

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.

Appeal from the Iowa District Court for Polk County
Hon. Arthur E. Gamble

**BRIEF AMICI CURIAE OF IOWA SCHOLARS OF
LAW, HISTORY, BIOETHICS, GENDER, AND SEXUALITY
IN SUPPORT OF PETITIONERS-APPELLEES**

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Dale Carpenter, “*Windsor Products: Equal Protection from Animus*,” 2013 *Sup. Ct. Rev.* 183 (2013) 24, 26

Editorial, “The Quest for Transgender Equality,” *The New York Times* (May 4, 2015),
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Andrew R. Flores, *Attitudes Toward Transgender Rights: Perceived Knowledge and Secondary Interpersonal Contact*, The Williams Institute at UCLA Law School (2015),
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Andrew R. Flores, et al., *How Many Adults Identify As Transgender In The United States?*, The Williams Institute at UCLA Law School (2016),
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Sandy E. James, et al., *Report of the 2015 U.S. Transgender Survey*, National Center for Transgender Equality (2016),
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INTEREST OF THE AMICI

Amici curiae are scholars, teachers, and legal clinicians who hold faculty positions at colleges and universities in the State of Iowa, and who have expertise in the fields of law, history, bioethics, gender, or sexuality. They submit this brief to assist the Court by providing information about the nature of discrimination against transgender people in Iowa and the United States; to provide additional current knowledge about the proper understanding of and treatment for gender dysphoria; to offer arguments beyond those made by petitioners-appellees about why the Iowa Department of Human Services Rule banning gender-affirming surgeries violates the Iowa constitution; and to discuss the history of this Court's dynamic and principled approach to Iowa's constitutional equality guarantees.

The amici include: Will Coghill-Behrends, Director of the Baker Teacher Leader Center, College of Education, University of Iowa; Lois K. Cox, Clinical Professor of Law, University of Iowa; Jennifer K. Dobe, Assistant Professor of Philosophy, Grinnell College; Karla A. Erickson, Professor of Sociology, Grinnell

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of identification only, and the positions set forth below are solely those of amici.

No party's counsel authored this brief in whole or in part, and no party, party's counsel, or person other than amici and amici's counsel contributed money to fund the preparation or submission of the brief.

ARGUMENT

I. The Iowa Constitution's Evolving Guarantee of Equality Encompasses Transgender Iowans

This case calls upon this Court to affirm, as it has many times throughout Iowa's history, that "[o]ur constitution is not merely tied to tradition, but recognizes the changing nature of society." *Callender v. Skiles*, 591 N.W.2d 182, 190 (Iowa 1999).

The equal protection of law guaranteed by Art. I, Secs. 1 and 6, of the Iowa constitution evolves to take account of updated knowledge and changing "social, economic, political, or scientific facts." *Varnum v. Brien*, 763 N.W.2d 862, 881 (Iowa 2009). The evolving nature of the equality guarantee follows from this Court's recognition that "[t]he framers of the Iowa Constitution knew, as

did the drafters of the United States Constitution, that ‘times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress,’ and as our constitution ‘endures, persons in every generation can invoke its principles in their own search for greater freedom’ and equality.” *Id.* at 876 (quoting *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003)).

This case involves Iowans who are transgender – more specifically, those who have been clinically diagnosed with the condition known as gender dysphoria, which is the strong and persistent sense of incongruence between one’s gender identity and one’s birth-assigned sex resulting in significant distress and functional impairments. For petitioners-appellees Eerieanna Good and Carol Beal, as well as others like them, certain forms of surgery have been determined by clinical professionals to be medically necessary to properly treat their gender dysphoria.

Americans who are transgender have “remained largely unseen until fairly recently,” but have attained a measure of public and private acceptance and understanding as “part of the

broader quest for equality for sexual minorities.” Editorial, “The Quest for Transgender Equality,” *The New York Times* (May 4, 2015), available at <https://www.nytimes.com/2015/05/04/opinion/the-quest-for-transgender-equality.html>. An estimated 0.6% of American adults, or about 1.4 million, identify as transgender. Andrew R. Flores, et al., *How Many Adults Identify As Transgender In The United States?*, The Williams Institute at UCLA Law School (2016), at 3, available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf>. The National Center for Transgender Equality, based on a 2015 survey of 27,715 transgender and non-gender-binary respondents from all 50 states, has reported that “respondents’ experiences ... show some of the positive impacts of growing visibility and acceptance of transgender people in the United States.” Sandy E. James, et al., *Report of the 2015 U.S. Transgender Survey*, National Center for Transgender Equality (2016), at 6, available at <https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF>. For example, respondents reported

“growing acceptance by family members, colleagues, classmates, and other people in their lives.” *Id.* at 7.

Best practices in medicine also have played “vital roles in the ongoing journey toward social and political progress for transgender people.” Cameron R. Waldman, “Transgender Medicine in the Path to Progress and Human Rights,” 18 *AMA J. of Ethics* No. 11 (2016), at 1067, available at <https://journalofethics.ama-assn.org/article/transgender-medicine-path-progress-and-human-rights/2016-11>.

Yet transgender Americans, in Iowa and elsewhere, continue to face not merely discrimination, but also “social stigma,” even “physical and psychological violence.” Andrew R. Flores, *Attitudes Toward Transgender Rights: Perceived Knowledge and Secondary Interpersonal Contact*, The Williams Institute at UCLA Law School (2015), available at <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Attitudes-Transgender-Rights-USA-September-2015.pdf>. The findings of the *2015 U.S. Transgender Survey* “paint a troubling picture of the impact of stigma and discrimination” on many transgender people. *2015*

U.S. Transgender Survey, at 5. For example, in the year before completing the survey, 46 percent of respondents had been verbally harassed and nine percent had been physically attacked because of being transgender. *Id.* Thirty percent reported being fired, denied a promotion, or experiencing some other form of mistreatment in the workplace due to their gender identity or expression. *Id.* at 4.

Survey respondents also reported “high levels of mistreatment when seeking health care.” *Id.* Nearly one-quarter (23 percent) reported that in the year prior to completing the survey they did not seek needed health care due to their fear of being mistreated as a transgender person, and 33 percent said they did not go to a health care provider when needed because they could not afford it. *Id.* at 5.

In this state, a 2016 report by faculty and students at the University of Iowa College of Law concluded that “transgender adults and children encounter discrimination, intolerance or prejudice in nearly every aspect of daily life in Iowa and across the U.S.” Rainbow Health Clinic, University of Iowa College of Law,

Where Do I Fit In? A Snapshot of Transgender Discrimination in Iowa (2016), at 2, available at <https://law.uiowa.edu/sites/law.uiowa.edu/files/Where-Do-I-Fit-In-A-Snapshot-of-Transgender-Discrimination-June-2016-Public-Release.pdf>.

Discrimination against transgender Iowans warrants searching and skeptical judicial review under the four-factor test this Court has adopted for heightened scrutiny, as the district court's sound analysis concluded (Dist. Ct. Op. at 23-26 (discussing factors of a history of invidious discrimination, ability to contribute to society, immutability, and political powerlessness)), and as the petitioners-appellees, as well as other *amici*, argue at greater length in their briefs (*e.g.*, Petitioners'-Appellees' Br. at 68-79). The Iowa legislature put the force of this state's law behind the principle of combatting the mistreatment of transgender persons when it amended the Iowa Civil Rights Act in 2007 to include gender identity.

In this case, transgender Iowans seek the simple right of equal treatment in state-funded medical care. "Like most Iowans," Eerieanna Good, Carol Beal, and others like them "are

responsible, caring, and productive individuals,” and “[l]ike all Iowans, they prize their liberties and live within the borders of this state with the expectation that their rights will be maintained and protected.” *Varnum*, 763 N.W.2d at 872 (footnote omitted).

II. The Ban on Gender-Confirming Surgeries Violates the Iowa Constitution’s Equality Guarantee

Good and Beal challenge an administrative Rule of the Iowa Department of Human Services, adopted more than two decades ago in 1994, which bans Iowa Medicaid coverage for “[p]rocedures related to transsexualism, hermaphroditism, [or] gender identity disorders” and “surgeries for the purpose of sex reassignment.” Iowa Admin. Code r. 441-78.1(4)(b)(2),(4). This Rule created an intentional classification, removing health care coverage from transgender people that they had previously been eligible to receive. Dist. Ct. Op. at 19 (“The language of the Regulation was added for the express purpose of denying coverage for sex reassignment surgery” after the Department received claims it “concluded it was required to cover.”).

The Rule inflicts harm on transgender Iowans because it is rooted in outdated medical evidence, fear of “controversy,” and misconceptions about medically necessary treatment for gender dysphoria. The Rule perpetuates negative and harmful stereotypes about transgender people. Further, the Department’s defense of its Rule falls far short of the “exceedingly persuasive” justification this Court requires under heightened scrutiny in equality protection cases. *See Varnum*, 763 N.W.2d at 897 (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)). As this Court taught long ago, a government practice should be upheld only when it “can stand the scrutiny of logic and sound reasoning in the light of present day standards.” *Acuff v. Schmit*, 78 N.W.2d 480, 485 (Iowa 1956).

The Rule banning gender-confirming surgeries cannot withstand such scrutiny, and the Department’s unpersuasive defense raises at least an inference that the true purpose of the ban is grounded in irrational prejudice against transgender people, which provides an independent ground for heightened scrutiny. The Rule violates equal protection.

A. The Rule Is Based on Outdated and Erroneous Conceptions About Treatment for Gender Dysphoria

In promulgating its ban on gender-confirming surgeries, the Department cited four findings: (1) what it called “[c]ontinuing controversy” about gender dysphoria, “particularly regarding sex reassignment surgery”; (2) the availability of other treatment options for gender dysphoria; (3) “[l]ack of a consensus opinion that sex reassignment surgery is an appropriate treatment”; and (4) the “need for further study.” Iowa Admin. Bulletin ARC 5345A (Jan. 4, 1995), at 1069.

The supposed “controversy” and lack of consensus around gender-confirming surgeries, if in fact they existed when the Rule was promulgated almost a quarter-century ago, have all but disappeared from mainstream medicine today. It is now recognized that, for some patients, surgical procedures are an appropriate and necessary component of an integrated course of clinical care. As the World Professional Association for Transgender Health (“WPATH”) explains, “While many transsexual, transgender, and gender nonconforming

individuals find comfort with their gender identity, role, and expression without surgery, for many others surgery is *essential and medically necessary to alleviate their gender dysphoria*. For the latter group, relief from gender dysphoria cannot be achieved without modification of their primary and/or secondary sex characteristics to establish greater congruence with their gender identity.” World Professional Association for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* (7th ed. 2011), at 54-55 (emphasis added, internal citation omitted), *available at* <https://www.wpath.org/publications/soc>.

These standards continue to be reinforced by a growing body of literature. The authors of a 2018 article in a major medical journal observe that “lessening social stigma, increased cultural awareness, and general psychosocial support have led to an increased acceptance of gender-confirmatory surgery,” and that “[i]n recent decades, the clinical approach to gender-confirmatory surgery has experienced a marked paradigm shift.” Jason M. Weissler, et al., “Gender-Affirming Surgery in Persons with

Gender Dysphoria,” 141 *Plastic and Reconstructive Surgery* No. 3 (March 2018), at 393e. And a 2018 article in the American Medical Association’s ethics journal further explains that “[t]here is strong and rapidly accumulating evidence that patients with gender dysphoria benefit from mental health, hormonal, and reconstructive surgical interventions during the social transition from their assigned to their intrinsic gender.” William M. Kuzon, Jr., et al., “Exclusion of Medically Necessary Gender-Affirming Surgery for America’s Armed Services Veterans,” 20 *AMA J. of Ethics* No. 4 (2018), at 404, available at <https://journalofethics.ama-assn.org/article/exclusion-medically-necessary-gender-affirming-surgery-americas-armed-services-veterans>.

This paradigm shift around gender-confirming surgeries has led to changes, as well, in the policies of insurers. Today, “private payers, Medicare, and Medicaid are increasingly paying for [surgical] procedures for transgender patients,” and these insurers now recognize that “[p]olicies banning discrimination based on gender identity ... are essential to engage transgender patients in

care and ensure coverage of these medically necessary procedures.” Laura Joszt, “Gender-Affirming Surgeries Increasingly Covered by Private Insurance, Medicare, Medicaid,” *Am. J. of Managed Care* “In Focus” Blog (March 2, 2018), available at <https://www.ajmc.com/focus-of-the-week/genderaffirming-surgeries-increasingly-covered-by-private-insurance-medicare-medicaid> (citing and quoting a study published in the July 2018 issue of *JAMA Surgery*); see also Kuzon, et al., “Exclusion of Medically Necessary Gender-Affirming Surgery,” at 404 (“Based on the preponderance of evidence and professional expert opinion, the insurance industry has, over the past 5-10 years, shifted from viewing gender-affirming surgery as ‘cosmetic’ or ‘elective’ to recognizing that surgery is part of the medically necessary treatment for gender dysphoria.”).

B. The Department’s Defense of its Rule Is Wholly Unpersuasive

The Department’s Rule banning coverage for gender-confirming surgeries is an intentional classification grounded in a flawed, outdated understanding of medical care for gender dysphoria. It perpetuates stereotypes and causes real harm for

Good, Beal, and other people like them. Those facts alone warrant this Court’s intervention, as we will discuss further in Part III. But rather than acknowledge these infirmities and update Iowa Medicaid policy based on the “further study” the Department said in 1995 was necessary (but which it never undertook), the Department trivializes the medical needs of transgender persons by characterizing the benefits of gender-confirming surgeries as merely aesthetic and “psychological.” These arguments are unsound and should be rejected.

The Department claims that “[s]urgical intervention to treat gender dysphoria addresses only the psychological symptoms of gender dysphoria.” Dept. Br. at 27. It maintains that these serious, major medical procedures are nothing more than a form of “cosmetic” surgery. This characterization apparently follows from the fact that the Iowa Administrative Code places gender-confirming surgery in the same category as breast augmentation, surgeries performed to counteract “the aging process,” and procedures to correct bad teeth. *See* Iowa Admin. Code r. 441-

78.1(4)(b) (listing certain forms of surgery which are excluded from Medicaid).

The Department's arguments carry a clear and intended implication: that the purposes and benefits of gender-confirming surgery are trivial, and thus not worthy of the expenditure of public funds. The Department suggests that such surgery is merely "psychological" in the sense that it is solely intended to assuage patients' vanity and make them feel better about their appearance.

In making this argument, the Department clings to a shibboleth that has been discredited by advancements in medical knowledge and understanding about gender dysphoria. In persons for whom they are appropriate, gender-confirming surgeries are therapeutic and part of integrated clinical treatment for gender dysphoria. As the American Medical Association's House of Delegates has affirmed, gender dysphoria is "a serious medical condition," and "[a]n established body of medical research demonstrates the effectiveness and medical necessity of mental health care, hormone therapy, and sex reassignment surgery as

forms of therapeutic treatment for many people diagnosed with [gender dysphoria].” American Medical Association, Resolution 122: “Removing Financial Barriers to Care for Transgender Patients” (2008), *reproduced at* http://bilerico.lgbtqnation.com/2008/06/good_news_from_the_ama.php. Medical experts “have rejected the myth that such treatments are ‘cosmetic’ or ‘experimental’ and have recognized that these treatments can provide safe and effective treatment for a serious health condition.” *Id.* Denial of benefits to treat this condition “represents discrimination based solely on a patient's gender identity.” *Id.*

The Department’s brief is not only wrong, it is incoherent. At the same time it dismisses the benefits of gender-confirming surgeries as merely “psychological,” it acknowledges that gender dysphoria, if not properly treated, can lead to serious consequences such as anxiety, depression, and suicide. Dept. Br. at 28. And the Department makes no attempt to dispute the authority of the WPATH *Standards of Care* regarding proper treatment for gender dysphoria – indeed, the Department invokes the WPATH *Standards* numerous times in its own brief. *See* Dept.

Br. at 26 n.6, 28, 48, 55. The *Standards* explain that for some patients, “surgery is *essential* and medically necessary,” and that relief from gender dysphoria “*cannot be achieved* without modification of their primary and/or secondary sex characteristics to establish greater congruence with their gender identity.” WPATH *Standards of Care* at 54-55 (emphases added). If a condition is acknowledged by the Department to be associated with suicidality or other serious health problems when it is not properly treated, and if the Department declines to dispute the treatment protocols prescribed by an international health organization which the Department itself recognizes as authoritative, then it is very difficult to understand why the Department would still refuse to provide for its care.

Moreover, the Department acknowledges that some *other* forms of “cosmetic, reconstructive, or plastic surgeries” – what it calls “a few, targeted exceptions” – *are* covered by Iowa Medicaid. See Dept. Br. at 23 and 23 n.5 (citing Iowa Admin. Code r. 441-78.1(4)(a)). Yet surprisingly, the Department makes no effort to attempt to explain how gender-confirming surgeries are less

medically necessary or less worthy of public expenditures than those other procedures that *are* covered.

The inconsistency and selective exceptions in the Department's rules raise suspicion that the classification excluding transgender persons from "cosmetic, reconstructive, or plastic surgeries" for *their* medical needs is a pretext for invidious discrimination, not sound medicine or public policy. Where the government's "asserted reasons" for a law do not "rationally explain" its relationship to a public purpose, a court should be alert to the possibility that the law really is based on "fears" and "irrational prejudice" against the group that is affected. Dale Carpenter, "*Windsor* Products: Equal Protection from Animus," 2013 *Sup. Ct. Rev.* 183, 209 (2013) (discussing and quoting *City of Cleburne v Cleburne Living Center*, 473 U.S. 432, 450 (1985)). Aside from the traditional factors for heightened scrutiny, the possibility that a law was impelled by an improper discriminatory purpose provides an independent reason to apply heightened scrutiny. *United States v. Windsor*, 570 U.S. 744, 770 (2013) ("In determining whether a law is motivated by an improper animus or

purpose,” discriminations of an “unusual” character “especially require careful consideration”); *Lawrence*, 539 U.S. at 580 (O’Connor, J., concurring in the judgment) (“When a law exhibits ... a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.”).

The Department’s position that gender-confirming surgeries are denied because their benefits are merely “psychological” appears to be a post-hoc rationalization adopted for purposes of litigation. When the ban was promulgated, the Department’s justification was not that surgeries provided merely “psychological” benefits. Rather, the Department said it did “not believe that available resources should be spent” on something as “controversial within the medical community” as “sex reassignment surgery.” Iowa Admin. Bulletin ARC 5345A (Jan. 4, 1995), at 1070. As we have discussed earlier in this brief, such controversy no longer exists. When government lawyers offer post-hoc rationalizations, rather than engaging with the *actual* reasons for why a policy was adopted, a Court should view the arguments

with skepticism. See Steve Sanders, “Making It Up: Lessons for Equal Protection Doctrine from the Use and Abuse of Hypothesized Purposes in the Marriage Equality Litigation,” 68 *Hastings L.J.* 657, 690 (2017) (when government “seeks to cover up the true purpose of discrimination,” it may resort to hypothesized purposes “to create the illusion that the discrimination advances some legitimate government purpose”). Notably, a federal court this year struck down a Wisconsin law barring coverage for gender-confirming surgeries in the state’s employee health insurance plan, concluding that the state’s arguments about cost and efficiency were post hoc justifications that did not survive heightened scrutiny under the Equal Protection Clause. *Boyden v. Conlin*, 2018 WL 4473347 (W.D. Wis. Sept. 18, 2018), at *18.

In assessing a law for improper discriminatory purpose, the “political and legal context” in which it was adopted also can be instructive. *Carpenter, Windsor Products*, at 245; *Village of Arlington Heights v Metropolitan Housing Corp.*, 429 U.S. 252, 266-67 (1977) (historical background of a decision is one factor in

considering discriminatory purpose). Here, as the district court found, the Department’s ban “was added for the express purpose of denying coverage for sex reassignment surgery” as a “response to the Eighth Circuit [federal court of appeals] finding that DHS was otherwise required to cover such procedures” and “after DHS had received Medicaid claims for sex reassignment surgery in 1991 that DHS ultimately concluded it was required to cover.” Dist. Ct. Op. at 19 (citing Good Admin. Record, at 213). These circumstances and timing cast further doubt that the Department’s justification for the ban on gender-confirming surgeries – that their benefits are merely “psychological” – should be credited. These facts also render untrue the Department’s assertion that a diagnosis of gender dysphoria “plays *no* role in whether an individual will or will not receive a requested procedure.” Dept. Br. at 24. Regardless of the level of scrutiny, in constitutional cases this Court considers the “actual truth-content” of legislative or constitutional facts offered in support of a government policy. *Varnum*, 763 N.W.2d at 881 (citation omitted). Doing so here demonstrates that the Department’s arguments

cannot rehabilitate a Rule that was adopted for the purpose of discrimination.

In summary, the Department's decision in 1994 to place surgical treatment for the serious medical condition of gender dysphoria in the same category as treatment to improve one's smile (*see* Iowa Admin. Code r. 441-78.1(4)(b)(1) (excluding Medicaid coverage for dental malocclusion)) or procedures to reverse "the aging process" (*id.* at 441-78.1(4)(b)(3)) cannot stand in light of current knowledge about proper treatment for gender dysphoria. The timing and circumstances of the ban's adoption suggest a purpose of invidious discrimination against transgender Iowans. And the Department's arguments in this litigation, attempting to provide a plausible, neutral justification for the policy, cannot overcome their own inconsistencies, their lack of footing in the ban's actual history, and their repudiation by medical experts.

III. Striking Down the Ban Would Fit Within the Tradition of This Court’s Approach to Constitutional Equality

Time and again, this Court has demonstrated principle and independence when it became necessary to review laws that were repugnant to Iowa’s longstanding commitment to the equality of all people. This case calls upon the Court to reaffirm that tradition.

In vindicating principles of constitutional equality, this Court has never shrunk from social or political controversy, and it has emphasized its duty to decide cases based on what “humanity, common reason and the best interests of society demand[.]” *Cole v. Cole*, 23 Iowa 433, 447 (1867) (rejecting a common law rule which denied women custody of their children upon divorce). Indeed, since the state’s earliest days, Iowa’s courts have been “called upon to decide cases that involved volatile social or political controversies of the time.” Iowa Judicial Branch, “Early Civil Rights Cases,” <https://www.iowacourts.gov/for-the-public/iowa-courts-history/civil-rights>. “These decisions demonstrate legal foresight as well as a deep and abiding respect for the values

enshrined in our Constitution and Bill of Rights.” *Id.* This Court has declared its “responsibility ... to protect constitutional rights of individuals ... even when the rights have not yet been broadly accepted, were at one time unimagined, or challenge a deeply ingrained practice or law.” *Varnum*, 763 N.W.2d at 876. It has emphasized that the judiciary must “perform its constitutional role free from the influences that tend to make society’s understanding of equal protection resistant to change.” *Id.* at 877.

In the wake of the Civil War, when some states still resisted acknowledging the equality of former slaves, this Court held that a local school board could not deny equal education to African-American children merely because “public sentiment in their district” was against it. *Clark v. Bd. of Directors*, 24 Iowa 266, 268 (1868). Five years later, while some other states were enforcing Jim Crow laws, this Court held that a mixed-race woman who had been removed from a steamboat dining room reserved for whites was entitled to the same rights and privileges as white passengers. *Coger v. Northwestern Union Packet Co.*, 37 Iowa 145 (1873). And in 1949, years before the African-American civil rights

movement began to take hold in other parts of the country and in federal law, this Court upheld a law making it illegal to refuse service in a restaurant on the basis of race. *State v. Katz*, 40 N.W.2d 41 (Iowa 1949).

Thanks in part to this Court's commitment to equality, Iowa also has been a leader in rejecting discrimination on the basis of gender. As early as 1869, this Court ruled that women could not be denied the right to practice law, allowing Iowa to become the first state to admit women to the bar. Iowa Judicial Branch, "Early Civil Rights Cases." This Court also was one of the first to hold that the Nineteenth Amendment, in extending to women the right to vote, also made them eligible for jury service. *State v. Walker*, 185 N.W. 619 (Iowa 1921).

And in *Varnum*, which struck down Iowa's ban on marriage equality for same-sex couples, this Court's unanimous opinion recognized that the rights of gays and lesbians to equal treatment in marriage could not be denied based on a long history of "prejudice and stereotyping." *Varnum*, 763 N.W.2d at 896 (citation omitted)).

Like these important decisions before it, this case calls on this Court to recognize that “times can blind us” to particular forms of prejudice (*Varnum*, 763 N.W.2d at 876 (citation and internal quotation marks omitted)) and that “[o]ur constitution is not merely tied to tradition, but recognizes the changing nature of society” (*Id.* (quoting *Callender*, 591 N.W.2d at 190)).

As discussed in Part II above, the Department’s Rule banning Medicaid coverage for gender-confirming surgery is grounded in an outdated and flawed understanding of medical care for gender dysphoria, producing real harm for many transgender Iowans. The misconceptions behind the Rule illustrate how discrimination against a minority group can be perpetuated by a cycle of stereotypes and inadequate knowledge.

Invalidating this Rule would not mean the Court was merely substituting its policy judgment for that of the Department of Human Services. There is no basis for deferring to a harmful and intentionally discriminatory policy whose declared premises are no longer true and which the Department does not defend based on the actual reasons for its adoption. This Court has recognized

that the adjudication of constitutional questions “involves crafting rules of law based on social, economic, political, or scientific facts” (*Varnum*, 763 N.W.2d at 881) and that “equal protection can only be defined by the standards of each generation” (*id.* at 877). One of the clearest lessons of this Court’s equality jurisprudence has been that “a [law] inconsistent with the Iowa Constitution must be declared void, even though it may be supported by strong and deep-seated traditional beliefs and popular opinion.” *Id.* at 875 (citing Iowa Const. art. XII, § 1).

In summary, since Iowa’s earliest days, this Court has embraced and articulated its role as guardian of the state’s constitution. Many of its most proud and important decisions have come when vindicating the principles that all persons “are, by nature, free and equal,” Iowa Const. art. I, § 1, and that privileges and benefits provided by the state government must “equally belong to all citizens,” *id.* § 6. Amici respectfully ask the Court in this case to uphold those principles once again.

CONCLUSION

This Court should hold that the Department's Rule banning Iowa Medicaid coverage for medically necessary gender-confirming surgeries violates Art. I, Secs. 1 and 6, of the Iowa constitution.

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/s/ Linda J. Dean
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I certify that on September 26, 2018, I served this document on all parties of record electronically by EDMS and that I have electronically filed this document with the Clerk of the Supreme Court, 1111 East Court Ave., Des Moines, IA 50319.

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