SUPREME COURT NO. 21-1977

IN THE SUPREME COURT OF IOWA

AIDEN VASQUEZ and MIKA COVINGTON,
PETITIONERS-APPELLEES/CROSS-APPELLANTS,

v.

IOWA DEPARTMENT OF HUMAN SERVICES,
RESPONDENT-APPELLANT/CROSS-APPELLEE.

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
HONORABLE WILLIAM P. KELLY

BRIEF OF BAY AREA LAWYERS FOR INDIVIDUAL FREEDOM, FORGE, INC., GLBTQ LEGAL ADVOCATES & DEFENDERS, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., NATIONAL CENTER FOR TRANSGENDER EQUALITY, NATIONAL LGBTQ+ BAR ASSOCIATION, NATIONAL LGBTQ TASK FORCE, NATIONAL WOMEN'S LAW CENTER, SOUTHERN ARIZONA GENDER ALLIANCE, TRANS PEOPLE OF COLOR COALITION, TRANS YOUTH EQUALITY FOUNDATION, TRANSGENDER LEGAL DEFENSE & EDUCATION FUND, AND TRANSGENDER RESOURCE CENTER OF NEW MEXICO AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS-APPELLEES

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amici curiae are organizations committed to safeguarding and advancing the rights of transgender individuals. Although their approaches differ, these organizations unite in a common mission of uplifting a community whose constituents seek to exist in peace and to be treated equally under the law. *Amici* have a substantial interest in opposing discrimination against the transgender community. They have witnessed the devastating effects that discrimination inflicts on transgender individuals and their loved ones. Because this Court's decision will directly affect *Amici*'s members and clients, the following entities join in the filing of this *amicus* brief[2]:

- Bay Area Lawyers for Individual Freedom (BALIF)
- FORGE, Inc.
- GLBTQ Legal Advocates & Defenders (GLAD)
- Lambda Legal Defense and Education Fund, Inc.
- National Center for Transgender Equality (NCTE)
- National LGBTQ+ Bar Association

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[1] Pursuant to Iowa Rule of Appellate Procedure 6.906(4)(d), *Amici* state that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *Amici* or their counsel made a monetary contribution to fund its preparation and submission. All parties have consented to the filing of this brief.

[2] A full description of each organization is included in the Appendix.

- National LGBTQ Task Force
- National Women's Law Center (NWLC)
- Southern Arizona Gender Alliance (SAGA)
- Trans People of Color Coalition (TPOCC)
- Trans Youth Equality Foundation (TYEF)
- Transgender Legal Defense & Education Fund (TLDEF)
- Transgender Resource Center of New Mexico (TRCNM)

ARGUMENT

In *Good v. Iowa Department of Human Services*, 924 N.W.2d 853 (Iowa 2019), this Court held that an administrative rule excluding gender-affirming surgery from Medicaid coverage ran afoul of the Iowa Civil Rights Act. *See* Iowa Code § 216.7(1)(a) (2009). In the wake of that decision, the Iowa legislature amended the Civil Rights Act to provide that it "shall not require any state or local government unit or tax-supported district to provide for sex reassignment surgery or any other cosmetic, reconstructive, or plastic surgery procedure related to transsexualism, hermaphroditism, gender identity disorder, or body dysmorphic disorder." Iowa Code § 216.7(3) (2022). The amendment codified—in materially identical language—the rule that excluded such surgeries from Medicaid coverage. Iowa Admin. Code r. 441-78.1(4). In so doing, the Iowa legislature cleared the way for the State to

enforce an administrative regulation categorically excluding transgender individuals seeking gender-affirming care from Medicaid coverage.

Petitioners are two transgender individuals who were denied coverage for medical care under that regulatory scheme. (Pet. Br. at 41–49.) They contend that the amended statute and the regulatory exclusion it authorized violate the Equal Protection Clause of the Iowa Constitution. (Pet. Br. at 31.) The district court agreed and held that the amended statute, the corresponding administrative regulation, and the State's denial of Medicaid coverage to Petitioners violated the Iowa Constitution's equal protection guarantee. (11/19/21 Order at 59.)

On appeal, the State does not dispute that the administrative regulation excluding gender-affirming care from Medicaid coverage violates the Iowa Constitution's Equal Protection Clause. (Resp. Br. at 25.) Instead, the State attacks the district court's decision on two discrete grounds. The State first contends that the district court exceeded its procedural authority in reaching the constitutionality of the statutory amendment to the Iowa Civil Rights Act. (*Id.* at 26.) In the alternative, the State argues that the statutory amendment passes constitutional muster under the Iowa Constitution's equal protection guarantee. (*Id.* at 34.) *Amici* do not address the procedural question briefed by

the parties, but rather explain why strict or heightened scrutiny is warranted if the Court tests the constitutionality of the statutory amendment.

That conclusion follows from the very text of the Iowa Constitution, which recognizes that "[a]ll men and women are, by nature, free and equal." Iowa Const. art. I, § 1. The Iowa Constitution 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. That guarantee of equal protection under the law is "the very foundation principle of our government." *Gartner v. Iowa Dep't of Pub. Health*, 830 N.W.2d 335, 350 (Iowa 2013) (quoting *Coger v. Nw. Union Packet Co.*, 37 Iowa 145, 153 (1873)).

Since its original articulation, that principle has been applied to groups who were previously unknown or 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, 556–57 (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*, 763 N.W.2d at 877. 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 maintain an independent analysis while treating federal constitutional doctrine as "a useful analytical starting point." *Id.* at 886 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).[3]

[3] 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, 197–98 (1976) (sex); *Clark v. Jeter*, 486 US 456, 461–62 (1988) (legitimacy); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) (religion); *SmithKline Beecham Corp. v. Abbott Lab'ys*, 740 F.3d 471, 481 (9th Cir. 2014) (sexual orientation); and *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 610 (4th Cir. 2020) (transgender status).

Applying those tests, 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 warrants heightened scrutiny.[4] These decisions stand for a

[4] *See, e.g.*, *Grimm*, 972 F.3d at 610 (finding "[e]ach factor . . . readily satisfied" with regard to transgender people and that "heightened scrutiny applies because transgender people constitute at least a quasi-suspect class"); *accord Karnoski v. Trump*, 926 F.3d 1180, 1200 (9th Cir. 2019) (finding "something more than rational basis" applies to policies that treat transgender persons differently); *Glenn v. Brumby*, 663 F.3d 1312, 1318 (11th Cir. 2011) (same); *Brandt v. Rutledge*, 551 F. Supp. 3d 882, 891 (E.D. Ark. 2021); *Corbitt v. Taylor*, 513 F. Supp. 3d 1309, 1314–15 (M.D. Ala. 2021); *Ray v. McCloud*, 507 F. Supp. 3d 925, 937 (S.D. Ohio 2020); *Kadel v. Folwell*, 446 F. Supp. 3d 1, 18 (M.D.N.C. 2020); *Stone v. Trump*, 400 F. Supp. 3d 317, 355 (D. Md. 2019); *Toomey v. Arizona*, No. 19-cv-35, 2019 WL 7172144, at *8 (D. Ariz. Dec. 23, 2019); *M.A.B. v. Bd. of Educ. of Talbot Cnty*., 286 F. Supp. 3d 704, 719–22 (D. Md. 2018); *Flack v. Wis. Dep't of Health Servs*., 328 F. Supp. 3d 931, 952–53 (W.D. Wis. 2018); *Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty., Fla.*, 318 F. Supp. 3d 1293, 1312 (M.D. Fla. 2018); *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1144–45 (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. U.S. Dep't of Educ*., 208 F. Supp. 3d 850, 874 (S.D. Ohio 2016); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015); *Marlett v. Harrington*, No. 1:15-cv-1382, 2015 WL 6123613, at *4 (E.D. Cal. Oct. 16, 2015); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139–40 (S.D.N.Y. 2015).

simple but profound proposition: discriminating against individuals based on transgender status is presumptively suspect. If the government wants to draw lines on that basis, it had better produce a compelling reason for doing so.

That message couldn't arrive at a more crucial time. Even as transgender people are increasingly accepted as equals in our society, transgender people have been subjected to a barrage of discrimination. *See infra* at pp. 23–33. This discrimination has unfolded at every level of government. In this fraught moment, it is vital for courts to affirm the dignity of transgender persons and make clear that our commitment to equal protection shields the transgender community. 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 notice to officials at all levels of government that they should proceed with extreme caution before classifying on this basis. Thus, distinctions based on transgender status would be permitted only if the State could demonstrate why that approach is truly necessary. Given the absence of any presumptively valid reason to draw lines by reference to transgender status, it is eminently reasonable to demand such justification. By virtue of its commitment to equal protection for *all* persons, the Iowa Constitution demands nothing less.

I. IOWA'S BAN ON GENDER-AFFIRMING MEDICAL CARE DISCRIMINATES BASED ON TRANSGENDER STATUS

As a threshold matter, the Court must first determine whether the legislature's statutory amendment to the Iowa Civil Rights Act classifies individuals based on transgender status. The answer to that question is yes. In both purpose and effect, the statutory amendment targets transgender Iowans for discriminatory treatment and deprives them of benefits previously conferred by the State's Medicaid scheme. (*See* Pet. Br. at 34–36.) In particular, the statutory amendment empowers State and local governments to exclude Medicaid coverage "for sex reassignment surgery or any other cosmetic, reconstructive, or plastic surgery procedure related to transsexualism, hermaphroditism, gender identity disorder, or body dysmorphic disorder." Iowa Code § 216.7(3) (2022). Wielding that authority, the Iowa Department of Human Services has enforced an administrative regulation that broadly excludes Medicaid coverage for "[p]rocedures related to transsexualism, hermaphroditism, gender identity disorders, or body dysmorphic disorders." Iowa Admin. Code r. 441-78.1(4)(b)(2).

Tellingly, the State does not dispute that this administrative regulation runs afoul of the Iowa Constitution's Equal Protection Clause. (Resp. Br. at 25) (acquiescing in the "order declaring the current rule unconstitutional"). That concession is fatal to the State's defense of the statutory amendment,

since the statute and administrative rule are "identically applied, and unavoidably intertwined." (11/19/21 Order at 17.) After this Court's decision in *Good*, the State was barred from enforcing its regulatory ban on gender-affirming care. (Pet. Br. at 51–53, 62–65.) The statutory amendment was put in place solely to confer discretion on the State to enforce that ban. *Id.* The administrative regulation can be enforced solely by virtue of the statutory amendment; if one is unconstitutional, the other must be too.

That conclusion is independently confirmed by federal cases identifying what it means for a law to discriminate against transgender people. As the United States Supreme Court has held, when a state targets an activity or conduct predominantly associated with a particular class of people, courts should presume an intent to discriminate against that class. *See, e.g.*, *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 689 (2010). Thus, a ban on same-sex intimacy is a form of discrimination against gay people. *See Varnum*, 763 N.W.2d at 885 ("The benefit denied by the marriage statute—the status of civil marriage for same-sex couples—[was] so closely correlated with being homosexual as to make it apparent the law [was] targeted at gay and lesbian people as a class") (quotations omitted); *see also Martinez*, 561 U.S. at 689; *Lawrence*, 539 U.S. at 575; *id.* at 583 (O'Connor, J., concurring) ("While it is true that the law applies only to conduct, the conduct targeted by this law is

conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class."). And here, a law targeting medical care that only transgender people need is a form of discrimination against transgender people. *See, e.g.*, *Karnoski*, 926 F.3d at 1201 (finding that a law discriminated against transgender people where it classified based on "gender dysphoria" and "gender transition"); *Bear Creek Bible Church v. Equal Emp. Opportunity Comm'n*, No. 4:18-cv-824, 2021 WL 5449038, at *35 (N.D. Tex. Nov. 11, 2021) (finding in a Title VII case that an employer's exclusion targeted transgender individuals because it applied only to persons with "gender dysphoria"); *Toomey*, 2019 WL 7172144, at *6 (recognizing as a matter of common sense that "transgender individuals are the only people who would ever seek [gender-affirming care]").

For this reason, it follows that the statutory amendment is a form of discrimination against transgender people—not only because it classifies based on terms like "transsexualism" and "gender identity disorder," but also because it singles out for exclusion a form of medical care that only transgender people seek. To be sure, the State may retort that the statutory amendment merely *withdraws* protection for such coverage under the Iowa Civil Rights Act. But that would be no answer at all, since federal courts have

recognized that the targeted withdrawal of benefits previously conferred on a protected class can function as discrimination against that class. *See Romer v. Evans*, 517 U.S. 620, 631 (1996); *Perry v. Brown*, 671 F.3d 1052, 1081 (9th Cir. 2012), *vacated sub nom. Hollingsworth v. Perry*, 570 U.S. 693 (2013). Here, the purpose and effect of the statutory amendment confirm that it is discriminatory.

Because the statutory amendment subjects transgender people to unequal treatment under the law, this Court must determine the appropriate level of judicial scrutiny that applies to the State's classifications based on transgender status.

II. TRANSGENDER CLASSIFICATIONS 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); *City of Cleburne 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 United States*

v. Windsor, 570 U.S. 744, 770 (2013); *Virginia*, 518 U.S. at 532; *Clark*, 486 U.S. at 461; *Graham*, 403 U.S. at 371–72; *Loving*, 388 U.S. at 11. This approach affords enhanced protection to vulnerable groups in circumstances rife with the potential for policymaking based on forbidden prejudice or stereotypes. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality).

The United States Supreme Court considers four factors in determining whether governmental action that discriminates against a particular group should face strict scrutiny: (1) whether the group has historically been subjected to discrimination, *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987); (2) whether the group's defining characteristic is relevant to its "ability to perform or contribute to society," *Cleburne*, 473 U.S. at 440–41; (3) whether the class exhibits "obvious, immutable, or distinguishing characteristics that define them as a discrete group," *Bowen*, 483 U.S. at 602; and (4) whether the class is "a minority or politically powerless," *id.*; *see also Grimm*, 972 F.3d at 611. This Court has "refuse[d] to view all the factors as elements or as individually demanding a certain weight in every case." *Varnum*, 763 N.W.2d at 889. Instead, this Court "analyze[s] each of the four factors and assess[es] 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.*

Here, all four factors cut decisively in favor of affording heightened protection to transgender people. Requiring robust judicial review of classifications based on transgender status 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. This Court should hold that strict or heightened scrutiny applies under the Iowa Constitution whenever the State draws lines based on transgender status.

A. Transgender Individuals Have Long Faced Discrimination

The State concedes that the history of discrimination faced by transgender individuals weighs in favor of strict or heightened scrutiny. (Final Br. of Resp. at 17, *Vasquez v. Iowa Dep't of Human Servs.*, No. CVCV061729 (Iowa D. Ct. Nov. 19, 2021).) Rightly so. Transgender people long "have suffered a history of persecution and discrimination . . . this is not much in debate." *Adkins*, 143 F. Supp. 3d at 139 (internal quotation marks omitted). There is simply "no doubt that transgender individuals historically have been subjected to discrimination on the basis of their gender identity, including high rates of violence and discrimination in education, employment, housing, and healthcare access." *Grimm v. Gloucester Cnty. Sch. Bd.*, 302 F. Supp. 3d

730, 749 (E.D. Va. 2018) (collecting cases); *accord Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017); *Karnoski v. Trump*, No. 17-cv-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"); *Ray*, 507 F. Supp. 3d at 937.

Regrettably, "this history of persecution and discrimination is not yet history." *Adkins*, 143 F. Supp. 3d at 139. As leading scholars have observed, "[i]t 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*, NAT'L CTR. FOR TRANSGENDER EQUAL. 8 (2011), https://perma.cc/B2ZU-UEHS. Thus, even as more Americans have come to understand and respect the dignity of transgender individuals, many in the transgender community have been stigmatized by their peers, excluded from civic society, and denied opportunities.

The data bear this out. In a 2020 national public opinion study regarding the experience of the LGBTQ community, more than half of transgender

respondents reported experiencing "discrimination in the past year." *See* Sharita Gruberg *et al.*, *The State of the LGBTQ Community in 2020: A National Public Opinion Study*, CTR. FOR AM. PROGRESS (Oct. 6, 2020), https://perma.cc/BDD7-CPKJ. And according to a 2016 national survey of transgender individuals, nearly half of respondents reported being "denied equal treatment, verbally harassed, and/or physically attacked in the past year because of being transgender." Sandy E. James *et al.*, *The Report of the 2015 U.S. Transgender Survey*, NAT'L CTR. FOR TRANSGENDER EQUAL. 198 (Dec. 2016), https://perma.cc/S2T3-Y4VT. 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) (citation omitted).

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

Healthcare: As this case demonstrates, perhaps the most invidious form of discrimination confronting transgender individuals involves access to healthcare. As of March 2022, fifteen states have restricted access to gender-affirming care or are considering laws that would do so. Kerith J. Conron *et*

al., *Prohibiting Gender-Affirming Medical Care for Youth*, THE WILLIAMS INST. (2022), https://perma.cc/GBX2-E4FH. And recent studies show that one in three transgender individuals reported negative experiences in seeking all forms of medical care. *See* James, *supra*, at 10. Indeed, 19% of respondents in one disheartening study reported being refused medical care outright due solely to their transgender status. *See* Grant, *supra*, at 6, 72–87. Such discrimination is especially severe against transgender people of color. According to one recent study, 68% of respondents identifying as a transgender person of color reported "negative or discriminatory treatment from a doctor or health care provider," while only 27% of white transgender respondents reported similar mistreatment. Lindsay Mahowald, *LGBTQ People of Color Encounter Heightened Discrimination*, CTR. FOR AM. PROGRESS (June 24, 2021), https://perma.cc/KG34-6B5N.

Prohibitions on gender-affirming care are particularly disturbing. As the United States Court of Appeals for the Fourth Circuit recently affirmed, gender-affirming "treatments are not cosmetic, elective, or experimental." *Kadel v. N. C. State Health Plan for Tchrs. & State Emps.*, 12 F.4th 422, 427 (4th Cir. 2021) (quotations omitted). Rather, they are "safe, effective, and often medically necessary." *Id.* at 427–28. That is the firm consensus among medical professionals. *See, e.g.*, James L. Madara, *AMA to states: Stop*

interfering in health care of transgender children, AM. MED. ASS'N (Apr. 26, 2021), https://perma.cc/SK8K-P97B; *APA Resolution on Gender Identity Change Efforts*, AM. PSYCH. ASSOC. (Feb. 2021), https://perma.cc/XFJ4-HVD9; *Transgender Health: Position Statement*, ENDOCRINE SOC'Y. (Dec. 2020), https://perma.cc/LZJ9-FV92. And it is well established that denying gender-affirming care poses extraordinarily serious risks to transgender individuals' mental and physical well-being. *See, e.g.*, *National Survey on LGBTQ Mental Health*, THE TREVOR PROJECT (2021), https://perma.cc/B9U3-QLC6; Jack L. Turban, *et al.*, *Access to gender-affirming hormones during adolescence and mental health outcomes among transgender adults*, 17 PLOS ONE 1, 12 (2022); Anthony N. Almazan & Alex S. Keuroghlian, *Association Between Gender-Affirming Surgeries and Mental Health Outcomes*, 156 JAMA SURGERY 611, 615 (2021). The district court thus found that denying transgender people access to medically necessary care ultimately increases total medical costs (11/19/21 Order at 38.). The enactment of anti-scientific laws that deny transgender people access to necessary care—even when doing so endangers them and raises overall healthcare costs—confirms the need for heightened judicial protection.

Education: Of course, healthcare is only one of many important domains in which transgender people face discrimination. Another such setting is 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 studies demonstrate that "[t]ransgender individuals in grades K-12 frequently experience harassment (78%), physical assault (35%), and sexual assault (12%) by students as well as by teachers and staff." Kevin M. Barry *et al.*, *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507, 553 (2016). As a result, some of these students are forced to leave school early or discontinue their higher education. *See id.*; *see also* James et al., *supra*, at 11, 130–38; Grant, *supra*, at 3, 32–49. Unfortunately, these harms have been exacerbated by the COVID-19 pandemic and the limited availability of healthcare resources. *See* U.S. Dep't of Educ. Off. for Civ. Rts., *Education in a Pandemic: The Disparate Impacts of COVID-19 on America's Students* 29–30 (2021). They have also been exacerbated by laws—such as H.B. 1557 in Florida—that target LGBTQ people and their families for discrimination and second-class status in schools.

Employment and Public Spaces: 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* Grant, *supra*, 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 reason. *See id.* at 3 & 50–76. 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* James, *supra*, at 5, 139–56. 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* Grant, *supra*, at 5. In many parts of the country, outright denials of service and comparable mistreatment in commerce remain all too common—even where anti-discrimination laws prohibit such conduct. *See* James, *supra*, at 16.

Identification Documents: It is difficult to overstate the complexities that transgender people face regarding government-issued identification documents. "Without identification, one cannot travel, register for school or

access many services that are essential to function in society." *Understanding the Transgender Community*, HUMAN RIGHTS CAMPAIGN (2020), https://perma.cc/3DM2-PZVV. 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, *supra*, at 5, 138–57. And it is well-known that an 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.*[5]

Legal System: Still another source of discrimination against transgender people has long been (and in some cases remains) the legal system. Historically, courts proved willing to void the marriages of transgender people and to strip them of parental rights. *See, e.g.*, *In re Estate*

[5] A number of courts have held that the United States Constitution prohibits policies that make it unduly burdensome (or impossible) for transgender people to obtain correct ID documents. *See, e.g.*, *Arroyo Gonzalez v. Rossello Nevares*, 305 F. Supp. 3d 327, 333 (D.P.R. 2018); *Love v. Johnson*, 146 F. Supp. 3d 848, 856–57 (E.D. Mich. 2015).

of Gardiner, 42 P.3d 120, 136–37 (Kan. 2002) (marriage); *M.B. v. D.W.*, 236 S.W.3d 31, 36–38 (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* Jennifer Levi & Daniel Redman, *The Cross-Dressing Case for Bathroom Equality*, 34 SEATTLE L. REV. 133, 151–58 (2009). Discrimination was also rampant in police practices—a fact that remains unchanged in some parts of the United States. Indeed, recent studies reveal that more than half of transgender individuals who interact with law enforcement report experiencing mistreatment. *See* James, *supra*, at 14. A separate study observed that almost half of the respondents would feel uncomfortable seeking police assistance. *See* Grant, *supra*, at 6, 158–73.

To this very day, the risk of discrimination within the legal system extends to every corner of a transgender person's life. 2021 was regarded as "the deadliest year for transgender and gender non-conforming people in the U.S. on record." Madeleine Carlisle, *Anti-Trans Violence and Rhetoric Reached Record Highs Across America in 2021*, TIME (Dec. 30, 2021), https://perma.cc/G37R-XUGZ; *cf. An Epidemic of Violence: Fatal Violence Against Transgender and Gender Non-Conforming People in the United States in 2020*, HUMAN RIGHTS CAMPAIGN (2020), https://perma.cc/G9F9-

23FA (noting that, since 2013, Black transgender women made up 66% of the victims of fatal violence against transgender and gender non-conforming people).

Amid that violence, more than 110 anti-transgender bills were introduced across dozens of state legislatures, with some becoming law. *See 2021 set a record for anti-transgender bills. Here's how you can support the community*, PBS NEWSHOUR (Dec. 30, 2021), https://perma.cc/JF2V-QVZ2; Sam Levin, *Mapping the anti-trans laws sweeping America: 'A war on 100 fronts,'* THE GUARDIAN (June 14, 2021), https://perma.cc/NWV3-PF55; Priya Krishnakumar, *This record-breaking year for anti-transgender legislation would affect minors the most*, CNN (Apr. 15, 2021), https://perma.cc/D5ZQ-Y53R. So far, things have not improved in 2022: the Nation is on track to set records for the number of laws targeting transgender youth. Arthur Jones II & Aaron Navarro, *This year on pace to see record anti-transgender bills passed by states, says Human Rights Campaign*, CBS NEWS (April 22, 2022), https://perma.cc/3E25-2K5F.

It is thus beyond doubt that transgender people have long faced (and continue to face) daunting barriers—both public and private—that have prevented transgender individuals from full, free, and equal participation in American life. Every level of government has, at times, contributed to such

discrimination. That is as true in Iowa as it is anywhere else. 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 *16 ("[O]ne would be hard-pressed to identify a class of people more discriminated against historically or otherwise 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

As the State acknowledges, transgender status is irrelevant to a person's ability to contribute to society. (*See* Final Br. of Resp., *Vasquez v. Iowa Dep't of Human Servs.*, No. CVCV061729 (Iowa D. Ct. July 19, 2021), at 17.) Being transgender does not render an individual less capable of being a lawyer, engineer, farmer, doctor, 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.

Courts that have considered the question have reached that same conclusion. *See, e.g.*, *Grimm*, 972 F.3d at 612; *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) ("[T]he 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. 3d at 874 ("[T]here 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 backed by ample empirical evidence. The consensus among medical and mental health communities is that transgender identities are "normal variations of human identity and expression." Madara, *supra*. That assessment is consistent with the best available studies, which offer no support 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*, 2018 WL 1784464, at *10 ("[T]he 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, https://perma.cc/4ZKA-NU2L; Deborah Sontag, *Once A Pariah, Now a Judge: The Early Transgender Journey of Phyllis Frye*, N.Y. TIMES (Aug. 29, 2015), https://perma.cc/E764-QWR9; Lisa Miller, *The Trans-Everything CEO*, N.Y. MAG. (Sept. 7, 2014), https://perma.cc/7EB4-TZZF; *25 Transgender People Who Influenced American Culture*, TIME (May 29, 2014), https://perma.cc/FUQ7-4PVK; Gary J. Gates & Jody L. Herman, *Transgender Military Service in the United States*, THE WILLIAMS INST. (2014), https://perma.cc/2NU4-KZYH; Brad Sears *et al*., *Employment Discrimination Against LGBT People: Existence and Impact*, *in Gender Identity and Sexual Orientation Discrimination in the Workplace*, THE BUREAU OF NATIONAL AFFAIRS (Christine Michelle Duffy & Denise M. Visconti eds. 2014), https://perma.cc/Z6JV-LJU7.

Simply put, there is no indication that transgender status has any inherent bearing on a person's worth or productivity. 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 or heightened scrutiny is appropriate, the United States Supreme Court has approved judicial skepticism of official acts

that discriminate based on "obvious, immutable, or distinguishing characteristics that define . . . a discrete group." *Bowen*, 483 U.S. at 602. "The notion is that it is unfair to penalize a person for characteristics that the person did not choose and that the individual cannot change." Erwin Chemerinsky, CONSTITUTIONAL LAW 714 (4th ed. 2013). 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. Rather, "the 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.* (cleaned up).

The State asserts that transgender individuals constitute a "diversified" group, alluding to "wide variation[s] in the medical needs of transgender Iowans." (Final Br. of Resp. at 17–18, *Vasquez v. Iowa Dep't of Human Servs.*, No. CVCV061729 (Iowa D. Ct. Nov. 19, 2021).) But that variation in medical needs does not detract from the widely grasped reality that the transgender community is discrete and identifiable. As many courts have recognized, "transgender people constitute a discrete group with immutable characteristics." *Grimm*, 972 F.3d at 612. They "consistently, persistently, and

insistently" express a gender that differs from their sex assigned at birth. *Id.* at 594. This "is not a choice," but rather, "is as natural and immutable as being cisgender." *Id.* at 612–13; *accord Brumby*, 663 F.3d at 1316 ("A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes."); *Doe 1*, 275 F. Supp. 3d at 208 (noting that "[t]ransgender individuals have immutable and distinguishing characteristics that make them a discernable class"); *Evancho*, 237 F. Supp. 3d at 288; *Adkins*, 143 F. Supp. 3d at 139–40. 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 consider in identifying a level of scrutiny is whether a group possesses the strength to politically protect itself from wrongful discrimination. As evidenced by the recent nationwide barrage of laws targeting their community, transgender people lack that political strength. *See Grimm*, 972 F.3d at 613 (noting that transgender people "ha[ve] not yet been able to meaningfully vindicate their rights through the political process"). Indeed, transgender people comprise just 0.6% of adults in the United States, *Grimm*, 972 F.3d at 613, and fewer than 0.31% of Iowans (or

7,500 people), Andrew R. Flores, et al., *How Many Adults Identify as Transgender in the United States?*, THE WILLIAMS INST. (June 2016), http://perma.cc/KL56-CXU7. There are no openly transgender members of Congress or federal judges, and, according to a 2020 tally, only 32 transgender elected officials serve at the state and local levels nationwide. Piper McDaniel & David Garcia, *Trans And Nonbinary Candidates Set Record Wins In Red And Blue States*, NPR (Nov. 9, 2020), https://perma.cc/5LNH-3F5S. And a recent study showed that nominating a transgender candidate reduced the proportion of respondents who would vote for their own political party's candidate by nearly half. *See, e.g.*, Philip E. Jones, et al., *Explaining Public Opinion Toward Transgender People, Rights, and Candidates*, 82 PUB. OP. Q. 252, 265 (2018).

As these facts suggest, the transgender community will struggle—and often fail—if left wholly to its own devices in combating 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 v. Hodges*, 576 U.S. 644, 672 (2015); *accord Grimm*, 302

F. Supp. 3d 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.

In the face of all this—and in a case where the political process stripped Medicaid coverage from transgender Iowans—the State suggests that transgender people enjoy strong political influence because "[d]iscrimination based on gender identity has been addressed by the Iowa legislature in the Civil Rights Act, the Anti-Bullying and Anti-Harassment Act, and hate crime statutes." (Final Br. of Resp. at 18, *Vasquez v. Iowa Dep't of Human Servs.*, No. CVCV061729 (Iowa D. Ct. Nov. 19, 2021) (citing Iowa Code §§ 216.7 (civil rights); 280.28 (anti-bullying); 729A.2 (hate crime)).) This argument fails. The ultimate question is whether transgender people have the political strength to vindicate their rights in the political process, obviating the need for robust judicial scrutiny of laws targeting them. The presence of just a few statutory protections has never been deemed sufficient to meet that test. *See Frontiero v. Richardson*, 411 U.S. 677, 685–88 & n.17 (plurality) (applying heightened scrutiny to sex classifications despite growing political and demographic power of women); *see also Varnum*, 763 N.W.2d at 894. Indeed, this case demonstrates the fragility of the statutory safeguards cited by the State: shortly after this Court recognized that the Iowa Civil Rights Act prohibits discrimination based on gender identity, the political process sought

to strip away crucial protections for transgender people. Under these circumstances, there can be "no doubt" that transgender individuals remain politically vulnerable. *Grimm*, 302 F. Supp. 3d at 750; *F.V.*, 286 F.Supp.3d at 1144; *Evancho*, 237 F.Supp.3d at 288.

* * *

Recognition of a protected class is appropriate when courts have good reason to believe that laws targeting a particular group rest ultimately on invidious prejudice or stereotypes. Numerous 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 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, regulations, and administrative decisions 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.

CONCLUSION

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

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Respectfully Submitted,

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APPENDIX

The following entities join in the filing of this *amicus* brief:

Bay Area Lawyers for Individual Freedom (BALIF) is the nation's oldest and largest bar association of lesbian, gay, bisexual and transgender ("LGBTQI") persons, including approximately 500 members in the San Francisco Bay Area. BALIF promotes the professional interests and social justice goals of its members and the legal interests of the LGBTQI community at large. For over 40 years, BALIF has actively participated in public policy debates concerning the rights of LGBTQI people and has authored and joined amicus efforts concerning matters of broad public importance.

FORGE, Inc. reduces the impact of trauma on transgender and nonbinary survivors and communities by empowering service providers, advocating for systems reform, and connecting survivors to healing possibilities. FORGE strives to create a world where all voices, people and bodies are valued, respected, honored, and celebrated; where every individual feels safe, supported, respected, and empowered.

Through strategic litigation, public policy advocacy, and education, **GLBTQ Legal Advocates & Defenders (GLAD)** works in New England and nationally to create a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation. GLAD has

litigated widely in both state and federal courts in all areas of the law in order to protect and advance the rights of lesbians, gay men, bisexuals, transgender individuals, and people living with HIV and AIDS. GLAD has worked on numerous cases on behalf of transgender people in every area of life, including access to health care and health insurance coverage.

Lambda Legal Defense and Education Fund, Inc. is the nation's oldest and largest legal organization committed to achieving full recognition of the civil rights of lesbian, gay, bisexual, transgender, and queer (LGBTQ) people and everyone living with HIV through impact litigation, education, and public policy work. Lambda Legal has served as counsel or amicus in seminal cases regarding the rights of LGBT people and people living with HIV.

The **National Center for Transgender Equality (NCTE)** is a nationwide, non-profit, non-partisan organization founded in 2003 to promote public understanding, opportunity, and well-being for the millions of Americans who are transgender. In addition to conducting public education and ground-breaking national survey research, NCTE works in the nation's capital and throughout the country to replace disrespect, discrimination, and violence with empathy, opportunity, and justice.

The **National LGBTQ+ Bar Association** is a nonprofit membership-based 501(c)(6) professional association. The National LGBTQ+ Bar

Association's more than 10,000 members and subscribers include lawyers, judges, legal academics, law students, and affiliated legal organizations supportive of lesbian, gay, bisexual, and transgender people's rights. The National LGBTQ+ Bar Association and its members work to promote equality for all people regardless of sexual orientation or gender identity or expression, and fight discrimination against LGBTQ+ people as legal advocates. The National LGBTQ+ Bar Association is a membership organization and files this brief on behalf of its members, who object to discrimination in health care services on the bases of sexual orientation or gender identity or expression.

The **National LGBTQ Task Force (Task Force)** advances full freedom, justice, and equality for LGBTQ people. The Task Force is building a future where everyone is free to be themselves in every aspect of their lives. Today, despite all the progress we have made to end discrimination, millions of LGBTQ people face barriers in every aspect of their lives: in housing, employment, healthcare, retirement, and basic human rights. These barriers must go, including any barriers to gender-affirming care, abortion care and bodily autonomy.

The **National Women's Law Center (NWLC)** is a non-profit legal advocacy organization that fights for gender justice—in the courts, in public policy, and in our society—working across the issues that are central to the

lives of women and girls—especially women of color, LGBTQ people, and low-income women and families. Since its founding in 1972, NWLC has worked to advance workplace justice, income security, educational opportunities, and health and reproductive rights. NWLC has participated in numerous cases, including before this Court, to ensure that rights and opportunities for women and transgender people are not unduly restricted.

The **Southern Arizona Gender Alliance (SAGA)** is a grassroots 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.

The **Trans People of Color Coalition (TPOCC)** is a non-profit organization founded by attorney, professor, and activist Kylar Broadus. TPOCC is the only national social justice organization that promotes the interest of trans people of color and exists to amplify transgender stories, support transgender leadership, and challenge issues of racism, transphobia, and transmisogyny.

The **Trans Youth Equality Foundation (TYEF)** provides education, advocacy, and support for transgender and gender non-conforming children and youth and their families. Their mission is to share information about the

unique needs of this community, partnering with families, educators and service providers to help foster a healthy, caring, and safe environment for all transgender children.

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, socioeconomic, and faith backgrounds.

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 advocates are current or former service people who sacrifice their lives in service of the United States.

CERTIFICATE OF COST

No costs were incurred to print or duplicate paper copies of this brief because the brief is only being filed electronically.

Dated: June 24, 2022

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) and Iowa R. App. P. 6.906(4) because this brief contains 6,637 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14 point Times New Roman font.

Dated: June 24, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2022, 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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