

Nos. 17-16148, 17-16212

In the
United States Court of Appeals
for the Ninth Circuit

SHILOH HEAVENLY QUINE, FKA Rodney James Quine,

Plaintiff-Appellee/Cross-Appellant,

and

MICHAEL HERNANDEZ CONTRERAS; STEVEN TERRELL BRUSITER; MANUEL
IGNACIO PEREZ; JOSE JAVIER GARCIA; JAMES NICHOLS; JOSIAH JEREMIAH
CLAWSON; JIMMY LEE SMITH; JOHN MICHAEL DILLON; NINA SHANAY MCQUEEN;
DAMIEN DWAYNE OLIVE,

Intervenor-Plaintiffs,

v.

SCOTT KERNAN, Secretary of California Department of Corrections and Rehabilitation; S.
PAJONG, M.D.; D. BRIGHT, Doctor; J. DUNLAP, Doctor; J. LEWIS; CALIFORNIA
DEPARTMENT OF CORRECTIONS AND REHABILITATION,

Defendants-Appellants/Cross-Appellees.

Appeal from the United States District Court
for the Northern District of California, San Francisco, No. 3:14-cv-02726-JST.
The Honorable **Jon S. Tigar**, Judge Presiding.

**AMICI CURIAE BRIEF OF THE NATIONAL CENTER FOR LESBIAN
RIGHTS, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., THE
NATIONAL CENTER FOR TRANSGENDER EQUALITY, NATIONAL
TRANS BAR ASSOCIATION, GLBTQ LEGAL ADVOCATES &
DEFENDERS, AND THE LGBT BAR ASSOCIATION OF GREATER NEW
YORK IN SUPPORT OF PLAINTIFF-APPELLEE/CROSS-APPELLANT AND
AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4), *amici curiae* the National Center for Lesbian Rights, Lambda Legal Defense and Education Fund, Inc., the National Center for Transgender Equality, National Trans Bar Association, GLBTQ Legal Advocates & Defenders, and the LGBT Bar Association of Greater New York each discloses that it does not have any parent corporation and that no publicly held company owns 10% or more of its stock.

Date: January 18, 2018

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INTERESTS OF AMICI CURIAE¹

The National Center for Lesbian Rights (“NCLR”) is a national non-profit legal organization committed to protecting and advancing the civil and human rights of lesbian, gay, bisexual, and transgender people and their families through litigation, public policy advocacy, and public education. The NCLR was founded in 1977 and has offices in California and Washington, D.C.

Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal”) is the oldest and largest national legal organization whose mission is to achieve full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people, and everyone living with HIV through impact litigation, education, and public policy work. Lambda Legal was founded in 1973 and has offices in California, New York, Illinois, Texas, Georgia, and Washington, D.C.

The National Center for Transgender Equality (“NCTE”) is devoted to advancing justice, opportunity, and well-being for transgender people through education and advocacy on national issues. Since 2003, NCTE has been engaged in educating legislators, policymakers, and the public, and advocating for laws and policies that promote the health, safety, and equality of transgender people. NCTE

¹ Counsel for *amici* obtained consent from counsel of all parties prior to filing this brief. No party or party’s counsel authored this brief in whole or in part or financially supported this brief, and no one other than *amici*, their members, or their counsel contributed money intended to fund preparing or submitting this brief. *See* FED. R. APP. P. 29.

provides resources to thousands of transgender people every year, including individuals in prisons, jails, and civil detention settings. NCTE also has been involved in efforts to implement the Prison Rape Elimination Act and to address the vulnerability of transgender people in confinement settings.

National Trans Bar Association (“NTBA”) is an organization dedicated to promoting the advancement of trans and gender non-conforming legal professionals. NTBA also is committed to expanding formal legal protections and access to legal representation for trans and gender non-conforming people.

GLBTQ Legal Advocates & Defenders (“GLAD”) is a legal rights organization that seeks equal justice for all persons under the law regardless of their sexual orientation, gender identity, or HIV/AIDS status. Since 1978, GLAD has worked in New England and nationally through strategic litigation, public policy advocacy, and education.

The LGBT Bar Association of Greater New York (“LeGaL”) was one of the nation’s first bar associations of the lesbian, gay, bisexual, and transgender (“LGBT”) legal community and remains one of the largest and most active organizations of its kind in the country. LeGaL is dedicated to improving the administration of the law, ensuring full equality for members of the LGBT community, promoting the expertise and advancement of LGBT legal professionals, and serving the larger community.

SUMMARY OF THE ARGUMENT

This appeal presents an important civil rights issue of first impression for the Ninth Circuit: whether classifications based on transgender status warrant heightened scrutiny under the Equal Protection Clause. *Amici* urge this Court to hold that discrimination based on transgender status requires strict scrutiny under the U.S. Supreme Court’s well-established framework. Discrimination targeting transgender people meets all of the hallmarks of a quintessential “suspect” classification because: (1) transgender people have experienced a long history of discrimination, (2) being transgender has no bearing on one’s ability to perform in or contribute to society, (3) being transgender is an immutable characteristic and an integral part of identity that defines a discrete group, and (4) transgender people are a small and politically vulnerable minority. *See* Section I, *infra*.

Alternatively, *amici* request that this Court affirm the district court’s application of intermediate scrutiny to the California Department of Corrections and Rehabilitation’s (“CDCR”) discriminatory treatment of transgender women. Numerous courts inside and outside of the Ninth Circuit have recognized that classifications based on transgender status warrant at least intermediate scrutiny because they are inherently sex-based. *See* Section II, *infra*.

This Court also should affirm the district court’s holding that *Turner v. Safley*, 482 U.S. 78 (1987), does not prevent the application of heightened scrutiny

to gender-based classifications in the prison context. In *Johnson v. California*, 543 U.S. 499 (2005), the Supreme Court held that *Turner* does not prevent the application of strict scrutiny to rights, like the right to be free from racial discrimination, that do not necessarily need to be compromised for the sake of proper prison administration. As a result, courts have repeatedly exempted gender-based classifications from the *Turner* test. See Section III, *infra*.

ARGUMENT

I. CLASSIFICATIONS BASED ON TRANSGENDER STATUS WARRANT STRICT SCRUTINY UNDER THE EQUAL PROTECTION CLAUSE.

The Fourteenth Amendment’s equal protection guarantee “is essentially a direction that all persons similarly situated should be treated alike.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Certain governmental classifications are inherently suspect because they are more likely to reflect historical patterns of discrimination than to serve a legitimate governmental purpose. *Id.* at 440–41; *Mass. Bd. of Retirees v. Murgia*, 427 U.S. 307, 312–13 (1976); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). In determining whether a particular classification is suspect, the Supreme Court has considered:

- 1) Whether the class has been historically “subjected to discrimination,” *Lyng v. Castillo*, 477 U.S. 635, 638 (1986);
- 2) Whether the class has a defining characteristic that “frequently bears no relation to 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,” *Lyng*, 477 U.S. at 638; and
- 4) Whether the class is “a minority or politically powerless.” *Id.*

No single factor is dispositive, and each can serve as a warning sign that a particular classification “provides no sensible ground for differential treatment,” *Cleburne*, 473 U.S. at 440, or is “more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective,” *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982). Transgender status readily satisfies all of these factors, and policies that discriminate against transgender people, including the CDCR policies here, warrant strict scrutiny.

1. Transgender People Have Suffered A Long History Of Discrimination.

Courts across the country have recognized that transgender people have long “face[d] discrimination, harassment, and violence because of their gender identity.” *Whitaker v. Kenosha Unified Sch. Dist. No. 1*, 858 F.3d 1034, 1051 (7th Cir. 2017); see *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 n.8 (N.D. Cal. 2015) (finding that transgender people “have experienced even greater levels of societal discrimination and marginalization” than gay and lesbian people); *Doe I v. Trump*, No. CV 17-1597 (CKK), 2017 WL 4873042, at *27 (D.D.C. Oct. 30, 2017)

(“As a class, transgender individuals have suffered, and continue to suffer, severe persecution and discrimination.”); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015) (finding that transgender people “have suffered a history of persecution and discrimination,” in virtually every aspect of society); *Evancho v. Pine-Richland*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017) (same); *Bd. of Educ. of Highland v. U.S. Dept. of Educ.*, 208 F. Supp. 3d 850, 874 (S.D. Oh. 2016) (same).

“The hostility and discrimination that transgender individuals face in our society today is well-documented.” *Brocksmith v. U.S.*, 99 A.3d 690, 698 n.8 (D.C. 2014). In particular, transgender people experience pervasive discrimination in schools, workplaces, and prisons. “78% of students who identify as transgender or as gender non-conform[ing] report being harassed while in grades K-12 . . . with 35% reporting physical assault and 12% reporting sexual assault.” *Whitaker*, 858 F.3d at 1051 (citation omitted). Transgender people are twice as likely to live in poverty and three times more likely to be unemployed, and nearly half (47%) of transgender people have experienced sexual assault at some point in their lifetime.²

² Sandy E. James *et al.*, *The Report of the 2015 U.S. Transgender Survey*, Nat’l Ctr. for Transgender Equal. (Dec. 2016), at 5-6, <https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF>.

Incarcerated transgender people are particularly vulnerable, frequently experiencing “harassment, isolation, forced sex, and physical assault, both by prison personnel and other inmates.”³ Before the Supreme Court’s decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), courts routinely voided the marriages of transgender people, based solely on their transgender status. *See, e.g., In re Estate of Gardiner*, 42 P.3d 120, 137 (Kan. 2002) (voiding a marriage between a transgender woman and her husband); *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999) (same); *Kantaras v. Kantaras*, 884 So. 2d 155 (Fla. Ct. App. 2004) (voiding a marriage between a transgender man and his wife); *In re Marriage of Simmons*, 825 N.E.2d 303 (Ill. App. Ct. 2005) (same).

Historically, transgender parents were often cut off from their children and in some cases stripped of their parental rights. *See, e.g., Daly v. Daly*, 715 P.2d 56, 60 (Nev. 1986) (terminating the parental rights of a transgender person after she

³ Am. Psychological Ass’n, *Guidelines for Psychological Practice With Transgender and Gender Nonconforming People*, at 839 (Dec. 2015), <http://www.apa.org/practice/guidelines/transgender.pdf>; *see also Farmer v. Brennan*, 511 U.S. 825, 831 (1994) (recognizing that transgender women are “particularly vulnerable to sexual attack by . . . inmates”); James *et al.*, *supra* n.2, at 191 (noting that transgender inmates are nearly six times as likely to experience sexual assault by facility staff or other inmates); Allen J. Beck, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011–12*, U.S. Dept. of Justice, Bureau of Justice Statistics (Dec. 2014), *available at*: https://www.bjs.gov/content/pub/pdf/svpjri1112_st.pdf (providing statistics on the prevalence of sexual victimization among transgender inmates).

underwent a gender transition); *In re Marriage of Simmons*, 825 N.E.2d at 312 (holding that a transgender man who had raised his son from the child's birth was not a legal father and had no right to maintain any relationship with the child). Even today, many transgender parents face discrimination in child custody and child welfare cases.⁴

In recent years, transgender people have been targeted by an unprecedented wave of state legislative attempts to deny transgender people access to public accommodations, restrict the ability of counties and municipalities to pass non-discrimination ordinances protecting transgender people, and exclude transgender students from protections at school.⁵ In 2016, North Carolina enacted HB2, which eliminated existing local nondiscrimination protections for transgender people and sought to exclude transgender people from equal access to facilities. *Carcano v. McCrory*, 203 F. Supp. 3d 615, 627 (M.D.N.C. 2016). That same year, Mississippi

⁴ See, e.g., *Tipsword v. Tipsword*, No. 1 CA-CV 12-0066, 2013 WL 1320444, at *3 (Ariz. Ct. App. 2013) (denying custody to a transgender parent); *M.B. v. D.W.*, 236 S.W.3d 31, 36 (Ky. Ct. App. 2007) (terminating the parental rights of a transgender parent based on alleged harm to children caused by failing to “adequately prepare” them for their parent’s gender transition).

⁵ See, e.g., Nat’l Conference of State Legislatures, *2017 State Legislation*, <http://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking635951130.aspx> (last visited Jan. 15, 2018) (listing dozens of anti-transgender bills being actively considered by state legislatures, including in Montana and Washington).

enacted HB 1523, which creates a broad exemption, applicable to any state law, for persons who believe that the terms man or woman “refer to an individual’s immutable biological sex as objectively determined by anatomy and genetics at time of birth.”⁶ These laws stigmatize transgender people and expose them to a heightened risk of discrimination and violence.

Transgender people also have been stripped of many previously existing federal protections.⁷ In February 2017, the U.S. Department of Justice (“DOJ”) and the U.S. Department of Education rescinded Title IX guidance protecting transgender students. *See id.* In March 2017, the U.S. Census Bureau removed questions regarding gender identity from the draft 2020 American Community Survey. *See id.* In April 2017, the DOJ abandoned its lawsuit challenging a North Carolina anti-transgender law. *See id.* In August 2017, President Trump directed the U.S. Department of Defense to ban military service by transgender people. *See id.* And in October 2017, the DOJ rescinded its prior position interpreting Title VII

⁶ *Protecting Freedom of Conscience from Government Discrimination Act*, Miss. Laws 2016, HB 1523 § 2 (eff. July 1, 2016), <http://billstatus.ls.state.ms.us/documents/2016/html/HB/1500-1599/HB1523SG.htm>.

⁷ *See* Nat’l Ctr. for Transgender Equal., *The Discrimination Administration: Trump’s Record of Action Against Transgender People*, <http://www.transequality.org/the-discrimination-administration> (last visited Jan. 15, 2018).

to protect transgender workers from discrimination based on gender identity. *See id.*

2. Being Transgender Has No Bearing On One's Ability To Perform In Or Contribute To Society.

Transgender people also “have a defining characteristic that frequently bears no relation to an ability to perform or contribute to society.” *Evancho*, 237 F. Supp. 3d at 288 (recognizing that “the Plaintiffs are in all respects productive, engaged, contributing members of society”); *see also Doe I*, 2017 WL 4873042, at *1 (“Plaintiffs are current and aspiring service members who are transgender . . . [and] have and continue to serve with distinction.”); *Highland*, 208 F. Supp. 3d at 874 (“[T]here is obviously no relationship between transgender status and the ability to contribute to society.”); *Norsworthy*, 87 F. Supp. 3d at 1119 n.8 (“[Transgender] identity is . . . irrelevant to their ability to contribute to society”). As courts have frequently recognized, there is “no argument or evidence suggesting that being transgender in any way limits one’s ability to contribute to society.” *Doe I*, 2017 WL 4873042, at *27; *see Highland*, 208 F. Supp. 3d at 874; *Adkins*, 143 F. Supp. 3d at 139.

3. Being Transgender Is An Immutable Or Distinguishing Characteristic And An Integral Part Of Identity That Defines A Discrete Group.

As this Court recognized nearly twenty years ago in *Hernandez-Montiel v. I.N.S.*, being transgender is “fundamental” to a person’s identity. 225 F.3d 1084, 1093 (9th Cir. 2000). Like sexual orientation, it is a “basic component of a person’s core identity.” *Id.* at 1094 (internal citations omitted). Transgender people “exhibit immutable or distinguishing characteristics that define them as a discrete group.” *Evancho*, 237 F. Supp. 3d at 288; *Doe I*, 2017 WL 4873042, at *27; *see Highland*, 208 F. Supp. 3d at 874; *Norsworthy*, 87 F. Supp. 3d at 1119 n.8. Transgender people’s gender identities are immutable because they are “inherent in who they are as people.” *Evancho*, 237 F. Supp. 3d at 288. Gender identity is a “deeply ingrained” characteristic that is not susceptible to voluntary change. *Id.*⁸

That transgender people constitute a discrete group also is apparent from the fact that the discrimination they face directly results from revelations about their

⁸ The U.S. Department of Health and Human Services’ Substance Abuse and Mental Health Services Administration (“SAMHSA”) recognizes the overwhelming consensus of medical and mental health organizations that “efforts to change a child’s or adolescent’s gender identity, gender expression, or sexual orientation are not an appropriate therapeutic intervention” and that “[n]o evidence supports the efficacy of such interventions to change sexual orientation or gender identity, and such interventions are potentially harmful.” SAMHSA, *Ending Conversion Therapy: Supporting and Affirming LGBTQ Youth*, at 51 (Oct. 2015), <http://store.samhsa.gov/shin/content/SMA15-4928/SMA15-4928.pdf>.

transgender status. *See Adkins*, 143 F. Supp. 3d at 139 (explaining that “[w]hat seems to matter [for this factor] is whether the characteristic of the class calls down discrimination when it is manifest” (quoting *Windsor v. U.S.*, 699 F.3d 169, 183 (2d Cir. 2012), *aff’d*, 570 U.S. 744 (2013))). Transgender people “often face backlash in everyday life when their status is discovered,” such as when there is a mismatch between their gender identity and the gender marker on their identity documents. *See Adkins*, 143 F. Supp. 3d at 139–40. And this discrimination touches all aspects of society—from schools, workplaces, and public accommodations to housing, health benefits, and correctional facilities. *See, e.g., Whitaker*, 858 F.3d at 1038–39 (schools); *Smith v. City of Salem*, 378 F.3d 566, 568 (6th Cir. 2004) (workplaces); *Carcano*, 203 F. Supp. 3d at 625–26 (public accommodations); *Smith v. Avanti*, 249 F. Supp. 3d at 1197–98 (D. Colo. 2017) (housing); *Prescott v. Rady Children’s Hosp.-San Diego*, 265 F. Supp. 3d 1090, 1097 (S.D. Cal. 2017) (health care); *Norsworthy*, 87 F. Supp. 3d at 1109–10 (corrections).

4. Transgender People Are A Small And Politically Vulnerable Minority.

“[T]ransgender people as a group represent a very small subset of society lacking the sort of political power other groups might harness to protect themselves from discrimination.” *Doe I*, 2017 WL 4873042, at *27. “[R]ecent estimates

suggest that transgender individuals make up approximately 0.6 percent” of the American population. *Id.*; *see also Evancho*, 237 F. Supp. 3d at 288. “[A]s a tiny minority of the population, whose members are stigmatized for their gender non-conformity in a variety of settings,” transgender people lack the strength to politically protect themselves from wrongful discrimination. *Highland*, 208 F. Supp. 3d at 874; *see also G.G. v. Gloucester Cty. Sch. Bd.*, 853 F.3d 729, 730 (4th Cir. 2017) (Davis, J., concurring) (recognizing transgender people as “a vulnerable group that has traditionally been unrecognized, unrepresented, and unprotected”); *Adkins*, 143 F. Supp. 3d at 140 (noting “there is no indication that there have ever been any transgender members of the United States Congress or the federal judiciary”). Indeed, “[t]he efforts of states to pass legislation requiring individuals to use sex-segregated bathrooms that correspond with their birth sex are but one example of the relative political powerlessness of this group.” *Highland*, 208 F. Supp. 3d at 874.

Accordingly, discrimination based on transgender status meets all of the Supreme Court’s criteria for a suspect classification, warranting strict scrutiny under the Equal Protection Clause.

II. CLASSIFICATIONS BASED ON TRANSGENDER STATUS WARRANT AT LEAST INTERMEDIATE SCRUTINY BECAUSE THEY ARE SEX-BASED.

At a minimum, discrimination against transgender people warrants intermediate scrutiny because it is sex discrimination. Under that standard, the government must demonstrate “an exceedingly persuasive” justification for the ban. *U.S. v. Va.*, 518 U.S. 515, 531 (1996). “The burden of justification is demanding and rests entirely on” the CDCR. *Id.* at 533. “The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation,” and “it must not rely on overbroad generalizations.” *Id.*

In *Schwenk v Hartford*, this Court held that discrimination based on a person’s transgender status is a form of sex-based discrimination. 204 F.3d 1187, 1200–02 (9th Cir. 2000). As *Schwenk* made clear by citing Title VII case law to support its analysis of the Gender Motivated Violence Act, the Court’s determination that anti-transgender discrimination is based on a person’s sex applies regardless of the specific statute or, in this case, constitutional provision at issue. A government policy that facially discriminates against transgender people, as the ban does here, must minimally be evaluated under the heightened standard applied to any form of sex-based discrimination. *Accord Glenn v Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011); *Whitaker*, 858 F.3d at 1051; *City of Salem*, 378 F.3d

at 572–75; *Rosa v. Park W. Bank Trust Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000); *see also Doe I*, 2017 WL 4873042, at *27–28.

Classifications based on transgender status are inherently sex-based because being transgender can only be understood with regard to a person’s sex. *See, e.g., Love v. Johnson*, 146 F. Supp. 3d 848, 850–51 (E.D. Mich. 2015). The definition of being transgender rests on there being a difference between a person’s gender identity and the sex assigned to them at birth. *Id.* Since both these characteristics are sex-related, differential treatment of transgender people requires consideration of a sex-related characteristic of the individual.⁹

In addition, as this Court noted in *Schwenk*, such discrimination because a person is transgender is based on a person’s perceived failure “to conform to socially-constructed gender expectations.” 204 F.3d at 1201–02. Classifications based on transgender status are “inextricably intertwined with gender classifications” because they “inherently discriminate[]” based on a person’s “failure to conform to gender stereotypes.” *Doe I*, 2017 WL 4873042, at *28.

⁹ Discrimination because a person “changes” their sex is sex-based in the same way that discrimination because someone converts religions is religion-based. *Schroer v. Billington*, 577 F. Supp. 2d 293, 306–07 (D.D.C. 2008).

As the Eleventh Circuit explained,

A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. The very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior. There is thus a congruence between discriminating against transgender . . . individuals and discrimination on the basis of gender-based behavioral norms.

Glenn, 663 F.3d at 1316 (citations omitted). Since “all persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype[s],” such protections “cannot be denied to a transgender individual.” *Id.* at 1318–20 (observing that the Supreme Court’s “consistent purpose” in “apply[ing] heightened scrutiny to sex-based classifications” “has been to eliminate discrimination on the basis of gender stereotypes,” and discussing cases). Indeed, characterizations based on transgender status should be subjected to at least intermediate scrutiny because they “embody ‘the very stereotype the law condemns.’” *Id.* at 1319–20 (quoting *J.E.B. v. Ala.*, 511 U.S. 127, 138 (1994) (declaring unconstitutional a government attorney’s use of peremptory juror strikes based on the presumption that potential jurors’ views would correspond to their sexes))).

Numerous district courts in this Circuit have applied intermediate scrutiny to Equal Protection claims involving transgender people based on *Schwenk*. *See, e.g., Stockman v. Trump*, No. 5:17-cv-01799-JGB-KK, Dkt. No. 79, at 19 (C.D. Cal.

Dec. 22, 2017) (noting that *Schwenk* “strongly suggested that discrimination on the basis of one’s transgender status is equivalent to sex-based discrimination,” and applying intermediate scrutiny to claims of transgender servicemembers); *Karnoski v. Trump*, No. C17-1297-MJP, 2017 WL 6311305, at *7 (W.D. Wash. Dec. 11, 2017) (same); *Olive v. Harrington*, No. 1:15-cv-01276, 2016 WL 4899177, at *5 (E.D. Cal. Sept. 14, 2016); *Marlett v. Harrington*, No. 1:15-cv-01382, 2015 WL 6123613, at *4 (E.D. Cal. Oct. 16, 2015); *Norsworthy*, 87 F. Supp. 3d at 1119.¹⁰

Applying intermediate scrutiny is also amply supported by a wall of authority from other circuits, including the Sixth, Seventh, and Eleventh Circuits, as well as district courts in the Second, Third, Fourth, and D.C. Circuits. *See, e.g., Whitaker*, 858 F.3d at 1052 (holding that discrimination against a transgender student is “inherently based upon a sex-classification”); *Glenn*, 663 F.3d at 1317–19 (holding that “discrimination against a transgender individual because of her

¹⁰ *Cf. SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 483 (9th Cir. 2014) (applying heightened scrutiny to equal protection claims involving sexual orientation).

gender-nonconformity is sex discrimination” under the Equal Protection Clause); *City of Salem*, 378 F.3d at 574–75, 577 (same).¹¹

Many other courts, including the First Circuit, have recognized that discrimination on the basis of transgender status constitutes sex discrimination in various statutory contexts. *See, e.g., Rosa*, 214 F.3d at 215–16 (holding that transgender person stated sex discrimination claim under Equal Credit Opportunity Act); *Prescott*, 265 F. Supp. 3d at 1098–99 (holding that discrimination against transgender patients constitutes sex discrimination under the Affordable Care Act); *Avanti*, 249 F. Supp. 3d. at 1201 (holding that discrimination against transgender woman and her partner constituted sex discrimination under the Fair Housing Act); *see also Whitaker*, 858 F.3d at 1052 (holding that discrimination against transgender students constitutes sex discrimination under Title IX); *City of Salem*, 378 F.3d at 574–75 (same, as to transgender employees under Title VII).

¹¹ *See also Doe I*, 2017 WL 4873042, at *28 (applying intermediate scrutiny to transgender servicemembers’ claims); *Stone v. Trump*, No. CV MJG-17-2459, 2017 WL 5589122, at *15 (D. Md. Nov. 21, 2017) (same); *Evancho*, 237 F. Supp. 3d at 288 (finding that “gender identity is entirely akin to ‘sex’ as that term has been customarily used in the Equal Protection analysis”); *Highland*, 208 F. Supp. at 872–74 (S.D. Ohio 2016) (finding that “transgender individuals are a quasi-suspect class [under the Equal Protection Clause] because discrimination against them is discrimination on the basis of sex”); *Carcano*, 203 F. Supp. at 640 (applying intermediate scrutiny to law regulating transgender people’s access to bathroom facilities); *Adkins*, 143 F. Supp. 3d at 140 (applying intermediate scrutiny to claims of transgender prisoner).

Thus, this Court should affirm that classifications based on transgender status warrant, at a minimum, intermediate scrutiny because they are inherently sex-based.

III. *TURNER V. SAFLEY* DOES NOT PREVENT THE APPLICATION OF HEIGHTENED SCRUTINY TO CLASSIFICATIONS BASED ON TRANSGENDER STATUS.

This Court should affirm its longstanding precedent that gender-based prison classifications require heightened scrutiny, not the lower standard applied to some other prisoner claims under *Turner v. Safley*, 482 U.S. 78 (1987). *Turner* held that “when a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.” *Id.* at 89. But as the Supreme Court subsequently made clear, that lower standard has no application to prison rules that violate the requirement of equal protection. *See Johnson*, 543 U.S. at 510. The Court explained:

[W]e have applied *Turner*’s reasonable-relationship test *only* to rights that are inconsistent with proper incarceration. . . . The right not to be discriminated against based on one’s race is not susceptible to *Turner*’s logic because it is not a right that need necessarily be compromised for the sake of proper prison administration.

Id. (citations omitted, emphasis in original).

Even before *Johnson* was decided, the D.C. Circuit cogently explained why equal protection claims involving gender-based classifications must be subject to

heightened scrutiny. *See Pitts v. Thornburgh*, 866 F.2d 1450 (D.C. Cir. 1989). As that court observed,

[E]qual protection claims . . . differ in kind from challenges to limitations upon personal rights . . . subject[] to [*Turner*] review While an equal protection right, too, is in a sense a personal right—*i.e.*, the right not to be discriminated against—the claim is also a demand that governmental action that affects an individual not be predicated upon constitutionally defective reasoning. The claim charges invidiousness, rather than an unwarranted interference with constitutionally secured liberties.

Id. at 1455; *see also id.* at 1454 (noting that “classifications relying explicitly upon gender” demand intermediate scrutiny because they “peculiarly suggest[] that the state is pursuing an improper purpose, one that furthers or contains ‘fixed notions concerning the roles and abilities of males and females’” (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982))).

Following *Johnson*, this Court and district courts within this Circuit have recognized that intermediate scrutiny—not the *Turner* standard—applies to equal protection claims based on facially discriminatory gender-based prison policies. *See Byrd v. Maricopa Cty. Sheriff’s Dept.*, 629 F.3d 1135, 1139 (9th Cir. 2011) (*en banc*) (recognizing that “given the existence of a facially discriminatory contraband policy, an equal protection claim based on the disparate treatment of male and female prisoners was viable”); *Fishman v. Williams*, No. CV 14–4823, 2017 WL 4075136, at *8 (C.D. Cal. Sept. 13, 2017); *Sassman v. Brown*, 99 F.

Supp. 3d 1223, 1234 n.9 (E.D. Cal. 2015); *Greene v. Tilton*, No. 2:09–cv–0793, 2012 WL 691704, at *8 (E.D. Cal. Mar. 2, 2012) (applying intermediate scrutiny to disparate personal property requirements for male and female inmates), *recommendation adopted by* 2012 WL 113602 (E.D. Cal. Mar. 29, 2012).

Courts in other circuits have done the same. *See, e.g., Roubideaux v. N.D. Dept. of Corr. & Rehab.*, 570 F.3d 966, 974–75 (8th Cir. 2009) (applying intermediate scrutiny to statutes governing correctional system’s decision-making process that contained a “gender-based classification on their face”); *Bullock v. Sheahan*, 568 F. Supp. 2d 965, 973 (N.D. Ill. 2008). Accordingly, this Court should hold that a heightened standard of review applies to classifications based on transgender status in the prison context.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to conclude that discrimination based on transgender status is subject to strict, or at a minimum intermediate, scrutiny under the Equal Protection Clause. *Amici* further request that this Court affirm the district court’s holding that this heightened standard of review applies to discrimination against transgender persons in the prison context.

Date: January 18, 2018

Respectfully submitted,

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National Trans Bar Association, GLBTQ Legal
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(a)(4)(G) and 32(g), I certify that:

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because this brief contains 4,630 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2016 Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on January 18, 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 appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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