ H.B. 2’s employment and public accommodations provisions made no such announcement and inflicted no such harm, and given their limited scope, the provisions could not be explained as the result of “a bare . . . desire to harm a politically unpopular group.”¹⁸⁵ The provisions conceivably served North Carolina’s interests in protecting bodily privacy, promoting intrastate commerce, and attracting businesses to the state,¹⁸⁶ which is all the equal protection clause requires under the rational basis test.¹⁸⁷

182. See *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Boston*, 515 U.S. 557, 576 (1995) (“[T]he guarantee[] of . . . equal protection ‘erec[ts] no shield against merely private conduct.’” (first quoting *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948); then quoting *NLRB v. Hudgens*, 424 U.S. 507, 513 (1976))).

183. *Romer*, 517 U.S. at 632.

184. *Id.* at 635.

185. *Id.* at 634 (quoting *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

186. There are differing opinions as to what economic effect H.B. 2 would have had on North Carolina. Compare AP: ‘Bathroom Bill’ to Cost North Carolina \$3.76B, WBTV (Mar. 27, 2017, 4:24 AM), <http://www.wbtv.com/story/35002047/ap-bathroom-bill-to-cost-north-carolina-376b> [<http://perma.cc/J333-KKDH>] (“The Associated Press has determined that North Carolina’s law limiting LGBT protections will cost the state more than \$3.76 billion in lost business over a dozen years.”), with Colin Campbell, *HB2 Losses Not Affecting NC’s Overall Economy, McCrory Budget Director Says*, CHARLOTTE OBSERVER (Aug. 15, 2016, 2:17 PM), <http://www.charlotteobserver.com/news/politics-government/article95757872.html> [<http://perma.cc/W2X8-K33H>] (noting that the budget director for North Carolina’s governor had suggested that the losses associated with the NBA decision to move the All-Star Game from Charlotte and the PayPal decision to cancel an expansion “aren’t big enough to affect the state’s overall economic growth, in part because North Carolina ranks as the 23rd largest economy in the world”). See also Rebecca Tippet, *If US States Were Countries, NC Would Be the World’s 35th Largest Economy*, UNC CAROLINA POPULATION CTR. (Jan. 20, 2015), <http://demography.cpc.unc.edu/2015/01/20/if-us-states-were-countries-nc-would-be-the-worlds-35th-largest-economy/> [<http://perma.cc/US6N-B7Q2>] (indicating that, “[i]f North Carolina were a country, its GDP of \$471 billion would be the 28th in the world,” and that,

B. The Fundamental Right to Bodily Privacy and the Equal Protection Challenge to H.B. 2's Bathroom Provisions

Because H.B. 2 restricted bathroom usage based on biological sex, the statute facially discriminated on the basis of gender under the Court's equal protection cases.¹⁸⁸ In the language of *United States v. Virginia*,¹⁸⁹ such legislation literally “closes a door . . . to women (or to men)” —specifically, the door to any restroom, shower room, locker room, or other changing facility set aside for members of the other biological sex.¹⁹⁰ Consequently, if a plaintiff challenges a state's policy of restricting bathrooms or other changing facilities based on biological sex, the state would have to show that the “classification serves ‘important governmental objectives and that the discriminatory means employed’ are ‘substantially related to the achievement of those objectives.’”¹⁹¹ To garner heightened scrutiny in the H.B. 2

“[i]f the U.S. states were treated as individual countries, North Carolina would be the 35th largest economy in the world”). As discussed in Section II.A.3 above, however, whether H.B. 2 actually would have achieved its purpose is irrelevant to its constitutionality.

187. See *Heller v. Doe*, 509 U.S. 312, 320 (1993) (“[A] classification ‘must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.’” (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) (citations omitted))).

188. The Supreme Court's equal protection cases take gender to be a quasi-suspect class and apply intermediate scrutiny to gender-based classifications. See *Craig v. Boren*, 429 U.S. 190, 197 (1976) (stating that “classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives”). In the equal protection context, “gender” and “sex” are used interchangeably. See *United States v. Virginia*, 518 U.S. 515, 531 (1996) (“Parties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for the action. Today's skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history.”). At a minimum, both terms include biological sex. The *Carcaño* plaintiffs and other LGBT advocates contend that “gender” and “sex” should be interpreted to include gender identity, although the exact scope of their proposed definition of “gender” and “sex” remains unclear. First Amended Complaint for Declaratory and Injunctive Relief, *supra* note 24, at 53–54; See G.G. *ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 737–38 (4th Cir. 2016) (Niemeyer, J., concurring in part and dissenting in part) (analyzing the uncertainty surrounding the meaning of “sex” and if that term includes gender identity, not just biological sex), *vacated and remanded*, 137 S. Ct. 1239 (2017) (mem.). As discussed above, the Supreme Court never has held that distinctions based on gender identity are subject to heightened scrutiny. See *infra* Section II.A. Because the Supreme Court has not interpreted “gender” or “sex” to include gender identity, this Article uses “gender” and “sex” interchangeably to refer to biological sex while recognizing that the *Carcaño* plaintiffs and others argue that these terms should include gender identity.

189. 518 U.S. 515 (1996).

190. *Id.* at 532 (citing *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 152 (1994) (Kennedy, J., concurring in judgment)).

191. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (quoting *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980)).

case, the *Carcaño* plaintiffs claimed that H.B. 2's bathroom provisions discriminated based on sex and that "sex" should have been interpreted to include gender identity.¹⁹² Under this position, H.B. 2's bathroom provisions constituted gender-based discrimination—and were subject to intermediate scrutiny—because these provisions permitted an individual whose gender identity aligned with his or her biological sex to use the bathroom consistent with his or her gender identity but prohibited those whose gender identity and biological sex did not align from doing so.¹⁹³ If a court had accepted this argument, then North Carolina would have had to have shown that H.B. 2 was substantially related to an important governmental interest, one that supported distinguishing the genders based on physiological differences.

Those defending challenged bathroom provisions—North Carolina and the Gloucester County School Board in Virginia—articulated two main reasons for separating public restrooms based on biological sex: privacy and safety.¹⁹⁴ Although the safety justification did not receive much traction in the lower federal courts,¹⁹⁵ the state's privacy interest, which is rooted in the due process clause of the Fourteenth Amendment, did. When considering alleged rights under the due process clause, a court must resolve two distinct issues: (1) how to define the right (a general right to bodily privacy, a more

192. See First Amended Complaint for Declaratory and Injunctive Relief, *supra* note 24, at 53–54.

193. See *id.* at 44–45 (“Under H.B. 2, non-transgender people are able to access restrooms and other single-sex facilities consistent with their gender identity, but transgender people are banned from restrooms and other single-sex facilities consistent with their gender identity.”).

194. See *Carcaño v. McCrory*, 203 F. Supp. 3d 615, 626 (M.D.N.C. 2016) (noting that “Governor McCrory and several members of the General Assembly strongly condemned the [Charlotte] ordinance, which they generally characterized as an affront to both privacy and public safety”); see also *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 733 (4th Cir. 2016) (Niemeyer, J., concurring in part and dissenting in part) (quoting the Gloucester County School Board for the proposition that: “[t]he School Board’s policy does not discriminate against any class of students. Instead, the policy was developed to treat all students and situations the same. To respect the safety and privacy of all students, the School Board has had a long-standing practice of limiting the use of restroom and locker room facilities to the corresponding biological sex of the students. The School Board also provides three single-stall bathrooms for any student to use regardless of his or her biological sex”), *vacated and remanded*, 137 S. Ct. 1239 (2017) (mem.).

195. In *Carcaño*, the federal district court considered the safety issue to be primarily an empirical question, on which the state did not proffer sufficient evidence: “the individual transgender Plaintiffs have used facilities corresponding with their gender identity for over a year without posing a safety threat to anyone. Moreover, on the current record, there is no evidence that transgender individuals overall are any more likely to engage in predatory behaviors than other segments of the population.” *Carcaño*, 203 F. Supp. 3d at 652 (internal citations omitted).

specific right to engage in intimate bodily functions without members of the opposite biological sex present, or something in between); and (2) whether the right constitutes a fundamental right under the due process clause such that states have an important interest in protecting that right.

While the Court has acknowledged that “[t]he identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution[.]”¹⁹⁶ the analysis “has not been reduced to any formula.”¹⁹⁷ In *Obergefell*, the Court noted that “[h]istory and tradition [may] guide and discipline th[e] inquiry” into fundamental rights, but that such a historical analysis “do[es] not set its outer boundaries.”¹⁹⁸ Stated differently, history and tradition provide one way, but not the only way, to determine whether an alleged right is fundamental. Thus, even though there was no specific tradition recognizing same-sex marriage, the Court concluded that same-sex couples could exercise the constitutional right to marry because of the “essential attributes of that right based in history, tradition, and other constitutional liberties inherent in this intimate bond.”¹⁹⁹

In *Obergefell*, the Court neither denied the important role history and tradition can play “in identifying interests of the person so fundamental that the State must accord them its respect”²⁰⁰ nor overruled the substantive due process analysis the Court employed in *Washington v. Glucksberg*.²⁰¹ In *Glucksberg*, the Court identified two primary features of its substantive due process analysis:

First, [the Court looks to see if the alleged right is] “deeply rooted in this Nation’s history and tradition,” and “implicit in the concept of ordered liberty,” such that “neither liberty nor justice would exist if they were sacrificed[.]” Second, [the Court] require[s] . . . a “careful description” of the asserted fundamental liberty interest.²⁰²

196. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015).

197. *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

198. *Obergefell*, 135 S. Ct. at 2598 (citing *Lawrence v. Texas*, 539 U.S. 558, 572 (2003)).

199. *Id.* at 2598 (citations omitted); see also *Lawrence*, 539 U.S. at 571–72 (explaining that more recent “laws and traditions . . . show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. ‘[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.’” (quoting *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring) (alteration in original))).

200. *Obergefell*, 135 S. Ct. at 2598 (citing *Poe*, 367 U.S. at 542).

201. 521 U.S. 702 (1997).

202. *Id.* at 720–21 (citations omitted).

Accordingly, history and tradition, coupled with the specificity requirement, serve to “direct and restrain” the Court so that the Justices do not use broad characterizations of rights to implement their own policy preferences.²⁰³ Moreover, if the Court determines that there is a fundamental right, then the government cannot infringe on that right “*at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.”²⁰⁴

Although the lower federal courts framed the right in slightly different ways, they found a history and tradition protecting the right of bodily privacy in not exposing one’s (or involuntarily being exposed to another’s) naked or partially clothed body. For example, in *Faulkner v. Jones*,²⁰⁵ the Fourth Circuit acknowledged “society’s undisputed approval of separate public rest rooms for men and women based on privacy concerns.”²⁰⁶ According to the Fourth Circuit panel, “[t]he need for privacy justifies separation and the differences between the genders demand a facility for each gender that is different.”²⁰⁷ Similarly, in *Lee v. Downs*,²⁰⁸ the Fourth Circuit recognized that, even though prisoners “surrender many rights of privacy[,]” they, like “[m]ost people, . . . have a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be especially demeaning and humiliating.”²⁰⁹ More recently, in his dissent in *G.G. ex rel Grimm*, Judge Niemeyer invoked the longstanding history and tradition that has supported separating bathrooms and other similar facilities based on biological sex: “Across societies and throughout history, it has been commonplace and universally accepted to separate public restrooms, locker rooms, and shower facilities on the basis of biological sex in order to address privacy and safety concerns arising from the biological differences between males and females.”²¹⁰ According to Judge Niemeyer, the interest in not having one’s “nude or partially nude body, genitalia, and other private parts . . . exposed to persons of the opposite biological sex . . . is inherent in the nature

203. *Id.* at 721.

204. *Reno v. Flores*, 507 U.S. 292, 302 (1993) (citations omitted).

205. 10 F.3d 226 (4th Cir. 1993).

206. *Id.* at 232.

207. *Id.*

208. 641 F.2d 1117 (4th Cir. 1981).

209. *Id.* at 1119.

210. *G.G. ex rel Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 734 (4th Cir. 2016) (Niemeyer, J., concurring in part and dissenting in part) *vacated and remanded*, 137 S. Ct. 1239 (2017) (mem.).

and dignity of humankind.”²¹¹ Drawing on these precedents when evaluating H.B. 2, the Middle District of North Carolina determined that “[t]here is no question that the protection of bodily privacy is an important government interest and that the State may promote this interest by excluding members of the opposite sex from places in which individuals are likely to engage in intimate bodily functions.”²¹²

The Third, Sixth, Seventh, and Ninth Circuits have reached the same conclusion—that there is “a constitutionally protected privacy interest in [one’s] partially clothed body” that is implicated “particularly while in the presence of members of the opposite sex.”²¹³ As the Ninth Circuit noted in *York v. Story*,²¹⁴ “[t]he desire to shield one’s unclothed figure from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity.”²¹⁵ And the Sixth Circuit explained in *Brannum v. Overton County School Board*²¹⁶ that “the constitutional right to privacy . . . includes the right to shield one’s body from exposure to viewing by the opposite sex.”²¹⁷ Moreover, the Sixth and Seventh Circuits have indicated that “[t]his interest is particularly strong with regard to minors.”²¹⁸

Based on this well-established history and tradition of protecting bodily privacy, many lower federal courts have concluded that individuals have a substantive due process right to avoid exposing their naked or partially clothed body to members of the opposite biological sex. As a result, the government has an important interest in protecting this fundamental right, and sex-segregated bathrooms are substantially related to that interest (by excluding members of the opposite biological sex from facilities where individuals are partially

211. *Id.* (citations omitted).

212. *Carcaño v. McCrory*, 203 F. Supp. 3d 615, 641 (M.D.N.C. 2016) (citations omitted).

213. *Doe v. Luzerne Cty.*, 660 F.3d 169, 176–77 (3d Cir. 2011).

214. 324 F.2d 450 (9th Cir. 1963).

215. *Id.* at 455; *see also Sepulveda v. Ramirez*, 967 F.2d 1413, 1416 (9th Cir. 1992) (concluding that “[t]he right to bodily privacy is fundamental” and stating that “common sense” and “decency” protect a parolee’s right not to be observed by a parole officer of the opposite sex when giving a urine sample).

216. 516 F.3d 489 (6th Cir. 2008).

217. *Id.* at 494.

218. *See Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598, 604 (6th Cir. 2005) (“Students of course have a significant privacy interest in their unclothed bodies.”); *Doe v. Renfrow*, 631 F.2d 91, 92–93 (7th Cir. 1980) (stating that it “does not require a constitutional scholar” to determine that strip searches violate a student’s right to privacy).

clothed or naked).²¹⁹ Consequently, instead of arguing that the government does not have an important interest in protecting bodily privacy or that sex-segregated facilities are not substantially related to that interest, plaintiffs who challenged H.B.2 had to contend that “sex” refers to differences in gender identity, not just physiological differences.²²⁰ Under this interpretation, bodily privacy interests pertain to differences in gender identity, not physiology. Thus, segregating restrooms based on biological sex is not substantially related to the government’s important interest in bodily privacy, which is rooted in gender identity differences. Individuals who self-identify as male, therefore, must be allowed to use the men’s restroom, and those who self-identify as female must be allowed to use the women’s restroom.

The central difficulty with this line of argument is that neither the Supreme Court nor the history and tradition the lower federal courts discussed have relied on gender identity to distinguish between men and women for purposes of bodily privacy. In fact, while the Supreme Court repeatedly has rejected “overbroad generalizations about the different talents, capacities, or preferences” of men and women, in at least two cases it has confirmed that physiological differences establish real distinctions that may warrant disparate treatment.²²¹ In *United States v. Virginia*, the Court held that the Virginia Military Institute (“VMI”) could not “constitutionally deny to women who have the will and capacity, the training and attendant opportunities that VMI uniquely affords.”²²² At the same time, the Court recognized that “[p]hysical differences between men and women . . . are enduring” and confirmed its prior conclusion in *Ballard v. United States*²²³ that “the two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.”²²⁴ Moreover, the Court expressly linked these physiological differences to privacy concerns, acknowledging that “[a]dmitting women to VMI would undoubtedly

219. *Carcaño v. McCrory*, 203 F. Supp. 3d 615, 641 (M.D.N.C. 2016). (“All parties agree that bodily privacy qualifies as an important State interest and that sex-segregated facilities are substantially related to that interest.”).

220. Memorandum of Law in Support of Plaintiffs’ Motion for Preliminary Injunction at 9–10, *Carcaño v. McCrory*, No. 1:16-cv-00236-TDS-JEP (M.D.N.C. May 16, 2016).

221. *United States v. Virginia*, 518 U.S. 515, 533 (1996) (citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643, 648 (1975)); *Califano v. Goldfarb*, 430 U.S. 199, 223–24 (1977) (Stevens, J., concurring in the judgment).

222. *Id.* at 542.

223. 329 U.S. 187 (1946).

224. *Virginia*, 518 U.S. at 533 (quoting *Ballard*, 329 U.S. at 193).

require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs.”²²⁵

Similarly, in *Nguyen v. Immigration and Naturalization Service*,²²⁶ the Court concluded that the “use of gender specific terms” is constitutionally permissible under the equal protection clause when the law at issue “takes into account a biological difference” between males and females.²²⁷ In *Nguyen*, the Immigration and Naturalization Service (“INS”) “impose[d] a set of requirements on the children of citizen fathers born abroad and out of wedlock to a noncitizen mother that are not imposed under like circumstances when the citizen parent is the mother.”²²⁸ The Court denied the claim that the INS policy was predicated on overbroad generalizations about the capacities of mothers and fathers, concluding that “the difference does not result from some stereotype” because “[t]here is nothing irrational or improper in the recognition that at the moment of birth . . . the mother’s knowledge of the child and the fact of parenthood have been established in a way not guaranteed in the case of the unwed father. This is not a stereotype.”²²⁹ In fact, the Court emphasized that refusing to recognize basic physiological differences could undermine equal protection:

To fail to acknowledge even our most basic biological differences . . . risks making the guarantee of equal protection superficial, and so disserving it. Mechanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real. The distinction embodied in the statutory scheme here at issue is not marked by misconception and prejudice, nor does it show disrespect for either class. The difference between men and women in relation to the birth process is a real one, and the principle of equal

225. *Id.* at 550 n.19; *see also id.* at 540 (“And it is uncontested that women’s admission would require accommodations, primarily in arranging housing assignments and physical training programs for female cadets.”); Act of Oct. 7, 1975 Pub. L. No. 94-106 § 803(a), 89 Stat. 531, 537 (codified at 10 U.S.C. § 4342 note (2012)) (stating that the academic and other standards for women admitted to the military academies “shall be the same as those required for male individuals, except for those minimum essential adjustments in such standards required because of physiological differences between male and female individuals”) (cited approvingly in *Virginia*, 518 U.S. at 550 n.19).

226. 533 U.S. 53 (2001).

227. *Id.* at 64.

228. *Id.* at 59–60.

229. *Id.* at 68.

protection does not forbid Congress to address the problem at hand in a manner specific to each gender.²³⁰

Likewise, in regard to H.B. 2, the differences between men and women with respect to anatomy and intimate bodily functions are “real,” such that the equal protection clause does not prevent the government from addressing the privacy issues surrounding bathroom use “in a manner specific to each gender.”²³¹

The lower federal courts also have concluded that physiological differences can justify treating men and women differently under certain circumstances. For example, in *Bauer v. Lynch*,²³² the Fourth Circuit determined that physiological differences warranted different physical fitness standards for male and female applicants.²³³ The appellate court in *Bauer* considered the case of a male applicant for the FBI who failed to complete the required number of push-ups for men and was dismissed from the program even though he would have qualified under the physical fitness standards for female applicants.²³⁴ He sued, claiming a violation of equal protection. The Fourth Circuit rejected his challenge, holding that the FBI could establish different standards for men and women because

[m]en and women simply are not physiologically the same for the purposes of physical fitness programs The Court recognized [in *Virginia*] that, although Virginia’s use of “generalizations about women” could not be used to exclude them from VMI, some differences between the sexes were real, not perceived, and therefore could require accommodations.²³⁵

In fact, the Fourth Circuit has stated in another case that to protect privacy interests, segregating bathrooms based on physiological differences between males and females is justified:

When . . . a gender classification is justified by acknowledged differences [between men and women], identical facilities are not necessarily mandated. Rather, the nature of the difference dictates the type of facility permissible for each gender. The point is illustrated by society’s undisputed approval of separate public rest rooms for men and women based on privacy concerns. The need for privacy justifies separation and the

230. *Id.* at 73.

231. *Id.*

232. 812 F.3d 340 (4th Cir. 2016).

233. *Id.* at 351.

234. *Id.* at 342.

235. *Id.* at 350.

differences between the genders demand a facility for each gender that is different.²³⁶

Drawing on these Supreme Court and Fourth Circuit precedents, the district court in *Carcaño* determined that H.B. 2's bathroom provisions were "substantially related to the State's interest in segregating bathrooms, showers, and other similar facilities on the basis of physiology."²³⁷

Consistent with the Fourth Circuit's analysis in *Bauer* and the district court's conclusion in *Carcaño*, the Second, Third, Sixth, and Ninth Circuits have recognized a right to bodily privacy that encompasses a right not to have one's naked or partially naked body exposed to individuals of the opposite biological sex.²³⁸ In *Johnston v. University of Pittsburgh*,²³⁹ a federal district court reached the same conclusion—the right to bodily privacy relates to biological sex, not gender identity. The *Johnston* court specifically addressed the right of a transgender male to use the men's restrooms and locker rooms at the University of Pittsburgh at Johnstown.²⁴⁰ The court ultimately rejected the plaintiff's claim that biological sex-segregated facilities constitute sex discrimination under the equal protection clause. According to the court, sex-based discrimination for equal protection

236. *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993) (emphasis omitted).

237. *Carcaño v. McCrory*, 203 F. Supp. 3d 615, 644 (M.D.N.C. 2016). The district court went on to conclude that H.B. 2's "use of birth certificates as a proxy for sex is substantially related to the State's privacy interest in separating individuals with different physiologies." *Id.*

238. *See Doe v. Luzerne Cty.*, 660 F.3d 169, 176–77 (3d Cir. 2011) (explaining that an individual has "a constitutionally protected privacy interest in his or her partially clothed body" which exists "particularly while in the presence of members of the opposite sex"); *Brannum v. Overton Cty. Sch. Bd.*, 516 F.3d 489, 494 (6th Cir. 2008) (noting that "the constitutional right to privacy . . . includes the right to shield one's body from exposure to viewing by the opposite sex" (citations omitted)); *Poe v. Leonard*, 282 F.3d 123, 137 (2d Cir. 2002) (concluding "that female inmates had a privacy interest in protecting themselves from 'the involuntary viewing of private parts of the body' by prison guards of the opposite sex" (quoting *Forts v. Ward*, 621 F.2d 1210, 1217 (2d Cir. 1980))); *id.* at 138–39 ("[T]here is a right to privacy in one's unclothed or partially unclothed body, regardless whether that right is established through the auspices of the Fourth Amendment or the Fourteenth Amendment."); *Sepulveda v. Ramirez*, 967 F.2d 1413, 1416 (9th Cir. 1992) (recognizing that "[t]he right to bodily privacy is fundamental" and that "common sense, decency, and [state] regulations" mandate that a parolee not be forced to produce a urine sample while being observed by an officer of the opposite sex); *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963) ("We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed figure from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity.").

239. 97 F. Supp. 3d 657 (W.D. Pa. 2015).

240. *Id.* at 661.

purposes requires discrimination based on biological sex: “separating students by sex based on biological considerations—which involves the physical differences between men and women—for restroom and locker room use simply does not violate the Equal Protection Clause.”²⁴¹ Consequently, the court determined that only rational basis review applied.²⁴² Yet the court went on to explain that, even if intermediate scrutiny were to apply, the defendant’s policy of segregating restrooms and locker rooms based on biological sex would satisfy that standard given the state’s interest in securing the privacy right the students have to disrobe outside the presence of those of the opposite sex: “[The University] explained that its policy is based on the need to ensure the privacy of its students to disrobe and shower outside of the presence of members of the opposite sex. This justification has been repeatedly upheld by courts.”²⁴³

Thus, North Carolina has an important interest in protecting the substantive due process privacy right of its citizens to disrobe or to engage in intimate bodily functions without members of the opposite biological sex being in the same restroom, shower, locker room, or similar changing facility. Moreover, H.B. 2 was substantially related to that interest. In fact, H.B. 2 specifically addressed that issue by prohibiting people of one biological sex from using the same bathroom facilities (and showers and locker rooms) as those of the other biological sex, which is the particular privacy interest at issue. Because individuals generally, and students in particular, have a right not to be partially clothed or naked in front of members of the opposite biological sex, H.B. 2 ensured that the different biological sexes would use separate facilities when engaged in personal, intimate bodily activities.

III. THE FEDERALISM AND SPENDING CLAUSE CHALLENGES TO THE DEPARTMENTS’ NATIONAL TRANSGENDER BATHROOM POLICY

Under the spending clause, Congress has the authority “to pay the Debts and provide for the . . . general Welfare of the United States.”²⁴⁴ In the exercise of this express power, Congress may offer federal funds to the states and impose conditions on those moneys to “ensure that the funds are used by the states to ‘provide for the . . .

241. *Id.* at 670.

242. *Id.* at 668.

243. *Id.* at 669 (citing *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224 (10th Cir. 2007)).

244. U.S. CONST. art. I, § 8, cl. 1.

general Welfare’ in the manner Congress intended.”²⁴⁵ Moreover, Congress’s power “to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.”²⁴⁶ Consequently, Congress can use its spending power to “encourage a State to regulate in a particular way, [and] influenc[e] a State’s policy choices,”²⁴⁷ going so far as to condition federal funding on the states’ “taking certain actions that Congress could not require them to take” directly.²⁴⁸ Both Title IX and VAWA were passed pursuant to Congress’s spending power.²⁴⁹ Thus, the constitutionality of these Acts depends in the first instance on whether Departments’ conditioning the preexisting funding to the states exceeds Congress’s spending clause authority.

Although Congress’s spending clause power is broad, it is not unlimited. Because Congress is not restricted to the objectives within Article I’s “enumerated legislative fields” when spending for the general welfare,²⁵⁰ the Court has looked to federalism principles (rather than the express provisions of Article I, Section 8) to discern the proper boundaries of Congress’s power. To respect the sovereignty of states within our federal system, “the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’s instructions.”²⁵¹ While Congress can impose certain conditions on a state’s receipt of federal funds, the constitutionality of Congress’s use of the spending power “rests on whether the State voluntarily and knowingly accepts the

245. *NFIB v. Sebelius*, 567 U.S. 519, 576 (2012) (quoting U.S. CONST. art. I, § 8, cl. 1).

246. *United States v. Butler*, 297 U.S. 1, 66 (1936).

247. *New York v. United States*, 505 U.S. 144, 166 (1992); see also *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980) (plurality opinion of Burger, C.J.) (noting that Congress may use its spending power “to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives”).

248. *Coll. Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999); see also *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (conditioning five percent of federal highway funds on each state’s raising its drinking age to twenty-one “even if Congress may not regulate drinking ages directly” under the Twenty-first Amendment to the United States Constitution).

249. *Jackson v. Birmingham Bd. Of Educ.*, 544 U.S. 167, 181 (2005) (“Title IX was enacted as an exercise of Congress’s powers under the Spending Clause.”); Pub. L. No. 103-322, 108 Stat. 1916 (1994) (codified as amended in scattered sections of 42 U.S.C.) (authorizing \$1.62 billion in federal funds over six years for a wide range of programs to help address the problem of violence against women); Sally F. Goldfarb, *The Supreme Court, the Violence Against Women Act, and the Use and Abuse of Federalism*, 71 *FORDHAM L. REV.* 57, 101 (2002).

250. *Butler*, 297 U.S. at 65–66.

251. *New York*, 505 U.S. at 162 (citing *Coyle v. Smith*, 221 U.S. 559, 565 (1911)).

terms of the ‘contract’” with the federal government.²⁵² If the financial incentives Congress dangles in front of the states to get them to adopt federal policies become coercive (i.e., if “pressure turns into compulsion”²⁵³), then the blandishments function as a stick, forcing States to implement the federal program and undermining the federalism balance that the Founders struck. Accordingly, to determine whether the Departments’ guidelines violate the spending clause, courts must carefully review the specific funding conditions as well as the underlying principles of federalism that serve as a primary check on Congress’s exercise of its spending power.

A. Federalism as a Limit on Congress’s Enumerated Powers

That federalism principles provide a check on congressional power is not surprising given that federalism is one of the defining characteristics of the United States’s republican form of government: “Federalism was our Nation’s own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other.”²⁵⁴

James Madison described the unique attributes of American federalism in Federalist No. 51:

In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will controul each other; at the same time that each will be controuled by itself.²⁵⁵

The Framers predicated this dual system on a novel and “what might at first seem a counterintuitive insight, that ‘freedom is enhanced by the creation of two governments, not one.’”²⁵⁶ The

252. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (citing *Steward Mach. Co. v. Davis*, 301 U.S. 548, 585–98 (1937)).

253. *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937).

254. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

255. THE FEDERALIST NO. 51, at 351 (James Madison) (Jacob E. Cooke ed., 1961).

256. *Bond v. United States*, 564 U.S. 211, 220–21 (2011) (quoting *Alden v. Maine*, 527 U.S. 706, 758 (1999)); see also *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (“Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.”).

freedom to be protected was that of individual citizens, who, as Alexander Hamilton asserted, are “the only proper objects of government.”²⁵⁷ Thus, the federal and state governments, working within their respective spheres of authority, would operate directly on the constituents of the nation and of each state: “The government of the Union, like that of each state, must be able to address itself immediately to the hopes and fears of individuals.”²⁵⁸ The other alternative the Founders considered—requiring Congress to get the approval of the states before legislating²⁵⁹—was rejected because “it might require the federal government to coerce the States into implementing legislation.”²⁶⁰ Thus, under our federal system, “even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.”²⁶¹

To ensure the liberty of individuals, the Court has recognized the need to protect the distinct spheres of the state and federal governments. The Court has emphasized that Congress lacks the authority to “commandeer[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.”²⁶² The federal government cannot force “the States to promulgate and enforce [federal] laws and regulations.”²⁶³ Given its broad enumerated powers under Article I, Section 8, “Congress has

257. THE FEDERALIST NO. 15, at 95 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

258. THE FEDERALIST NO. 16, at 102–03 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

259. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 243–44 (Max Farrand ed., 1911).

260. *New York v. United States*, 505 U.S. 144, 164 (1992); *see also* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 197 (Jonathan Elliot ed., 2d ed. 1836) (noting that Oliver Ellsworth explained to the Connecticut delegation that “[t]his Constitution does not attempt to coerce sovereign bodies, states, in their political capacity . . . But this legal coercion singles out the . . . individual.”); 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 256 (Jonathan Elliot ed., 2d ed. 1836) (quoting Charles Pinckney’s statement to the South Carolina House of Representatives that “the necessity of having a government which should at once operate upon the people, and not upon the states, was conceived to be indispensable by every delegation present”); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 9 (Max Farrand ed., 1911) (noting that James Madison said “[t]he practicability of making laws, with coercive sanctions, for the States as political bodies, had been exploded on all hands”).

261. *New York*, 505 U.S. at 166 (citations omitted).

262. *Id.* at 161 (citing *Hodel v. Va. Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 288 (1981)).

263. *Id.* at 161 (quoting *FERC v. Mississippi*, 456 U.S. 742, 762 (1982)).

substantial powers to govern the Nation directly, including in areas of intimate concern to the States,”²⁶⁴ but Congress must exercise that power “directly upon the citizens” instead of directly on the states (as was the case under the Articles of Confederation).²⁶⁵ In this way, the Constitution protects the sovereignty of the federal and state governments, precluding either from undermining the proper authority of the other. As Chief Justice Chase famously said, “[t]he Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.”²⁶⁶

Although Congress cannot directly coerce, commandeer, or compel a state’s legislative or executive branch to act, Congress may use its spending power “to encourage a State to regulate in a particular way . . . [by] hold[ing] out incentives to the States as a method of influencing a State’s policy choices.”²⁶⁷ But even in the spending clause context, the Court has recognized that federalism principles restrict the scope of congressional authority even though, as the Court noted in *United States v. Butler*,²⁶⁸ the spending power “is not limited by the direct grants of legislative power found in the Constitution.”²⁶⁹ Congress is permitted to tax and spend for “the . . . general Welfare,”²⁷⁰ which gives Congress broad authority, untethered from the express enumerated fields in the rest of Article I, Section 8.²⁷¹ Not surprisingly, then, the Court has looked to the dual sovereign system to impose some limit on Congress’s spending power. Given the federal government’s expansive financial resources, absent a structural limit on the spending power, Congress could “tear down the barriers, to invade the states’ jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed.”²⁷² If the federal government could use financial incentives to coerce states to act in a certain manner, then “the two-

264. *Id.* at 162.

265. *Lane Cty. v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1868).

266. *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1869); *see also* *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) (“[T]he States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.”); *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 523 (1926) (“[N]either government may destroy the other nor curtail in any substantial manner the exercise of its powers.”).

267. *New York*, 505 U.S. at 166.

268. 297 U.S. 1 (1936).

269. *Id.* at 66.

270. U.S. CONST. art. I, § 8, cl. 1.

271. *See Helvering v. Davis*, 301 U.S. 619, 640–41 (1937) (discussing Congress’s broad discretion to determine the meaning of “general welfare”).

272. *Butler*, 297 U.S. at 78; *see also* *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 654–55 (1999) (Kennedy, J., dissenting).

government system established by the Framers would give way to a system that vests power in one central government, and individual liberty would suffer.”²⁷³ And, as discussed more fully below, this is why the Court strikes down legislation passed under Congress’s spending power if it passes the point at which “pressure turns into compulsion.”²⁷⁴

In addition to respecting the sovereignty of the states, adhering to federalism limits under the Constitution protects the integrity of the political system, ensuring that voters know whom to hold accountable for governmental actions: “[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.”²⁷⁵ Coercive spending provisions in federal legislation do the same thing, undermining political accountability by effectively forcing states to adopt federal policy:

Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate’s preferences; state officials remain accountable to the people. By contrast, where the Federal Government compels States to regulate [either directly or through spending provisions], the accountability of both state and federal officials is diminished.²⁷⁶

This is true with respect to legislative and administrative policy as well as with regard to areas traditionally left to the states, such as education: “Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory.”²⁷⁷

273. *NFIB v. Sebelius*, 567 U.S. 519, 577 (2012).

274. *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937).

275. *New York v. United States*, 505 U.S. 144, 169 (1992).

276. *Id.* at 168.

277. *United States v. Lopez*, 514 U.S. 549, 577 (1995) (Kennedy, J., concurring) (citations omitted).

B. Withholding All Title IX Funding Would Have Exceeded Congress's Spending Clause Power

Because states are separate and distinct sovereigns within our federal system, Congress cannot “require the States to govern according to Congress’s instructions.”²⁷⁸ Rather, under the spending clause, Congress may condition federal funding on the states’ agreeing to terms in the underlying legislation.²⁷⁹ Congress offers states certain funds to advance (what Congress determines to be) the general welfare of the nation, and the states then determine whether to accept the federal government’s offer.²⁸⁰ This is why the Supreme Court has “repeatedly characterized . . . spending clause legislation ‘much in the nature of a *contract*.’”²⁸¹ Whether Congress exceeds its authority under the spending clause (by impermissibly trenching on the sovereignty of the states) “rests on whether the State voluntarily and knowingly accepts the terms of the ‘contract.’”²⁸² Thus, Congress can use its spending power to “encourage a State to regulate in a particular way . . . [and] influenc[e] a State’s policy choices,”²⁸³ but cannot “us[e] financial inducements to exert a ‘power akin to undue influence.’”²⁸⁴

In the “typical case” where states have an actual choice whether to accept or reject federal funding, the Court requires states “to defend their prerogatives by adopting ‘the simple expedient of not yielding’ to federal blandishments when they do not want to embrace the federal policies as their own.”²⁸⁵ When the state is free to take or leave the proposed conditions, state officials, not federal authorities, are politically accountable for their decision. Voters can use the voting booth to reward or punish state officials for adopting the

278. *New York*, 505 U.S. at 162 (citing *Coyle v. Smith*, 221 U.S. 559, 565 (1911)).

279. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (“[I]n return for federal funds, the States agree to comply with federally imposed conditions.”).

280. *See Barnes v. Gorman*, 536 U.S. 181, 186 (2002) (explaining that “[j]ust as a valid contract requires offer and acceptance of its terms,” Congress properly exercises its spending power only if “the [recipient] voluntarily and knowingly accepts the terms of the ‘contract’”).

281. *Id.* (quoting *Pennhurst State Sch. & Hosp.*, 451 U.S. at 17); *see also Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 640 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998); *Guardians Ass’n v. Civil Serv. Comm’n of New York*, 463 U.S. 582, 599 (1983); *Id.*, 463 U.S. at 632–33 (Marshall, J., dissenting); *Lau v. Nichols*, 414 U.S. 563, 568–69 (1974).

282. *Pennhurst State Sch. & Hosp.*, 451 U.S. at 17 (citing *Steward Mach. Co. v. Davis*, 301 U.S. 548, 585–98 (1937)).

283. *New York*, 505 U.S. at 166.

284. *NFIB v. Sebelius*, 567 U.S. 519, 577 (2012) (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)).

285. *Id.* at 579 (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 482 (1923)).

proposed federal policy as the state's own. While the federal government may have proposed the contract, state officials accepted the deal, making them responsible for the new state policy.²⁸⁶

Where Congress exerts undue influence over the states, however, state sovereignty and political accountability are threatened. This can occur, as in *Printz v. United States*,²⁸⁷ when the federal government requires the state to take certain actions, as well as when federal officials use their spending power to advance federal objectives while being insulated from political accountability. In *Printz*, Congress sought to enlist local law enforcement officials to conduct background checks on handgun purchasers.²⁸⁸ The government argued that “the background-check provision of the Brady Act did not require state legislative or executive officials to make policy” but only “to assist in the implementation of federal law.”²⁸⁹ The Court rejected this argument, explaining that local officials are “put in the position of taking the blame for its burdensomeness and for its defects.”²⁹⁰ In fact, the danger to political accountability is more acute when Congress legislates under its spending power “because Congress can use that power to implement federal policy it could not impose directly under its enumerated powers.”²⁹¹

1. The Spending Clause Analysis under *South Dakota v. Dole*

In *South Dakota v. Dole*,²⁹² the Court set out four factors for determining whether Congress exceeds its spending clause authority under the Constitution in a given case.²⁹³ Under *Dole*, legislation passed pursuant to the spending power is constitutional if it (1) is in furtherance of the general welfare, (2) specifies the conditions “unambiguously . . . enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation,” (3) is germane to the federal project or program at issue, and (4) does not condition the receipt of federal funding on a state's engaging in unconstitutional conduct (e.g., Congress cannot require states to pass

286. Of course, if voters do not approve of the federal spending policy (i.e., the contract that Congress proposed), they can vote out the federal officials for their part in the spending clause contract.

287. 521 U.S. 898 (1997).

288. *Id.* at 903.

289. *Id.* at 926–27.

290. *Id.* at 930; *see also id.* (“[I]t will be the CLEO and not some federal official who stands between the gun purchaser and immediate possession of his gun.”).

291. *NFIB v. Sebelius*, 567 U.S. 519, 578 (2012).

292. 483 U.S. 203 (1987).

293. *Id.* at 207–08.

laws banning all abortions in order to receive grants under a federal funding program).²⁹⁴

The first and fourth *Dole* factors derive directly from the language of the Constitution but, in practice, do not impose much of a limit on Congress. Given that Congress has the express power under Article I to tax and spend for “the . . . general Welfare,”²⁹⁵ “courts should defer substantially to the judgment of Congress.”²⁹⁶ In fact, the level of deference is so great that the Court has suggested that the “general welfare” may not be a judicially enforceable restriction.²⁹⁷ The fourth factor recognizes that other provisions of the Constitution might prohibit certain spending conditions, but as *Dole* made clear, “the constitutional limitations on Congress when exercising its spending power are less exacting than those on its authority to regulate directly.”²⁹⁸ All that *Dole* requires is that Congress not use its spending power “to induce States to engage in activities that would themselves be unconstitutional.”²⁹⁹ In *Dole*, the Constitution did not preclude Congress’s conditioning a portion of federal highway funds on a state’s raising its drinking age to twenty-one because such an action “would not violate the constitutional rights of anyone.”³⁰⁰ Congress simply proposed a condition “which the state [was] free at [its] pleasure to disregard or to fulfill.”³⁰¹

In the wake of *Dole*, the germaneness requirement also is routinely met. The Court concluded that conditioning five percent of federal highway moneys on a state’s raising its minimum drinking age was “directly related to one of the main purposes for which highway funds are expended—safe interstate travel”—even though the condition did not directly govern how states spent federal funds for the construction and maintenance of highways.³⁰² All the Court required was that the spending condition be “reasonably calculated to

294. *Id.* (citations omitted) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

295. U.S. CONST. art. I, § 8, cl. 1.

296. *Dole*, 483 U.S. at 207 (citations omitted).

297. *Buckley v. Valeo*, 424 U.S. 1, 90–91 (1976) (per curiam).

298. *Dole*, 483 U.S. at 209.

299. *Id.* at 210.

300. *Id.* at 211.

301. *Steward Mach. Co. v. Davis*, 301 U.S. 548, 595 (1937).

302. *Dole*, 483 U.S. at 208 (citing 23 U.S.C. § 101(b) (1982)). In dissent, Justice O’Connor sought to give more bite to the germaneness requirement, requiring that any conditions be reasonably related to the specific purpose of the program at issue. The drinking age requirement failed her test because it was “not sufficiently related to interstate highway construction to justify so conditioning funds appropriated for that purpose.” *Id.* at 214 (O’Connor, J., dissenting).

address this particular impediment to a purpose for which the funds are expended,”³⁰³ with Congress specifying the purpose, and the Court deferring to Congress as to the reasonableness of the requirement.³⁰⁴

Consequently, as the Supreme Court explained in *Pennhurst State School & Hospital v. Halderman*,³⁰⁵ the central question in spending clause cases is “whether the State voluntarily and knowingly accepts the terms of the ‘contract.’”³⁰⁶ Under the second prong of the *Dole* test, courts must determine whether a valid contract was formed (i.e., whether one sovereign (the state) voluntarily and knowingly accepted the terms offered by the other sovereign (the federal government)).³⁰⁷ Consistent with general contract principles, the “knowing” requirement ensures that the federal government specifies all the material terms of the agreement so that states are aware of what they must do if they accept federal funding: “There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it.”³⁰⁸ This requirement also explains why Congress’s broad spending power “does not include surprising participating States with post-acceptance or ‘retroactive’ conditions.”³⁰⁹ Congress cannot change the terms of the agreement *ex post*. Hence, in *National Federation of Independent Business v. Sebelius*,³¹⁰ (“NFIB”) the Court struck down the Medicaid expansion under the Affordable Care Act (“ACA”)³¹¹ because, among other things, “[a] State could hardly anticipate that Congress’s reservation of the right to ‘alter’ or ‘amend’ the Medicaid program included the power to transform it so dramatically.”³¹²

The voluntariness requirement has received the most attention from the Court. Whether a state can voluntarily accept the conditions tied to federal funding depends largely on the nature and size of the financial inducement that Congress offers. Although states generally can protect their sovereign interests by “the simple expedient of not

303. *Id.* at 209 (majority opinion).

304. *Helvering v. Davis*, 301 U.S. 619, 640–41 (1937).

305. 451 U.S. 1 (1981).

306. *Id.* at 17 (citing *Steward Mach. Co.*, 301 U.S. at 585–98).

307. *See Dole*, 483 U.S. at 207 (citing *Pennhurst State Sch. & Hosp.*, 451 U.S. at 17).

308. *See Pennhurst State Sch. & Hosp.*, 451 U.S. at 17.

309. *Id.* at 25.

310. *NFIB v. Sebelius*, 567 U.S. 519, 585 (2012).

311. The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified in scattered sections of 42 U.S.C.).

312. *NFIB*, 567 U.S. at 584.

yielding”³¹³ to federal financial incentives, at some point, the amount (and possibly the type³¹⁴) of funds becomes “so coercive as to pass the point at which ‘pressure turns into compulsion.’”³¹⁵ In *Dole*, South Dakota’s acceptance of the spending condition was voluntary because Congress threatened to withhold only five percent of certain federal highway funds—“a relatively small percentage” that “offered relatively mild encouragement”—if the state did not increase its drinking age to twenty-one.³¹⁶ Thus, the Court concluded that Congress validly exercised its spending power.³¹⁷

2. Determining When Pressure Turns into Compulsion

In the wake of *Dole*, the critical distinction to be made in evaluating legislation enacted under the spending clause is between encouragement and coercion. While Congress has broad authority to entice states to accept conditions under the spending clause, the federal government cannot cross the point at which “pressure turns into compulsion.”³¹⁸ For at that point, Congress properly can be viewed as “using financial inducements to exert a ‘power akin to undue influence[.]’”³¹⁹ thereby undermining the states’ ability to voluntarily accept the proposed contract. The Supreme Court has not specified exactly how much money must be at issue before a state can claim coercion.³²⁰ Is the inquiry made on a state-by-state basis or

313. *Massachusetts v. Mellon*, 262 U.S. 447, 482 (1923).

314. The Court’s primary focus has been on the amount of the financial inducement. *See infra* text accompanying notes 317–27. But three Justices have also suggested that the source of the funding—whether Congress is conditioning new funds related to the new conditions or is threatening to withhold independent grants—bears on the coercion analysis. *See NFIB*, 567 U.S. at 580 (acknowledging that when “conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes”). And the joint dissenters contend that federalism principles also might limit Congress’s spending power. The nature of the grant—e.g., a substantial grant that was conditioned on a state’s acquiescing to federal policy demands in areas traditionally left to the states—also might impact the spending power analysis. *See id.* at 680–81 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

315. *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)).

316. *Id.*

317. *Id.* at 212.

318. *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937).

319. *NFIB*, 567 U.S. at 577 (quoting *Steward Mach. Co.*, 301 U.S. at 590).

320. Justice Ginsburg addresses this uncertainty directly, wondering how courts should decide whether a state is free to accept the proposed conditions or is being coerced:

Are courts to measure the number of dollars the Federal Government might withhold for noncompliance? The portion of the State’s budget at stake? And which State’s—or States’—budget is determinative: the lead plaintiff, all

should courts consider whether the “average” state would be coerced? Does the total number of dollars at stake determine the coercive nature of the spending conditions? Or should courts consider what percentage of a state’s budget the federal funding constitutes?

Given how important the distinction between inducement and coercion is to the spending clause analysis, one might expect the Court to identify the specific point at which mild encouragement transforms into forced acceptance. But the Court has not done this—not in *Dole*, *Steward Machine*, or *NFIB*. Instead, the Court has acknowledged that there is such a point and then concluded that a particular spending provision either has or has not crossed that line:

The Court in *Steward Machine* did not attempt to ‘fix the outermost line’ where persuasion gives way to coercion. The Court found it ‘[e]nough for present purposes that wherever the line may be, this statute is within it.’ We have no need to fix a line either. It is enough for today that wherever that line may be, this statute is surely beyond it.³²¹

Although not specifying a particular point along the continuum, the joint dissenters in *NFIB* contended that “courts should not conclude that legislation is unconstitutional on this ground unless the coercive nature of an offer is unmistakably clear.”³²²

In *NFIB*, seven justices had no problem concluding that the use of the spending power to expand Medicaid under the ACA crossed the line.³²³ The ACA expanded the scope of Medicaid, making new funds available to the states so long as the states extended coverage to anyone, who, among other qualifications, was under age sixty-five and within 133% of the federal poverty line.³²⁴ If a state refused to provide that new coverage, the ACA imposed a substantial sanction—the loss of all federal Medicaid funds, not simply the new funding related to the expansion of the program.³²⁵ And as Chief Justice Roberts and the joint dissent explained, the total amount threatened was extremely large—whether viewed as a percentage of the average state’s budget

challenging States (26 in this litigation, many with quite different fiscal situations), or some national median?

Id. at 643 (Ginsburg, J., concurring in part and dissenting in part).

321. *See id.* at 585 (majority opinion) (internal citations omitted).

322. *Id.* at 681 (Justices Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

323. *Id.* (“In this case, however, there can be no doubt. . . . If the anticoercion rule does not apply in this case, then there is no such rule.”); *id.* at 585 (majority opinion) (“It is enough for today that wherever that line may be, this statute is surely beyond it.”).

324. *See* 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII) (2006).

325. *See id.* § 1396c; *see also NFIB*, 567 U.S. at 581.

or the percentage of total federal expenditures to the states.³²⁶ Whereas the highway funds at issue in *Dole* amounted to less than half of one percent of South Dakota's budget, the funding at issue in *NFIB* constituted more than ten percent of an average state's budget.³²⁷ Chief Justice Roberts stated that rather than "mild encouragement," the threatened loss of all Medicaid funding was "a gun to the head" of states, a form of "economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion."³²⁸

The joint dissent reached the same conclusion as Chief Justice Roberts but focused more specifically on Congress's overall grants to the states. In 2010, the federal government distributed over \$233 billion to cover costs for pre-expansion Medicaid, an amount that equated to approximately 22% of all combined state expenditures combined.³²⁹ Medicaid consumed a larger percentage of states' budgets than any other item, with "federal funds account[ing] for anywhere from 50% to 83% of each State's total Medicaid expenditures," an amount equal to 64.6% of all Medicaid expenditures across the country.³³⁰ Consequently, the joint dissent rejected the lower court's reasoning that states simply could raise taxes in an amount equal to the revenue lost if they rejected Congress's terms: "[T]he sheer size of this federal spending program in relation to state expenditures means that a state would be very hard pressed to compensate for the loss of federal funds by cutting other spending or raising additional revenue."³³¹

In contrast, the spending provisions in *Dole* would have withheld only \$614.7 million in federal highway funding if every state refused to adopt the twenty-one-year-old drinking age—only 0.19% of all combined state expenditures.³³² And five percent of South Dakota's

326. *NFIB*, 567 U.S. at 581 (majority opinion); *id.* at 682 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

327. *Id.* at 581–82 (majority opinion).

328. *Id.*

329. *Id.* at 682 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting) (citing NAT'L ASS'N OF STATE BUDGET OFFICERS, 2010 STATE EXPENDITURE REPORT: EXAMINING FISCAL 2009–2011 STATE SPENDING 7, 47 (2011)).

330. *Id.* (citing 42 U.S.C. § 1396d(b) (Supp. IV 2010)).

331. *Id.* at 683.

332. *Id.* at 684 (citing KAREN A. FARRELL, NAT'L ASS'N OF STATE BUDGET OFFICERS, STATE EXPENDITURE REPORT 1989, at 10, 84 (1989)). The total amount of federal funds provided for transportation expenditures in 1987 was approximately \$12.3 billion dollars, but the law in *Dole* threatened to withhold five percent of this amount, i.e., \$614.7 million dollars. Act of July 17, 1984, Pub. L. No. 98-363, sec. 158, 98 Stat. 435, 437 (codified at 23 U.S.C. § 158(a)(1) (Supp. V 1987)).

federal highway funds constituted less than one percent of the state's total expenditures.³³³ In comparison, the \$233 billion in federal Medicaid spending that states stood to lose under the ACA was 42.3% of all federal payments to the states,³³⁴ and South Dakota would have “los[t] federal funding equaling 28.9% of its annual state expenditures.”³³⁵ Whereas threatening to withhold 0.19% of all combined state expenditures was properly characterized as “relatively mild encouragement,” the Justices in the *NFIB* majority had no hesitation concluding that the federal government's threatening to withhold \$233 billion (or roughly 21.86% of all state expenditures) was coercive.³³⁶

In light of *Dole* and *NFIB*, the question for courts that would have had to have considered the constitutionality of the Departments' new directives regarding transgender access to bathrooms was whether withholding all education funding under Title IX also crossed the line from encouragement to compulsion. Where on the coercion spectrum did Title IX funding fall? As the joint dissent in *NFIB* pointed out, federal support for elementary and secondary education is substantial but runs a distant second to the federal outlays to states for Medicaid.³³⁷ Federal funding for K-12 education amounts to 12.8% of total federal distributions to the states (roughly \$70.6 billion in 2010), which is only 6.6% of all combined state expenditures.³³⁸ Of course, under Chief Justice Roberts's opinion, conditioning 10% of a state's budget on its accepting Congress's terms is “a gun to the head,” an impermissibly coercive condition that violates Congress's spending power.³³⁹ And, as the joint dissent pointed out, Arizona's federal education funds amounted to 9.8% of Arizona's expenditures.³⁴⁰ This is a significantly smaller percentage than the thirty-three percent Arizona spent on Medicaid³⁴¹ but remains a considerable sum nonetheless.

333. KAREN A. FARRELL, NAT'L ASS'N OF STATE BUDGET OFFICERS, STATE EXPENDITURE REPORT 1989, at 10, 84 (1989).

334. *NFIB*, 567 U.S. at 685 (citing NAT'L ASS'N OF STATE BUDGET OFFICERS, 2010 STATE EXPENDITURE REPORT: EXAMINING FISCAL 2009–2011 STATE SPENDING 7, 10, 47 (2011)).

335. *Id.* (citing NAT'L ASS'N OF STATE BUDGET OFFICERS, 2010 STATE EXPENDITURE REPORT: EXAMINING FISCAL 2009–2011 STATE SPENDING 7, 47 (2011)).

336. *Id.* (quoting *South Dakota v. Dole*, 483 U.S. 203, 211 (1987)).

337. *Id.* at 683.

338. *Id.* (citing NAT'L ASS'N OF STATE BUDGET OFFICERS, 2010 STATE EXPENDITURE REPORT: EXAMINING FISCAL 2009–2011 STATE SPENDING 7, 16 (2011)).

339. *Id.* at 581–82 (majority opinion).

340. *Id.* at 683 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

341. *Id.*

According to Justice Ginsburg, the joint dissent would find coercion if states could not, as a practical matter, resist the proposed federal grant. Under her interpretation of the dissent, “any federal spending program, sufficiently large and well-funded, would be unconstitutional.”³⁴² Withdrawing Medicaid funding was coercive given the sheer size of the program, but states might be able to refuse smaller programs, such as federal funding for K-12 education (or presumably Title IX moneys).³⁴³ Is 6.6% of all state expenditures coercive? Justice Ginsburg thought not but contended that, in the wake of *NFIB*, lower courts lack sufficient guidance to know how to decide this issue.³⁴⁴

3. The States’ Arguments About Why Withholding Title IX Funds Was Coercive

The States challenging the Departments’ guidelines had at least three arguments they could have made to support their claim that the Departments’ threat to withhold all Title IX funding (as well as all VAWA funding) was impermissibly coercive. First, although the total amount of federal funding for Title IX is less than the Medicaid funding at issue in *NFIB*, North Carolina and the other twenty-three states that challenged the Departments’ guidelines in district courts in Texas and Nebraska could have contended that the Departments’ “financial inducement”³⁴⁵ was coercive, passing the point at which “pressure turns into compulsion.”³⁴⁶ Title IX applies to all educational institutions receiving federal funds.³⁴⁷ Accordingly, the amount at issue was greater than the *NFIB* joint dissent’s discussion of federal funding for elementary and secondary education, which amounted to more than \$70.65 billion in 2010.³⁴⁸ Though estimates vary, the Human Rights Campaign reported that North Carolina had approximately \$4.5 billion in Title IX funds at risk.³⁴⁹ If North

342. *Id.* at 642 n.24 (Ginsburg, J., concurring in part and dissenting in part).

343. *Id.*

344. *Id.* at 642.

345. Plaintiffs’ First Amended Complaint for Declaratory and Injunctive Relief, *supra* note 4, at 37–38 (citation omitted).

346. *South Dakota v. Dole*, 483 U.S. 203, 211 (1987) (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)); First Amended Complaint for Declaratory and Injunctive Relief at 44, *Nebraska v. United States*, No. 4:16-CV-03117 (D. Neb. Oct. 21, 2016) (using language from *Dole* and *Steward Machine Company* to support the state’s argument).

347. Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681 (2015).

348. NAT’L ASS’N OF STATE BUDGET OFFICERS, 2010 STATE EXPENDITURE REPORT: EXAMINING FISCAL 2009–2011 STATE SPENDING 16 (2011)

349. In *United States v. North Carolina*, the Intervenor-Defendants contended in their Answer and Counterclaims that “[s]uch a loss [of Title IX funding] would not only impair

Carolina refused to adopt the Departments' guidelines, then it stood to lose an amount equal to 17.9% of its \$25.2 billion in general revenue during the 2015–2016 fiscal year.³⁵⁰ The threat to withhold all Title IX moneys, therefore, put North Carolina in the unconstitutional position of having to choose either to adopt the federal government's new policy or to find a new way to cover lost Title IX funding by taking 17.9% of its revenue from other important programs, or by raising taxes dramatically. As the *NFIB* joint dissent explained, such a choice is impermissibly coercive:

When a heavy federal tax is levied to support a federal program that offers large grants to the States, States may, as a practical matter, be unable to refuse to participate in the federal program and to substitute a state alternative. Even if a State believes that the federal program is ineffective and inefficient, withdrawal would likely force the state to impose a huge tax increase on its residents, and this new state tax would come on top of the federal taxes already paid by residents to support subsidies to participating States.³⁵¹

Texas and the twenty-two other states that sued the Departments stood to lose similarly large amounts of Title IX funding given that school districts across the United States “receive a share of the \$69,867,660,640 in annual funding that the federal government directs to education.”³⁵² The roughly \$70 billion in federal education funding constitutes approximately 9.3% of the total amount states spend on elementary and secondary education.³⁵³ For example, for fiscal year 2016, Texas's Title IX funds (\$5,028,581,142) constituted 18.13% of

the teaching and research mission of UNC, but would also affect K-12 education throughout the State. Local schools would likely be forced to curtail programs, fire teachers and increase class sizes—all to the detriment of the state's hundreds of thousands of schoolchildren.” *Intervenor-Defendants' Answer and Counterclaims* at 32, *United States v. North Carolina*, No. 1:16-cv-00425-TDS-JEO (M.D.N.C. June 30, 2016). Furthermore, the *Intervenor-Defendants* alleged that “the Department's demands carry a threat to cut off over \$100 million in annual federal funding currently provided to the State's Department of Public Safety.” *Id.* at 33.

350. STATEWIDE ACCOUNTING DIV., OFFICE OF THE STATE CONTROLLER, NORTH CAROLINA COMPREHENSIVE ANNUAL FINANCIAL REPORT FOR THE FISCAL YEAR ENDED JUNE 30, 2016, at 51 (2016), https://ncosc.s3.amazonaws.com/s3fs-public/documents/files/2016_comprehensive_annual_financial_report_bookmarked.pdf [<https://perma.cc/54HM-DMFZ>].

351. *NFIB v. Sebelius*, 567 U.S. 519, 680 (2012) (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

352. *Plaintiffs' Application for Preliminary Injunction* at 20, *Texas v. United States*, No. 7:16-cv-00054-0 (N.D. Tex. July 6, 2016).

353. *See id.*

the Texas Education Association's budget (\$27,732,858,771).³⁵⁴ For fiscal year 2017, the percentage is expected to increase to 19.10% of the Texas Education Association's budget.³⁵⁵ The amounts were roughly equivalent for the other plaintiffs in the Texas action.³⁵⁶ Thus, while less than one percent of a state's budget is not coercive, the loss of a much greater percentage of education funding would have been, thereby precluding the executive branch from imposing such a condition on the states.

Second, North Carolina and the other states could have argued that courts must consider not only the coercive effect of the government's conditioning large sums of existing funds on the ability of a state to freely enter into an agreement with the federal government, but also the federalism implications of Congress's having such authority. In support of this position, the states could have relied on the joint dissent in *NFIB*. The joint dissenters proffered an example dealing with education funding to highlight the need to protect areas traditionally left to the states. These Justices considered the impact of federal legislation "offering each State a grant equal to the State's entire annual expenditures for primary and secondary education."³⁵⁷ Under this hypothetical, the federal funds were conditioned on a state's adopting a federal policy dictating "such things as school curriculum, the hiring and tenure of teachers, the drawing of school districts, the length and hours of the school day, the school calendar, a dress code for students, and rules of student discipline."³⁵⁸ Although, as a purely legal matter, states might be able to reject the offer, the amount of funding is so high that, as a practical matter, no state would reject the offer because "its residents would not only be required to pay the federal taxes needed to support this expensive new program, but they would also be forced to pay an equivalent amount in state taxes."³⁵⁹ As a result, the states would have

354. See CONFERENCE COMMITTEE REPORT ON HOUSE BILL NO. 1, 84th Leg., Reg. Sess., art. III, § 1 (Tex. 2015).

355. *Id.*

356. In their Application for Preliminary Injunction, the plaintiffs alleged that Arizona would lose federal funding equal to 19.1% of its public-education budget, Kentucky 17.6% of its primary and secondary education budget, Tennessee 18.6% of its primary and secondary education budget, Alabama \$246 million in federal funds for primary and secondary education, and the Heber-Overgaard Unified School District more than 15% of the district's total budget. See Plaintiffs' Application for Preliminary Injunction, *supra* note 352, at 11 n.22.

357. *NFIB v. Sebelius*, 567 U.S. 519, 680 (2012) (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

358. *Id.* at 680–81.

359. *Id.* at 681.

no choice but to acquiesce to Congress's requirements.³⁶⁰ In so doing, though, "the State and its subdivisions would surrender their traditional authority in the field of education."³⁶¹ Absent the anti-coercion check on the spending clause, Congress could circumvent federalism principles and dictate policy in what heretofore had been viewed as areas, such as education, that historically have been left to the states.³⁶² This example was particularly relevant in the North Carolina actions because the state expressly had invoked federalism principles to defend H.B. 2 and to explain why the Departments should not have been allowed to dictate policy regarding bathroom and locker room access in public schools across the country.³⁶³

Third, North Carolina and the other states that contested the Departments' guidance could have contended that, because spending clause legislation is "much in the nature of a *contract*,"³⁶⁴ neither the federal government nor the states were able to materially alter or impose new conditions under the agreement without satisfying the *Dole* factors anew. According to these states, the Departments' guidance in their May 2016 "Dear Colleague" letter would have imposed new requirements on the states (and hence a new contract), compelling acceptance by threatening to withdraw all existing moneys under the Act going forward.

Not surprisingly, the federal government countered that the Departments' recent instruction that the prohibition on sex

360. See, e.g., *id.* (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) ("When a heavy federal tax is levied to support a federal program that offers large grants to the States, States may, as a practical matter, be unable to refuse to participate in the federal program and to substitute a state alternative."). In her opinion, Justice Ginsburg challenges the speculative nature of the four dissenters' anti-coercion argument, claiming that "[t]he joint dissenters are long on conjecture and short on real-world examples." *Id.* at 642 n.24 (Ginsburg, J., concurring in part and dissenting in part). Based on her understanding of the joint dissent's argument, "all that matters, it appears, is whether States can resist the temptation of a given federal grant" such that "any federal spending program, sufficiently large and well funded, would be unconstitutional." *Id.*

361. *Id.* at 681 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

362. During oral argument in *NFIB*, the Solicitor General acknowledged that under the government's view of the spending clause, Congress would have the power to enact the type of program discussed above. Oral Argument at 39:40–50, *NFIB v. Sebelius*, 567 U.S. 519 (2012) (No. 11-400), <https://www.oyez.org/cases/2011/11-393> [<https://perma.cc/DU2J-DKB2>].

363. Intervenor-Defendants' Answer and Counterclaims, *supra* note 349, at 39 ("Several provisions of the federal Constitution also make clear that the States remain independent sovereigns in the federal system . . . [N]one of those provisions authorizes any arm of the federal government to impose requirements for 'access' to state-owned bathrooms, locker rooms or shower facilities.").

364. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (emphasis added).

discrimination under Title IX also precluded “discrimination based on a student’s gender identity, including discrimination based on a student’s transgender status,” constituted “*significant guidance*” but “does not add requirements to applicable law.”³⁶⁵ Rather than change existing law, the guidance simply “provide[d] information and examples to inform recipients about how the Departments evaluate whether covered entities are complying with their legal obligations.”³⁶⁶ For example, under Title IX, schools “may provide separate toilet, locker room, and shower facilities on the basis of sex.”³⁶⁷ According to the federal government, the Departments had clarified that “sex” includes a student’s expressed gender identity such that under Title IX schools “must allow transgender students access to such facilities consistent with their gender identity.”³⁶⁸ The prohibition on sex discrimination—to which the states previously agreed as a condition of receiving Title IX funds—remains the same; the Departments merely clarified that “sex,” which has caused confusion for schools regarding the rights of transgender students under Title IX, includes gender identity.

In *NFIB*, Justice Ginsburg advanced a similar argument in dissenting from the majority’s spending clause analysis. According to Justice Ginsburg, the Medicaid expansion under the ACA was different from *Dole* because in the Medicaid context, “Congress [had] not threatened to withhold funds earmarked for any other program.”³⁶⁹ Congress connected the changes to Medicaid directly to the funding for Medicaid, which was consistent with its “broad authority to construct or adjust spending programs to meet its contemporary understanding of ‘the General Welfare.’”³⁷⁰ Rather than create an entirely new program, the ACA brought more of America’s poor within Medicaid, thereby furthering Medicaid’s basic goal of helping states provide medical care to “needy persons.”³⁷¹

365. U.S. Dep’t of Educ. & U.S. Dep’t of Justice, *supra* note 3, at 1.

366. *Id.*

367. 34 C.F.R. § 106.33 (2012).

368. U.S. Dep’t of Educ. & U.S. Dep’t of Justice, *supra* note 3, at 3.

369. *NFIB v. Sebelius*, 567 U.S. 519, 631 (2012) (Ginsburg, J., concurring in part and dissenting in part).

370. *Id.* at 635 (quoting *Helvering v. Davis*, 301 U.S. 619, 640–41 (1937)).

371. The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §§ 2001–07, 124 Stat. 119, 271–85 (codified in scattered sections of 42 U.S.C.); S. REP. NO. 89-404, pt. 1, at 3 (1965); *see also* Social Security Amendments Act of 1965, § 121(a), Pub. L. No. 89-97, 79 Stat. 286, 343 (codified as amended at 42 U.S.C. § 301) (stating that the purpose of Medicaid is to enable states “to furnish . . . medical assistance on behalf of [certain persons] whose income and resources are insufficient to meet the costs of necessary medical services”).

According to Justice Ginsburg, the ACA's expansion of Medicaid left "unchanged the vast majority of these [Medicaid] provisions; it add[ed] beneficiaries to the existing program and specifi[e]d the rate at which States [would] be reimbursed for services provided to the added beneficiaries."³⁷² Moreover, Congress viewed the expansion as an amendment to the Medicaid Act, not an entirely novel health care program.³⁷³ Thus, the ACA, like the Departments' significant guidance regarding the scope of Title IX, constituted a change to an existing program. And in Justice Ginsburg's view, conditioning the continued receipt of Medicaid funds on the states' adopting the proffered changes was permissible to advance the general welfare under Congress's broad spending power.

Seven Justices rejected Justice Ginsburg's argument in *NFIB*, and twenty-four states challenging the Departments' directives argued that courts should reject the argument in the Title IX context as well. In *NFIB*, Chief Justice Roberts indicated that determining whether a program is "a modification of the existing [Medicaid] program" is an objective analysis for the courts to make, not Congress.³⁷⁴ The focus must be on whether the change to the program is "properly viewed merely as a modification" or actually constitutes a new program.³⁷⁵ In making this determination, *NFIB* instructs that how "Congress style[s]" the changes to a program "is irrelevant."³⁷⁶ Similarly, courts cannot rely exclusively on "the number of pages the amendment occupies, or the extent to which the change preserves and works within the existing program."³⁷⁷ Instead, courts should consider

372. *NFIB*, 567 U.S. at 634 (Ginsburg, J., concurring in part and dissenting in part); see The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §§ 2001(a)(1), (3), 124 Stat. at 271–72.

373. *NFIB*, 567 U.S. at 635 ("Congress styled and clearly viewed the Medicaid expansion as an amendment to the Medicaid Act, not as a 'new' health-care program."); Elise Viebeck et al., *Conservatives Endorse Latest Republican Plan to Revise Obamacare*, THE WASHINGTON POST (Apr. 26, 2017), https://www.washingtonpost.com/powerpost/conservative-pressure-groups-throw-weight-behind-gop-health-care-deal/2017/04/26/918ad730-2a82-11e7-a616-d7c8a68c1a66_story.html?utm_term=.dd6695f52a75 [https://perma.cc/DDM5-4KQ6] (quoting Michael Needham, Chief Executive, Heritage Action for America, as saying, "[t]o be clear, this is not full repeal.").

374. *NFIB*, 567 U.S. at 582 (majority opinion).

375. *Id.*

376. *Id.*

377. *Id.* at 582 n.13. To illustrate this point, Chief Justice Roberts proffered the example of an alteration to Medicaid that was short and operated within Medicaid's existing framework: "All of a State's citizens are now eligible for Medicaid." Such a proposal "would take up a single line and would not alter any 'operational aspect[] of the program' beyond the eligibility requirements." *Id.* (internal citation omitted). But such a change would "foist an entirely new health care system upon the States" rather than simply modify Medicaid. *Id.*

whether the proposed changes “accomplish[] a shift in kind, not merely degree[,]” analyzing (among other things) “the manner in which the expansion is structured”³⁷⁸

Applying this framework to the proposed expansion of Medicaid under the ACA, Chief Justice Roberts concluded that the ACA’s Medicaid provisions “enlist[ed] the States in a new health care program.”³⁷⁹ Although Congress retained the right to alter or amend Medicaid,³⁸⁰ the ACA transformed Medicaid from a program “designed to cover medical services for four particular categories of the needy” to “an element of a comprehensive national plan to provide universal health insurance coverage.”³⁸¹ Reinforcing the novel nature of the expansion, Congress fashioned a new funding provision to cover the costs of providing services to those made newly eligible under the expansion and established less comprehensive coverage for these new participants. While Congress certainly has the authority to create new programs, *NFIB* held that Congress could not connect acceptance of these new conditions to the states’ pre-existing funding under Medicaid: “Congress is not free to . . . penalize States that choose not to participate in that new program by taking away their existing Medicaid funding.”³⁸² Congress could offer additional funding to states that accept the ACA’s Medicaid provisions and deny such additional funding to any state that refused to abide by the new conditions. But Congress could not “surpris[e] participating States with post-acceptance or ‘retroactive’ conditions”³⁸³ that required states to adhere to a dramatically transformed program or risk losing all pre-existing Medicaid moneys.³⁸⁴

The states that challenged the Departments’ bathroom policy could have argued that Chief Justice Roberts’s reasoning in *NFIB* applied *a fortiori* to the policy. The federal government averred that its guidelines were merely interpretive rules, which served to clarify the obligations and responsibilities of schools under Title IX. According to the Departments, these guidelines did not create a new program or transform Title IX because they did “not add requirements to applicable law[;]” rather, they gave “information and examples to inform recipients about how the Departments evaluate

378. *Id.* at 583–84.

379. *Id.* at 584.

380. See 42 U.S.C. § 1304 (2012) (reserving to Congress “[t]he right to alter, amend, or repeal any provision” of Medicaid).

381. *NFIB*, 567 U.S. at 583.

382. *Id.* at 585.

383. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 25 (1981).

384. See *NFIB*, 567 U.S. at 580.

whether covered entities are complying with their legal obligations.”³⁸⁵ Under *NFIB*, though, courts should look beyond how the government “style[s]” the change and consider the actual impact on the program or, as in this case, statutory requirements. That the guidelines “work[] within the existing [Title IX] program” was not “dispositive.”³⁸⁶ The states maintained that the guidelines (1) imposed an entirely new requirement that substantially altered—and conflicted with—the longstanding understanding of Title IX as precluding discrimination based on biological sex and (2) threatened to withhold all pre-existing Title IX funding if states refused to implement these guidelines. *NFIB*, so the argument goes, prohibits the federal government from doing either—imposing post-acceptance conditions and tying those conditions to pre-existing Title IX funding.³⁸⁷ Thus, conditioning all Title IX (as well as VAWA) funds on a state’s accepting the Departments’ new interpretation of Title IX impermissibly would have placed new requirements on the states. Instead of encouraging states to adopt the new interpretation through additional financial incentives, the federal government threatened to withhold all pre-existing Title IX and VAWA funding. *NFIB* prohibits this type of coercion: “When, for example, such conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes.”³⁸⁸

To support their position, the states could have invoked the Texas federal district court’s recent decision in *Texas v. United States*,³⁸⁹ which granted a nationwide injunction to the thirteen states, various state agencies, and school districts from Texas and Arizona that challenged the federal government’s previous claim “that Title VII and Title IX require that all persons must be afforded the opportunity to have access to restrooms, locker rooms, showers, and other intimate facilities that match their gender identity rather than their biological sex.”³⁹⁰ Although the district court grounded its injunction in the Administrative Procedures Act (“APA”),³⁹¹ its analysis bears directly on the spending clause analysis detailed in *NFIB*.³⁹² Under the APA, agencies may issue interpretative rules and

385. U.S. Dep’t of Educ. & U.S. Dep’t of Justice, *supra* note 3, at 1.

386. *NFIB*, 567 U.S. at 582 n.13.

387. *Id.* at 580; *see also Pennhurst*, 451 U.S. at 25.

388. *NFIB*, 567 U.S. at 580.

389. 201 F. Supp. 3d 810 (N.D. Tex. 2016).

390. *Id.* at 815–16.

391. *Id.* at 815.

392. *See supra* Section III.B.2.

articulate policies without having to subject such rules and policies to public notice and comment.³⁹³ Legislative or substantive rules are different.³⁹⁴ Such substantive rules must be published in the Federal Register to give the public an opportunity to comment on them, the so-called “notice and comment” requirement.³⁹⁵ This requirement enables an agency to understand the impact of its proposed legislative rules and to modify the rules based on the comments of those impacted by the rules.³⁹⁶

Although the APA does not specify what constitutes a legislative or substantive rule, the Supreme Court has held that (1) a “legislative-type rule” is one that “affect[s] substantial individual rights and obligations”³⁹⁷ and (2) “the promulgation of these regulations must conform with any procedural requirements imposed by Congress.”³⁹⁸ Such procedural requirements “assure fairness and mature consideration of rules of general application.”³⁹⁹ According to one circuit court, “the most important factor concerns the actual legal effect (or lack thereof) of the agency action in question on regulated entities.”⁴⁰⁰ A substantive rule “establishes a binding norm,” a “‘line in the sand’ that, once crossed, removes all discretion from the agency.”⁴⁰¹

In the Texas lawsuit, as in the North Carolina and Nebraska actions, the federal government argued that the Departments’ guidelines “[were] interpretative rules and [were] therefore exempt from the notice and comment requirements.”⁴⁰² Consistent with *NFIB*, though, the district court considered how the guidelines operated, not how the government labeled them. Looking at the post-

393. 5 U.S.C. §§ 553(b)(3)(A), (d)(2) (2012).

394. See *Nat’l Min. Ass’n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014) (holding that “[t]he APA divides agency action . . . into three boxes: legislative rules, interpretive rules, and general statements of policy”).

395. 5 U.S.C. §§ 553(b)–(c).

396. See *Prof’ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir. 1995).

397. *Morton v. Ruiz*, 415 U.S. 199, 232 (1974); see also *Chrysler Corp. v. Brown*, 441 U.S. 281, 301 (1979) (“In order for a regulation to have the ‘force and effect of law,’ it must have certain substantive characteristics and be the product of certain procedural requisites.”).

398. *Chrysler Corp.*, 441 U.S. at 303 (citing *Morton*, 415 U.S. at 232).

399. *Id.* (quoting *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969)).

400. *Nat’l Mining Ass’n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014) (first citing *Catawba Cty. v. EPA*, 571 F.3d 20, 33–34 (D.C. Cir. 2009); then citing *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 382 (D.C. Cir. 2002); and then citing *Nat’l Ass’n of Home Builders v. Norton*, 415 F.3d 8, 15 (D.C. Cir. 2005)).

401. *Prof’ls & Patients for Customized Care*, 56 F.3d at 596, 601.

402. *Texas v. United States*, 201 F. Supp. 3d 810, 827 (N.D. Tex. 2016).

guidance events (including the Department of Justice’s lawsuit against North Carolina) and the legal effect of the guidelines, the district court concluded that the Departments’ interpretations “[were] ‘compulsory in nature.’”⁴⁰³ The Departments’ “Dear Colleague” letter expressly stated that schools “must not treat a transgender student differently from the way it treats other students of the same gender identity” and “must allow transgender students access to such facilities consistent with their gender identity.”⁴⁰⁴ At the hearing, the federal government confirmed “that schools not acting in conformity with Defendants’ Guidelines are not in compliance with Title IX.”⁴⁰⁵ Consequently, the district court held that the Departments’ guidelines “[were], in practice, legislative rules—not just interpretations or policy statements because they set clear legal standards.”⁴⁰⁶ As a result, the APA’s notice and comment requirement applied,⁴⁰⁷ and the district court enjoined the Departments for failing to follow the procedural rules set forth in the APA.⁴⁰⁸

The district court’s analysis demonstrates why the Departments’ guidance regarding transgender students constituted a new requirement and not simply an interpretation or clarification of Title IX. Given that the guidance was legislative and substantive, the Departments’ interpretation constituted a novel and substantive change to Title IX. Moreover, that new requirement was connected to the pre-existing Title IX funds, not additional funding that states could elect to accept or reject—a legislative tactic the Supreme Court previously deemed impermissible:

Nothing in our opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care, and requiring that States accepting such funds comply with the conditions on their use. What Congress is not free to do is to penalize States that choose not to participate in that new program by taking away their existing Medicaid funding.⁴⁰⁹

403. *Id.* at 830 (citing *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000)).

404. U.S. Dep’t of Educ. & U.S. Dep’t of Justice, *supra* note 3, at 2–3.

405. *Texas*, 201 F. Supp. 3d at 830 (quoting Transcript of Hearing on Motion for Injunction at 71, *Texas v. United States*, Civil Action No. 7:16-cv-00054-O (N.D. Tex. Aug. 12, 2016)).

406. *Id.* (citing *Panhandle Producers & Royalty Owners Ass’n v. Econ. Regulatory Admin.*, 847 F.2d 1168, 1174 (5th Cir. 1988)).

407. 5 U.S.C. § 553(b)–(c) (2012).

408. *Texas*, 201 F. Supp. 3d at 836.

409. *NFIB v. Sebelius*, 567 U.S. 519, 585 (2012).

Accordingly, even if the Departments had complied with the APA's notice and comment requirement (because the guidance is legislative in nature), their substantive guidance still would have violated the spending clause because the Departments would have been "surprising participating States with post-acceptance or 'retroactive conditions'" instead of "unambiguously" imposing the condition at the time the Title IX moneys originally were offered to the states.⁴¹⁰

To the extent that the Departments wanted to adopt a legislative rule requiring school systems that maintained separate restroom and locker room facilities on the basis of sex to allow transgender students access to such facilities consistent with the students' expressed gender identity, that rule would have had to have gone through the notice and comment requirements under the APA. But even if the Departments had done that, they still could not require public-school systems to either implement that rule or lose all existing Title IX moneys. Since its passage, schools have understood Title IX to allow for bathrooms and locker rooms to be segregated based on biological sex, not gender identity. Regardless of whether one agrees with the Departments' proposed policy, that policy would have imposed new obligations on school systems across the country and threatened to remove all Title IX funding from schools that refused to adopt the policy: "[The Departments'] Guidelines and actions indicate that [states and school systems] jeopardize their federal education funding by choosing not to comply with [the] Guidelines."⁴¹¹ And as *NFIB* explained, imposing such new conditions with the prospects of losing all pre-existing and substantial federal funding violates the spending clause.⁴¹²

410. *Id.* at 583–84 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17, 25 (1981)).

411. *Texas*, 201 F. Supp. 3d at 825; *see also Texas v. EEOC*, 827 F.3d 372, 383 (5th Cir. 2016) ("Instead, 'legal consequences' are created whenever the challenged agency action has the effect of committing the agency itself to a view of the law that, in turn, forces the plaintiff either to alter its conduct, or expose itself to potential liability.").

412. *See NFIB*, 567 U.S. at 585 ("Nothing in our opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care, and requiring that States accepting such funds comply with the conditions on their use. What Congress is not free to do is to penalize States that choose not to participate in that new program by taking away their existing Medicaid funding.").

CONCLUSION

H.B. 2 has been called “the most egregious, sweeping, hate-filled anti-LGBT legislation in this country’s history,”⁴¹³ and whether true or not, North Carolina endured numerous repercussions from that perception. PayPal called off an expansion it had planned for Charlotte.⁴¹⁴ Bruce Springsteen cancelled a concert.⁴¹⁵ Jimmy Buffet said that his decision to continue playing in the state would depend on whether the law was repealed.⁴¹⁶ The NBA moved the 2017 All-Star Game from Charlotte to another city.⁴¹⁷ The NCAA decided that the road to the Final Four would not go through Greensboro.⁴¹⁸ And perhaps most significant to a state where “ACC sports are as much a part of [the] culture as beach music, barbeque and bluegrass,” the state lost 10 neutral-site ACC championship games.⁴¹⁹

These are not the only voices in the public square, however. A small business owner in Charlotte indicated that she and her husband considered moving their business to South Carolina as a result of the Charlotte Ordinance.⁴²⁰ David and Jason Benham, former HGTV

413. *REPEAL NORTH CAROLINA’S ANTI-LGBT LAW*, ACLU, <https://action.aclu.org/secure/NC-repeal-HB2> [<https://perma.cc/QZ87-CH2M>] (last updated Apr. 24, 2016).

414. Rick Rothacker et al., *PayPal Withdraws Plans for Charlotte Expansion Over HB2*, CHARLOTTE OBSERVER (Apr. 5, 2016, 10:15 AM), <http://www.charlotteobserver.com/news/business/article70001502.html> [<https://perma.cc/YQB7-M323>] (noting that PayPal had decided against putting a new operations center that would have employed more than 400 in Charlotte).

415. Bruce Springsteen, *A Statement from Bruce Springsteen on North Carolina*, BRUCE SPRINGSTEEN (Apr. 8, 2016), <http://brucespringsteen.net/news/2016/a-statement-from-bruce-springsteen-on-north-carolina> [<https://perma.cc/9X5X-7LED>] (indicating opposition to H.B. 2 and announcing the cancellation of a concert planned for Greensboro, North Carolina).

416. Aaron Smith, *Jimmy Buffett to Play NC Despite ‘Stupid Law’—Will Reconsider Future Shows*, CNN (Apr. 12, 2016, 8:09 AM), <http://money.cnn.com/2016/04/12/news/jimmy-buffett-north-carolina-mississippi-lgbt/> [<https://perma.cc/DFL7-BXF6>] (“As for the future of shows in North Carolina, it would definitely depend on whether that stupid law is repealed.”).

417. *NBA Statement Regarding 2017 NBA All-Star Game*, NBA (July 21, 2016, 5:36 PM), <http://www.nba.com/2016/news/07/21/nba-statement-all-star-game-relocation-from-charlotte/> [<https://perma.cc/6U89-RQ56>] (announcing the relocation of the All-Star Game).

418. See Andrew Carter, *NCAA Pulls Championship Events from North Carolina over HB2*, NEWS & OBSERVER (Sept. 12, 2016, 7:38 PM), <http://www.newsobserver.com/sports/college/acc/article101457472.html> [<https://perma.cc/W3MP-ZBXD>] (reporting actions the NCAA has taken as a result of H.B. 2).

419. See Andrew Carter, *ACC Moving 2016–17 Championships from NC over HB2*, NEWS & OBSERVER (Sept. 14, 2016, 1:31 PM), <http://www.newsobserver.com/sports/college/acc/article101789597.html> [<https://perma.cc/E25D-AL4Y>].

420. See Katherine Peralta, *For Businesses Backing HB2, Privacy and Religious Freedom are Focal Points*, CHARLOTTE OBSERVER (May 2, 2016, 12:59 PM), <http://www.charlotteobserver.com/news/business/article75129037.html> [<https://perma.cc>

stars and owners of a North Carolina real-estate business, lauded H.B. 2.⁴²¹ And Franklin Graham, the leader of the Billy Graham Evangelistic Association, blamed the loss of major sporting events on Charlotte's city council, not the North Carolina General Assembly.⁴²²

Though the General Assembly has now repealed H.B. 2, both sides have decried the repeal bill,⁴²³ ensuring that public debate will continue—just as the Founders would have expected when they designed our dual system of government. H.B. 2 and laws like it certainly involve very difficult and sensitive issues, and debate about them “all too often may shade into rancor.”⁴²⁴ But the Constitution was not intended to resolve all issues such as these, nor does it permit the federal government to do so. In our federal system, judging the merits of laws like H.B. 2 does not belong to the courthouse or to the White House. It is a task reserved to the statehouse, where citizens, through their elected representatives, can “determine how best to form a consensus to shape the destiny of the Nation and its people.”⁴²⁵

/YH7A-HVDB] (discussing a Charlotte business owner's concerns about the Charlotte Ordinance).

421. *Id.* (noting the Benhams' support of H.B. 2).

422. See Tim Funk, *Franklin Graham Praises McCrory, Blames Charlotte for HB2-Related Disruption*, CHARLOTTE OBSERVER (Oct. 13, 2016, 5:22 PM), <http://www.charlotteobserver.com/living/religion/article108054712.html> [https://perma.cc/E57Y-T2PD] (discussing Franklin Graham's views on H.B. 2).

423. See Craig Jarvis & Colin Campbell, *HB2 off the Books as Gov. Roy Cooper Signs Compromise into Law*, CHARLOTTE OBSERVER (Mar. 30, 2017, 10:12 AM), <http://www.charlotteobserver.com/news/politics-government/article141658044.html> [https://perma.cc/ZN4M-CCTK] (noting various responses to H.B. 2's repeal bill).

424. *Schuette v. Coal. to Def. Affirmative Action, Integration & Immigrant Rights & Fight for Equal.* by Any Means Necessary (BAMN), 134 S. Ct. 1623, 1638 (2014).

425. *Id.* at 1637.