

SUPREME COURT No. 18-1158
POLK COUNTY CASE NOS. CVCV054956 & CVCV055470 (CONS.)

IN THE SUPREME COURT OF IOWA

EERIEANNA GOOD and CAROL BEAL,
PETITIONERS-APPELLEES,

v.

IOWA DEPARTMENT OF HUMAN SERVICES,
RESPONDENT-APPELLANT.

**BRIEF OF LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.,
NATIONAL CENTER FOR TRANSGENDER EQUALITY, TRANSGENDER
AMERICAN VETERANS ASSOCIATION, TRANSCEND LEGAL,
TRANSGENDER LEGAL DEFENSE AND EDUCATION FUND,
TRANSGENDER ALLIES GROUP, THE TRANSGENDER RESOURCE
CENTER OF NEW MEXICO, AND THE SOUTHERN ARIZONA GENDER
ALLIANCE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS-APPELLEES**

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
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TABLE OF CONTENTS

IDENTITY AND INTEREST OF AMICI CURIAE1

ARGUMENT3

I. IN PURPOSE AND EFFECT, THE RULE DISCRIMINATES BASED ON
TRANSGENDER STATUS7

II. OFFICIAL CLASSIFICATIONS BASED ON TRANSGENDER STATUS
MUST FACE STRICT JUDICIAL SCRUTINY UNDER THE IOWA
CONSTITUTION8

 A. Transgender Individual Have Long Faced Discrimination10

 B. Transgender Individuals Are Fully Able to Contribute to Society18

 C. Transgender Individuals Are a Discrete, Identifiable Group21

 D. The Transgender Community Lacks Effective Political Power22

CONCLUSION26

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Adams by & through Kasper v. Sch. Bd. of St. Johns Cty., Fla.</i> , 318 F. Supp. 3d 1293 (M.D. Fla. 2018).....	6
<i>Adkins v. City of New York</i> , 143 F. Supp. 3d 134 (S.D.N.Y. 2015).....	passim
<i>Arroyo Gonzalez v. Rossello Nevares</i> , 305 F. Supp. 3d 327 (D.P.R. 2018).....	15
<i>Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep’t of Educ.</i> , 208 F. Supp. 3d 850 (S.D. Ohio 2016).....	6, 18, 24
<i>Bierkamp v. Rogers</i> , 293 N.W.2d 577 (Iowa 1980)	8
<i>Bowen v. Gilliard</i> , 483 U.S. 587 (1987)	9, 21
<i>Burlington N. R. Co. v. Ford</i> , 504 U.S. 648 (1992).....	5
<i>Califano v. Goldfarb</i> , 430 U.S. 199 (1977)	11
<i>City of Cleburne, Tex. v. Cleburne Living Ctr.</i> , 473 U.S. 432 (1985).....	8, 18
<i>City of Richmond v. J.A. Croson Co.</i> , 488 U.S. 469 (1989)	9
<i>Coger v. Nw. Union Packet Co.</i> , 37 Iowa 145 (1873)	4
<i>Craig v. Boren</i> , 429 U.S. 190 (1976).....	5
<i>Daly v. Daly</i> , 715 P.2d 56 (Nev. 1986).....	15
<i>Doe 1 v. Trump</i> , 275 F. Supp. 3d 167 (D.D.C. 2017).....	18, 21, 24
<i>Evancho v. Pine-Richland Sch. Dist.</i> , 237 F. Supp. 3d 267 (W.D. Pa. 2017) ...	6, 22, 24
<i>F.V. v. Barron</i> , 286 F. Supp. 3d 1131 (D. Idaho 2018).....	6
<i>Flack v. Wis. Dep’t of Health Servs.</i> , No. 18-Civ-309, 2018 WL 3574875 (W.D. Wis. July 25, 2018).....	6, 17
<i>Frontiero v. Richardson</i> , 411 U.S. 677 (1973).....	18, 23

<i>Gartner v. Iowa Dep’t of Pub. Health</i> , 830 N.W.2d 335 (Iowa 2013).....	8
<i>Glenn v. Brumby</i> , 663 F.3d 1312 (11th Cir. 2011)	22
<i>Graham v. Richardson</i> , 403 U.S. 365 (1971)	5, 9
<i>Grimm v. Gloucester Cty. Sch. Bd.</i> , 302 F. Supp. 3d 730 (E.D. Va. 2018)..	6, 22, 24
<i>Hernandez-Montiel v. INS</i> , 225 F.3d 1084 (9th Cir. 2000)	21
<i>In re Det. of Hennings</i> , 744 N.W.2d 333 (Iowa 2008)	5
<i>In re Estate of Gardiner</i> , 42 P.3d 120 (Kan. 2002)	15
<i>Karnoski v. Trump</i> , No. 17-Civ-1297, 2018 WL 1784464 (W.D. Wash. Apr. 13, 2018).....	11, 18, 19
<i>Lawrence v. Texas</i> , 539 U.S. 558 (2003).....	4
<i>Love v. Johnson</i> , 146 F. Supp. 3d 848 (E.D. Mich. 2015).....	15
<i>Lyng v. Castillo</i> , 477 U.S. 635 (1986)	9
<i>M.A.B. v. Bd. of Educ. of Talbot Cty.</i> , 286 F. Supp. 3d 704 (D. Md. 2018).....	6
<i>M.B. v. D.W.</i> , 236 S.W.3d 31 (Ky. Ct. App. 2007)	15
<i>Meyer v. Nebraska</i> , 262 U.S. 390 (1923).....	12
<i>Nguyen v. State</i> , 878 N.W.2d 744 (Iowa 2016)	5
<i>Norsworthy v. Beard</i> , 87 F. Supp. 3d 1104 (N.D. Cal. 2015)	6
<i>Obergefell v. Hodges</i> , 135 S. Ct. 2584 (2015).....	20, 24
<i>Planned Parenthood of the Heartland v. Reynolds ex rel. State</i> , 915 N.W.2d 206 (Iowa 2018).....	4
<i>Plyler v. Doe</i> , 457 U.S. 202 n.14 (1982)	25
<i>Racing Ass’n of Cent. Iowa v. Fitzgerald</i> , 675 N.W.2d 1 (Iowa 2004)	4
<i>Reed v. Reed</i> , 404 U.S. 71 (1971).....	9
<i>Sherman v. Pella Corp.</i> , 576 N.W.2d 312 (Iowa 1998)	4

<i>SmithKline Beecham Corp. v. Abbott Labs.</i> , 740 F.3d 471 (9th Cir. 2014)	5
<i>State v. Baldon</i> , 829 N.W.2d 785 (Iowa 2013).....	5
<i>Thomas v. Gonzales</i> , 409 F.3d 1177 (9th Cir. 2005)	21
<i>United States v. Carolene Prods. Co.</i> , 304 U.S. 144 (1938)	25
<i>United States v. Windsor</i> , 699 F.3d 184 (2012).....	22
<i>Varnum v. Brien</i> , 763 N.W.2d 862 (Iowa 2009)	passim
<i>Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.</i> , 858 F.3d 1034 (7th Cir. 2017)	10

Statutes

2016 Miss. Laws Ch. 334 (H. B. 1523), § 2(c) (2016).....	16
Iowa Const. art. I, § 1.....	3
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Other Authorities

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Brad Sears et al., <i>Relationship of Sexual Orientation and Gender Identity to Performance in the Workplace</i> (2009)	20
Brooke Sopelsa, <i>Meet 2017’s Newly Elected Transgender Officials</i> , NBC NEWS (Dec. 28, 2017)	23
Charlie Savage, <i>In Shift, Justice Dept. Says Law Doesn’t Bar Transgender Discrimination</i> , N.Y. TIMES (Oct. 5, 2017).....	13
Cournos, <i>A Modern Plutarch</i> (1928)	7

Deborah Sontag, <i>Once A Pariah, Now a Judge: The Early Transgender Journey of Phyllis Frye</i> , N.Y. TIMES (Aug. 29, 2015)	19
Erwin Chemerinsky, CONSTITUTIONAL LAW (3d ed. 2006)	21
Gates & Herman, <i>Transgender Military Service in the United States</i> (2014).....	20
Grace Guarnieri, <i>HUD Accused of Systematically Removing LGBT People from Homeless and Housing Decisions</i> , NEWSWEEK (Mar. 1, 2018).....	17
Human Rights Campaign, <i>Understanding the Transgender Community</i> (accessed July 1, 2018)	14
Jaime M. Grant, et al., <i>Injustice at Every Turn: A Report of the National Transgender Discrimination Survey</i> (2011).....	passim
James et al., <i>Report of the 2015 U.S. Transgender Survey</i> (2016).....	12, 13, 15
Juanne Summers, <i>Education Department Says It Is No Longer Investigating Transgender Bathroom Complaints</i> , CNN (Feb. 12, 2018).....	12
Leah Litman & Helen K. Murillo, <i>Information Wars Part I: The Challenge to the Census</i> , TAKE CARE (April 13, 2017).....	17
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Lena H. Sun & Julia Eilperin, <i>CDC Gets List of Forbidden Words: Fetus, Transgender, Diversity</i> , WASHINGTON POST (Dec. 15, 2017).....	16
Levi & Redman, <i>The Cross-Dressing Case for Bathroom Equality</i> , 34 Seattle L. Rev. 133 (2009).....	15
Lisa Miller, <i>The Trans-Everything CEO</i> , N.Y. MAG. (Sept. 7, 2014).....	19
Michael Statford, <i>Trump Administration Scraps Resources for Transgender Students</i> , POLITICO (Mar. 8, 2018)	12
Molly Olmstead, <i>The Department of Education Will No Longer Investigate Transgender Student Bathroom Complaints</i> , Slate (Feb. 13, 2018).....	16
Praveen Fernandes, <i>The Census Won't Collect L.G.B.T. Data. That's A Problem</i> , N.Y. TIMES (May 10, 2017).....	16

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Sejal Singh, *The Trump Administration Is Rolling Back Data Collection on LGBT Older Adults*, CENTER FOR AMERICAN PROGRESS (Mar. 20, 2017).....16

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IDENTITY AND INTEREST OF AMICI CURIAE

Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal”) is the nation’s oldest and largest legal organization whose mission is to achieve full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people, and everyone living with HIV through impact litigation and public policy. Lambda Legal has extensive experience litigating cases concerning the proper application of equal protection review to classifications targeting persons based on their sex, sexual orientation, gender identity, and transgender status, as well as other civil rights cases of significance under the Iowa Constitution. *See, e.g., Karnoski v. Trump*, No. 17-cv-1297, 2018 WL 1784464 (W.D. Wash. Apr. 13, 2018); *Gartner v. Iowa Dep’t of Pub. Health*, 830 N.W.2d 335, 351 (Iowa 2013); *Rhoades v. State*, 848 N.W.2d 22 (Iowa 2014); *Varnum v. Brien*, 763 N.W.2d 862, 880 (Iowa 2009).

The National Center for Transgender Equality (NCTE) is a national social justice organization founded in 2003 and devoted to advancing justice, opportunity, and well-being for transgender people through education and advocacy on national issues. NCTE works with policymakers and communities around the country to develop fair and effective public policy.

The Transgender American Veterans Association (“TAVA”) is a 501(c)3 organization that works proactively with other concerned GLBT organizations to ensure that transgender veterans will receive appropriate care for their medical

conditions. Further, TAVA helps in educating the Department of Veterans Affairs (VA) and the Department of Defense (DoD) on issues regarding fair and equal treatment of transgender and transsexual individuals.

Transcend Legal is a non-profit legal organization that cultivates equitable social, medical and legal recognition of transgender people by offering culturally competent, transgender-led legal representation, public policy advocacy, community empowerment, and public education. Transcend Legal focuses on ensuring that all transgender people have access to transgender-related health care.

Transgender Legal Defense & Education Fund (TLDEF) is a non-profit legal organization that represents and advocates for the transgender community. TLDEF is committed to ending discrimination against transgender people, and to achieving equality for transgender people through impact litigation and education. TLDEF's clients include transgender people of all ages, who come from diverse racial, ethnic, socio-economic, and faith backgrounds

Transgender Allies Group (TAG) has been providing education about and advocacy for transgender citizens in Nevada since 2012. One of its efforts led to the drafting and implementation in 2015 of Washoe County School District's Transgender and Gender Non-Conforming inclusionary policy, the first of its kind in Nevada and a model example that the U.S. Department of Education shared with

the country in 2016. TAG has seen students thrive with acceptance and inclusion, looking forward to work and school opportunities after graduation.

Transgender Resource Center of New Mexico (TGRCNM) provides transgender cultural competency education all over New Mexico, individual and policy-level advocacy, and direct services for transgender individuals. Many of the people for whom TGRCNM are current or former service people who have been willing to sacrifice everything to serve the United States.

The Southern Arizona Gender Alliance (SAGA) is a grass-roots organization of trans activists based in Tucson, Arizona. For two decades, SAGA has helped create a welcoming and supportive community for transgender and other gender nonconforming people in Southern Arizona through advocacy, community education, resource referral, and peer support.

ARGUMENT

The Iowa Constitution recognizes that “[a]ll men and women are, by nature, free and equal.” Iowa Const. art. I, § 1. It further promises that “[a]ll laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens.” *Id.* art. I, § 6. This “guarantee of equal protection of the law is ‘the very foundation principle of our government.’” *Planned Parenthood of the Heartland v. Reynolds ex rel. State*, 915 N.W.2d 206, 244 (Iowa

2018) (quoting *Coger v. Nw. Union Packet Co.*, 37 Iowa 145, 153 (1873)). Simply stated, it requires that “all persons similarly situated should be treated alike.” *Racing Ass’n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 7 (Iowa 2004) (citation omitted).

Since its original articulation, that principle has been extended and applied to groups who were previously unknown and unwelcome. Although many once considered it natural to discriminate based on race, sex, sexual orientation, alienage, religion, and other grounds, we have increasingly come to recognize the injustice of treating people differently based on characteristics that have no relationship to their capabilities. *See Varnum v. Brien*, 763 N.W.2d 862, 880 (Iowa 2009); *Sherman v. Pella Corp.*, 576 N.W.2d 312, 317 (Iowa 1998); *see also Lawrence v. Texas*, 539 U.S. 558, 579 (2003); *United States v. Virginia*, 518 U.S. 515, 557 (1996).

Courts play an important role in that story. “The process of defining equal protection . . . begins by classifying people into groups,” and requires that the law evolve as “a new understanding of equal protection is achieved.” *Varnum v. Brien*, 763 N.W.2d 862, 877 (Iowa 2009). Ultimately, when it becomes apparent that “a particular grouping results in inequality,” the judicial system must perform its “constitutional role” and thwart classifications that serve only to subordinate. *Id.* This is often achieved by requiring the government to provide compelling, well-tailored reasons whenever it seeks to assign benefits or burdens based on a suspect trait. *See id.* at 876-82. In elaborating such rules, Iowa courts carefully guard their

“authority to develop independent analyses under the Iowa Constitution,” but have described the U.S. Supreme Court’s “general framework for determining the constitutional ‘suspectness’ of a class as a useful analytical starting point.” *Id.* at 907 n.10; *see also Nguyen v. State*, 878 N.W.2d 744, 757 (Iowa 2016); *State v. Baldon*, 829 N.W.2d 785, 820 (Iowa 2013) (Appel, J., specially concurring); *In re Det. of Hennings*, 744 N.W.2d 333, 338 (Iowa 2008).¹

Under this Court’s precedent, classifications based on transgender status are suspect. In recent years, an increasing number of Americans have come to recognize the dignity and equality of their transgender neighbors. This evolution has resulted not only from large-scale studies that refute antiquated notions about sex and gender identity, but also from greater societal awareness of transgender individuals and their life experiences. Against that background, many state and federal courts have held that discrimination against transgender people is presumptively suspect. Those courts have recognized that each factor relevant to strict scrutiny analysis warrants its application here: (1) this group has suffered a long history of discrimination; (2) this group’s defining characteristic is irrelevant to social productivity; (3)

¹ Leading federal cases include *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (race), *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (alienage), *Craig v. Boren*, 429 U.S. 190 (1976) (sex), *Clark v. Jeter*, 486 US 456 (1988) (legitimacy), *Burlington N. R. Co. v. Ford*, 504 U.S. 648, 651 (1992) (religion), and *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481 (9th Cir. 2014) (sexual orientation).

transgender status is a distinct and immutable characteristic; and (4) transgender people cannot fully protect themselves through the political process alone.²

These decisions stand for a simple but profound proposition: transgender status should almost never be relevant to lawmaking. If the government wants to draw lines on this basis, it had better produce a compelling reason for doing so.

That message couldn't arrive at a more crucial time. Even as more and more Americans have accepted them as equals, transgender people have been subjected to a barrage of hate. *See infra* at 15-18. That campaign has unfolded at every level of government, from the White House to local school boards. In this fraught moment, it is vital for courts to affirm the dignity of transgender persons and to make clear that our commitment to equal protection shields the transgender community from discrimination. By requiring the government to affirmatively explain and justify transgender-based classifications, strict scrutiny serves to smoke out (and deter) reliance on biased assumptions. The application of strict scrutiny also provides clear

² *See Adams by & through Kasper v. Sch. Bd. of St. Johns Cty., Fla.*, 318 F. Supp. 3d 1293, 1312 (M.D. Fla. 2018); *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704, 718 (D. Md. 2018); *Flack v. Wis. Dep't of Health Servs.*, No. 18-Civ-309, 2018 WL 3574875, at *15 (W.D. Wis. July 25, 2018); *Grimm v. Gloucester Cty. Sch. Bd.*, 302 F. Supp. 3d 730, 749 (E.D. Va. 2018); *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1145 (D. Idaho 2018); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017); *Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep't of Educ.*, 208 F. Supp. 3d 850, 874 (S.D. Ohio 2016); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015).

notice to officials at all levels of government that they should proceed with extreme caution before classifying on this basis. Official acts creating distinctions based on transgender status would still be permitted, but the State would be required to demonstrate why that is really, truly necessary. By virtue of its commitment to equal protection for *all* persons, the Iowa Constitution demands nothing less.

**I. IN PURPOSE AND EFFECT, THE RULE DISCRIMINATES
BASED ON TRANSGENDER STATUS**

The most elementary “requirement of equal protection—that the law must treat all similarly situated people the same—has generated a narrow threshold test.” *Varnum*, 763 N.W.2d at 882. Specifically, the plaintiffs in an equal protection case must show that they are “similarly situated” to those whom the law treats differently. *See id.* Here, the State argues that the plaintiffs fail this test because—in its view—the Rule discriminates *only* based on the reasons why a person seeks surgical services. *See* State Br. 41. From that premise, the State concludes that transgender and non-transgender Medicaid recipients are treated exactly the same. *See id.*

This argument calls to mind Anatole France’s observation that “the law, in its majestic equality, forbids the rich as well as the poor to sleep under the bridges, to beg in the streets, and to steal bread.” France, quoted in Cournos, *A Modern Plutarch* 27 (1928). In the State’s telling, transgender and non-transgender people are both denied coverage for surgical services that—by pure happenstance—are needed only by transgender people, and so both groups are treated alike. To state that argument

is to refute it. Indeed, this Court has already identified and rejected the State’s formalistic fallacy, emphasizing that the Iowa Constitution’s equal-protection guarantee requires “that laws treat alike all those who are similarly situated *with respect to the purpose of the law.*” *Varnum*, 763 N.W.2d at 882 (emphasis added); accord *Gartner v. Iowa Dep’t of Pub. Health*, 830 N.W.2d 335, 351 (Iowa 2013). Put differently, “the law itself must be equal.” *Varnum*, 763 N.W.2d at 883.

Here, the Rule is quite obviously unequal. It was written with the purpose of “exclude[ing] coverage for sex reassignment for Medicaid recipients who are [transgender].” Op. at 21. And it functions to deny transgender people—but nobody else—coverage for medically-necessary treatment, based solely on the ground that the persons requesting it are transgender. This is the very definition of *inequality*. The Court must therefore consider what level of scrutiny applies to the Rule.

II. OFFICIAL CLASSIFICATIONS BASED ON TRANSGENDER STATUS MUST FACE STRICT JUDICIAL SCRUTINY UNDER THE IOWA CONSTITUTION

The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. *See Bierkamp v. Rogers*, 293 N.W.2d 577, 579-80 (Iowa 1980); *see also City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (collecting cases). However, some ways of classifying people are so rarely relevant to achieving any legitimate goal—and are so frequently infected with prohibited

animus—that the general rule does not apply. In such cases, “[t]he constitutional guarantee of equal protection . . . [demands] closer scrutiny by courts.” *Varnum*, 763 N.W.2d at 880; *accord Virginia*, 518 U.S. at 533; *Clark*, 486 U.S. at 456; *Graham*, 403 U.S. at 365; *Loving*, 318 U.S. at 1. This approach affords enhanced protection to vulnerable groups in circumstances rife with the potential for policymaking based on forbidden prejudice or stereotypes. *See Virginia*, 518 U.S. at 533; *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality).

The U.S. Supreme Court has identified four factors as relevant to determining whether governmental action that discriminates against a particular group should face strict scrutiny: (1) whether the group has experienced a history of invidious discrimination; (2) whether the defining characteristic of the group is relevant to one’s ability to contribute to society; (3) whether members of the group have obvious, immutable, or distinguishing characteristics that define them as a discrete class; and (4) whether the group can protect itself against discrimination through the political process. *See Bowen v. Gilliard*, 483 U.S. 587, 602 (1987); *Lyng v. Castillo*, 477 U.S. 635, 638 (1986); *Reed v. Reed*, 404 U.S. 71, 76 (1971). This Court has long treated those factors as a helpful starting point in interpreting the Iowa Constitution. *See Varnum*, 763 N.W.2d at 888. In so doing, it has rejected rigid tests, noting that “we analyze each of the four factors and assess how each bears on the question of

whether the Iowa Constitution requires a more searching scrutiny be applied to the specific classification at issue.” *Id.* at 889.

It follows from this Court’s precedent that classifications based on transgender status are suspect. All four factors bearing on the issue cut decisively in favor of affording heightened protection. And requiring robust review of such classifications would be consistent with the purpose of this doctrine: thwarting invidious discrimination against a politically powerless group whose members can contribute fully to society, but have nonetheless been treated as outcasts. Recognizing that fact, many courts have already held that transgender status is a suspect or quasi-suspect class. *See cases cited supra* at 6 n.2. Following in their footsteps, this Court should hold that strict scrutiny applies under the Iowa Constitution whenever the State draws lines based on transgender status.

A. Transgender Individuals Have Long Faced Discrimination

“Transgender people have suffered a history of persecution and discrimination . . . this is not much in debate.” *Adkins*, 143 F. Supp. 3d at 139 (citation omitted); *see also Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017) (“There is no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity.”); *Karnoski v. Trump*, No. 17-Civ-1297, 2018 WL 1784464, at *10 (W.D. Wash. Apr.

13, 2018) (“The history of discrimination and systemic oppression of transgender people in this country is long and well-recognized.”).

“Moreover, this history of persecution and discrimination is not yet history.” *Adkins*, 143 F. Supp. 3d at 139. As leading scholars observe, “it is part of social and legal convention in the United States to discriminate against, ridicule, and abuse transgender and gender non-conforming people within foundational institutions such as the family, schools, the workplace and health care settings.” Jaime M. Grant, et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey 2* (2011). Even as most Americans have come to understand and respect the dignity of transgender individuals, some continue to blame transgender persons “for bringing the discrimination and violence on themselves.” *Id.* The result is that many in the transgender community have been stigmatized by their peers, excluded from civic society, and denied opportunities for advancement. Few groups in American history have experienced such pervasive animus. This Court must therefore stand guard against official acts based upon “overbroad generalizations” that perpetuate historical patterns of discrimination. *Califano v. Goldfarb*, 430 U.S. 199, 211 (1977).

To illustrate those patterns of discrimination, it is helpful to consider a few domains of public life in which transgender individuals face continuing inequality:

Education: The “American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance.” *Meyer v. Nebraska*,

262 U.S. 390, 400 (1923). That is no less true for transgender individuals. But recent large-scale studies demonstrate that “[m]ore than three-quarters (77%) of those who were out or perceived as transgender at some point between Kindergarten and Grade 12 (K–12) experienced some form of mistreatment,” such as being “verbally harassed,” “disciplined more harshly,” or physical assaulted. James et al., *Report of the 2015 U.S. Transgender Survey* 11 & 130–138 (2016). As a result, some of these students were forced to leave school early or discontinue their higher education. *See id.*; *see also* Grant, *Injustice at Every Turn*, 3 & 32–49. Those who remained, in turn, faced steeper barriers to a full and fair education.³

Employment: Discrimination against transgender individuals does not end upon graduation. In national studies, over 90% of transgender respondents report experiencing harassment, mistreatment or discrimination on the job—a reality that has forced many to hide who they are. *See* James, *U.S. Transgender Survey*, at 3. Over 45% of transgender individuals have experienced an adverse job outcome by virtue of their gender non-conforming identity, and 26% have lost their job for that

³ Recently, the United States Department of Education has all but abandoned these students—first by announcing that it will summarily dismiss complaints from them alleging gender discrimination, and second by removing key documents from its website aimed at assisting transgender students. *See* Michael Statford, *Trump Administration Scraps Resources for Transgender Students*, POLITICO (Mar. 8, 2018); Juaane Summers, *Education Department Says It Is No Longer Investigating Transgender Bathroom Complaints*, CNN (Feb. 12, 2018).

reason. *See id.* at 3 & 139–156. As a result of this discrimination, there are “large economic disparities between transgender people . . . and the U.S. population,” including a poverty rate twice the national average and an unemployment rate three times the national average. *See Grant, Injustice at Every Turn*, 5 & 50–71. The resulting economic injury is amplified by the fact that a majority of transgender persons report facing harassment in places of public accommodation, such as hotels, restaurants, buses, airports, and agencies. *See id.* at 5. In many parts of the country, outright denials of service and comparable mistreatment in commerce remain all too common. *See James, U.S. Transgender Survey*, at 16.⁴

Healthcare: Perhaps the most disturbing form of discrimination confronting the transgender community involves access to healthcare. In recent studies, over one in three transgender individuals reported negative experiences—such as verbal harassment—in seeking medical care within the prior year. *See id.* at 10. These struggles extended to insurance, where denial of coverage for even routine care remains a source of anxiety and instability. *See id.* at 16. For these and other reasons,

⁴ Here, too, the federal government has recently targeted the transgender community for exclusion. On October 5, 2017, the United States Department of Justice instructed its attorneys to take the legal position that federal law does not protect transgender workers from discrimination. *See Charlie Savage, In Shift, Justice Dept. Says Law Doesn’t Bar Transgender Discrimination*, N.Y. TIMES (Oct. 5, 2017).

19% of respondents in a separate study reported being refused medical care due to their transgender status. *See Grant, Injustice at Every Turn*, 6 & 72–87.⁵

Identification Documents: It is difficult to overstate the complexities that transgender people face with respect to their government-issued identification documents. “Without identification, one cannot travel, register for school, or access many services that are essential to function in society.” Human Rights Campaign, *Understanding the Transgender Community* (accessed July 1, 2018).⁶ Many states, however, maintain policies that make it impossible for most or even all transgender people to obtain government-issued identification that reflects their gender identity. Studies show that over 40% of transgender persons therefore live without IDs that match their gender identity. *See Grant, Injustice at Every Turn*, 5 & 138–157. And it is well known that inaccurate ID effectively “outs” transgender people—exposing them to harassment, refusals of service, and even potential violence. When these individuals present their ID in the ordinary course, 40% report being harassed, 3% report being attacked, and 15% report being asked to leave. *See id.*⁷

⁵ The United States Department of Health and Human Services has announced that it will revoke rules interpreting the Affordable Care Act’s anti-discrimination provisions as protecting transgender people. *See R. Pear, Trump Plan Would Cut Back Health Care Protections for Transgender People*, N.Y. TIMES (Apr. 21, 2018).

⁶ <https://www.hrc.org/resources/understanding-the-transgender-community>.

⁷ A number of courts have held that the Constitution prohibits policies making it unduly burdensome (or possible) for transgender people to obtain correct ID

Legal System: Still another source of discrimination is the legal system itself. Historically, courts proved willing to void the marriages of transgender people and to strip them of parental rights. *See, e.g., In re Estate of Gardiner*, 42 P.3d 120, 137 (Kan. 2002) (marriage); *M.B. v. D.W.*, 236 S.W.3d 31, 36 (Ky. Ct. App. 2007) (parental rights); *Daly v. Daly*, 715 P.2d 56, 59 (Nev. 1986) (same). At the local level, many cities outlawed cross-dressing, effectively sweeping transgender people into the criminal justice system. *See Levi & Redman, The Cross-Dressing Case for Bathroom Equality*, 34 Seattle L. Rev. 133, 151–58 (2009). Discrimination also persists in police practices. In a recent study of transgender individuals, more than half of the respondents who interacted with law enforcement officers experienced mistreatment. *See James, U.S. Transgender Survey*, at 14. A different study observed that half of the respondents would feel uncomfortable seeking police assistance. *See Grant, Injustice at Every Turn*, 6 & 158–173.

Discrimination within the legal system extends to every corner of a transgender person’s life. Numerous states are considering bills that would ban transgender people from using bathrooms consistent with their gender identity.⁸

documents. *See, e.g., Arroyo Gonzalez v. Rossello Nevares*, 305 F. Supp. 3d 327 (D.P.R. 2018); *Love v. Johnson*, 146 F. Supp. 3d 848, 850 (E.D. Mich. 2015).

⁸ *See* National Conference of States Legislatures, “*Bathroom Bill*” *Legislative Tracking* (July 28, 2017).

Some of these states have enacted even more expansive legislation targeting transgender people for disadvantage in a wide array of public accommodations. *See* Public Facilities Privacy & Security Act, N.C. House Bill 2, 2d Extra Sess. (2016) (Sess. Law 2016-3); 2016 Miss. Laws Ch. 334 (H. B. 1523), § 2(c) (2016). And the federal government has embraced a series of policies that serve mainly to injure transgender people and deny their existence. To identify just a few examples:

- In March 2017, amid clear signs of animus, the Census Bureau retracted a proposal to collect data on LGBT people in the 2020 Census.⁹
- That same month, the Department of Health & Human Services announced that its national survey of older adults, and the services they need, would no longer collect information on LGBT participants.¹⁰
- In December 2017, the Centers for Disease Control & Prevention were instructed not to use the word “transgender” in official documents.¹¹
- The Department of Education has announced that it will summarily dismiss gender discrimination complaints from transgender students.¹²
- More recently, the Department of Housing & Urban Development has removed transgender-related resources from its website and announced

⁹ Praveen Fernandes, *The Census Won't Collect L.G.B.T. Data. That's A Problem*, N.Y. TIMES (May 10, 2017).

¹⁰ Sejal Singh, *The Trump Administration Is Rolling Back Data Collection on LGBT Older Adults*, CENTER FOR AMERICAN PROGRESS (Mar. 20, 2017).

¹¹ Lena H. Sun & Julia Eilperin, *CDC Gets List of Forbidden Words: Fetus, Transgender, Diversity*, WASHINGTON POST (Dec. 15, 2017).

¹² Molly Olmstead, *The Department of Education Will No Longer Investigate Transgender Student Bathroom Complaints*, SLATE (Feb. 13, 2018).

its intent to withdraw two important agency-proposed policies designed to protect LGBT people experiencing homelessness.¹³

As two civil rights scholars have noted, these developments at the federal level are unified by a common theme: “Information suppression is an effort to keep LGBTQ people closeted, out of sight from a society that might over time come to see their humanity and accept their personhood and rights.” Leah Litman & Helen K. Murillo, *Information Wars Part I: The Challenge to the Census*, TAKE CARE (April 13, 2017).

It is thus beyond doubt that transgender people have long faced daunting barriers—both public and private—that have prevented them from full, free, and equal participation in American life. Every level of government has, at times, contributed to that pattern of discrimination. That is as true in Iowa as it is anywhere else. See Len Sandler et al., *Where Do I Fit In?: A Snapshot of Transgender Discrimination in Iowa* (June 2016). In recognition of that fact, and of the animus that haunts so many policies targeting the transgender community, this Court should hold that classifications based on transgender status are facially suspect. See *Flack*, 2018 WL 3574875, at *15 (“[O]ther than certain races, one would be hard-pressed to identify a class of people more discriminated against historically or otherwise

¹³ Grace Guarnieri, *HUD Accused of Systematically Removing LGBT People from Homeless and Housing Decisions*, NEWSWEEK (Mar. 1, 2018).

more deserving of the application of heightened scrutiny when singled out for adverse treatment, than transgender people.”).

B. Transgender Individuals Are Fully Able to Contribute to Society

The second question this Court must ask is whether being transgender limits a person’s ability to contribute to society. *See Cleburne*, 473 U.S. at 440–44 (citation omitted); *Frontiero v. Richardson*, 411 U.S. 677 (1973) at 686 (plurality). The answer to that question is simple: “no.” In general, a person’s transgender status is irrelevant to his or her ability to contribute to society. It does not render an individual less capable of being a lawyer, engineer, farmer, doctor, mechanic, businessman, or judge. Put differently, transgender status is a personal characteristic that has no legitimate bearing on one’s competence, skill, or value as a human being in American life and law. Every court to have considered the question has easily concluded as much. *See, e.g., Karnoski*, 2018 WL 1784464, at *10 (“Discrimination against transgender people clearly is unrelated to their ability to perform and contribute to society.”); *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 209 (D.D.C. 2017) (“Despite this discrimination, the Court is aware of no argument or evidence suggesting that being transgender in any way limits one’s ability to contribute to society.”); *Highland Local*, 208 F. Supp. at 874 (“There is obviously no relationship between transgender status and the ability to contribute to society.”); *Adkins*, 143 F Supp. 3d at 139 (“The Court is not aware of any data or argument suggesting that a

transgender person, simply by virtue of transgender status, is any less productive than any other member of society.”).

This conclusion is supported by ample empirical evidence. The American Psychiatric Association, for example, has concluded that being transgender “implies no impairment in judgment, stability, reliability, or general social or vocational capabilities.” APA, *Position Statement on Discrimination Against Discrimination Against Transgender and Gender Variant Individuals* (July 2012). That assessment is consistent with the best available studies, which offer no support whatsoever for the proposition that transgender people are inherently less productive than any other group. To the contrary, these studies—much like journalistic reports and lived experience—show that given the chance to be who they are, transgender individuals can thrive and render extraordinary service to the nation. *See Karnoski*, No. 2018 WL 1784464, at *10 (“The Individual Plaintiffs in this case contribute not only to society as a whole, but to the military specifically. For years, they have risked their lives serving in combat and non-combat roles, fighting terrorism around the world, and working to secure the safety and security of our forces overseas.”); *see also Transgender Lives: Your Stories*, N.Y. TIMES (accessed July 1, 2018); Deborah Sontag, *Once A Pariah, Now a Judge: The Early Transgender Journey of Phyllis Frye*, N.Y. TIMES (Aug. 29, 2015); Lisa Miller, *The Trans-Everything CEO*, N.Y. MAG. (Sept. 7, 2014); *25 Transgender People Who Influenced American Culture*,

TIME (May 29, 2014); Gates & Herman, *Transgender Military Service in the United States* (2014); Brad Sears et al., *Relationship of Sexual Orientation and Gender Identity to Performance in the Workplace* (2009). It would thus be a grievous error to conclude that being transgender renders a person less productive in society.

It is possible that the State will point to statistics showing higher rates of mental illness and other social difficulties in the transgender community. But any such argument would be perverse. As Judge Rakoff has observed, “some transgender people experience debilitating dysphoria while living as the gender they were assigned at birth, but this is the product of a long history of persecution forcing transgender people to live as those who they are not.” *Adkins*, 143 F. Supp. 3d at 139. That is exactly right. It would thus be manifestly incorrect and unjust to conclude that transgender people may *continue* to be discriminated against because some members of their community shows the signs of suffering that result from a history of stigma and discrimination. In a different context, the United States Supreme Court has warned against allowing “received practices” to “serve as their own continued justification,” thereby ensuring that “new groups could not invoke rights once denied.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015). The same logic applies here. There is no indication that transgender status has any inherent bearing on a person’s social worth. Holding the government to account when it seeks

to classify on that basis will only ensure that transgender individuals are free to reach their full potential on the same terms as all other Americans.

C. Transgender Individuals Are a Discrete, Identifiable Group

In deciding whether strict scrutiny is appropriate, the U.S. Supreme Court has approved judicial skepticism of official acts that discriminate based on “obvious, immutable, or distinguishing characteristics that define . . . a discrete group.” *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987). “The notion is that it is unfair to penalize a person for characteristics the person did not choose and that the individual cannot change.” Erwin Chemerinsky, *CONSTITUTIONAL LAW* 672 (3d ed. 2006). Notably, however, “[t]he constitutional relevance of the immutability factor is not reserved to those instances in which the trait defining the burdened class is absolutely impossible to change.” *Varnum*, 763 N.W.2d at 893. “[T]he immutability prong of the suspectness inquiry surely is satisfied when . . . the identifying trait is so central to a person’s identity that it would be abhorrent for government to penalize a person for refusing to change [it].” *Id.* (quotation marks and citations omitted).

This requirement is plainly satisfied here: “Transgender individuals have immutable and distinguishing characteristics that make them a discernable class.” *Doe 1*, 275 F. Supp. 3d at 208; *see also Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000), *overruled on other grounds by Thomas v. Gonzales*, 409 F.3d 1177, 1187 (9th Cir. 2005) (observing that a transgender person’s “sexual identity is

immutable because it is inherent in his identity; in any event, he should not be required to change it”). Specifically, “the disparity between the gender they were assigned at birth and the gender they identify with” defines transgender persons as a discrete and identifiable group. *Grimm*, 402 F. Supp. 3d at 75 accord *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (“A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes.”); *Evancho*, 237 F. Supp. 3d at 288 (“[Plaintiffs’] transgender characteristics are inherent in who they are as people.”); *Adkins*, 143 F. Supp. 3d at 139–140 (observing that the revelation of a person’s transgender status frequently “calls down discrimination”). Were this Court to hold that classifications based on transgender status trigger strict scrutiny, its rule would cover a discrete category of persons whom the state has no lawful right to punish for living as their true selves.

D. The Transgender Community Lacks Effective Political Power

A final factor that courts sometime consider in assessing strict scrutiny is whether a group possesses “the strength to politically protect [itself] from wrongful discrimination.” *United States v. Windsor*, 699 F.3d at 184 (2012). The transgender community lacks that strength. To be sure, anti-discrimination efforts have recently met with some success in a few states and cities. But most attempts to secure antidiscrimination legislation have failed—and many of the most significant strides toward *de jure* equality at the federal level have been rolled back. By any objective

measure, and certainly in comparison to other protected classes, the barriers to transgender persons achieving equality through the political process remain daunting. *See Frontiero*, 411 U.S. at 688 (plurality) (holding that classifications targeting women merit heightened scrutiny even though women constitute half of the electorate); *Adkins*, 143 F. Supp. 3d at 140 (“[I]n comparison to gay people at the time of *Windsor*, transgender people lack the political strength to protect themselves.”). As political power has been defined by state and federal courts for purposes of strict scrutiny analysis, transgender people do not have it and show no signs of acquiring it.

Consider just a few of the many facts that illustrate this point:

- In 2017, even after nine openly transgender people won elections, there were fewer than 20 total transgender officials at the state and local levels combined nationwide (and zero at the federal level).¹⁴
- There are no openly transgender members of Congress or federal judges, exemplifying exclusion from major public institutions.¹⁵
- Fewer than half of the fifty states have laws that explicitly prohibit discrimination against transgender people.¹⁶

¹⁴ *See* Brooke Sopelsa, *Meet 2017’s Newly Elected Transgender Officials*, NBC NEWS (Dec. 28, 2017)

¹⁵ *See Adkins*, 143 F. Supp. 3d at 140.

¹⁶ *See* American Civil Liberties Union, *Transgender People & The Law*.

- The federal government has recently reversed its position and begun arguing that civil rights laws do not protect transgender people.¹⁷

As these facts suggest, the transgender community will struggle—and often fail—if left wholly to its own devices in combating invidious discrimination. Strict judicial scrutiny of laws classifying based on transgender status is therefore necessary to ensure that “personal opposition” does not become “enacted law and public policy,” thus putting “the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied.” *Obergefell*, 135 S.Ct. at 2692; *accord Grimm*, 302 F. Supp. 2d at 750; *Doe 1*, 275 F. Supp. 3d at 209; *Highland Local*, 208 F. Supp. 3d at 874; *Evancho*, 237 F. Supp. 3d at 288.

* * * * *

Recognition of a protected class is appropriate when courts have good reason to worry that laws targeting a particular group rest ultimately on invidious prejudice or stereotypes. A number of vulnerable minority groups in American society have evoked the need for this level of sustained judicial vigilance. And under this Court’s well-established doctrine, the transgender community is one of them. Official acts that target the transgender community are presumptively “incompatible with the constitutional understanding that each person is to be judged individually and is

¹⁷ See Transgender Equality, *Trump’s Record of Action Against Transgender People* (last accessed July 1, 2018).

entitled to equal justice under the law.” *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982). That conclusion is only strengthened by related precedents holding that officials lack any valid interest in enforcing gender-based expectations of proper conduct. *See Virginia*, 518 U.S. at 533. Iowa laws, rules, and regulations that classify based on transgender status deserve a much harder look from the judiciary than laws regulating packaged milk. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). The time has come for this Court to hold as much—thereby offering clarity to government officials and affirming the dignity of all transgender persons.¹⁸

¹⁸ For the reasons set forth by Appellees, *amici* agree that the Rule cannot survive strict scrutiny (or any level of scrutiny) and should be invalidated.

CONCLUSION

For the foregoing reasons, *Amici* respectfully submit that this Court should conclude that transgender classifications are subject to strict scrutiny.

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1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 5,465 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2018, I electronically filed this document with the Supreme Court Clerk using the EDMS system, which will serve it on the appropriate parties electronically.

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