

NOT IN THE NAME OF WOMEN’S SAFETY: WHOLE WOMAN’S HEALTH AS A MODEL FOR TRANSGENDER RIGHTS

SHAYNA MEDLEY*

The Supreme Court’s recent decision in Whole Woman’s Health v. Hellerstedt struck down two burdensome Texas regulations on abortion providers that would have closed seventy-five percent of clinics in the state. The decision has been lauded by the reproductive justice community, not only as a victory for abortion rights, but also as a victory for science, data, and evidence. The Court acknowledged the consensus in the medical community that abortion is a safe procedure, that the clinic regulations could not be proven to increase the safety of even one patient, and that women’s health and safety would dramatically suffer because of, rather than be improved by, the laws. In this Article, I draw connections between the abortion restrictions at issue in Whole Woman’s Health and the recent anti-transgender “bathroom bills” that have cropped up in a number of states over the past couple of years—from the myths and fear campaigns that propel them, to the women’s health and safety justifications that attempt to sustain them—and propose that a correct application of the Whole Woman’s Health precedent similarly necessitates striking these laws down.

TABLE OF CONTENTS

<i>Introduction</i>	442
I. <i>WHOLE WOMAN’S HEALTH AND ITS IMPACT</i>	445
A. <i>The Undue Burden Standard</i>	445
B. <i>The Myths Behind TRAP Laws and the Court’s Response: A Victory For Science, Data, and Evidence</i> ..	448
C. <i>Current Applications of Whole Woman’s Health</i>	449
II. <i>Anti-Trans Laws and Policies</i>	451
A. <i>A Brief History</i>	452
B. <i>Factual and Scientific Inquiry into the Myths and Stereotypes Behind Anti-Trans Bathroom Bills</i>	454
i. <i>Scientific Understanding of Sex and Gender</i>	454
ii. <i>Women’s Safety and the True Causes of Sexual Assault</i>	457
III. <i>Applying the Legal Standard</i>	464

* 2017 Skadden Fellow at the ACLU LGBT & HIV Project; J.D., Harvard Law School, 2017; B.A., Brandeis University 2012. Many thanks to Martha Minow, Khiara Bridges, Mindy Roseman, Douglas NeJaime, Hillary Schneller, Joshua Block, and Chase Strangio for their feedback on this piece.

IV. <i>Looking Ahead</i>	469
Conclusion	473

INTRODUCTION

In the 2015 term, the Supreme Court decided *Whole Woman's Health v. Hellerstedt*¹—a decision that reaffirmed the right to choose established in *Roe v. Wade*² and prevented the closure of many Texas abortion clinics. But *Whole Woman's Health* extends even beyond laws that restrict access to reproductive healthcare. It establishes high standards for data, reintroduces a reliance on scientific evidence that has been missing in much of the Court's jurisprudence, and inserts a healthy dose of skepticism toward asserted state interests that fail to accomplish what they purport to do.

The widespread impact of *Whole Woman's Health* can already be felt in recent voting rights cases, where several judges in Wisconsin and Texas have cited the decision in support of finding voting restrictions unconstitutional that place burdens on minority voters in the name of combating nearly non-existent problems, such as voter fraud.³ In this Article, I advocate for the application of *Whole Woman's Health* to other areas of constitutional law—namely, Fourteenth Amendment challenges to recent bills that restrict transgender individuals' access to public spaces.

Like the Targeted Regulations of Abortion Providers (“TRAP” laws) that have fallen in the wake of *Whole Woman's Health*, anti-transgender “bathroom bills” must also fail under the Court's articulated standard. State legislation targeted at removing transgender people from single-sex spaces, and bathrooms in particular, have cropped up across the nation over the past year. Nineteen states introduced bills that would have restricted transgender people's access to single-sex bathrooms and other facilities in the 2016 legislative session.⁴ Attacks on the transgender community have continued to in-

¹ 136 S. Ct. 2292 (2016).

² 410 U.S. 113 (1973).

³ See *Frank v. Walker*, 196 F. Supp. 3d 893, 915 n.10 (E.D. Wis. 2016) (“The Supreme Court recently reiterated that where a state law burdens a constitutional right, the state must produce evidence supporting its claim that the burden is necessary to further the state's claimed interests.” (citing *Whole Woman's Health*, 136 S. Ct. at 2306–08)); *Veasey v. Abbott*, 830 F.3d 216, 275 n.3 (5th Cir. 2016) (Higginson, J., concurring) (“[A]s the Supreme Court recently reminded, that a state interest is legitimate does not necessarily mean courts should ignore evidence of whether a specific law advances that interest or imposes needless burdens.” (citing *Whole Woman's Health*, 136 S. Ct. 2292)), *cert. denied*, 137 S. Ct. 612 (2017). Imani Gandy, writing for *Rewire*, also notes: “In North Carolina, while *Whole Woman's Health* was not featured in the Circuit Court of Appeals' denunciation of the state's sweeping election law, you can certainly feel its presence.” Imani Gandy, “Whole Woman's Health Breathes New Life into Voting Rights Cases,” *REWIRE* (Aug. 5, 2016, 5:34 PM), <https://rewire.news/article/2016/08/05/whole-womans-health-breathes-new-life-voting-rights-cases/> [<https://perma.cc/WY7L-LURL>].

⁴ See, e.g., Joellen Kralik, “Bathroom Bill” *Legislative Tracking*, NAT'L CONF. ST. LEGISLATURES (Feb. 23, 2017), <http://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking635951130.aspx> [<https://perma.cc/JWT5-58YS>].

crease leading up to and after the 2016 presidential election. A growing number of states, including Texas, Virginia, and Kentucky, have already proposed anti-trans bathroom bills for consideration in 2017.⁵ Civil rights groups have been making strong arguments that policies that exclude transgender people from single-sex spaces violate Title IX and the Fourteenth Amendment's equal protection guarantee even before the Supreme Court's decision in *Whole Woman's Health*,⁶ but the opinion breathes new life into these arguments. *Whole Woman's Health* quashes any remaining doubt about the constitutionality of these bills by mandating judicial inquiry into asserted state interests and the factual validity of the problem the state purports to solve.

In this Article, I argue that *Whole Woman's Health* can and should be used as an important litigation tool to challenge anti-transgender policies, and that a proper reading of the decision leads to their constitutional invalidity. Like TRAP laws, anti-trans bills almost universally claim to serve an interest in women's health and safety. Often these arguments come in the form of fear-mongering campaigns about sexual assault in bathrooms, suggesting that transgender people are sexual predators and that cisgender men will abuse non-discrimination laws to assault women in the bathroom. Data from a number of sources indicate that these occurrences are essentially non-existent, and that discriminatory laws targeting transgender people will not create added deterrence for perpetrators not already deterred by the criminal law.⁷ Rather, it is transgender people who are frequently the targets of assault.⁸ Inaction in passing laws to combat sexual assault against the most vulnerable populations and in spaces where it is most prevalent further calls into question the states' motives in passing discriminatory legislation.

Like the proponents of anti-trans legislation, anti-abortion legislatures relied on (and continue to promote) fear campaigns and feigned health and safety concerns to garner support for their bills. The Texas legislature painted abortion as an unsafe and medically risky procedure to justify the onerous licensing and facility requirements imposed on providers in *Whole Woman's Health*.⁹ However, the plaintiff-providers, relying on scientific studies and expert testimony, both successfully demonstrated that abortion

⁵ *Id.*; see also Joseph D. Lyons, *These States' Anti-Trans Bathroom Bill Proposals Should Be on Your Radar in 2017*, BUSTLE (Jan. 5, 2017), <https://www.bustle.com/p/these-states-anti-trans-bathroom-bill-proposals-should-be-on-your-radar-in-2017-28093> [<https://perma.cc/M7AM-ALFF>].

⁶ Groups like the ACLU and Lambda Legal continue to make equal protection claims in transgender rights cases under sex discrimination and sex stereotyping theories. See, e.g., Brief of Plaintiffs-Appellants at 27–40, *Carcaño v. McCrory*, No. 16-1989 (4th Cir. Oct. 18, 2016) [hereinafter *Carcaño Brief*].

⁷ See, e.g., Carlos Maza & Luke Brinker, *15 Experts Debunk Right-Wing Transgender Bathroom Myth*, MEDIA MATTERS (Mar. 20, 2014, 10:01 AM), <http://mediamatters.org/research/2014/03/20/15-experts-debunk-right-wing-transgender-bathro/198533> [<https://perma.cc/PA5Q-LWXC>].

⁸ See *infra* notes 115–118 and accompanying text.

⁹ See *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2301 (2016).

was extremely safe and called the state's interests into question by pointing to a multitude of riskier procedures that were not similarly regulated.¹⁰ While the Court found state interests in health and safety to be legitimate aims, it held that judges are required to examine the evidentiary support for the interests the state claims to further.¹¹ When a law burdens a constitutional right, those burdens must be weighed against the benefits it serves. While the "undue burden" standard articulated for abortion access cases differs in some ways from the tiers of scrutiny applied in equal protection jurisprudence, the principles for which *Whole Woman's Health* stands—namely, judicial scrutiny of purported state interests—applies in both analyses, as the following sections will explain.

This Article proceeds in four parts. Part I parses the *Whole Woman's Health* decision and the role of data and scientific evidence in the Court's opinion. It surveys the ways in which the decision has been relied on thus far, including its application to similar abortion restrictions, different kinds of reproductive rights, and other areas of constitutional law. Part II expounds on the proposal and passage of recent anti-trans bathroom legislation—including the fear campaigns that surround them and the evidence that dispels them—and draws parallels to the abortion restrictions at issue in *Whole Woman's Health*. Part III then details the applicable legal standard under the Equal Protection Clause of the Fourteenth Amendment and Title IX for sex discrimination cases, explaining why discrimination against transgender people is a form of sex discrimination and stereotyping, and why the principles from *Whole Woman's Health's* are applicable to other areas of constitutional law. Finally, Part IV looks at recent developments in transgender rights cases and the possible applications of the *Whole Woman's Health* to this litigation. It critiques the Supreme Court's intervention in the Fourth Circuit's pro-civil-rights decision in *G.G. ex rel. Grimm v. Gloucester County School Board*,¹² and advocates that litigators and judges rely on the driving principles in *Whole Woman's Health* as precedent for inquiring into the factual validity of states' proffered interests. Taking recent voting rights cases as a model, I advocate for an expansive application of *Whole Woman's Health* in striking down sham legislation with thinly veiled discriminatory motives.

¹⁰ Justice Breyer's majority opinion quoted the district court: "Abortion, as regulated by the State before the enactment of House Bill 2, has been shown to be much safer, in terms of minor and serious complications, than many common medical procedures not subject to such intense regulation and scrutiny." *Id.* at 2302 (quoting *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 684 (W.D. Tex. 2014)) (citing briefs describing the risks associated with colonoscopies, vasectomies, plastic surgery, and other procedures).

¹¹ *Id.* at 2310 ("[T]he Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake." (emphasis omitted) (quoting *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007))).

¹² *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016), *vacated*, No. 16-273, 2017 WL 855755 (U.S. Mar. 6, 2017) (mem.).

I. *WHOLE WOMAN'S HEALTH* AND ITS IMPACT

The standard articulated by the Supreme Court in the recent *Whole Woman's Health* decision emphasized the importance of judicial inquiry into the state's proffered interest for its laws, including when those laws purport to further health and safety goals. This Part situates the *Whole Woman's Health* decision within a brief history of abortion jurisprudence, picking up from the "undue burden" standard first articulated in *Planned Parenthood of Southeastern Pennsylvania v. Casey*¹³ and the subsequent state restrictions on abortion that followed. It examines the recurring themes throughout the Court's opinion that favor scientific facts and data and are skeptical of pretextual state justifications that lack evidentiary foundations. Finally, it traces the other areas of law in which these aspects of the decision have already been applied and the issues scholars have suggested it might impact next.

A. *The Undue Burden Standard*

The Supreme Court's recent decision in *Whole Woman's Health v. Hellerstedt* reaffirmed and clarified the "undue burden" standard—the legal test for evaluating state restrictions on abortion set forth in *Casey*.

In *Casey*, a plurality of the Court held that the state may regulate abortion in the interest of fetal life or women's health, but laws that place an "undue burden" on a woman's right to choose are unconstitutional.¹⁴ An undue burden exists when the "purpose or effect" of unnecessary health regulations "is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."¹⁵ After *Casey*, anti-choice legislatures began passing a cascade of abortion restrictions that continues today.¹⁶ Lower courts struggled to define and apply the undue burden standard.¹⁷ Particular confusion arose surrounding how to treat laws that the state claimed furthered health and safety interests, but had the effect of regulating abortion providers out of operation.¹⁸ As Reva Siegel and Linda Greenhouse explained, however, "*Casey* expresses concern" about pretext-

¹³ 505 U.S. 833 (1992).

¹⁴ *Id.* at 874 (plurality opinion).

¹⁵ *Id.* at 878.

¹⁶ According to the Guttmacher Institute, abortion restrictions were at an all-time low in 1992 before *Casey* was decided, but have since been increasing, with a spike after the 2010 midterm elections. In fact, twenty-seven percent of abortion restrictions passed after *Roe* have been enacted since 2010. *Last Five Years Account for More Than One-Quarter of All Abortion Restrictions Enacted Since Roe*, GUTTMACHER INST. (Jan. 13, 2016), <https://www.guttmacher.org/article/2016/01/last-five-years-account-more-one-quarter-all-abortion-restrictions-enacted-roe> [<https://perma.cc/6A7V-KA6U>].

¹⁷ *See, e.g., Planned Parenthood of Middle Tenn. v. Sundquist*, 38 S.W.3d 1, 16 (Tenn. 2000).

¹⁸ *See* Linda Greenhouse & Reva B. Siegel, *Casey and the Clinic Closings: When "Protecting Health" Obstructs Choice*, 125 *YALE L. J.* 1428, 1431 (2016).

tual laws and “cautions against [u]nnecessary health regulations.”¹⁹ They argued: “To preserve *Casey*’s core . . . judges have to review health-justified restrictions on abortion in order to ensure that they actually serve health-related ends and do not instead protect potential life by unconstitutional means”²⁰ The Court in *Whole Woman’s Health* affirmed this reading of *Casey*.

In *Whole Woman’s Health*, a Texas abortion clinic challenged two restrictions—an admitting privileges and an ambulatory surgical center requirement—that were part of Texas’s House Bill 2 (“H.B. 2”), an omnibus abortion statute placing a number of onerous restrictions on both clinics and patients.²¹ Writing for a 5–3 majority, Justice Breyer clarified that—as the plaintiffs had argued—the undue burden determination involves examining whether the purported benefits of the law outweigh the burdens on the woman’s right to choose.²² The Court concluded that “neither of [the H.B. 2] provisions confers medical benefits sufficient to justify the burdens upon access that each imposes,” and struck them both down as violations of the Fourteenth Amendment’s Due Process Clause.²³

The burdens were clear—the Texas requirements would have shut down seventy-five percent of the abortion clinics in the state,²⁴ severely restricting access for millions of Texas women, and hitting the hardest in rural areas and border towns, largely affecting poor, immigrant women.²⁵ The Court flatly rejected the Fifth Circuit’s articulation of the undue burden standard, in which it had held judges should make no independent inquiry into the validity of the state’s interest in health and safety.²⁶ The Supreme Court clarified that courts should not simply defer to the state’s contention that the regulations provide medical benefits.²⁷ Rather, courts must inquire into the factual support for the purported medical benefits and weigh them against the corresponding burdens.²⁸

¹⁹ *Id.* at 1444 (quoting *Casey*, 505 U.S. at 878 (plurality opinion)) (alteration in original).

²⁰ *Id.* at 1445.

²¹ *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016). The admitting privileges provision required all physicians performing abortions to obtain admitting privileges at a local hospital within thirty miles of the clinic. TEX. HEALTH & SAFETY CODE ANN. § 245.010(a) (West 2016); *see id.* § 171.0031. The ambulatory surgical center provision required clinics to meet the minimum standards for ambulatory surgical centers in Texas, which included a long list of facility requirements about the plumbing, heating, lighting, ventilation, facility equipment, and hygienic conditions of the clinic. TEX. HEALTH & SAFETY CODE ANN. §§ 243.010, 245.010(a) (West 2010).

²² *Whole Woman’s Health*, 136 S. Ct. at 2310.

²³ *Id.* at 2300.

²⁴ *Id.* at 2301. The district court concluded over forty clinics were open before the law, and that only seven, and maybe an eighth, would have existed if all the laws had gone into effect. *Id.*

²⁵ *See id.* at 2302.

²⁶ *See id.* at 2309–10.

²⁷ *See id.* at 2310.

²⁸ *Id.*

Regarding the admitting privileges requirement, the Supreme Court accepted the scientific evidence offered by the plaintiffs that abortions in Texas are “extremely safe.”²⁹ It cited several peer-reviewed studies finding that less than one percent of first and second trimester abortions involve “complications requiring hospital admission.”³⁰ The majority also cited expert testimony explaining that, when rare complications do arise, they usually manifest days after the procedure, at which point it is best for the patient to seek treatment at the hospital nearest to her home.³¹ Accordingly, an abortion provider with admitting privileges at a hospital close to the clinic would provide no benefit for a patient experiencing complications at home. Furthermore, the Court referred to the question asked at oral argument to Texas, as to whether they were aware of a “single instance” in which the admitting privileges requirement helped a patient “obtain better care.”³² The state could point to no such example.³³ The Court found the “longer waiting times . . . increased crowding,” and a decrease in doctors able to provide abortions that would result from the admitting privileges law created an undue burden in light of the “virtual absence of any health benefit.”³⁴

The ambulatory surgical center (“ASC”) provision required abortion clinics to meet a number of costly facility standards unnecessary for the abortion procedures the clinics were performing.³⁵ The district court found the requirements would not produce more positive outcomes for patients.³⁶ The Supreme Court cited medical briefs that showed the state failed to impose similar requirements on facilities that performed far more dangerous procedures. Childbirth, far riskier than abortion, was not subject to an ASC requirement in Texas, as women were allowed to give birth at home with midwives.³⁷ Texas also failed to subject colonoscopies, liposuction, or miscarriage management to ASC requirements, despite all carrying greater risks than abortion.³⁸ This pointed to the sham nature of the law—the legislature was not concerned with making risky medical procedures safer, as the requirement was not based on the differences between abortion procedures and other medical procedures. Because abortion procedures do not involve penetrating the skin or heavily sedated patients, the surgical center requirements would not improve patient outcomes.³⁹ As with the admitting privileges re-

²⁹ *Id.* at 2311 (quoting *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 684 (W.D. Tex. 2014)).

³⁰ *Id.*

³¹ *See id.*

³² *Id.*

³³ *Id.* at 2312.

³⁴ *Id.* at 2313.

³⁵ *See id.* at 2314–15.

³⁶ *Id.* at 2315.

³⁷ *See id.*

³⁸ *Id.* (citing Brief for Amici Curiae Am. Coll. of Obstetricians and Gynecologists, et al. in Support of Petitioners at 14–15, 14 n.29, *Whole Woman's Health*, 136 S. Ct. 2292 (No. 15-247)).

³⁹ *Id.* at 2315–16.

quirement, the Court pointed to the fact that when rare complications do arise, they most often arise once the patient is at home,⁴⁰ also rendering the surgical center requirements useless to the patient seeking care at a hospital after she returned to her home.

The Supreme Court found the district court's conclusion that the Texas laws "would be harmful to, not supportive of, women's health" fully supported by the evidence in the case.⁴¹ Thus, "in the face of no threat to women's health," the Court determined that Texas was "seek[ing] to force women to travel long distances to get abortions in crammed-to-capacity superfacilities."⁴² The burden this placed on patients was undue, and therefore constitutionally deficient, given the lack of corresponding medical benefits.⁴³

*B. The Myths Behind TRAP Laws and the Court's Response:
A Victory For Science, Data, and Evidence*

The Supreme Court's decision in *Whole Woman's Health* has been consistently lauded not only as a win for reproductive justice, but a win for science, data, and evidence.⁴⁴ As one commentator put it, the Court "restored scientific facts to their rightful place in American jurisprudence and in the legislative decision-making that has for too long threatened the health and wellbeing of women and their families."⁴⁵ The abortion restrictions at issue in *Whole Woman's Health*, like those in other states that had been on the rise since *Casey*, were riddled with "numerous misunderstandings and pure fiction about the health risks of abortion Among them were claims that the procedure is fraught with complications, causes cancer, leads to reduced fertility and results in depression, or even suicide."⁴⁶ Anti-abortion advocates and legislators relied on junk science that has continually been discredited to create a climate of fear around abortion and that has attempted to justify sham medical regulations intended to shut clinics down.⁴⁷

Whole Woman's Health made clear that courts have a duty to examine scientific evidence, including when the state puts forth a health and safety justification for its laws. The majority opinion contains broad language

⁴⁰ *Id.* at 2316.

⁴¹ *Id.* at 2318.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ See, e.g., Ariana Eunjung Cha, *Supreme Court Rules Against Texas and for Science in Abortion Case*, WASH. POST (June 27, 2016), <https://www.washingtonpost.com/news/to-your-health/wp/2016/06/27/the-supreme-court-rules-against-texas-and-for-science-in-abortion-case/> [<https://perma.cc/R9C4-PRLE>]; Andrea Flynn, *The Winner in Whole Woman's Health v. Hellerstedt: Science*, ROOSEVELT INST. (June 28, 2016), <http://rooseveltinstitute.org/winner-whole-womans-health-v-hellerstedt-science/> [<https://perma.cc/W9HR-N4F2>].

⁴⁵ Flynn, *supra* note 44.

⁴⁶ Cha, *supra* note 44.

⁴⁷ See, e.g., *id.*

about the role of the courts and the importance of medical evidence, not limited to abortion restrictions. “The statement that legislatures, and not courts, must resolve questions of medical uncertainty is also inconsistent with this Court’s case law,” Justice Breyer wrote for the majority.⁴⁸ The majority reaffirmed that the “Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake.”⁴⁹ The Court rejected the state’s call for deference to their proffered interest without inquiry into its factual validity. “Instead, the Court, when determining the constitutionality of laws regulating abortion procedures, has placed considerable weight upon evidence and argument presented in judicial proceedings.”⁵⁰

Justice Ginsburg joined the majority opinion in full, and also wrote a paragraph concurrence that further highlighted the sham nature of the laws.⁵¹ She emphasized that the laws at issue clearly did not do what they purported to do.⁵² In her short opinion, she cited two briefs submitted by medical providers as amici curiae, one brief by scientists who research abortion safety, and one brief by the American Civil Liberties Union, focusing on the scientific data in contradiction with the state’s interests.⁵³ This evidence, she found, supported the statement that “complications from an abortion are both rare and rarely dangerous.”⁵⁴ Not only did the Texas laws not further women’s health, they produced the opposite effect by making the procedure more difficult to obtain, thus forcing women to “resort to unlicensed rogue practitioners,” creating a greater threat to their safety.⁵⁵

C. *Current Applications of Whole Woman’s Health*

Many scholars and advocates agree that the emphasis on science, the hard look at the validity of the state’s interest, and the balancing of burdens and benefits that permeate the *Whole Woman’s Health* decision are broadly applicable to other cases, both in the reproductive rights arena and beyond. Perhaps the easiest application of the decision has been to TRAP legislation

⁴⁸ *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2310 (2016).

⁴⁹ *Id.* (emphasis omitted) (quoting *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007)).

⁵⁰ *Id.*

⁵¹ *See id.* at 2320–21 (Ginsburg, J., concurring).

⁵² *See id.* at 2321 (Ginsburg, J., concurring).

⁵³ *See id.* at 2320–21 (Ginsburg, J., concurring) (citing Brief for Amici Curiae Am. Coll. of Obstetricians and Gynecologists, et al. in Support of Petitioners at 14–15, *Whole Woman’s Health*, 136 S. Ct. 2292 (No. 15-247); Brief Amici Curiae of Ten Penn. Abortion Care Providers in Support of Petitioners at 17–22, *Whole Woman’s Health*, 136 S. Ct. 2292 (No. 15-247); Brief for Social Science Researchers as Amici Curiae in Support of Petitioners at 5–11, *Whole Woman’s Health*, 136 S. Ct. 2292 (No. 15-247); Brief Amicus Curiae of the American Civil Liberties Union, et al. in Support of Petitioners at 7, *Whole Woman’s Health*, 136 S. Ct. 2292 (No. 15-247)).

⁵⁴ *Id.* at 2320 (quoting *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 912 (7th Cir. 2015), *cert denied*, 136 S. Ct. 2545 (2016)).

⁵⁵ *Id.* at 2321 (citing Brief Amici Curiae of Ten Penn. Abortion Care Providers in Support of Petitioners at 17–22, *Whole Woman’s Health*, 136 S. Ct. 2292 (No. 15-247)).

in other states with admitting privileges and ambulatory surgical center requirements. Shortly after the decision, the Court denied cert in cases challenging similar laws in Mississippi and Wisconsin, and Alabama dropped its appeal of a decision finding its law unconstitutional.⁵⁶

Commentators have drawn logical connections from the invalidation of TRAP laws to other kinds of abortion restrictions. An article in *Rewire* advocated for challenges to state-mandated ultrasound laws under the new *Whole Woman's Health* decision.⁵⁷ Citing the lack of efficacy of abdominal ultrasounds early in pregnancy and the invasive nature of vaginal ultrasounds, the author argues the privacy and autonomy violations should be weighed against the evidence that ultrasounds are not medically necessary in many cases, and may cause psychological harm.⁵⁸

Another article in the *New England Journal of Medicine* suggests that *Whole Woman's Health* calls into question the Court's 2007 decision in *Gonzales v. Carhart*,⁵⁹ which the author argues impermissibly relied on legislative "findings" about intact dilation and extraction—a second-trimester abortion procedure—which were in conflict with expert medical testimony.⁶⁰ Such deference to state legislative findings runs counter to an *independent* judicial inquiry into the facts.

Others have advocated for the decision's application to aspects of women's reproductive healthcare beyond abortion. A *Washington Post* article suggested a similar balancing test should be applied in contraception cases, requiring courts to look at the burdens on access to healthcare compared to the potential burdens on religious exercise.⁶¹

⁵⁶ The Court denied certiorari in similar cases in Wisconsin and Mississippi, whose admitting privileges laws had been blocked by lower courts. *See e.g.*, *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908 (7th Cir. 2015), *cert denied*, 136 S. Ct. 2545 (2016); *Jackson Women's Health Org. v. Currier*, 760 F.3d 448 (5th Cir. 2014), *cert denied*, 136 S. Ct. 2536 (2016). The Alabama Attorney General declined to appeal a lower court ruling finding their AP law unconstitutional. *See Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1330, 1332–33 (M.D. Ala. 2014); *see also What's Happened Since the Supreme Court's Whole Woman's Health Decision?*, NAT'L ABORTION FED'N (July 6, 2016), <https://prochoice.org/whats-happened-since-the-supreme-courts-whole-womans-health-decision/> [<https://perma.cc/5GS4-YYL5>].

⁵⁷ Imani Gandy, *After 'Whole Woman's Health' Decision, Advocates Should Fight Ultrasound Laws with Science*, *REWIRE* (July 29, 2016, 2:41 PM), <https://rewire.news/article/2016/07/29/whole-womans-health-ultrasound-laws-science/> [<https://perma.cc/NS4W-7KV9>].

⁵⁸ *See id.*

⁵⁹ 550 U.S. 124 (2007).

⁶⁰ *See* R. Alta Charo, *Whole Women's Victory— or Not?*, 375 *NEW ENG. J. MED.* 809, 810 (2016), <http://www.nejm.org/doi/full/10.1056/NEJMp1609167> [<https://perma.cc/8X4H-T4GZ>].

⁶¹ *See* Amanda Hollis-Brusky & Rachel VanSickle-Ward, *Here Are Two Ways That Breyer's Wonky Opinion in Whole Woman's Health Could Transform Abortion Politics*, *WASH. POST* (July 3, 2016), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/07/03/here-are-2-ways-that-breyers-wonky-opinion-in-whole-womens-health-could-transform-abortion-politics/> [<https://perma.cc/STE6-6H7W>].

While most of the coverage of *Whole Woman's Health* has centered on possible future applications to other abortion restrictions or reproductive healthcare issues, some have also recognized its potential influence beyond the reproductive justice movement. For example, several recent voting rights cases have cited *Whole Woman's Health*. Judges in district and appellate courts cited the decision for the proposition that states cannot enact burdensome legislation aimed at non-existent problems.⁶² The state must provide evidence for its claims, and if it can offer no proof of the problem it seeks to remedy, the laws will not pass constitutional muster.⁶³ Like the legislators passing TRAP laws claiming an interest in women's health, the lawmakers defending the voting restrictions could not produce any evidence of the supposed voter fraud they were trying to mitigate.⁶⁴ A number of judges around the country have struck these laws down, unwilling to buy states' claims without the requisite proof, perhaps emboldened by the Supreme Court's decision in *Whole Woman's Health*.⁶⁵ Judges are seeing through the thinly veiled attempt to "preserve the integrity of elections" by passing laws clearly designed to "keep people of color from voting," in the same way that states used "women's health and safety" to shield their true legislative motive to shut down clinics.⁶⁶ The following Part argues that there are just as many, if not more, similarities between the abortion restrictions at issue in *Whole Woman's Health* and recent anti-transgender bills, and judges must follow this precedent by taking a hard look at the facts surrounding their passage.

II. ANTI-TRANS LAWS AND POLICIES

Since the marriage equality victory in *Obergefell v. Hodges*,⁶⁷ anti-LGBT legislators have turned their energy toward bills that exclude transgender people from single-sex spaces, with a particular crusade against bath-

⁶² See *Frank v. Walker*, 196 F. Supp. 3d 893, 915 n.10 (E.D. Wis. 2016) ("The Supreme Court recently reiterated that where a state law burdens a constitutional right, the state must produce evidence supporting its claim that the burden is necessary to further the state's claimed interests." (citing *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2306–08 (2016))); *Veasey v. Abbott*, 830 F.3d 216, 275 n.3 (5th Cir. 2015) (Higginson, J., concurring) ("[A]s the Supreme Court recently reminded, that a state interest is legitimate does not necessarily mean courts should ignore evidence of whether a specific law advances that interest or imposes needless burdens." (citing *Whole Woman's Health*, 136 S. Ct. 2292)), *cert denied* 137 S. Ct. 612 (2017).

⁶³ See *Frank*, 196 F. Supp. 3d at 916.

⁶⁴ See *id.* at 915.

⁶⁵ While not every opinion has cited *Whole Woman's Health*, several commentators have observed its undertones throughout the recent voting rights cases. See, e.g., Gandy, *supra* note 3 ("In North Carolina, while *Whole Woman's Health* was not featured in the Circuit Court of Appeals' defenestration of the state's sweeping election law, you can certainly feel its presence.").

⁶⁶ *Id.*

⁶⁷ 135 S. Ct. 2584 (2015).

rooms. This Part examines the history and current state of anti-trans bathroom bills and the many parallels between these laws and the abortion restrictions at issue in *Whole Woman's Health*. As with abortion restrictions, anti-trans bills have gained traction with the public through fear campaigns, misinformation, and junk science. Predominantly male legislatures mimic the rhetoric about protecting women's health and safety. Both types of laws claim an interest in fixing a problem that does not exist in order to dismantle the constitutional rights of marginalized groups. This Part argues that the *Whole Woman's Health* decision demands factual inquiry into the government's stated interest in passing anti-trans bathroom bills. The claimed benefits of the law must be balanced against the constitutional harms. If the state cannot produce any evidence of the problem it is aiming to combat and there is evidence that constitutional harm will result, courts are obligated under *Whole Woman's Health* to strike the law down as constitutionally deficient.

A. A Brief History

A brief history of single-sex restrooms is helpful in understanding the recent anti-transgender legislation. First and foremost, there is no medical need for restrooms segregated by sex. Toilets are uniform, stalls are private, and most men and women share restrooms facilities in their homes. In fact, single-sex restroom laws did not come about until the late 1800s, as they were formulated in response to women's increased presence in the work force and in public life.⁶⁸ The same line of thinking led to the creation of separate department store parlors, library reading rooms, and train cars for women—all of which are now obsolete—and stemmed from outdated perceptions of chivalry, women's need for protection from men, and general fears about women entering the workplace.⁶⁹

Yet, single-sex restrooms continue to permeate public society, despite the fact that women have been integrated into education and the workplace for many decades. These days, unjustified fears about sexual assault are often at the forefront of the arguments for maintaining this sex-segregated system. As Professor David Cohen writes, "fear of violence is certainly part of the reason for sex segregating restrooms, fear of heterosexual sexual interaction is another one of the reasons Society assumes heterosexuality; thus, men and women cannot be together in a setting involving the exposure of their genitalia."⁷⁰ These underlying assumptions serve to perpetuate socie-

⁶⁸ See Ted Trautman, *Sex-Segregated Restrooms Are an Outdated Relic of Victorian Paternalism*, SLATE (Apr. 11, 2014, 4:13 PM), http://www.slate.com/blogs/outward/2014/04/11/sex_segreated_public_restrooms_an_outdated_relic_of_victorian_paternalism.html [<https://perma.cc/FR97-K9A4>].

⁶⁹ *Id.* (citing TOILET: PUBLIC RESTROOMS AND THE POLITICS OF SHARING (Harvey Molotch & Laura Norén eds., 2010)).

⁷⁰ David S. Cohen, *Keeping Men "Men" and Women Down: Sex Segregation, Anti-essentialism, and Masculinity*, 33 HARV. J.L. & GENDER 509, 530 (2010).

tal norms about gender and sexuality, which harm transgender people and cisgender women alike.

While many sex-segregated bathroom laws and policies have now existed for over a century, recent legislation has sought to further alienate trans people by making it a crime to use the bathroom consistent with their gender identity. Legislatures are accomplishing this by defining “sex” in ways that are inconsistent with medical science. For example, North Carolina’s House Bill 2, which was challenged in federal court by Lambda Legal and the American Civil Liberties Union,⁷¹ prohibited people from using restrooms inconsistent with their “biological sex” in schools and public accommodations and prevented localities from passing non-discrimination protections.⁷² The statute defined “biological sex” as “[t]he condition of being male or female, which is stated on a person’s birth certificate.”⁷³ While North Carolina was the only state to enact such legislation, eighteen other states considered variations of anti-trans bathroom bills in the 2016 legislative session.⁷⁴ A growing number of states, including Virginia, Texas, and Kentucky, have introduced similar bills this session.⁷⁵

The problem—or one of the many problems—with these bills is that they rely on scientifically arbitrary criteria in defining “biological sex.” The birth certificate rule, for example, operates in conjunction with other state laws that impose burdensome requirements on changing a person’s gender marker on their state identification documents. The processes for changing the gender marker on one’s birth certificate vary greatly from state to state.⁷⁶ Virtually all require some kind of certification by a healthcare professional, but states differ on which professionals are allowed to sign this document.⁷⁷ Others, including North Carolina, require costly surgeries.⁷⁸ Thus, a person’s

⁷¹ See *Carcaño v. McCrory*, No. 1:16cv236, 2016 WL 4508192, at *1 (M.D.N.C. Aug. 26, 2016).

⁷² N.C. GEN. STAT. § 143-760 (2016).

⁷³ *Id.* § 143-760(a)(1).

⁷⁴ See Kralik, *supra* note 4.

⁷⁵ See David A. Graham, *What’s Behind the New Wave of Transgender ‘Bathroom Bills’*, ATLANTIC (Jan. 9, 2017), <https://www.theatlantic.com/politics/archive/2017/01/states-see-a-new-wave-of-transgender-bathroom-bills/512453/> [<https://perma.cc/5HUX-UTQT>]. According to the National Conference of State Legislatures, at least twelve states are considering similar legislation in the 2017 session. See Kralik, *supra* note 4. Kentucky and Texas borrow from North Carolina’s H.B. 2 in defining “biological sex” by birth certificate. See *id.*

⁷⁶ See *ID Documents Center*, NAT’L CTR. FOR TRANSGENDER EQUALITY (Feb. 8, 2017), <http://www.transequality.org/documents> [<https://perma.cc/G4CU-RHSN>].

⁷⁷ See *ID Documents Center: Alaska*, NAT’L CTR. FOR TRANSGENDER EQUALITY (Feb. 8, 2017), <http://www.transequality.org/documents/state/alaska> [<https://perma.cc/7SPW-RJY9>] (noting that Alaska requires signed statement by a physician, social worker, psychologist, professional counselor, physician assistant, or advanced nurse practitioner to change gender on a birth certificate); *ID Documents Center: Georgia*, NAT’L CTR. FOR TRANSGENDER EQUALITY (Feb. 8, 2017), <http://www.transequality.org/documents/state/georgia> [<https://perma.cc/UHY8-LKPA>] (noting that Georgia requires signature of a physician to change gender on a birth certificate).

⁷⁸ See N.C. GEN. STAT. § 130A-118(b)(4) (2015).

ability to amend their birth certificate largely depends on the laws in the state where they reside and their ability (or willingness) to undergo mandatory “sex reassignment” surgery, which is not covered by most health insurance.⁷⁹ Given these realities, it is clear that the ‘M’ or ‘F’ on one’s birth certificate has little to do with biology, and much to do with geography and financial status. Furthermore, as described *infra* Section C, laws and policies that attempt to narrowly define sex based on the appearance of genitalia (or chromosomes, such as Minnesota’s House File 41⁸⁰) run counter to the consensus in the scientific community that a number of variables contribute to one’s sex, and result in more than just two binary possibilities.

B. Factual and Scientific Inquiry into the Myths and Stereotypes Behind Anti-Trans Bathroom Bills

As *Whole Woman’s Health* instructs, it is the court’s duty to inquire into the facts and evidence relied upon by the state in passing legislation. Anti-trans bathroom bills rely on two fatal factual flaws—misconceptions about the scientific understanding of sex and the causes of sexual assault. I lay out the evidence for both in the next two sections.

i. Scientific Understanding of Sex and Gender

Anti-trans bathroom policies are grounded in stereotypes that run directly contrary to scientific understanding of sex and gender. For decades, the bulk of scientific evidence has not supported a binary conception of sex or gender—rather, experts agree that a number of biological factors go into the determination of what we commonly refer to as “sex.” Rather than attempt a definition that encompasses this multi-factor understanding, anti-trans legislatures rely solely on physical characteristics that they deem valuable—mostly commonly, appearance of genitalia or sex-assigned-at-birth.

Dr. Norman Spack, a pediatric endocrinologist at Boston Children’s Hospital, gave testimony in opposition to a proposed bathroom bill in Maine, L.D. 1046, and explained the problem with defining “biological sex.”⁸¹ “I don’t think there is a pediatric endocrinologist who could give you an accurate definition of that term,” he said.⁸² “Are we referring to chromosomal sex, gonadal sex, hormonal sex, genital sex, or reproductive sex?”⁸³ While often these traits are aligned, for many individuals they are not. For

⁷⁹ See *Transgender Health Care*, HEALTHCARE.GOV, <https://www.healthcare.gov/transgender-health-care/> [<https://perma.cc/G6V9-G6DT>].

⁸⁰ H.F. 41, 2017 Leg., 90th Sess. (Minn. 2017).

⁸¹ See *An Act to Amend the Application of the Maine Human Rights Act Regarding Public Accommodation: Public Hearing on L.D. 1046*, 125th Leg. Sess. 1 (Me. 2011) (Statement of Dr. Norman Spack) (on file with author) [hereinafter Spack].

⁸² *Id.*

⁸³ *Id.*

example, approximately one in 1,500 babies are born with ambiguous genitalia and may be diagnosed as intersex.⁸⁴ As Dr. Spack explained, people born with Androgen Insensitivity Syndrome (“AIS”) almost always identify as female and have female genitals, but have male chromosomes and gonads and no female reproductive organs.⁸⁵ Bathroom bills that define “biological sex” by chromosomes would exclude women with AIS from using the women’s restroom, whereas those using genitalia or sex assigned at birth would not. Under laws that do not define “biological sex,” it is unclear which bathroom girls with AIS would be allowed to use. Furthermore, as Dr. Spack points out, sexual orientation and gender identity are “increasingly shown by dynamic brain imaging studies to be biological.”⁸⁶ Bathroom bills erroneously rely on only one or two of these traits, ignoring the multitude of factors that go into determining what we commonly refer to as one’s sex or gender, leaving vulnerable any individuals that do not fall clearly on one side of the binary.

The bills that use sex-assigned-at-birth are not biological at all, and instead give deference to the sex the attending doctor decided to write on the newborn’s birth certificate, which involves a visual determination based on the external appearance of the infant’s genitalia. As ACLU lawyer Chase Strangio explained, “this classification serves population control and surveillance and not medical purposes.”⁸⁷ He referred to conversations with medical experts who could not point to a single medical justification for this practice.⁸⁸

The idea that sex is not binary or single-factored is not new in the medical community. In 1968, the *Journal of the American Medical Association* published an article identifying nine components that went into the concept of sex: “external genital appearance, internal reproductive organs, structure of the gonads, endocrinologic sex, genetic sex, nuclear sex, chromosomal sex, psychological sex[, and] social sex.”⁸⁹ As Vanessa Heggie, writing for the *Guardian*, succinctly puts it: “what science cannot do is tell us which of these tests is the best measure of sex, or which gives us our ‘true’ identity—that entirely depends on what we want to do with the results, why we’re testing, and our cultural attitudes towards sex and gender”⁹⁰

⁸⁴ AM. PSYCH. ASS’N, ANSWERS TO YOUR QUESTIONS ABOUT INDIVIDUALS WITH INTERSEX CONDITIONS 1 (2017), <http://www.apa.org/topics/lgbt/intersex.pdf> [https://perma.cc/RU8W-XB9M].

⁸⁵ Spack, *supra* note 81.

⁸⁶ *Id.*

⁸⁷ Chase Strangio, *What Is a “Male Body”?*, SLATE (July 19, 2016, 1:08 PM), http://www.slate.com/blogs/outward/2016/07/19/there_s_no_such_thing_as_a_male_body.html [https://perma.cc/LS62-UJCT].

⁸⁸ *Id.*

⁸⁹ Keith L. Moore, *The Sexual Identity of Athletes*, 205 JAMA 163, 164 (1968).

⁹⁰ Vanessa Heggie, *Nature and Sex Redefined – We Have Never Been Binary*, GUARDIAN (Feb. 19, 2015, 3:07 AM), <https://www.theguardian.com/science/the-h-word/2015/feb/19/nature-sex-redefined-we-have-never-been-binary> [https://perma.cc/XCN4-AWDJ].

Heggie's statement brings home the problem with state's interest in so-called bathroom bills. There is no genuine interest in policies that mirror the scientific understanding of sex. Rather, legislators are deciding some characteristics are more important than others based on their own gender biases and cultural attitudes about sex. These biases and attitudes center on the way people look. The majority of states define "biological sex" by sex assigned at birth or birth certificates requiring sex reassignment surgery, which indicates they view external, physical appearance as more important than chromosomes, hormones, reproductive organs, social sex, etc.⁹¹ By contrast, science supports the understanding that biological sex is complex, and non-binary. "[T]here has never been scientific . . . consensus that there are simply two human sexes . . ." ⁹²

Furthermore, the rhetoric used to propel anti-trans bills often centers on the "bathroom predator myth." The factual inaccuracies of two underlying components of this myth—that trans people are sexual predators or cis men will abuse non-discrimination laws to assault women—are debunked in the next section. But part of this myth also relies on a fundamental misunderstanding of gender—the idea that trans women are actually men. As Chase Strangio has explained:

Like so many anti-trans laws, policies[,] and messages we are confronted with, [North Carolina's] HB 2 was animated by the lie that the state needed to protect women from men in women's bathrooms. As I have said elsewhere, of course, "when a transgender woman uses a women's restroom[] there are still zero men—biological or otherwise—in that restroom. [. . .] Transgender women are women; transgender men are men."⁹³

Medical briefs were highly successful in *Whole Woman's Health* and should be equally utilized in transgender rights cases. If the state attempts to ground its interest in science, biology, or medicine, the courts have a duty to scrutinize those claims under *Whole Woman's Health*. The medical community standards show that bathroom bills are not grounded in a scientific understanding of biology, but in impermissible sex stereotypes based on appearances.

Despite this evidence, though, it is worth acknowledging the reality that the Supreme Court may not yet be willing to discard the gender binary completely. Rejecting a gender binary could have implications for a number of sex-based classifications, like the existence of sex-segregated facilities in the

⁹¹ Cf. Kralik, *supra* note 4 (cataloguing proposed state anti-trans bathroom bills that define biological sex as sex assigned at birth).

⁹² Heggie, *supra* note 90.

⁹³ Chase Strangio, *In Court Over North Carolina's Anti-Trans HB 2*, MEDIUM (Aug. 1, 2016) (quoting Strangio, *supra* note 87), <https://medium.com/@chase.strangio/in-court-over-north-carolinas-anti-trans-hb-2-7ea5e7c9973b#sbw8fcrn> [<https://perma.cc/4NBP-PWKE>].

first place. At this stage, litigators are not yet making the argument for dissolution of all single-sex spaces,⁹⁴ and opponents often cite the possible end to single-sex bathrooms as one of the many horrors that might occur if we treat transgender people equally.⁹⁵ Perhaps they are right that sex segregation is on the decline, but this is a distraction from the issue at hand. Fears of future progress cannot justify unconstitutional burdens. An incremental approach under this theory would maintain that, at minimum, states must not define sex or gender in ways that run contrary to scientific understanding. Rather, people must be allowed to self-identify into existing sex-segregated facilities, given the complexity of our current best understanding of sex. While I believe the states' unscientific and exclusionary definitions of sex are enough to strike down bathroom bills on their own, the argument outlined in the following section is likely going to be more persuasive to current courts. The states' asserted interests in women's health and safety and the absence of corresponding evidence of a health or safety problem expose undeniable parallels between the abortion restrictions struck down in *Whole Woman's Health* and the current anti-trans bathroom legislation. This avenue allows courts to avoid, at least temporarily, sanctioning a non-binary scientific understanding of sex, while still recognizing the invalidity of laws that impose large constitutional burdens with no remedial benefit.

ii. *Women's Safety and the True Causes of Sexual Assault*

One of the major parallels between TRAP laws and anti-trans bills is the legislative interest in remedying a harm that, upon examination of the facts, is virtually non-existent. As a pretext for motives to remove trans people from public spaces, policymakers are fueling fear campaigns around the "bathroom predator" myth—a story that perpetuates the false ideas that (1) trans people are sexual predators or (2) cis men will abuse anti-discrimination laws or policies to sexually assault women in the restroom. As *Whole Woman's Health* and recent voting rights cases have shown, burdensome laws that aim to remedy a problem of which virtually no instances exist cannot withstand any form of constitutional scrutiny.

In 2015, opponents of an anti-discrimination law in Houston "created 'No Men in Women's Bathrooms' t-shirts and a TV ad" portraying an older man following a young girl in the women's bathroom.⁹⁶ Opponents made similar arguments against allowing a transgender girl to use the girls' locker

⁹⁴ See, e.g., Carcaño Brief, *supra* note 6, at 13 (emphasizing that "Plaintiffs never challenged sex-separated facilities").

⁹⁵ Cf. Brief of Defendant-Appellee and Intervenor/Defendants-Appellees at 32, Carcaño v. McCrory, No. 16-1989 (4th Cir. Nov. 21, 2016) [hereinafter McCrory Brief] ("The concept of sex-separated facilities . . . has been explicitly recognized by federal law for over four decades.")

⁹⁶ Emily Bazelon, *Making Bathrooms More 'Accommodating'*, N.Y. TIMES MAG., Nov. 17, 2015, <http://www.nytimes.com/2015/11/22/magazine/making-bathrooms-more-accommodating.html> [<https://perma.cc/G9AY-EPUK>].

room at a high school in Chicago.⁹⁷ In that case, the Department of Education found the school in violation of Title IX because it required the student to use the nurse's office, a separate and non-comparable facility to the girls' locker room.⁹⁸ In its complaint in *G.G. ex rel. Grimm v. Gloucester County*,⁹⁹ the ACLU described comments at school board meetings made by parents seeking to prevent a transgender student from using the boys' restroom at a high school in Virginia¹⁰⁰:

Some speakers claimed that transgender students' use of restrooms that match their gender identity would violate the privacy of other students and would lead to sexual assault in bathrooms. Another suggested that boys who are not transgender would come to school wearing a dress and demand to use the girls' restroom for nefarious purposes.¹⁰¹

These comments reflect just how susceptible parents were to these scare tactics. Similarly, Texas Lt. Governor Dan Patrick recently introduced Senate Bill 6, which originally targeted trans women but not trans men, because he believes "men can defend themselves."¹⁰²

Similar fear campaigns characterized the H.B. 2 debates in North Carolina. The bill was presented as a response to an anti-discrimination ordinance proposed by the city of Charlotte.¹⁰³ In February of 2016, before the bill was introduced, Governor McCrory warned of legislative intervention. "This shift in policy could . . . create major public safety issues by putting citizens in possible danger from deviant actions by individuals taking improper advantage of a bad policy," he told city council members of the Charlotte public accommodations law.¹⁰⁴ At the committee hearing in March, several

⁹⁷ See Editorial, *An Illinois High School's Tragic Discrimination Against a Transgender Student*, WASH. POST, Nov. 17, 2015, https://www.washingtonpost.com/opinions/discriminating-against-a-transgender-student-in-illinois/2015/11/17/0dc3a53e-84d0-11e5-8ba6-ccc48b74b2a7_story.html [<https://perma.cc/6GJ2-7RVV>].

⁹⁸ Letter from Adele Rapport, Reg'l Dir., Dep't of Educ. Office for Civil Rights, to Dr. Daniel E. Cates, Superintendent, Twp. High Sch. Dist. 211 on OCR Case No. 05-14-10155, at 10, 13 (Nov. 2, 2015), <https://www2.ed.gov/documents/press-releases/township-high-211-letter.pdf> [<https://perma.cc/TB69-FMGS>].

⁹⁹ 132 F. Supp. 3d 736 (E.D. Va. 2015), *rev'd in part*, 822 F.3d 709 (4th Cir. 2016), *vacated*, No. 16-273, 2017 WL 855755 (U.S. Mar. 6, 2017).

¹⁰⁰ See Complaint at 8, 10, *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 132 F. Supp. 3d 736 (E.D. Va. 2015) (No. 4:15cv54).

¹⁰¹ *Id.* at 8.

¹⁰² Diana Tourjee, *New Transphobic 'Bathroom Bill' Targets Trans Women but Not Trans Men*, VICE (Dec. 20, 2016, 7:35 PM), https://broadly.vice.com/en_us/article/new-transphobic-bathroom-bill-targets-trans-women-but-not-trans-men [<https://perma.cc/EJ6F-P9SF>].

¹⁰³ Colin Campbell et al., *Governor's Office: HB2 Repeal Possible If Charlotte Drops LGBT Ordinance First*, CHARLOTTE OBSERVER (Sept. 16, 2016, 3:17 PM), <http://www.charlotteobserver.com/news/politics-government/article102255582.html> [<https://perma.cc/EU9W-D96D>].

¹⁰⁴ David Badash, *NC Gov. Warns Charlotte Protecting LGBT People Will Bring 'Immediate' State Consequences*, NEW C.R. MOVEMENT (Feb. 22, 2016, 10:01 AM),

representatives tried to couch the law in concerns about uniformity and intra-state commerce,¹⁰⁵ but the supremacy of the bathroom predator myth remained clear. Representative Dean Arp went so far as to paint a detailed picture of what he thought an anti-discrimination law for transgender people would mean:

Summer's coming. . . . Emily and Ashante, [seven]-year-old girls are so excited to go to the pool. . . . They go into the locker rooms. . . . 'All right girls. . . . Go ahead and take off your clothes and get on your bathing suits' As they begin to do so, in walks a biological male. Sits down on the wood bench in front of the lockers right beside them, and begins to disrobe. What just happened? Emily, Ashante[,] and their mother just lost their privacy.¹⁰⁶

But the picture Representative Arp paints is not just about privacy—it is meant to appear menacing and predatory, and implies the girls' safety is at risk.

Several opponents called out the fear tactics and discriminatory motives behind the bill. "We must not allow fear-mongering and discrimination against others," said Representative Tricia Cotham.¹⁰⁷ "It has no place in North Carolina" ¹⁰⁸ Representative Rodney Moore agreed:

[L]et's drill down into what the intent of this particular legislation is. . . . [T]his is about fear I've done the research [T]here has not, to my knowledge, been any catastrophic incident of assaults, of rapes, in these bathrooms . . . so the argument that this is such a grave challenge or grave issue of public safety, . . . just doesn't mesh, . . . doesn't pan out based upon the data.¹⁰⁹

H.B. 2, like the Texas TRAP laws discussed *supra* Part I, was passed under the guise of protecting the safety of women and girls in the absence of corresponding data about a safety threat. The bathroom predator myth—like the myth about the dangers of abortion—resonated with many citizens and succeeded, at least in part, in temporarily veiling the legislature's discriminatory motives, despite dozens of studies and experts speaking out against its inac-

http://www.thenewcivilrightsmovement.com/davidbadash/nc_gov_warns_charlotte_protecting_lgbt_people_in_law_vwill_bring_immediate_state_consequences [<https://perma.cc/BZ5T-WRXT>].

¹⁰⁵ See Debate on House Bill 2, 2016 Leg., 2nd Extra Sess., at 4, 7, 44. (N.C. 2016). (statements of Rep. Paul Stam, Rep. Dan Bishop, and Rep. Rodney Moore), <http://www.ncleg.net/sessions/2015e2/HB2Transcripts/HouseFloorDebate.pdf> [<https://perma.cc/2YQR-CL9C>].

¹⁰⁶ *Id.* at 46 (statement of Rep. Dean Arp).

¹⁰⁷ *Id.* at 21 (statement of Rep. Tricia Cotham).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 43 (statement of Rep. Rodney Moore).

curacy.¹¹⁰ While North Carolina technically repealed the original H.B. 2 in March, the replacement bill continues to prohibit anti-discrimination protections for showers, bathrooms, and changing facilities in any state entities in the name of safety and privacy.¹¹¹

The *Whole Woman's Health* Court rejected this kind of fear-mongering. Anti-choice legislatures often played up stories like that of Kermit Gosnell, a doctor providing abortions at a non-compliant clinic who was convicted of murder of several infants, to justify onerous TRAP laws.¹¹² But, there were existing criminal laws in place to deter such conduct,¹¹³ and, as Justice Ginsburg pointed out, increasingly stringent regulations that had the effect of closing safe, reliable clinics down would create *more* demand for “unlicensed, rogue providers.”¹¹⁴ Similarly, anti-trans policies will not deter sexual assault perpetrators who are already not deterred by existing criminal laws that make sexual violence illegal. Rather, they impose impossible burdens on trans people by increasing the likelihood of violence against them, and entrench the existence of single-sex spaces that breed misogynistic attitudes toward all women. Like TRAP laws, anti-trans bathroom bills are not only based on unfounded fears, but they exacerbate the harms they claim to prevent. Transgender people are among the most vulnerable to sexual violence,¹¹⁵ but instead are being portrayed as the perpetrators. One survey indicated 70% of transgender people experience “some sort of negative reaction or harassment when using a bathroom.”¹¹⁶ Studies also indicate that denial of

¹¹⁰ See, e.g., Brief of Amici Curiae Anti-Sexual Assault, Domestic Violence, & Gender-Based Violence Organizations in Support of Plaintiff-Appellants’ Seeking Reversal at 7–16, *Carcaño v. McCrory*, No. 16-1989 (4th Cir. Oct. 25, 2016).

¹¹¹ Chase Strangio, *Don’t Be Fooled by North Carolina, There Is No Repeal of The Anti-Trans HB2, Only More Discrimination*, ACLU (Mar. 30, 2017), <https://www.aclu.org/blog/speak-freely/dont-be-fooled-north-carolina-there-no-repeal-anti-trans-hb2-only-more>.

¹¹² See, e.g., *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2313–14 (2016) (“[T]he dissent suggests that one benefit of H.B. 2’s requirements would be that they might ‘force unsafe facilities to shut down.’ To support that assertion, the dissent points to the Kermit Gosnell scandal. . . . But there is no reason to believe that an extra layer of regulation would have affected [his] behavior. Determined wrongdoers, already ignoring existing statutes and safety measures, are unlikely to be convinced to adopt safe practices by a new overlay of regulations.” (citation omitted)).

¹¹³ See *id.*

¹¹⁴ *Id.* at 2321 (Ginsburg, J., concurring).

¹¹⁵ Different sources indicate transgender people face sexual violence at rates anywhere from 50–64%. See, e.g., Lauren Palk, *Sexual Assault in the LGBT Community*, NAT’L CTR. FOR LESBIAN RTS. (April 30, 2014), <http://www.nclrights.org/sexual-assault-in-the-lgbt-community> [<https://perma.cc/3BNV-NX8K>]; *Sexual Assault in the Transgender Community*, OFF. FOR VICTIMS CRIMES (June 2014), http://www.ovc.gov/pubs/forge/sexual_numbers.html [<https://perma.cc/58VW-UD99>].

¹¹⁶ Zack Ford, *Study: Transgender People Experience Discrimination Trying to Use Bathrooms*, THINK PROGRESS (June 26, 2013), <http://thinkprogress.org/lgbt/2013/06/26/2216781/transgender-bathroom-study> [<https://perma.cc/3GQ4-F2NG>]. The U.S. Transgender Survey also found 59% of transgender people avoided public bathrooms for fear of confrontation; 12% reported they have been “harassed, attacked, or sexually assaulted in a bathroom”; and 8% reported “kidney or urinary tract infection[s] . . . from avoiding using the restroom in the past year.” NAT’L CTR. FOR TRANSGENDER EQUAL., HARASS-

access to single-sex facilities consistent with gender identity increases rates of suicidality for transgender individuals,¹¹⁷ who already attempt suicide in staggering numbers.¹¹⁸ In direct conflict with their stated goals, anti-trans policies have serious negative health and safety consequences. Similarly, the TRAP laws in *Whole Woman's Health* created significant health and safety risks by severely restricting access to healthcare, increasing wait times,¹¹⁹ and as Justice Ginsburg pointed out, forcing more women to resort to harmful means of self-induced abortion.¹²⁰ Both sets of laws claim an interest in solving a safety problem that does not exist while simultaneously imposing grave health and safety risks on vulnerable populations.

The sham nature of both types of laws is also evidenced by the legislature's failure to regulate any true offenders of the safety concerns they claim to address. While people on both sides of the debate may express concern with reliance on legislative inaction alone, this additional context provides support for the claim that health and safety is not the true motive. The *Whole Woman's Health* Court pointed to the fact that Texas did not regulate any other outpatient medical procedures that imposed greater risks than abortion, such as liposuction, childbirth, or colonoscopies.¹²¹ The Court concluded from this evidence that the legislature's intent was to single out abortion for disfavored treatment, rather than a genuine concern for women's health and safety.¹²² Similarly, state legislatures passing bathroom bills are not genuinely trying to solve the problem of sexual assault. Sexual assault is a pressing problem, but trans exclusionary policies exacerbate rather than solve the issue. As noted above, trans people are frequently the victims of sexual violence, not the perpetrators.¹²³ Exclusionary policies put them in grave dan-

MENT OF TRANSGENDER PEOPLE IN BATHROOMS AND EFFECTS OF AVOIDING BATHROOMS: PRELIMINARY FINDINGS FROM THE 2015 U.S. TRANSGENDER SURVEY 1 (2016), <https://static1.squarespace.com/static/54f76238e4b03766696d8f4c/t/5782a8d9197aeaa57b589608/1468180715144/USTS-Preliminary-Findings-July-2016-2.pdf> [<https://perma.cc/V9RR-J6PQ>].

¹¹⁷ Dr. Kristie Seelman analyzed data from the National Transgender Discrimination Survey, and found a significant relationship between denial of access to single-sex spaces and lifetime suicide attempts. Kristie E. Seelman, *Transgender Adults' Access to College Bathrooms and Housing and the Relationship to Suicidality*, 63 J. HOMOSEXUALITY 1378, 1387 (2016).

¹¹⁸ A study by the Williams Institute and the American Foundation for Suicide Prevention, using data from the National Transgender Discrimination Survey, reported a suicide attempt rate of 41% among survey respondents, compared to 4.6% in the U.S. population at large. ANN P. HAAS ET AL., AM. FOUND. FOR SUICIDE PREVENTION & WILLIAMS INST., *SUICIDE ATTEMPTS AMONG TRANSGENDER AND GENDER NON-CONFORMING ADULTS 2* (2014), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/AFSP-Williams-Suicide-Report-Final.pdf> [<https://perma.cc/G6L7-CBGA>].

¹¹⁹ *Whole Women's Health v. Helldorstedt*, 136 S. Ct. 2292, 2313 (2016).

¹²⁰ *Id.* at 2321 (Ginsburg, J., concurring).

¹²¹ *Id.* at 2315 (majority opinion).

¹²² *Id.* ("These facts indicate that the surgical-center provision imposes 'a requirement that simply is not based on differences' between abortion and other surgical procedures 'that are reasonably related to' preserving women's health, the asserted 'purpos[e] of the Act in which it is found.'" (quoting *Doe v. Bolton*, 410 U.S. 179, 194 (1973)).

¹²³ See *supra* notes 115–116 and accompanying text.

ger, leading to increased risks of assault and suicide.¹²⁴ Fifteen experts in twelve different states—including law enforcement, government employees, and advocates for victims of sexual assault—have also debunked the myth that sexual predators will exploit antidiscrimination laws to commit sexual assault crimes in restrooms.¹²⁵ “It relies on grossly dehumanizing and mean-spirited depictions of transgender people. And it’s based on a gross misunderstanding of how sexual assault actually happens.”¹²⁶ The fact that these bills target individuals who are frequently victims of physical and sexual abuse in order to protect against a certain kind of violence of which there is no documented instance provides stark evidence of the true purpose of the laws.

Furthermore, many scholars suggest that single sex spaces—in particular, the preservation of all-male spaces—perpetuate, rather than prevent, cultures of sexual violence,¹²⁷ which creates more doubt about the legislature’s proffered interest in promoting safety. Experts on sexual assault prevention call for intervention on college campuses, particularly in male-dominated spaces like fraternities, finals clubs, and sports teams, and consistently speak out against bills that discriminate against trans people. For example, a 2016 study of 379 male undergraduates revealed 54% of student athletes admitted to at least one instance of sexually coercive behavior, compared to 38% of non-athletes.¹²⁸ A 2007 study showed that 8% of first-year fraternity members engage in sexually coercive conduct compared to 2.5% of non-fraternity first-year college men.¹²⁹ In April of 2016, over 300 organizations working to end sexual violence signed a memorandum opposing anti-transgender initiatives, noting “none of the[] jurisdictions [that have passed nondiscrimination laws] ha[s] seen a rise in sexual violence or other public safety

¹²⁴ See *supra* notes 117–18 and accompanying text.

¹²⁵ Maza & Brinker, *supra* note 7.

¹²⁶ Carlos Maza, *We Can’t Be Scared of the ‘Bathroom Predator’ Myth*, HUFFINGTON POST (Nov. 4, 2016, 12:22 PM), http://www.huffingtonpost.com/carlos-maza/we-cant-be-scared-of-the_b_8472698.html [https://perma.cc/GE7Y-9MEX].

¹²⁷ See, e.g., Cohen, *supra* note 70, at 544–46 (“[W]hen men are in sex-segregated environments, they often engage in behavior that creates, reinforces, and exacerbates negative attitudes about women that contribute to men’s oppression of women. This occurs in a variety of ways, such as perceiving women as inferior, as sex objects, or as threats to male privilege.” *Id.* at 544.).

¹²⁸ Ed Cara, *Half of Male College Athletes Admit History of ‘Sexually Coercive’ Behavior Such As Sexual Assault, Rape*, MED. DAILY (June 2, 2016, 8:59 PM), <http://www.medicaldaily.com/college-athletes-sexual-assault-rape-myths-388585> [https://perma.cc/Z6JG-J8EQ] (citing Belinda-Rose Young et al., *Sexual Coercion Practices Among Undergraduate Male Recreational Athletes, Intercollegiate Athletes, and Non-Athletes, VIOLENCE AGAINST WOMEN*, May 30, 2016).

¹²⁹ John D. Foubert et al., *Behavior Differences Seven Months Later: Effects of a Rape Prevention Program*, 44 NASPA J. 728, 739 (2008); see also John Foubert, Opinion, ‘Rapebait’ E-mail Reveals Dark Side of Frat Culture, CNN (Oct. 9, 2013, 4:09 PM), <http://www.cnn.com/2013/10/09/opinion/foubert-fraternities-rape> [https://perma.cc/VPY6-5CHK].

issues due to nondiscrimination laws.”¹³⁰ Alexandra Brodsky, Skadden Fellow at the National Women’s Law Center (NWLC), also penned an op-ed in the *New York Times* calling for an end to the use of young women as “props” to justify discrimination against trans people.¹³¹ NWLC and other women’s health and gender violence prevention organizations filed an amicus brief in support of the transgender student in *Gloucester County School Board v. G.G.*, noting that lawmakers have “[h]istorically . . . offered the pretext of protecting women as an excuse to discriminate against . . . disfavored groups.”¹³² Moreover, the brief noted that transgender students are particularly susceptible to sex-based harassment, and thus in greater need of Title IX’s protections.¹³³ This overwhelming national consensus among organizations that work daily to end sexual violence that discrimination against transgender people perpetuates rather than prevents assault lends tremendous support to the claims that these laws do not further their stated goals.

Critics may argue that the discriminatory comments of some individual legislators or officials cannot be ascribed to the legislature as a whole, or that legislative intent is not a valid inquiry in the first place. As Professor Richard Fallon recently wrote, legislative intent plays an important role in American constitutional jurisprudence but the doctrine is riddled with challenges.¹³⁴ The *Whole Woman’s Health* inquiry, however, does not require proof of discriminatory intent. Many believe, and for good reason, that the TRAP and bathroom legislation were intended to restrict abortion access and target trans people, respectively. But the laws are unconstitutional, even assuming a legitimate health and safety interest could be discerned, if they impose burdens on constitutional rights and do not further the goals they claim to achieve. Regardless of intent, the burdens on trans people are undeniable, and the health and safety interest—while neutral on its face—is not actually furthered by the law.

Whole Woman’s Health emphasizes the court’s role in evaluating the fit between the policy and the problem it purports to solve. As the next Part will show, this inquiry is neither limited to the abortion context nor the undue burden standard. Rather, *Whole Woman’s Health* makes an essential point about the judicial role that spans other areas of law and standards of review.

¹³⁰ NAT’L TASK FORCE TO END SEXUAL AND DOMESTIC VIOLENCE AGAINST WOMEN, NATIONAL CONSENSUS STATEMENT OF ANTI-SEXUAL ASSAULT AND DOMESTIC VIOLENCE ORGANIZATIONS IN SUPPORT OF FULL AND EQUAL ACCESS FOR THE TRANSGENDER COMMUNITY I (2016), <http://endsexualviolence.org/files/NTFNationalConsensusStmntTransAccessWithSignatoriesUpdated4-29-16.pdf> [<https://perma.cc/NF5E-LQTC>].

¹³¹ Alexandra Brodsky, Opinion, *Don’t Use Girls as Props to Fight Trans Rights*, N.Y. TIMES (Oct. 27, 2016), https://www.nytimes.com/2016/10/27/opinion/dont-use-girls-as-props-to-fight-trans-rights.html?_r=0 [<https://perma.cc/GS47-RQMC>].

¹³² Brief of Amici Curiae National Women’s Law Center, et al., in Support of Respondent at 21, *Gloucester Cty. Sch. Bd. v. G.G.*, 2017 WL 855755 (U.S. Mar. 6, 2017) (No. 16-273), 2017 WL 1057278.

¹³³ *Id.* at 19–20.

¹³⁴ See Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523, 525, 527 (2016).

The focus on pretextual health and safety legislation makes the *Whole Woman's Health* decision all the more applicable to anti-trans policies.

III. APPLYING THE LEGAL STANDARD

Quoting *Gonzales v. Carhart*, the *Whole Woman's Health* majority emphasized that the “Court retains an independent constitutional duty to review factual findings *where constitutional rights are at stake*.”¹³⁵ Opponents may argue this standard reaffirmed by *Whole Woman's Health* does not apply outside the abortion context or does not apply to statutory claims, but as this section will demonstrate, precedent does not support this narrow interpretation.

Discrimination against transgender people is rightfully characterized as sex discrimination or sex stereotyping. Courts of appeals in the First,¹³⁶ Fourth,¹³⁷ Sixth,¹³⁸ Ninth,¹³⁹ and Eleventh¹⁴⁰ circuits have recognized this argument in both equal protection and statutory sex discrimination claims. So have numerous district courts, as well as the EEOC¹⁴¹ and the Department of Education.¹⁴² The Supreme Court clarified in *Price Waterhouse v. Hopkins*¹⁴³

¹³⁵ *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2310 (2016) (emphasis omitted) (quoting *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007)).

¹³⁶ See *Rosa v. Parks W. Bank & Tr. Co.*, 214 F.3d 213, 214 (1st Cir. 2000) (holding a prospective bank customer who appeared “biological[ly] male, [but] dressed in traditionally feminine attire” and was refused a loan successfully made out a claim for sex discrimination under the Equal Credit Opportunity Act and other state anti-discrimination statutes).

¹³⁷ See *G.G. ex. rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 723–24 (4th Cir. 2016) (invalidating a school board’s policy requiring students to use the bathroom corresponding with their sex assigned at birth rather than gender identity because it violates Title IX and corresponding federal guidance), *vacated*, No. 16-273, 2017 WL 855755 (U.S. Mar. 6, 2017).

¹³⁸ See *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004) (holding a transgender fire department employee’s allegations that the employee was fired for failure to conform to gender stereotypes and the fire department’s beliefs about “how a man should look and behave” were sufficient to plead claims of sex stereotyping and gender discrimination under Title VII of the Civil Rights Act and the Fourteenth Amendment).

¹³⁹ See *Schwenck v. Hartford*, 204 F.3d 1187, 1201–02 (9th Cir. 2000) (holding gender animus encompasses animus against transgender persons under the Gender Motivated Violence Act, and thus the evidence relating to the attempted rape of a transgender inmate by a prison guard supported the finding that the attack was gender-motivated).

¹⁴⁰ See *Glenn v. Brumby*, 663 F.3d 1312, 1315–16 (11th Cir. 2011) (holding the firing of an employee because she came out as transgender violated the Equal Protection Clause’s sex stereotyping prohibition).

¹⁴¹ See, e.g., *Macy v. Holder*, No. 0120120821, 2012 WL 1435995, at *1 (E.E.O.C. Apr. 20, 2012) (holding sex discrimination claims cognizable under Title VII for discrimination on the basis of gender identity or transgender status).

¹⁴² See “Dear Colleague” Letter from Catherine E. Lhamon, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ., & Vanita Gupta, Principal Deputy Assistant Attorney Gen. for Civil Rights, U.S. Dep’t of Justice (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> [<https://perma.cc/LQ4U-PBRP>].

¹⁴³ 490 U.S. 228 (1989).

that sex discrimination includes sex stereotyping,¹⁴⁴ and held an employer discriminated against an employee on the basis of sex when they took employment action “on the basis of a belief that a woman cannot be aggressive, or that she must not be.”¹⁴⁵ While *Price Waterhouse* was a Title VII case, its logic has been extended to constitutional sex discrimination claims. As these courts have recognized, the root of discrimination against transgender people is discrimination for their failure to conform to gender stereotypes, which constitutes sex discrimination under *Price Waterhouse*.¹⁴⁶ Without delving too deep into this debate, as this is not the focus of the article, I presume that discrimination against transgender individuals is sex discrimination under the reasoning of these circuits and therefore heightened scrutiny is the appropriate level of scrutiny.

Under the Equal Protection Clause of the Fourteenth Amendment, sex discrimination claims receive heightened scrutiny.¹⁴⁷ Heightened scrutiny is generally understood to be at least as strict as the undue burden standard applied to abortion restrictions, so one would expect the evidentiary standards to be at least as high for states claiming a health and safety rationale to justify constitutional violations on the basis of sex.¹⁴⁸ Lambda Legal and the ACLU have already taken note of the implications of *Whole Woman's Health* for sex discrimination cases, and cited the case several times in their appellate brief in *Carcaño v. McCrory*, the suit against North Carolina's H.B.2.¹⁴⁹ The plaintiffs explained, “highly speculative fears like the ones raised by Defendants have been rejected time and again by the courts as a valid justification for discriminatory laws.”¹⁵⁰ The Court in *Whole Woman's Health*, the

¹⁴⁴ *Id.* at 250–51 (plurality opinion).

¹⁴⁵ *Id.* at 250.

¹⁴⁶ *See, e.g., Glenn v. Brumby*, 663 F.3d 1312, 1316–17 (11th Cir. 2011) (“In *Price Waterhouse v. Hopkins*, the Supreme Court held that discrimination on the basis of a gender stereotype is sex-based discrimination. . . . Accordingly, discrimination against a transgender individual because of her gender-nonconformity is sex discrimination . . .”).

¹⁴⁷ *See, e.g., Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (“[T]he party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an ‘exceedingly persuasive justification’ for the classification . . . [and must] show[] at least that the classification serves ‘important governmental objectives and that the discriminatory means employed’ are ‘substantially related to the achievement of those objectives.’” (first quoting *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981); then quoting *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150 (1980)).

¹⁴⁸ The Court in *Casey* did not situate the undue burden standard in the traditional levels of scrutiny, so judges and scholars remained divided on its force. *See, e.g., Emma Freeman, Note, Giving Casey Its Bite Back: The Role of Rational Basis Review in Undue Burden Analysis*, 48 HARV. C.R.-C.L. L. REV. 279, 293 (2013) (“The Justices’ invocation of the language of rational basis is, perhaps, partially responsible for the dissolution of undue burden’s rigor and its persistent misinterpretation.”). The *Whole Woman's Health* Court clarified the nature of the balancing test, but was met with criticism from Justice Thomas in dissent, calling the analysis a form of strict scrutiny. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2324 (2016) (Thomas, J., dissenting).

¹⁴⁹ *See* Brief of Plaintiffs-Appellants at 20, 44, 52, 55, *Carcaño v. McCrory*, No. 16-1989 (4th Cir. Oct. 18, 2016).

¹⁵⁰ *Id.* at 44 (citing *Whole Woman's Health*, 136 S. Ct. at 2313–14).

Carcaño plaintiffs assert, understood that “[d]etermined wrongdoers, already ignoring existing statutes and safety measures, are unlikely to be [deterred] . . . by a new overlay of regulations.”¹⁵¹ Furthermore, “[e]xisting criminal laws ‘protect the privacy and safety of all citizens, regardless of gender identity.’”¹⁵²

Critiques to this application may come from a number of angles. Some will undoubtedly question the *Whole Woman’s Health* majority opinion itself, invoking the logic of the two dissenting opinions. Justice Thomas claimed the decision was an example of abortion exceptionalism—an illustration of the Court’s willingness to “ben[d] the rules for favored rights.”¹⁵³ He rejects the balancing test as contrary to *Casey*, which he claims gave “broad latitude” to state legislatures to resolve medical and scientific uncertainties.¹⁵⁴ Arguments about legislative deference are sure to be at the forefront of defenses to anti-trans bathroom legislation, and opponents will likely respond to the *Whole Woman’s Health* comparison by invoking reasoning similar to Justice Thomas’s dissent and calling the medical data inconclusive. However, states defending anti-trans laws cannot meet their burden of proof in justifying laws that impose great constitutional harm to solve virtually non-existent problems. While Justice Alito spent the majority of his dissent on the *res judicata* issue, he also criticized the type of evidence accepted by the majority.¹⁵⁵ He called the conclusion that the laws caused the clinic closures a “crude inference[]” rather than a claim based on “direct evidence.”¹⁵⁶ This critique is not necessarily in conflict with the idea that courts should conduct an independent inquiry into health and safety justifications, but rather reflects a disagreement about what kind of evidence is sufficient to show the burdens are causally connected to the laws. As Justice Kagan pointed out at oral argument, though, the evidence was “almost like the perfect controlled experiment,” because the twelve clinics that had closed with the law in place reopened when it was lifted.¹⁵⁷

Another counterargument likely to be raised by opponents is that the *Whole Woman’s Health* opinion is limited to the undue burden inquiry, and cannot be extended to equal protection cases. Indeed, defendant-appellees raised this argument in their brief on appeal in *Carcaño v. McCrory*.¹⁵⁸ How-

¹⁵¹ *Id.* (second alteration in original) (quoting *Whole Woman’s Health*, 136 S. Ct. at 2313–14).

¹⁵² *Id.* at 52 (“The record contains nothing to suggest that [Texas’s] H.B. 2 would be more effective than pre-existing [criminal] law at deterring wrongdoers” (quoting *Whole Woman’s Health*, 136 S. Ct. at 2314)).

¹⁵³ *Whole Woman’s Health*, 136 S. Ct. at 2321 (Thomas, J., dissenting).

¹⁵⁴ *Id.* at 2324–25 (quoting *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 885 (1992) (plurality opinion)).

¹⁵⁵ *See id.* at 2331–43 (Alito, J., dissenting).

¹⁵⁶ *Id.* at 2343.

¹⁵⁷ Oral Argument at 13:08, *Whole Woman’s Health*, 136 S. Ct. 2292 (No. 15-274), <https://www.oyez.org/cases/2015/15-274> [<https://perma.cc/K6EA-DPZQ>].

¹⁵⁸ *See* Brief of Defendant-Appellee and Intervenor/Defendants-Appellees at 37 n.13, *Carcaño v. McCrory*, No. 16-1989 (4th Cir. Nov. 21, 2016) (stating that “[a]ppellants

ever, this interpretation does not withstand either the text of the *Whole Woman's Health* opinion or past precedent. The plain language of the standard applies to all claims where a constitutional right is at stake.¹⁵⁹ In fact, the *Gonzales* Court credited a 1932 workers' compensation opinion by Justice Brandeis for this assertion, further indicating that the duty to review factual findings need not be limited to the abortion context.¹⁶⁰ Furthermore, several courts have already cited *Whole Woman's Health* in striking down pretextual laws voting laws.

As I have argued, heightened scrutiny is the applicable standard for sex discrimination claims, under which discrimination against transgender people rightly falls. But, even if a court were to reject this application, the principles of judicial inquiry emphasized in *Whole Woman's Health* apply to rational basis review. As discussed earlier in the Article, courts in the Fourth, Fifth, and Seventh Circuits have struck down voting restrictions that claimed an interest in remedying voter fraud as a pretext for restricting minority access to the polls.¹⁶¹ Several have cited *Whole Woman's Health* for the proposition that, "where a state law burdens a constitutional right, the state must produce evidence supporting its claim that the burden is necessary to further the state's claimed interests."¹⁶² In *Veasey v. Abbott*,¹⁶³ the Fifth Circuit Court of Appeals pointed to the fact that, out of twenty million votes cast in Texas in the past decade, there were only two convictions of in-person voter fraud.¹⁶⁴ The court concluded that the district court need not "accept that legislators were really so concerned with this almost nonexistent problem."¹⁶⁵ The disparate impact on minority voters, the evidence of discriminatory intent, and the fact that the laws would not serve the state's proffered goal led the court to find the voter ID laws unconstitutional.¹⁶⁶ While it is often unclear what level of scrutiny courts are employing for disparate impact voting rights claims, the Fifth Circuit appeared to find the Texas voter ID law unconstitutional even under rational basis review. The majority concluded: "Even under the least searching standard of review we employ for these types of challenges, there cannot be a total disconnect between the State's announced interests and the statute enacted."¹⁶⁷ The court cited an economic regulation case for the proposition that deference to economic legislation even under rational basis review does not mandate "judi-

also support their argument . . . by mistakenly citing cases *outside* the equal protection context," including *Whole Woman's Health*).

¹⁵⁹ *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2310 (2016).

¹⁶⁰ *Gonzales*, 550 U.S. at 165 (citing *Crowell v. Benson*, 285 U.S. 22, 60 (1932)).

¹⁶¹ See *supra* note 3 and accompanying text.

¹⁶² *Frank v. Walker*, 196 F. Supp. 3d. 893, 915 n.10 (E.D. Wis. 2016).

¹⁶³ 830 F.3d 216 (5th Cir. 2016).

¹⁶⁴ *Id.* at 238.

¹⁶⁵ *Id.* at 239.

¹⁶⁶ *Id.* at 272.

¹⁶⁷ *Id.* at 262.

cial blindness” to the state’s asserted interests.¹⁶⁸ This kind of “total disconnect” between a law’s purpose and effect counsels striking the law down under even the most lenient standard of review.

As organizations like GLAD and Lambda Legal have argued, rational basis review takes into account whether a law is singling out a particular group for disfavored treatment.¹⁶⁹ Like the law at issue in *Romer v. Evans*,¹⁷⁰ where the Court found suspect the fact that Colorado only prohibited anti-discrimination protections for gay people and not other groups,¹⁷¹ the law at issue in *Carcaño v. McCrory* similarly prevents anti-discrimination ordinances only for trans people. It is “normal course” for legislatures to assert a pretextual interest rather than admit discriminatory motives, and “[r]ational basis review does not require the Court to take such fictions at face value.”¹⁷² The *Whole Woman’s Health* Court recognized this problem, and thus did not limit its principles of judicial review to the undue burden inquiry.

Some may argue that *Whole Woman’s Health* is inapplicable to Title IX claims. But this argument falls flat, given that Title IX is at least as extensive as the Fourteenth Amendment when it comes to sex discrimination analysis.¹⁷³ Thus, the principles of *Whole Woman’s Health* may also be imported to challenges to trans discriminatory school policies under Title IX. The aforementioned voting rights cases dealt with claims under both the Constitution and the Voting Rights Act. Like the VRA, Title IX is a federal statute enacted to enforce a constitutional right. As Cohen points out, Equal Protection Clause and Title IX jurisprudence overlap in a number of ways.¹⁷⁴ There is even significant evidence from text and history that Title IX was meant to extend *beyond* the Fourteenth Amendment’s sex discrimination prohibition.¹⁷⁵ Courts frequently borrow from constitutional analysis in Title IX

¹⁶⁸ *Id.* (quoting *St. Joseph Abbey v. Castille*, 712 F.3d 215, 226 (5th Cir. 2013)).

¹⁶⁹ Amicus Curiae Brief of Gay & Lesbian Advocates & Defenders and Lambda Legal Defense & Education Fund, Inc. in Support of Edith Windsor and the United States Addressing the Merits and Supporting Affirmance at 13, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) [hereinafter GLAD Brief in *Windsor*] (arguing that, if the Court declined to apply heightened scrutiny to the Defense of Marriage Act, rational basis ‘with bite’ should apply, given the evidence of animus toward a particular group).
¹⁷⁰ 517 U.S. 620 (1995).

¹⁷¹ *Id.* at 633; *see also* GLAD Brief in *Windsor*, *supra* note 169, at 12–13 (citing *Romer*, 517 U.S. at 633).

¹⁷² GLAD Brief in *Windsor*, *supra* note 169, at at 25.

¹⁷³ *See* David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J.L. & GENDER 217, 220 (2005). Title IX carves out some exceptions that the Fourteenth Amendment does not, but those exceptions are not at issue in these transgender rights cases. For example, the statute exempts private undergraduate admissions, *see* 20 U.S.C. § 1681(a)(1) (2012), and regulations have created an exception for contact sports, *see* 45 C.F.R. § 86.41(b) (2016).

¹⁷⁴ *See* Cohen, *supra* note 173, at 218–19.

¹⁷⁵ *Id.* at 220.

cases and vice versa, and there is no reason to counsel against doing so here.¹⁷⁶

The independent judicial inquiry standard reaffirmed by *Whole Woman's Health* is applicable to a number of constitutional rights, including sex discrimination claims under Title IX and the Constitution. After determining its applicability to anti-trans bathroom bills, it is clear that the decision counsels striking them down. Like the TRAP laws invalidated by *Whole Woman's Health*, anti-trans bathroom bills claim an interest in solving a health and safety issue that does not exist. There is ample evidence that the safety interest is pretext for discrimination against transgender people. Similar fear campaigns characterized the rise of both TRAP laws and bathroom bills when efforts to directly restrict abortion access or discriminate against transgender people failed. Upon examination of testimony and evidence by reliable medical organizations and sexual assault prevention groups, it becomes clear that anti-trans bills like North Carolina's do nothing to deter sexual assault or increase the safety of women and girls, and only serve to impose dangerous risks on the lives of the transgender community.

IV. LOOKING AHEAD

Many rights for transgender people hang in the balance in 2017. This term, the Supreme Court granted cert in *G.G. ex rel. Grimm v. Gloucester County School Board*—the first transgender rights case to reach the highest Court.¹⁷⁷ However, after the Trump administration withdrew the Title IX guidance¹⁷⁸ on which the lower court relied heavily in its favorable decision, the Court vacated and remanded the case.¹⁷⁹ Now, the Fourth Circuit must confront the meaning of sex discrimination in Title IX head on. Despite North Carolina's claim to have repealed H.B. 2, the state's new bill, H.B. 142, prohibits local governments from enacting anti-discrimination protections in private employment and public accommodations until 2020 and prohibits all political subdivisions of the state from passing any protections regarding multiple occupancy restrooms, showers, or changing facilities, claiming an interest in "bathroom safety and privacy."¹⁸⁰ Anti-trans bill proposals are already proliferating the 2017 legislative session,¹⁸¹ after the Republican successes in the 2016 election. Should any of these bills become law, civil rights groups are ready to take action: "[W]e will consider every option,

¹⁷⁶ See *id.* at 219–20.

¹⁷⁷ 822 F.3d 709 (4th Cir. 2016), *vacated*, No. 16-273, 2017 WL 855755 (U.S. Mar. 6, 2017).

¹⁷⁸ Ariane de Vogue et al., *Trump Administration Withdraws Federal Protections for Transgender Students*, CNN (Feb. 3, 2017, 10:16 AM), <http://www.cnn.com/2017/02/22/politics/doj-withdraws-federal-protections-on-transgender-bathrooms-in-schools/> [https://perma.cc/5YQV-FPXS].

¹⁷⁹ No. 16-273, 2017 WL 855755 (U.S. Mar. 6, 2017).

¹⁸⁰ N.C. Gen. Stat. Ann. § 143-760; see also Strangio, *supra* note 111.

¹⁸¹ See, e.g., Kralik, *supra* note 5.

including litigation, to protect the trans people who will be harmed,” said Chase Strangio of the ACLU.¹⁸² This Part will examine some of the prominent legal challenges facing the transgender community in 2017 and the applicability of *Whole Woman’s Health* to current or prospective litigation.

Without specific guidance from the Obama administration telling schools to treat transgender students consistent with their gender identity, the Fourth Circuit on remand in *Gloucester County* must interpret the meaning of the statutory language in Title IX prohibiting discrimination on the basis of sex. While the Supreme Court only granted cert on the Title IX questions,¹⁸³ the ACLU also raised the constitutional question about whether the Fourteenth Amendment’s equal protection guarantee applies to transgender people under sex discrimination and sex stereotyping theories. Sooner or later, the Supreme Court will have to face these questions head on, and must decide the meaning of sex discrimination and its applicability to transgender people. In the meantime, lower courts should recognize that these questions turn heavily on the Court’s decision in *Whole Woman’s Health*. As the previous sections have demonstrated, *Whole Woman’s Health* reaffirmed the judicial duty to inquire into the state’s motives and proffered interests when a law burdens a constitutional right. The Court rightfully recognized the real world effects of the Texas TRAP laws—the closure of 75% of clinics in the state would have severely restricted access to healthcare and forced patients to seek care by rogue providers or even resort to dangerous self-induction methods. Similarly, the physical and psychological harms to transgender people under discriminatory bathroom legislation abound, including increased risk of harassment, assault, and suicide. The proffered interests for these laws both rely on fear mongering campaigns in the name of women’s health and safety as pretext for discriminatory motives. Just as the Court recognized the safety of the abortion procedure and the lack of evidence that burdensome licensing requirements would benefit even a single patient, it must similarly recognize that anti-trans bathroom bills will not deter sexual assault or enhance women’s safety.

When the Supreme Court granted the stay in *Gloucester County*, it missed this critical connection. On August 3, 2016, Justice Breyer joined the conservative justices in deciding to grant the school board’s motion for a stay against the Fourth Circuit’s decision,¹⁸⁴ meaning the plaintiff, Gavin, would be forbidden from using the boys’ bathroom until the Court was finished

¹⁸² Dominic Holden, *Texas and Kentucky File Bills to Restrict Transgender Bathroom Access*, BUZZFEED NEWS (Jan. 5, 2017, 5:33 PM), https://www.buzzfeed.com/dominic-holden/states-file-bills-to-restrict-transgender-bathroom-access?utm_term=.aeZYKjD5q#.ccv51yZIO [<https://perma.cc/C4QP-3RYZ>].

¹⁸³ See *Gloucester Cty.*, 137 S. Ct. at 369; Petition for a Writ of Certiorari at i, *Gloucester Cty.*, 2017 WL 855755 (No. 16-273).

¹⁸⁴ See *Gloucester Cty. Sch. Bd. v. G.G. ex. rel. Grimm*, 136 S. Ct. 2442, 2242 (2016) (mem.), *vacated*, No. 16-273, 2017 WL 855755 (U.S. Mar. 6, 2017).

with the case. There is no analysis in the opinion, but for Justice Breyer's one sentence concurrence. He wrote:

In light of the facts that four Justices have voted to grant the application referred to the Court by the Chief Justice, that we are currently in recess, and that granting a stay will preserve the status quo (as of the time the Court of Appeals made its decision) until the Court considers the forthcoming petition for certiorari, I vote to grant the application as a courtesy.¹⁸⁵

Many questions remain. First, what is the "status quo?" It was not, in the Court's view, the time Gavin was using the boys' restroom without issue before the lawsuit, or the time since his rights were vindicated by the Fourth Circuit. Rather, the "status quo" the Court identified was the period the district court's opinion, which had been overturned, was in effect. Second, to whom is this a courtesy? This is the most troubling part of the sparse opinion. Justice Breyer cites a death penalty case, in which courtesy votes are sometimes used to prevent an execution while the Court decides whether to grant cert.¹⁸⁶ His application of the courtesy vote to prevent a seventeen-year-old transgender high school student from using the boys' bathroom is concerning. It indicates a lack of appreciation for the people these laws are harming. In *Whole Woman's Health*, the Court (including Justice Breyer) also voted to grant a stay, but there the situation was reversed.¹⁸⁷ Allowing the Fifth Circuit's decision to remain in place would have allowed the harmful regulations to go into effect. The Court recognized the immense burden the regulations would impose, so it postponed the law's enforcement until the case was decided. By contrast, the Fourth Circuit's decision in *Gloucester County* had already barred the allegedly illegal policy and the Supreme Court decided to put it back in place. This decision ignores the severe harms anti-trans bathroom policies impose on transgender people, especially transgender youth, and appears to buy into the fear-mongering rhetoric that the policies provide some sort of safety benefit that should remain in place as the Court decides what to do.

The gender divide in the Court's opinion is also telling. The three women on the Court dissented, and would have left the Fourth Circuit decision untouched, allowing Gavin to use the restroom consistent with his gender identity while the litigation continued.¹⁸⁸ The women on the highest court in the country are evidently not threatened by trans people using the bathroom, yet in granting the school board's motion for a stay, the Court sided with the school board in the name of women's safety. In deciding the merits, the

¹⁸⁵ *Id.*

¹⁸⁶ *See id.* (citing *Medellín v. Texas*, 554 U.S. 759, 765 (2008) (Breyer, J., dissenting)).

¹⁸⁷ *See Whole Woman's Health v. Cole*, 135 S. Ct. 2923 (2015) (mem.); *see also Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292, 2303 (2016).

¹⁸⁸ *See Gloucester Cty.*, 136 S. Ct. at 2242.

Fourth Circuit should take a page from *Whole Woman's Health* in scrutinizing the state's interests, and recognize that the fear campaigns around bathrooms have no basis in the evidence, and the burdens on trans people far outweigh the (non-existent) benefits.

Currently, North Carolina is the only state to still have anti-trans bathroom legislation in effect, though several states are continuing to propose similar bills in the 2017 legislative session. Lambda Legal and the ACLU challenged North Carolina's H.B. 2 in *Carcaño v. McCrory*, and several organizations have already begun to draw the connection to *Whole Woman's Health*. As indicated above, the plaintiffs in their appellate brief cited *Whole Woman's Health*, drawing connections between the fear campaigns used to justify the discriminatory laws and the evidence that the additional regulations provided no additional deterrence in light of the existing criminal laws already guarding against the alleged safety concerns.¹⁸⁹

In a separate H.B. 2 lawsuit brought by the Department of Justice against North Carolina,¹⁹⁰ sixty-eight companies, including Apple, Ebay, and Microsoft, filed a motion for an amicus brief in support of the plaintiff's preliminary injunction motion against H.B. 2.¹⁹¹ The companies also identified the *Whole Woman's Health* connection:

Putting aside the fact that a concern about protecting "women and girls" would have called for a response much more targeted than H.B. 2, the suggestion that permitting transgender persons to use bathrooms corresponding to their gender identity somehow exposes women and girls to a heightened risk of sexual predation is both offensive and wholly unsubstantiated. *Cf. Whole Woman's Health v. Hellerstedt*, [136 S. Ct. 2292, 2313 (2016)] (holding state laws unconstitutional where they had a "virtual absence of . . . benefit[s]" but imposed many burdens).¹⁹²

While the H.B. 2 litigation was partially derailed by the state legislature's bait-and-switch,* litigants plan to challenge North Carolina's replacement bill, which is equally discriminatory and continues to claim an interest in bathroom safety and privacy.¹⁹³ As these litigators and amici have indicated,

¹⁸⁹ See Carcaño Brief, *supra* note 6, at 44 (citing *Whole Woman's Health*, 136 S. Ct. at 2313–14).

¹⁹⁰ *United States v. North Carolina*, 1:16CV425, 2016 WL 4005839 (M.D.N.C. July 25, 2016).

¹⁹¹ See Unopposed Motion by 68 Companies for Leave to File an Amicus Curiae Brief in Support of Plaintiff, *North Carolina*, 2016 WL 4005839 (1:16CV425).

¹⁹² *Id.* at 10 (citation omitted).

¹⁹³ Shortly after North Carolina replaced H.B. 2 with H.B. 142, the Department of Justice, under the direction of the Trump administration, withdrew from the lawsuit and the case was voluntarily dismissed. See Mary Emily O'Hara, *Justice Department Withdraws Lawsuit Over HB2 'Bathroom Bill'*, NBC News (Apr. 14, 2017), <http://www.nbcnews.com/feature/nbc-out/justice-department-withdraws-lawsuit-over-hb2-bathroom-bill-n746551>. However, the ACLU and Lambda Legal are continuing their suit for damages. See *Lambda Legal and ACLU: 'Trump Administration Continues to Abandon Trans-*

Whole Woman's Health will continue to be applicable in a number of ways, and the Court has a duty to consistently apply this precedent. Unsubstantiated interests in protecting the safety of women and girls will not provide the foundation for discriminatory regulations under any standard of review. Applying the principles of *Whole Woman's Health*, anti-trans policies must clearly fall.

CONCLUSION

Ultimately, a shift toward a more scientific, evidence-based Court would be a positive one, and advocates should seize on this trend in demonstrating why other pretextual laws grounded in sex stereotypes cannot stand. Reproductive justice and transgender rights lawyers would benefit from increased collaboration as they fight to protect communities from serious health and safety risks and work to combat fear-mongering campaigns in the name of women's health and safety. Taking *Whole Woman's Health* as a model may be particularly important to gain the vote of Justice Breyer in future trans rights litigation. Breyer authored the lauded reproductive rights opinion, but sided with conservative justices in putting the discriminatory school board policy back in place while the outcome in *Gloucester County* was pending. The similarities are striking. *Whole Woman's Health* forcefully rejects "women's health and safety" as a justification for discriminatory laws that impose grave constitutional burdens on vulnerable communities. As lower courts continue to decide trans rights cases and litigators prepare for the possibility of a future Supreme Court decision, this driving principle should remain salient.

gender Americans, Lambda Legal (Apr. 14, 2017), http://www.lambdalegal.org/news/nc_20170414_doj-withdraws-from-hb2-suit. See Richard Craver, *LGBT plaintiffs plan to target bill that did away with HB2*, Winston-Salem Journal (May 2, 2017), http://www.journalnow.com/news/elections/state/lgbt-plaintiffs-plan-to-target-bill-that-did-away-with/article_00896f21-9922-5a2d-8af4-948fd3670ba7.html.

