No. 18-35347

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RYAN KARNOSKI, et al.,
Plaintiffs-Appellees,

STATE OF WASHINGTON, Attorney General's Office Civil Rights Unit,
Intervenor-Plaintiff-Appellee,

v.

DONALD J. TRUMP, in his official capacity as President of the United States, et al.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Washington,
Case No. 2:17-Civ-1297 (The Hon. Marsha J. Pechman)

BRIEF OF THE NATIONAL CENTER FOR TRANSGENDER EQUALITY, THE SOUTHERN ARIZONA GENDER ALLIANCE, THE TRANS YOUTH EQUALITY FOUNDATION, TRANSCEND LEGAL, TRANSGENDER ALLIES GROUP, TRANSGENDER LEGAL DEFENSE & EDUCATION FUND & TRANSGENDER RESOURCE CENTER OF NEW MEXICO AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, amici curiae hereby state that no party to this brief is a publicly-held corporation, issues stock, or has a parent corporation.

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Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993) 23

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Burlington N. R. Co. v. Ford, 504 U.S. 648 (1992) 4

Califano v. Goldfarb, 430 U.S. 199 (1977)... 12

Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez, 561 U.S. 661 (2010) 23

City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432 (1985) 9, 10, 16

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 9

Craig v. Boren, 429 U.S. 190 (1976) 5

Daly v. Daly, 715 P.2d 56 (Nev. 1986).. 15

Doe 1 v. Trump, 275 F. Supp. 3d 167 (D.D.C. 2017)...............................16, 20, 22

Etsitty v. Utah Transit Auth., 502 F.3d 1215 (10th Cir. 2007) 24

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F.V. v. Barron, 286 F. Supp. 3d 1131 (D. Idaho 2018)... 5

Frontiero v. Richardson, 411 U.S. 477 (1996) 16, 21

Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011) 20

Grimm v. Gloucester Cty. Sch. Bd., 302 F. Supp. 3d 730 (E.D. Va. 2018).. 5, 20, 22

Hernandez-Montiel v. INS, 225 F.3d 1084 (9th Cir. 2000) 20

In re Estate of Gardiner, 42 P.3d 120 (Kan. 2002) 15

J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994) 8

Karnoski v. Trump, No. 17-Civ-1297, 2018 WL 1784464 (W.D. Wash. Apr. 13, 2018) 11, 16, 18

Love v. Johnson, 146 F. Supp. 3d 848 (E.D. Mich. 2015)................................... 15

Loving v. Virginia, 388 U.S. 1 (1967).. 5, 9

Lyng v. Castillo, 477 U.S. 635 (1986) 10

M.B. v. D.W., 236 S.W.3d 31 (Ky. Ct. App. 2007) 15

Marbury v. Madison, 5 U.S. 137 (1803)... 4

Meyer v. Nebraska, 262 U.S. 390 (1923).. 12

Norsworthy v. Beard, 87 F.Supp.3d 1104 (N.D. Cal. 2015).................................. 6

Obergefell v. Hodges, 135 S. Ct. 2584 (2015) 19

Plyler v. Doe, 457 U.S. 202 (1982) 25

Reed v. Reed, 404 U.S. 71 (1971)... 10

Schuette v. BAMN, 134 S. Ct. 1623 (2014).. 4

SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471 (9th Cir. 2014) 5, 9

Thomas v. Gonzales, 409 F.3d 1177 (9th Cir. 2005)... 20

United States v. Carolene Prods. Co., 304 U.S. 144 (1938) 25

United States v. Windsor, 570 U.S. 744 (2013)) 5, 10

Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034 (7th Cir. 2017) 11

Windsor v. United States, 699 F.3d 169 (2d Cir. 2012)............................10, 19, 20

Other Authorities

2016 Miss. Laws Ch. 334 (H. B. 1523), § 2(c) (2016)... 7

25 Transgender People Who Influenced American Culture, TIME (May 29, 2014) 18

American Civil Liberties Union, *Transgender People & The Law* 21

APA, *Position Statement on Discrimination Against Transgender and Gender Variant Individuals* (July 2012) 17

Brad Sears et al., *Relationship of Sexual Orientation and Gender Identity to Performance in the Workplace* (2009) 18

Brooke Sopelsa, *Meet 2017's Newly Elected Transgender Officials*, NBC NEWS (Dec. 28, 2017) 21

Charlie Savage, *In Shift, Justice Dept. Says Law Doesn't Bar Transgender Discrimination*, N.Y. TIMES (Oct. 5, 2017) 13

Deborah Sontag, *Once A Pariah, Now a Judge: The Early Transgender Journey of Phyllis Frye*, N.Y. TIMES (Aug. 29, 2015).. 17

Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 6:04 AM)....... 23

Erwin Chemerinsky, CONSTITUTIONAL LAW (3d ed. 2006).................................. 19

Gates & Herman, *Transgender Military Service in the United States* (2014)........ 18

Grace Guarnieri, *HUD Accused of Systematically Removing LGBT People from Homeless and Housing Decisions*, NEWSWEEK (Mar. 1, 2018) 7

Human Rights Campaign, *Understanding the Transgender Community* (accessed July 1, 2018)... 14

Jaime M. Grant, et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* 2 (2011) .... passim

James et al., *Report of the 2015 U.S. Transgender Survey* (2016). 12, 13, 14, 15

Jody L. Herman, *Potential Impact of Voter Identification Laws on Transgender Voters in the 2016 General Election* (2016) 22

Juanne Summers, *Education Department Says It Is No Longer Investigating Transgender Bathroom Complaints*, CNN (Feb. 12, 2018) 12

Leah Litman & Helen K. Murillo, *Information Wars Part I: The Challenge to the Census*, TAKE CARE (April 13, 2017) 8

Lena H. Sun & Julia Eilperin, *CDC Gets List of Forbidden Words: Fetus, Transgender, Diversity*, WASHINGTON POST (Dec. 15, 2017) 7

Levi & Redman, *The Cross-Dressing Case for Bathroom Equality*, 34 Seattle L. Rev. 133 (2009) 15

Lisa Miller, *The Trans-Everything CEO*, N.Y. MAG. (Sept. 7, 2014) 17

Michael Statford, Trump *Administration Scraps Resources for Transgender Students*, POLITICO (Mar. 8, 2018) 12

Molly Olmstead, The *Department of Education Will No Longer Investigate Transgender Student Bathroom Complaint*s, Slate (Feb. 13, 2018) 7

National Conference of States Legislatures, *"Bathroom Bill" Legislative Tracking* (July 28, 2017) 6

Praveen Fernandes, *The Census Won't Collect L.G.B.T. Data. That's A Problem*, N.Y. TIMES (May 10, 2017) 7

Public Facilities Privacy & Security Act, N.C. House Bill 2, 2d Extra Sess. (2016) (Sess. Law 2016-3) 7

Robert Pear, *Trump Plan Would Cut Back Health Care Protections for Transgender People*, N.Y. TIMES (Apr. 21, 2018) 14

Sejal Singh, *The Trump Administration Is Rolling Back Data Collection on LGBT Older Adults*, CENTER FOR AMERICAN PROGRESS (Mar. 20, 2017) 7

Transgender Equality, *Trump's Record of Action Against Transgender People* (last accessed July 1, 2018) 22

Transgender Lives: Your Stories, N.Y. TIMES (accessed July 1, 2018) 17

INTEREST OF AMICI CURIAE

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 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. Because Southern Arizona includes two major military bases (Fort Huachuca Army Base and Davis-Monthan Air Force Base), SAGA serves many active duty and reserve service members who are directly affected by the ban on transgender military service, as well as transgender veterans who fear their medical care and other Veteran's Administration benefits are at risk given the anti-transgender assumptions on which this policy is based.

The Trans Youth Equality Foundation is a national 501(c)(3) non-profit organization. Its mission is to advocate for transgender children and youth in their families, schools, communities, and with their providers. It educates and shares resources regarding discrimination and works towards the protection of civil rights.

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—including those serving in the military—have access to transgender-related health care.

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, and has seen them look forward to work and school opportunities after graduation. Banning military service takes away an important opportunity for transgender students, instigating stigma and shame from being excluded from the chance to serve their country. TAG believes that this type of "othering" is discrimination in the most basic sense, leads to ostracization and de-humanization, and establishes transgender people as targets for violence. It therefore believes the Ban must be overturned.

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 (including backgrounds of military service).

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. TGRCNM stands behind these members of the transgender community.[1]

[1] Pursuant to Fed. R. App. P. 29(c)(5) amici state that no party's counsel authored the brief in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than amici and their counsel—contributed money that was intended to fund preparing or submitting the brief. All parties have consented to the filing of this brief.

INTRODUCTION & SUMMARY OF ARGUMENT

"A prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded." *United States v. Virginia*, 518 U.S. 515, 557 (1996). Although many Americans once considered it natural to discriminate based on race, sex, religion, and other grounds, we have since come to recognize the injustice of treating groups differently based on characteristics that have no relationship to their capabilities. Of course, this evolution is itself part of the Framers' design: they knew 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." *Lawrence v. Texas*, 539 U.S. 558, 579 (2003).

Courts play an important role in that process. It is their solemn duty to "say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). And that duty reaches its zenith in cases involving "the right of the individual not to be injured by the unlawful exercise of governmental power." *Schuette v. BAMN*, 134 S. Ct. 1623, 1636 (2014) (plurality). Accordingly, when new insight reveals that official acts targeting a particular group are inconsistent with the Constitution's guarantee of equal protection, courts must carefully guard against discrimination. 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 Burlington N. R. Co. v. Ford*, 504 U.S. 648, 651 (1992) (religion); *Clark v. Jeter*, 486 US 456 (1988)

(legitimacy); *Craig v. Boren*, 429 U.S. 190 (1976) (sex); *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (alienage); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (race); *see also SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481 (9th Cir. 2014) (concluding that classifications based on sexual orientation are subject to heightened scrutiny following *United States v. Windsor*, 570 U.S. 744, 772 (2013)).

Under settled Supreme Court precedent, that requirement should also apply to classifications based on transgender status. 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 national 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 courts have held that discrimination against transgender people is presumptively suspect. Those courts have recognized that each factor relevant to heightened scrutiny analysis warrants its application here: (1) this group has suffered a long history of discrimination; (2) its defining characteristic is irrelevant to social productivity; (3) transgender status is a distinct and immutable characteristic; and (4) transgender people cannot fully protect themselves through the political process alone. *See 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).

These decisions stand for a simple but profound proposition: transgender status should almost never be relevant to lawmaking. As a result, if the government wants to draw lines on this basis, it had better produce a compelling reason for doing so. By requiring the government to affirmatively explain and justify its transgender-based classifications, the application of strict scrutiny serves to smoke out (and deter) reliance on biased assumptions regarding transgender status. 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.

That message couldn't arrive at a more crucial time. In recent years, even as more and more Americans have accepted them as equals, transgender people have been subjected to a barrage of hate and discrimination. Numerous states are considering bills that would ban transgender people from using bathrooms consistent with their gender identity.[2] Some of these states have enacted even more expansive legislation targeting transgender people for disadvantage. *See* Public Facilities Privacy & Security Act, N.C. House Bill 2, 2d Extra Sess. (2016) (Sess. Law 2016-

[2] *See* National Conference of States Legislatures, *"Bathroom Bill" Legislative Tracking* (July 28, 2017).

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.[3]
- 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.[4]
- In December 2017, the Centers for Disease Control & Prevention were instructed not to use the word "transgender" in official documents.[5]
- The Department of Education has announced that it will summarily dismiss gender discrimination complaints from transgender students.[6]
- More recently, the Department of Housing & Urban Development has removed key transgender-related resources from its website and announced its intent to withdraw two important agency-proposed policies designed to protect LGBT people experiencing homelessness.[7]

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

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

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

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

[6] Molly Olmstead, Th*e Department of Education Will No Longer Investigate Transgender Student Bathroom Complaint*s, Slate (Feb. 13, 2018).

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

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).

In this fraught moment, it would be a grave error for courts to demand nothing but threadbare rationality from laws that discriminate against transgender people. Indeed, were this Court to hold that it is presumptively legitimate for officials to treat people worse based on their transgender status, horrific consequences would ensue. That ruling would *itself* invite further discrimination against transgender people—and would come to be seen as "a brand upon them . . . an assertion of their inferiority." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 142 (1994).

In contrast, following Supreme Court precedent and applying strict scrutiny to discriminatory acts like the Ban would affirm the dignity of transgender individuals. That holding would also strike a sensitive balance between lawmakers' legitimate goals and the Constitution's guarantee of equal protection. Official acts classifying based on transgender status would still be permitted, but the government would be required to demonstrate why that approach is really, truly necessary. Given the nation's sordid history of anti-transgender discrimination, and given the absence of any presumptively valid reason to draw lines based on transgender status, it is eminently reasonable to demand such justification. By virtue of its commitment to equal protection for *all* Americans, our Constitution demands nothing less.

ARGUMENT

OFFICIAL ACTS TARGETING TRANSGENDER INDIVIDUALS MUST FACE STRICT JUDICIAL SCRUTINY

"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." *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 animus—that the "general rule" does not apply. *See id.* In such cases, courts subject the challenged classification to a form of intensified judicial scrutiny. *See SmithKline Beecham*, 740 F.3d at 480; *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 City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality); *Virginia*, 518 U.S. at 533.

The 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); *Cleburne*, 473 U.S. at 441; *Reed v. Reed*, 404 U.S. 71, 76 (1971). The Supreme Court has not insisted that all four factors be present to trigger strict scrutiny. *See Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012), *aff'd* 570 U.S. 744 (2013). Rather, the first and second factors lie at the core of the inquiry. Those two considerations are common to *every* suspect classification. And where they coexist, they strongly support the conclusion that governmental action targeting the class should be viewed with substantial skepticism.

It follows from the Court's precedent that classifications based on transgender status are suspect, including at the federal level. *See Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). 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 transgender status to be a suspect or quasi-suspect class. *See cases cited supra* at 4–5. Following in their footsteps, this Court should hold that strict scrutiny applies whenever the government 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.[8]

[8] Recently, the 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); Juanne Summers, *Education Department Says It Is No Longer Investigating Transgender Bathroom Complaints*, CNN (Feb. 12, 2018).

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 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.[9]

Healthcare: Perhaps the most disturbing form of discrimination confronting the transgender community involves access to healthcare. In recent studies, over one

[9] Here, too, the federal government has recently targeted the transgender community for exclusion. On October 5, 2017, the 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).

in three transgender individuals reported negative experiences—such as verbal harassment—in seeking medical care within the prior year. *See id.* at 10. Those 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, 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.[10]

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).[11] 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

[10] The 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* Robert Pear, *Trump Plan Would Cut Back Health Care Protections for Transgender People*, N.Y. TIMES (Apr. 21, 2018).

[11] https://www.hrc.org/resources/understanding-the-transgender-community.

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.*[12]

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.

[12] A number of courts have held that the Constitution prohibits policies making 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 (D.P.R. 2018); *Love v. Johnson*, 146 F. Supp. 3d 848, 850 (E.D. Mich. 2015).

As these examples make clear, 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 this pattern of discrimination. 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.

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, 686 (1996) (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 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. *See 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); Brad Sears et al., *Relationship of Sexual Orientation and Gender Identity to Performance in the Workplace* (2009).

Any conceivable doubt on that score is dispelled by the facts of this case. As the plaintiffs here have shown—and as scholars have documented—transgender individuals have served this nation with distinction in all branches of the armed forces. *See* Gates & Herman, *Transgender Military Service in the United States* (2014). To quote Judge Pechman, "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." *Karnoski*, No. 2018 WL 1784464, at *10. It would thus be a grievous error to conclude that being transgender renders a person less productive in society.

It is possible that the government 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 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 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 scrutiny is appropriate, the 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). Judge Jacobs has thus observed that "what seems to matter is whether the characteristic of the class calls down discrimination when it is manifest." *Windsor*, 699 F.3d at 183.

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 750; *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." *Windsor*, 699 F.3d at 184. 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 the Supreme Court 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).[13]
- There are no openly transgender members of Congress or federal judges, exemplifying exclusion from major public institutions.[14]
- Fewer than half of the fifty states have laws that explicitly prohibit discrimination against transgender people.[15]

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[13] *See* Brooke Sopelsa, *Meet 2017's Newly Elected Transgender Officials*, NBC NEWS (Dec. 28, 2017)

[14] *See Adkins*, 143 F. Supp. 3d at 140.

[15] *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.[16]
- Because transgender individuals often have trouble obtaining proper government-issued ID, it is estimated that voter-identification laws may have disenfranchised over 34,000 transgender people in eight states in the November 2016 general election.[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 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.

E. The Government's Position Is Without Merit

The government does not offer a serious argument against applying strict scrutiny to classifications based on transgender status. Instead, it gestures vaguely in the direction of a two-part response. That position collapses upon inspection.

[16] *See* Transgender Equality, *Trump's Record of Action Against Transgender People* (last accessed July 1, 2018).

[17] *See* Jody L. Herman, *Potential Impact of Voter Identification Laws on Transgender Voters in the 2016 General Election* (2016).

First, the government asserts that the Ban does not actually classify based on transgender status, but instead "draws lines on the basis of a medical condition (gender dysphoria) and its treatment (gender transition)." Gvmt. Br. 23. Given that the Ban implements President Trump's policy of disallowing "[t]ransgender individuals to serve in any capacity in the U.S. Military," this is a curious argument. Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 6:04 AM).

In any event, the government's claim that it is merely targeting a medical condition, rather than a class of person, defies common sense. Courts have elsewhere rejected such implausible distinctions—and this Court should do the same. *See Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 689 (2010) ("Our decisions have declined to distinguish between status and conduct in this context."); *Lawrence v. Texas*, 539 U.S. at 575 ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination."); *id.* at 583 (O'Connor, J., concurring in judgment) ("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."); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews.").

Second, the government asserts in a footnote that "even if this policy could be characterized as turning on transgender status, such classifications do not trigger heightened scrutiny." Gvmt. Br. 24 n.2. That conclusory claim is not supported by any substantive argument. Instead, the government merely cites a decade-old Tenth Circuit case. *See Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1227 (10th Cir. 2007). That case, in turn, offered no reasoning; it simply cited an earlier opinion concluding that "transsexuals are not a protected class." *Brown v. Zavaras*, 63 F.3d 967, 971 (10th Cir. 1995). Yet even that earlier opinion—published over 20 years ago—suggested "reevaluating" the level of scrutiny in light of new research. *Id.* The only reason the Tenth Circuit declined to reevaluate the standard in 1995 was because the plaintiff's allegations were "too conclusory to allow proper analysis of this legal question." *Id.* Suffice it to say, if that is the best the government can muster in support of its view that transgender status is not a suspect classification, then this Court shouldn't hesitate to reject the government's position and apply strict scrutiny.

*   *   *   *   *

As Defendants observe, federal courts are ordinarily reluctant to establish new suspect classes. Recognition of a protected class is appropriate, however, when courts have good reason to worry that laws targeting a particular group rest ultimately on prejudice or stereotypes. Under the Supreme Court's well-established four-part test, the transgender community is unquestionably one of those groups.

Official acts that target the transgender community—or draw lines based on its crucial characteristics—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 and lawmakers lack any valid interest in enforcing gender-based expectations of proper conduct. *See Virginia*, 518 U.S. at 533. Simply stated, laws 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 in their briefs, *amici* agree that the Ban cannot survive strict scrutiny and should remain preliminarily enjoined.

CONCLUSION

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

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Respectfully Submitted,
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CERTIFICATE OF COMPLIANCE

Counsel for *amici curiae* certifies that this brief contains 5,439 words, based on the "Word Count" feature of Microsoft Word 2016. Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), this word count does not include the words contained in the Corporate Disclosure Statement, Table of Contents, Table of Authorities, and Certificates of Counsel. Counsel also certifies that this document has been prepared in a proportionally spaced typeface using 14-point Times New Roman in Microsoft Word 2016.

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CERTIFICATE OF SERVICE

Counsel for *amici curiae* certifies that on July 3, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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