IN THE SUPREME COURT OF IOWA
Supreme Court No. 18-1158

EERIEANNA GOOD and CAROL BEAL,

Petitioners-Appellees

v.

IOWA DEPARTMENT OF HUMAN SERVICES,

Respondent-Appellant.

Appeal from the Iowa District Court for Polk County
Hon. Arthur E. Gamble, Nos. CVC054956, CVC055470 (consolidated)

BRIEF OF IMPACT FUND, NATIONAL WOMEN'S LAW CENTER AND 25 LEGAL AND ADVOCACY ORGANIZATIONS AS AMICI CURIAE IN SUPPORT OF PETITIONERS-APPELLEES GOOD AND BEAL

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LIST OF AMICUS CURIAE

- Impact Fund
- National Women's Law Center
- A Better Balance: The Work and Family Legal Center
- AIDS Legal Referral Panel
- American Association of University Women
- Atlanta Women for Equality
- Bay Area Lawyers for Individual Freedom
- Bet Tzedek
- California Women's Law Center
- Centro Legal de la Raza
- Equality California
- Equality Florida Institute
- Equality New Mexico
- Equality North Carolina
- Equal Rights Advocates
- GLBTQ Legal Advocates & Defenders
- Legal Aid at Work
- Legal Aid Society
- Legal Voice
- LGBT Bar Association of Los Angeles
- National Center for Lesbian Rights
- National LGBTQ Task Force
- National Council of Jewish Women
- National Organization for Women Foundation
- National Queer Asian Pacific Islander Alliance
- SAGE
- Women's Law Project

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INTEREST OF AMICI CURIAE[1]

This brief is submitted by the Impact Fund, National Women's Law Center, and 25 non-profit legal and advocacy organizations as Amici Curiae.

The Impact Fund is a non-profit legal foundation that provides strategic leadership and support for impact litigation to achieve economic and social justice. It provides funding, offers innovative training and support, and serves as counsel for impact litigation across the country. The Impact Fund has served as counsel in a number of major civil rights cases, including cases challenging employment discrimination, lack of access for those with disabilities, and violations of fair housing laws. Through its work, the Impact Fund seeks to use and support impact litigation to achieve social justice for all communities.

The National Women's Law Center (NWLC) is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights and the rights of all people to be free from sex discrimination. Since its founding in 1972, NWLC has focused on issues of key importance to women and girls, including economic security, employment, education, and health, with special attention to the needs of low-income women and those who face multiple and

[1] Pursuant to Iowa Court Rule 6.906(4)(d), no counsel for a party authored this brief in whole or in part; (ii) no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; and (iii) no person other than Amici Curiae, their members, or their counsel made a monetary contribution intended to fund its preparation or submission.

intersecting forms of discrimination. NWLC has participated as counsel or amicus curiae in a range of cases before the Supreme Court and the federal Courts of Appeals to secure equal treatment and opportunity in all aspects of society through enforcement of the Constitution and laws prohibiting discrimination. NWLC has long sought to ensure that rights and opportunities are not restricted on the basis of gender and that all individuals enjoy the full protection against sex discrimination promised by federal law.

Additional Amici include 25 legal and advocacy organizations, whose statements of interest are listed in the attached Motion for Leave to File Amicus Curiae Brief. Each organization supporting this amicus brief is dedicated to ensuring that its constituents and all others in this country receive equal treatment under the law.

Amici write separately to describe the overwhelming support for civil rights protections for transgender people under federal laws prohibiting sex discrimination, to highlight other states' interpretations of civil rights laws that protect both sex and gender identity, and to place this case in the larger context of courts' recognition that sex discrimination laws protect the civil rights of lesbian, gay, bisexual, and transgender people.

SUMMARY OF ARGUMENT

The Iowa District Court's ruling that Iowa Administrative Code 441-78.1(4) does not violate the Iowa Civil Rights Act's ("ICRA") prohibition against sex discrimination relied almost entirely upon *Sommers v. Iowa Civil Rights Commission*, 337 N.W.2d 470 (Iowa 1983) ("*Sommers v. ICRC*" or "*Sommers*"). At the time *Sommers* was decided, the question of whether ICRA's prohibition on sex discrimination extended to transgender people was one of first impression. This Court looked to federal courts for guidance and adopted the approach of the leading cases at that time, and held "transsexuals" are not protected by ICRA. Federal caselaw has since progressed significantly, and the decision should be revisited.

The cases on which *Sommers* relies predate the U.S. Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), which recognized sex discrimination based on sex stereotyping and gender nonconformity. The cases cited in *Sommers* have been explicitly or implicitly overruled, and courts now recognize with "near-total uniformity" that the pre-*Price Waterhouse* exclusion of transgender people from protections against sex discrimination "has been eviscerated." *Glenn v. Brumby*, 663 F.3d 1312, 1318 n.5 (11th Cir. 2011) (quoting *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004)); *see also* Order of June 6, 2018 ("Order"), at 16.

Sommers perpetuates an inconsistency that deprives individuals of rights in Iowa's state courts that they possess in its federal courts, contrary to the State's intent to construe ICRA broadly. *See, e.g.*, *Hollinger v. State*, No. 15-2012, 2016 WL 7395738, at *4 (Iowa Ct. App. 2016) (ruling that a decision of "the ICRA providing less protection to Iowa workers than is provided under federal law . . . goes against the legislature's express statement that the ICRA 'shall be construed broadly to effectuate its purposes' of eliminating unfair and discriminatory practices in employment.'") (quoting Iowa Code § 216.18(1); citing *Iron Workers Loc. No. 67 v. Hart*, 191 N.W.2d 758, 770 (Iowa 1971)).

The addition of "gender identity" to ICRA in 2007 does not resolve the matter, as federal law protects transgender people under well-recognized theories of *sex* discrimination. In addition, multiple courts that have interpreted state laws protecting both sex and gender identity continue to look to federal law to interpret prohibitions on sex discrimination. Decisions from courts nationwide demonstrate that "sex" and "gender" are intertwined, and that both characteristics are entitled to protection.

The legal status of lesbian, gay, bisexual, and transgender individuals has changed dramatically in the last thirty-five years, and *Sommers* fossilizes perceptions of transgender people that are now outdated and unjust. It should be overturned.

ARGUMENT

I. This Court Should Overturn *Sommers v. Iowa Civil Rights Commission* Because the Cases Upon Which It Relied Are No Longer Good Law.

The district court denied Petitioners-Appellees EerieAnna Good and Carol Beal's claims of sex discrimination, citing this Court's decision in *Sommers v. ICRC*. While it recognized that the underlying holding of *Sommers* may have "eroded," the court considered itself bound by the decision. Order at 16. It wrote:

> Petitioners argue that *Sommers* is essentially dead law, decided prior to the legislature's 2007 amendment to the ICRA adding "gender identity" to § 216.7, and is based upon federal case law that has since been "eviscerated" in federal courts. While Petitioners' argument is compelling, the Court is mindful of the Iowa Supreme Court's admonition against district courts overturning Supreme Court precedent. Regardless of whether this Court believes that *Sommers* has been eroded by subsequent developments in federal case law, this Court is bound by its precedent until the Iowa Supreme Court holds otherwise. Thus, the Court does not find that ICRA's prohibition against sex discrimination includes discrimination against transgender individuals.

Order at 16-17 (internal citations and footnotes omitted).

Thirty-five years ago, the Court recognized that "[t]his is a case of first impression of Iowa," and looked to the federal courts' interpretation of similar language in Title VII. *Sommers v. ICRC*, 337 N.W.2d at 474. The Court identified four relevant decisions: *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748 (8th Cir. 1982); *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659 (9th Cir. 1977); *Powell v. Read's, Inc.*, 436 F. Supp. 369 (D. Md. 1977); and *Voyles v. Ralph K. Davies*

Medical Center, 403 F. Supp. 456 (N.D. Cal. 1975)). Though the decisions were not binding on the Court, it found the unanimous holdings, in light of other factors, "persuasive." *Id*. The Court followed these decisions and held that ICRA's prohibition against sex discrimination does not protect transgender people. *Id*.

Federal courts have implicitly or explicitly overturned each of these foundational decisions. Today, the overwhelming majority of federal courts to consider the question have found that sex discrimination encompasses discrimination against transgender persons.

This appeal presents an opportunity for the Court to review its decision in *Sommers*. It has written, "We do not overturn our precedents lightly and will not do so absent a showing the prior decision was clearly erroneous." *McElroy v. State*, 703 N.W.2d 385, 394 (Iowa 2005). However, it also recognized that overturning a prior decision may be more appropriate under certain circumstances:

> [W]hen a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment.

Id. at 395 (quoting Benjamin N. Cardozo, The Nature of the Judicial Process 150 (1921)).

Sommers v. ICRC presents such a rule. As in *McElroy*, advancements in the law have revealed the deep injustice underlying the *Sommers* decision. *Sommers* deprives transgender people of the protection of ICRA's safeguards against sex

discrimination, even as they are protected by similar federal laws. *Sommers* should be overturned to remedy this injustice and ensure that transgender people receive the full benefit of ICRA's protection.

II. After *Sommers*, the U.S. Supreme Court Subsequently Interpreted Sex Discrimination to Prohibit Discrimination Based on Sex Stereotyping and Gender Nonconformity.

Six years after *Sommers v. ICRC*, a plurality of the U.S. Supreme Court declared that Title VII's prohibition on differential treatment of employees "*because of* . . . sex" meant "gender must be irrelevant to employment decisions." *Price Waterhouse*, 490 U.S. at 240. The Court observed:

> [W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "'[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'"

Id. at 251 (second alteration in original; internal citations omitted).

The U.S. Supreme Court subsequently identified other instances of actionable sex discrimination based on a failure to conform to sex stereotypes. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 550 (1996) ("generalizations about 'the way women are,' estimates of what is appropriate for *most women*," do not justify excluding women "outside the average description."); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 139 n.11 (1994). ("We have made abundantly clear in past cases that gender classifications that rest on impermissible stereotypes violate

the Equal Protection Clause, even when some statistical support can be conjured up for the generalization.").

In *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), the Supreme Court interpreted Title VII to prohibit same-sex sexual harassment, *id*. at 79. In doing so, it wrote, "[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id*. Recently, in *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017), the Court described the dangerous nature of laws themselves grounded in gender stereotypes, writing, "Overbroad generalizations of that order, the Court has come to comprehend, have a constraining impact, descriptive though they may be of the way many people still order their lives," *id.* at 1692-93.

The evolution of the Court's interpretation of actionable sex discrimination reflects a desire to situate statutory language in the context of modern workplaces, schools, and public accommodations. The Iowa Supreme Court has recognized this evolution and indicated its openness to it. In *Nelson v. James H. Knight DDS, P.C.*, 834 N.W.2d 64 (Iowa 2013), this Court remarked, "[A] decision based on a gender stereotype can amount to unlawful sex discrimination," *id*. at 71 (citing *Price Waterhouse* and *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000));

id. ("If Nelson could show that she had been terminated because she did not conform to a particular stereotype, this might be a different case").

In concurrence, Chief Justice Cady observed that, when interpreting civil rights statutes:

> [T]he process provided by the courts can often be the best environment for those echoes to be heard with greater clarity, aided by the benefit of a greater understanding achieved over the passage of time. . . . [T]he accumulation of court cases continues to shape [sex discrimination's] meaning, all seeking to express the intention of the legislature and to fulfill the purpose of these statutes.

Id. at 73-74 (Cady, C.J., concurring). Moreover, "[s]ince the enactment of this nation's civil rights law in 1964, courts have generally interpreted 'sex' discrimination in the workplace to mean employment discrimination as a result of a person's gender status." *Id.* at 74 (Cady, C.J., concurring) (citing *Smith*, 378 F.3d at 575).

As the discussion below illustrates, the groundwork has been laid for this Court to acknowledge the sea change in the federal law around sex discrimination, overrule *Sommers*, and adopt a broader interpretation of ICRA's prohibition on sex discrimination.

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Virtually All Federal Courts to Consider the Question Have Held That Federal Prohibitions on Sex Discrimination Protect Transgender People.

After *Price Waterhouse*, numerous federal courts have concluded that federal prohibitions on sex discrimination include discrimination against transgender people. The First, Sixth, Seventh, Ninth, and Eleventh Circuits have definitively ruled on the matter, while the remaining circuit courts have either considered the matter favorably or, in the absence of circuit precedent, their district courts have followed the favorable rulings of other circuits. The following is a brief summary of the current landscape.

The First Circuit held the plaintiff asserted a valid claim for sex discrimination under the Equal Credit Opportunity Act after a loan officer turned the plaintiff away "because she thought that Rosa's attire did not accord with his male gender." *Rosa v. Park W. Bank & Tr. Co.*, 214 F.3d 213, 215 (1st Cir. 2000); *see id.* at 216 (incorporating *Price Waterhouse*).

In the Second Circuit, the District of Connecticut ruled in favor of a plaintiff denied employment after she disclosed her identity as a transgender person and her intent to begin work as a woman. *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 512 (D. Conn. 2016). In denying summary judgment to the defendant, the court held:

> *Price Waterhouse* shows that gender-stereotyping *is* sex discrimination *per se*. That is, the plurality and concurrences do not

> create a fundamentally new cause of action, but rather rely on an understanding of the scope of Title VII's prohibition against discrimination "because of sex" that reaches discrimination based on stereotypical ideas about sex.

Id at 522.

The Third Circuit has not reached the question of whether gender identity discrimination is a form of impermissible sex stereotyping, but has observed that a school district's policy giving transgender students access to facilities corresponding with their gender identity was a proactive effort to "avoid[] the issues that may otherwise have occurred under Title IX." *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 536 (3d Cir. 2018), *pet. for panel reh'g granted*, 897 F.3d 515 (mem.) (3d Cir. 2018). Several of its district courts have recognized that unlawful sex-stereotyping discrimination extends to transgender people. *See, e.g.*, *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 297 (W.D. Pa. 2017) (holding that transgender plaintiffs "demonstrated a reasonable likelihood of showing that Title IX's prohibition of sex discrimination includes discrimination as to transgender individuals based on their transgender status and gender identity"); *Mitchell v. Axcan Scandipharm, Inc.*, No. Civ.A. 05-243, 2006 WL 456173, at *2 (W.D. Pa. Feb. 17, 2006) (holding that a transgender plaintiff properly alleged sex discrimination claims under Title VII and Pennsylvania law based on "facts showing that his failure to conform to sex stereotypes of how

a man should look and behave was the catalyst behind defendant's actions.").

The Fourth Circuit had an opportunity to consider the matter in *G.G. ex rel. Grimm v. Gloucester County School Board*, but changing federal regulations rendered a dispositive ruling elusive. 822 F.3d 709 (4th Cir. 2016), *vacated and remanded*, 137 S. Ct. 1239 (2017). Last year, the Fourth Circuit remanded the case to the Eastern District of Virginia for further consideration. *Grimm v. Gloucester Cty. Sch. Bd.*, 869 F.3d 286 (4th Cir. 2017). The district court recently concluded that "allegations of gender stereotyping are cognizable Title VII sex discrimination claims and, by extension, cognizable Title IX sex discrimination claims," and that the plaintiff "sufficiently pled a Title IX claim of sex discrimination under a gender stereotyping theory." *Grimm v. Gloucester Cty. Sch. Board*, 302 F. Supp. 3d 730, 746, 748 (E.D. Va. 2018). The court recently certified an appeal to the Fourth Circuit. Order, ECF. No. 153, No. 15-cv-54-AWA (Jun. 5, 2018).

In the Fifth Circuit, the Southern District of Texas held, "Title VII is violated when an employer discriminates against any employee, transsexual or not, because he or she has failed to act or appear sufficiently masculine or feminine enough for an employer." *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008) (quoting *Schroer v. Billington*, 525 F. Supp. 2d 58, 63 (D.D.C. 2007)).

The Sixth Circuit has rendered a series of influential decisions holding that transgender employees can state a sex discrimination claim under Title VII when an employer's adverse action is based on the employee's failure to conform to sex stereotypes. *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004).

Last year, the Seventh Circuit recognized a right of action for transgender people under Title IX's prohibition on sex discrimination, contrary to its decision under Title VII in *Ulane v. Eastern Airlines, Inc.*, 742 F.3d 1081 (7th Cir. 1984). In *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017), *cert. dismissed*, 138 S. Ct. 1260 (2018), the court enjoined a school district policy forbidding a transgender student from accessing restrooms that conformed with his gender identity, *id.* at 1039. In doing so, it held that transgender students can "bring[] sex-discrimination claims based upon a theory of sex-stereotyping as articulated four years later by the Supreme Court in *Price Waterhouse v. Hopkins*[.]" *Id.* at 1047 (contrary to the "reasoning" in *Ulane*).

The Eighth Circuit recently "assume[d]" without deciding that the "prohibition on sex based discrimination under Title VII . . . encompasses protection for transgender individuals." *Tovar v. Essentia Health*, 857 F.3d 771,

775 (8th Cir. 2017).[2] The Eighth Circuit had previously acknowledged the impact of *Price Waterhouse*, holding "[g]ender stereotyping can violate Title VII when it influences employment decisions." *Hunter v. United Parcel Serv., Inc.*, 697 F.3d 697, 702 (8th Cir. 2012).

The Ninth Circuit issued an early decision recognizing that *Price Waterhouse*'s sex-stereotyping analysis overruled previous cases excluding transgender people from sex discrimination protections, including its decision in *Holloway v. Arthur Anderson & Co.*:

> The initial judicial approach taken in cases such as *Holloway* has been overruled by the logic and language of *Price Waterhouse*. In *Price Waterhouse*, which was decided after *Holloway* and *Ulane*, the Supreme Court held that Title VII barred not just discrimination based on the fact that Hopkins was a woman, but also discrimination based on the fact that she failed "to act like a woman"—that is, to conform to socially-constructed gender expectations.

Schwenk v. Hartford, 204 F.3d 1187, 1201-02 (9th Cir. 2000) (quoting *Price Waterhouse*, 490 U.S. at 240).

The Tenth Circuit has not explicitly joined its sister circuits, but has "assume[d], without deciding," that a transgender individual could raise a claim of discrimination "because of sex" under Title VII based on his or her failure to

[2] The court did not reach a full analysis of the Title VII claim because it held that the plaintiff lacked standing. *Tovar*, 857 F.3d at 776. On remand, the district court recently held that "Title VII, and by extension Title IX, recognize that sex discrimination encompasses gender-identity discrimination." *Tovar v. Essentia Health*, No. 16-100, 2018 WL 4516949, at *3 (D. Minn. Sept. 20, 2018).

conform to sex stereotypes. *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224 (10th Cir. 2007). The panel observed that "[a] number of courts have relied on *Price Waterhouse* to expressly recognize a Title VII cause of action for discrimination based on an employee's failure to conform to stereotypical gender norms," and proceeded based on the assumption that the plaintiff had established a prima facie case of discrimination under the *Price Waterhouse* theory of gender stereotyping. *Id.* at 1223-24.

The Eleventh Circuit documented the growing national consensus in *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011), an Equal Protection case that has become a lodestar in this area of law. Relying on the long line of circuit and district court cases preceding it, the court held, "[D]iscrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender. Indeed, several circuits have so held." *Id.* at 1317 (citing and discussing *Schwenk*, 204 F.3d at 1198-203; *Rosa*, 214 F.3d at 215-16; *Smith*, 378 F.3d at 569, 572; *Barnes*, 401 F.3d 729). The court continued, "All persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype. . . . An individual cannot be punished because of his or her perceived gender non-conformity." *Id.* at 1318-19.

Finally, in the D.C. Circuit, the District of D.C. has held that a decision not to hire a transgender candidate "was infected by sex stereotypes" and that, "[u]ltimately, I do not think that it matters for purposes of Title VII liability whether the [Defendant] withdrew its offer of employment because it perceived Schroer to be an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual." *Schroer v. Billington*, 577 F. Supp. 2d 293, 305 (D.D.C. 2008). The court concluded that, "Schroer is entitled to judgment based on a *Price Waterhouse*-type claim for sex stereotyping." *Id.*

As the foregoing illustrates, federal case law has shifted with "near-total uniformity," *Glenn*, 663 F.3d at 1218 n.5, since *Sommers v. ICRC* was decided. Courts across the country now recognize the right of transgender people to challenge sex discrimination arising from sex stereotyping. Allowing *Sommers* to stand denies transgender people the ability to challenge sex-stereotyping discrimination under ICRA, while they are able to do so under similar federal laws.

III. The Federal Decisions Relied on in *Sommers* Are No Longer Good Law.

Sommers relied on four federal cases from the Eighth Circuit, Ninth Circuit, the District of Maryland, and the Northern District of California to determine that the ICRA's prohibition against sex discrimination did not cover transgender individuals. *Sommers v. ICRC*, 337 N.W.2d at 474 (citing *Sommers v. Budget*

Mktg., Inc., 667 F.2d 748 (Eighth Circuit); *Holloway*, 566 F.2d 659 (Ninth Circuit); *Powell*, 436 F. Supp. 369 (District of Maryland); *Voyles*, 403 F. Supp. 456 (Northern District of California)). Those decisions are no longer good law, and thus *Sommers* stands on untenable grounds.

A. *Sommers v. Budget Marketing, Inc.*

Though the Eighth Circuit has not overruled *Sommers v. Budget Marketing*, as described above, it has recognized the impact of *Price Waterhouse* and recently "assume[d]" without deciding that transgender people are protected by Title VII's prohibition on sex discrimination. *Tovar*, 857 F.3d at 775; *Hunter*, 697 F.3d at 702.

In addition, multiple district courts in the Eighth Circuit have openly departed from *Sommers*. *See, e.g.*, *Dawson v. H&H Elec., Inc.*, No. 4:14CV00583 SWW, 2015 WL 5437101, at *3 (E.D. Ark. Sept. 15, 2015) (noting that it is "well settled" that Title VII "prohibits an employer from taking adverse action because an employee's behavior or appearance fails to conform to gender stereotypes"); *Radtke v. Miscellaneous Drivers & Helpers Union Loc. 638 Health, Welfare, Eye & Dental Fund*, 867 F. Supp. 2d 1023, 1032 (D. Minn. 2012) ("In any case, the 'narrow view' of the term 'sex' in Title VII in . . . *Sommers* 'has been eviscerated by *Price Waterhouse*.'").

B. *Holloway v. Arthur Anderson & Co.* and *Voyles v. Ralph K. Davies Medical Center*

As noted above, the Ninth Circuit explicitly overruled *Holloway v. Arthur Anderson* and implicitly overruled *Voyles v. Ralph K. Davies Medical Center* with its decision in *Schwenk v. Hartford*, 204 F.3d at 1201-02. Multiple courts in the Ninth Circuit have recognized that "*Holloway* is no longer good law" after *Schwenk*. *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1118-19 (N.D. Cal. 2015). *See also Duronslet v. Cty. of Los Angeles*, 266 F. Supp. 3d 1213, 1222 (C.D. Cal. 2017) (same); *Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001, 1011 n. 76 (D. Nev. 2016) (same).

C. *Powell v. Read's, Inc.*

Though the Fourth Circuit has not yet issued an opinion in this area, the District of Maryland has abandoned the position it took in *Powell v. Read's, Inc.* *See, e.g.*, *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704, 714 (D. Md. 2018) (holding "transgender discrimination is per se actionable sex discrimination under Title VII based on *Price Waterhouse*"); *Finkle v. Howard Cty.*, 12 F. Supp. 3d 780, 788 (D. Md. 2014) (concluding that on the basis of the Supreme Court's holding in *Price Waterhouse*, . . . Plaintiff's claim that she was discriminated against 'because of her obvious transgendered status' is a cognizable claim of sex discrimination under Title VII.").

This Court has held, "Stare decisis does not prevent the court from reconsidering, repairing, correcting or abandoning past judicial announcements when error is manifest." *McElroy*, 703 N.W.2d at 395 (quoting *Miller v. Westfield Ins. Co.*, 606 N.W.2d 301, 306 (Iowa 2000)). The ground upon which *Sommers* was built has crumbled, and this appeal provides an opportunity for the Court to correct it.

IV. There is No Need to Parse Between Discrimination Based on Gender Identity and That Based on Sex.

The addition of gender identity as a protected category under ICRA should not preclude transgender people from availing themselves of its protections from discrimination because of sex. To find otherwise would require this Court to parse between discrimination based on "gender identity" and discrimination based on "sex," where the former is actionable, while the latter is not. This is contrary to the approach taken in other states and, as multiple federal courts have discovered, ultimately unworkable. It also frustrates the legislature's intent that ICRA "be construed broadly to effectuate its purposes." Iowa Code § 216.18(1).

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A. Other State Statutes That Enumerate Gender Identity as a Protected Category Do Not Exclude Transgender Individuals from Protection from Discrimination Based on Sex.

Iowa is one of twenty-four states, including the District of Columbia, that expressly bar discrimination based on gender identity in addition to sex.[3] No court has held that these statutes protect transgender people only from discrimination based on gender identity.

At least one court has found that explicit state protections against discrimination based on gender identity do *not* preclude relief for plaintiffs under parallel sex discrimination provisions. In *Smith v. Avanti*, 249 F. Supp. 3d 1194 (D. Colo. 2017), the District of Colorado, interpreting the Colorado Anti-Discrimination Act (CADA), found that the defendant discriminated on the basis of both sex and sexual orientation (defined to include "transgender status"), *id* at 1202 (citing Colo. Rev. Stat. § 24-34-301(7)), 1203. In the absence of a statutory definition for "sex," the court looked to federal civil rights laws and concluded there was "no reason why the analysis . . . should not be equally applicable under the CADA." *Id*

[3] *See* Movement Advancement Project, *Snapshot: LGBT Equality by State*, http://www.lgbtmap.org/equality-maps/legal_equality_by_state/ (last updated Sept. 17, 2018). Twenty states and the District of Columbia include gender identity provisions in antidiscrimination statutes. New York, Michigan, and Pennsylvania have interpreted their civil rights statutes as encompassing gender identity. *Id.*

Even after states have added gender identity as a separate protected category in their antidiscrimination laws, courts continued to look to federal caselaw to interpret these statutes. This models the approach taken in Iowa. The ICRA "'only pronounces a general proscription against discrimination and we have looked to the corresponding federal statutes to help establish the framework to analyze claims and otherwise apply our statute.'" *Goodpaster v. Schwan's Home Serv., Inc.*, 849 N.W.2d 1, 9 (Iowa 2014) (quoting *Casey's Gen. Stores, Inc. v. Blackford*, 661 N.W.2d 515, 519 (Iowa 2003)).

For example, the Eighth Circuit has recognized that federal law can guide interpretations of the Minnesota Human Rights Act, which protects sex and gender identity, because of the statute's "substantial similarities" to Title VII. *Hunter*, 697 F.3d at 702 (citing *Wayne v. MasterShield, Inc.*, 597 N.W.2d 917, 921 (Minn. Ct. App. 1999)). Other courts have done so as well. *See Parents for Privacy v. Dallas Sch. Dist. No. 2*, No. 3:17-cv-01813, 2018 WL 3550267, at *23, *24 (D. Or. Jul. 24, 2018), *appeal docketed*, No. 18-35708 (9th Cir. Aug. 23, 2018) ("A policy that segregates school facilities based on biological sex and prevents transgender students from accessing facilities that align with their gender identity violates Oregon Law," just as it "would violate Title IX"); *Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001, 1011, 1014 (D. Nev. 2016) (concluding that "discrimination 'because of sex' under Title VII includes discrimination based on a person's

gender" just as "Nevada law broadly prohibits 'gender' discrimination") (citing Nev. Rev. Stat. § 613.330(1)); *Wilson v. Phoenix House*, 978 N.Y.S.2d 748, 755-56 & n.4, 767 (N.Y. Sup. Ct. 2013) (observing a "congruence, or overlap, between discriminating against transgender, gender variant or intersex individuals and discrimination on the basis of gender-based behavioral norms," citing federal law, and holding that under New York City's Human Rights Law "discrimination against a person because of gender nonconformity is discrimination on the basis of gender and/or sex.").

Finally, state courts that looked to federal interpretations of sex as a protected category have not altered their analysis after adding gender identity as a separate protected category in their antidiscrimination laws. *See, e.g.*, *Fabian*, 172 F. Supp. 3d at 514 n.3 ("The relevant federal precedent is generally applicable to [Connecticut Fair Employment Practices Act] claims as well") (citing *Levy v. Comm'n on Hum. Rts. & Opportunities*, 236 Conn. 96, 103 (Conn. 1996)); *id.* at 527 n.12 ("I interpret the same way the parallel CFEPA provisions"); *Lie v. Sky Pub. Corp.*, No. 013117J, 2002 WL 31492397, at *5 (Mass. Super. Ct. Oct. 7, 2002) (finding, "[i]n light of Massachusetts' history of interpreting expansively remedial civil rights legislation," that a transgender plaintiff sufficiently alleged sex discrimination because she "contends that the defendant's conduct was based on stereotyped notions of 'appropriate' male and female behavior in the same

manner as the conduct of the defendant in *Price Waterhouse.*") (citing Mass. Gen Laws ch. 151B § 9); *Doe ex rel. Doe v. Yunits*, No. 001060A, 2000 WL 33162199, at *6 (Mass. Super. Ct. Oct. 11, 2000) ("Federal cases have recognized the impropriety of discriminating against a person for failure to conform with the norms of their biological gender."); *Enriquez v. W. Jersey Health Sys.*, 342 N.J. Super. 501, 514-16 (N.J. Super. Ct. App. Div. 2001) ("We conclude that the reasoning reflected in . . . *Price Waterhouse*, *Schwenk*, and *Rosa* is more closely connected to our own state's historic policy of liberally construing the [Law Against Discrimination] . . . We conclude that sex discrimination under the LAD includes gender discrimination so as to protect plaintiff from gender stereotyping and discrimination for transforming herself from a man to a woman."). Connecticut, Massachusetts, and New Jersey each added gender identity as a protected category in their antidiscrimination statutes after the above decisions were issued, and their courts have not changed course.

B. Courts Have Found Discrimination Based on Gender Identity and Sex to be Inextricably Intertwined.

Multiple federal courts have recognized that one's gender identity is inherently tied to sex and trying to "draw lines" between the two is "unmanageable." *See Grimm*, 302 F. Supp. 3d at 742 (noting that "attempting to draw lines based on physiological and anatomical characteristics proves unmanageable"). In doing so, they have held that discrimination based on a

person's transgender status and/or gender transition, even absent evidence of sex stereotyping, is unlawful sex discrimination.

In *R.G. and G.R. Funeral Homes*, the Sixth Circuit deemed it "analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex." 884 F.3d at 575. The court continued,

> [A]n employer cannot discriminate on the basis of transgender status without imposing its stereotypical notions of how sexual organs and gender identity ought to align. There is no way to disaggregate discrimination on the basis of transgender status from discrimination on the basis of gender non-conformity, and we see no reason to try.

Id. at 576-77. The court acknowledged that while one's "biological sex does not dictate her transgender status," *id.* at 578, it observed that nonetheless "discrimination on the basis of transgender status necessarily entails discrimination on the basis of sex—no matter what sex the employee was born or wishes to be," *id.*

Similarly, the Ninth Circuit held that "the terms 'sex' and 'gender' have become interchangeable," and that civil rights statutes "prohibit discrimination based on gender as well as sex." *Schwenk*, 204 F.3d at 1201-02. The Ninth Circuit rejected the view adopted by earlier, pre-*Price Waterhouse* cases that excluded "gender" from the meaning of "sex" in Title VII and instead concluded that "under *Price Waterhouse*, 'sex' under Title VII encompasses both sex—that is, the

biological differences between men and women—*and* gender." *Id.* at 1202. *Schwenk* was correct to do so. After all, if one's dress, hairstyle, and make-up usage constitute aspects of sex—as *Price Waterhouse* confirms that they do—then they also constitute aspects of gender identity, which gives rise to those outward expressions of sex. *See also R.G. & G.R. Funeral Homes*, 884 F.3d at 578 ("After all, a subset of both women and men decline to wear dresses or makeup, but discrimination against any woman on this basis would constitute sex discrimination under *Price Waterhouse*").

Moreover, in the context of Equal Protection, a government policy that infringes on transgender individuals' rights "cannot be stated without referencing sex" and conformity with "the sex-based stereotypes associated with their assigned sex at birth." *See Whitaker*, 858 F.3d at 1051.

Recognizing the right of transgender people to be free from discrimination whether based on gender identity or sex makes practical sense and reflects scientific evidence that the two are not distinct. Gender identity has biological roots, as does sex. *See, e.g.*, Aruna Saraswat et al., *Evidence Supporting the Biologic Nature of Gender Identity*, 21 Endocrine Practice 199, 199-204 (2015); *accord*, *Karnoski v. Trump*, No. C17-1297, 2018 WL 1784464, at *10 (W.D. Wash. Apr. 13, 2018 ("Experts agree that gender identity has a biological component, and there is a medical consensus that gender identity is deep-seated,

set early in life, and impervious to external influences."). Because gender identity is a sex-based characteristic, discrimination against a transgender person—who is defined as such because his or her gender identity does not match the sex ascertained at birth—is based both on sex and gender identity. It is thus a mistake to make broad assumptions about what precisely constitutes "biological sex," distinct from gender identity. *See Schroer*, 577 F. Supp. 2d at 306 (determining that "[r]esolving the dispute . . . as to the proper scientific definition of sex, however, is not within this Court's competence" and "unnecessary.").

This Court need not struggle with biological and psychological nuances underscoring the sex/gender distinction; instead, a broad, inclusive interpretation of sex discrimination aligns with other courts' considerations of the matter and the intent of ICRA.

V. *Price Waterhouse* and Its Progeny Have Led to Greater Protections for Lesbian, Gay, Bisexual, and Transgender People.

Price Waterhouse's inclusive interpretation of sex discrimination has reached beyond its facts to protect against discrimination based on sex in multiple areas of life affecting lesbian, gay, bisexual and transgender people. *See, e.g.*, *Wetzel v. Glen St. Andrew Living Comm.*, No. 17-1322, 2018 WL 4057365, at *3 (7th Cir. Aug. 27, 2018 (holding that defendant violated the Fair Housing Act [FHA] by discriminating against a lesbian plaintiff); *Avanti*, 249 F. Supp. 3d at

1200 (agreeing with the transgender female plaintiffs that "discrimination against women (like them) for failure to conform to stereotype norms . . . is discrimination on the basis of sex under the FHA"); *Rosa*, 214 F.3d at 215-16 (holding that treating a person whose dress fails to conform with norms associated with her gender is impermissible sex stereotyping under the Equal Credit Opportunity Act).

Multiple federal district courts have enjoined the Trump Administration's ban on transgender people serving in the armed forces because it amounts to sex discrimination. They have justified their decisions in part on a sex-stereotyping basis. *See Doe 1 v. Trump*, 275 F. Supp. 3d 167, 209-10 (D.D.C. 2017) ("The Accession and Retention Directives' exclusion of transgender individuals inherently discriminates against current and aspiring service members on the basis of their failure to conform to gender stereotypes."); *see also Stockman v. Trump*, No. EDCV17-1799, 2017 WL 9732572 (C.D. Cal. Dec. 22, 2017 ("The Ninth Circuit has strongly suggested that discrimination on the basis of one's transgender status is equivalent to sex-based discrimination. . . . Additionally, sex-based discrimination can include discrimination based on someone failing 'to conform to socially-constructed gender expectations'"); *Karnoski v Trump*, No. C17-1297, 2017 WL 6311305, at *7 (W.D. Wash. Dec. 11, 2017) (citing *Schwenk* and *Price Waterhouse* for the proposition that "discrimination based on a person's failure 'to conform to socially-constructed gender expectations' is a form of gender

discrimination"); *Stone v. Trump*, 280 F. Supp. 3d 747, 768 (D. Md. 2017) ("[T]he Directives are a form of discrimination on the basis of gender").

In addition, the Second and Seventh Circuits have both found that Title VII protects gays and lesbians from discrimination on the basis of sexual orientation, harnessing the theories of impermissible sex stereotyping under *Price Waterhouse* and *Oncale* that protect transgender plaintiffs. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 108 (2d Cir. 2018) (*en banc*) ("[W]e hold now that Title VII prohibits discrimination on the basis of sexual orientation as discrimination "because of . . . sex."); *Hively v. Ivy Tech Comm. Coll. of Indiana*, 853 F.3d 339, 341 (7th Cir. 2017) *(en banc*) ("[W]e conclude today that discrimination on the basis of sexual orientation is a form of sex discrimination."); *see also Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 201 (2d Cir. 2017) (finding that a gay plaintiff raised cognizable gender stereotyping claims). The Seventh Circuit has recognized that prejudice deriving from notions of gender non-conformity undergirds both sex and sexual orientation discrimination. *Hively*, 853 F.3d at 346 ("Our panel described the line between a gender nonconformity claim and one based on sexual orientation as gossamer-thin; we conclude that it does not exist at all.").

Sommers v. ICRC is a vestige of a bygone era. The decision continues to truncate the rights of transgender people in Iowa, even as the federal cases it cited are no longer good law. This appeal presents an opportunity to reevaluate

Sommers and provide transgender people with the same protections under the Iowa Civil Rights Act to which they are entitled under federal civil rights laws that prohibit sex discrimination.

CONCLUSION

For the foregoing reasons, Amici urge the Court to overrule *Sommers v. Iowa Civil Rights Commission*, 337 N.W.2d 470 (Iowa 1983), and reverse the district court's ruling on Appellees Good and Beal's claim of sex discrimination under the Iowa Civil Rights Act.

Respectfully submitted,

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