

No. 22-1927

In the

**United States Court of Appeals
For the Fourth Circuit**

CHRISTOPHER FAIN; SHAUNTAE ANDERSON,
individually and on behalf of a class of persons,

Plaintiffs-Appellees,

v.

WILLIAM CROUCH, in his official capacity as Cabinet Secretary of the West Virginia Department of Health and Human Resources; CYNTHIA BEANE, in her official capacity as Commissioner for the West Virginia Bureau for Medical Services; WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, Bureau for Medical Services,

Defendants-Appellants,

On Appeal from the United States District Court
for the Southern District of West Virginia
Hon. Robert C. Chambers, District Judge
Case No. 3:20-cv-00740

**BRIEF OF AMICI CURIAE FAIRNESS WEST VIRGINIA AND
MOUNTAIN STATE JUSTICE, INC.
IN SUPPORT OF APPELLEES**

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December 7, 2022

CORPORATE DISCLOSURE STATEMENT

Amici curiae Fairness West Virginia and Mountain State Justice, Inc. certify that they are both nonprofit organizations, with no parent companies and no publicly traded stock. Amici certify that they are unaware of any publicly held corporation or similarly situated legal entity that has a direct financial interest in the outcome of this litigation.

/s/ Jah Akande _____

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STATEMENT OF IDENTITY AND INTEREST¹

Fairness West Virginia (“Fairness”) is a nonprofit civil rights organization and the leading advocacy organization in West Virginia for lesbian, gay, bisexual, and transgender West Virginians. Fairness is devoted to eliminating discrimination on the basis of sexual orientation and gender identity in all facets of public life, including employment, education, housing, and public accommodations. Fairness is also specifically committed to ending discrimination against transgender West Virginians and advocating for the provision of fair and equitable resources, including health care, to transgender people in the State.

Mountain State Justice, Inc. is a nonprofit legal services firm dedicated to redressing entrenched and emerging systemic social, political, and economic imbalances of power for underserved West Virginians through legal advocacy and community empowerment. Through class actions, individual cases, and policy advocacy, Mountain State Justice has assisted thousands of people fighting to protect their

¹ No party’s counsel authored this brief in whole or in part, and no entity or person, aside from amici curiae, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. Appellants’ counsel represented that Appellants do not consent to the filing of this brief.

families, their homes, their health and safety, their right to education, and their livelihoods.

Together, Amici are dedicated to ensuring that all West Virginians, including LGBTQ West Virginians, receive the health care they need. Amici therefore have a strong interest in guaranteeing that transgender West Virginians enrolled in Medicaid—a doubly marginalized and vulnerable population—receive necessary care in accordance with the recommendations of their medical providers and the law.

INTRODUCTION & SUMMARY OF ARGUMENT

This case is about West Virginia Medicaid’s policy exclusion, which denies life-saving care to transgender people across the State.

Gender-affirming surgery allows transgender persons—those whose gender identity is not in alignment with their sex assigned at birth—to live in accordance with their gender identity, thus alleviating a debilitating condition known as gender dysphoria. Gender-affirming surgical procedures encompass a range of potential treatments for transgender patients. These include but are not limited to chest reconstructive (or “top”) surgery, genital (or “bottom”) surgery, and facial reconstructive surgery. For transgender people struggling with gender

dysphoria, these procedures are often urgent, medically necessary, and lifesaving. Yet, West Virginia's Medicaid program categorically bars transgender people from accessing gender-affirming surgery *regardless* of medical necessity and *irrespective* of whether the same procedure is covered for cisgender people. Amici respectfully submit this brief to emphasize how vital it is to low-income West Virginians that Medicaid covers these critical services. Medicaid is the key source of medical care for a third of the State's residents, and it is a program on which transgender West Virginians particularly depend.

There is no good reason to deny coverage for these surgical procedures; in fact, the State has no rationale as to why the exclusion was ever adopted. Covering this care is cost-effective, especially given the State's historic budget surpluses. And coverage is legally required under basic non-discrimination principles. As Appellees well explain (and the district court correctly held), West Virginia Medicaid's blanket denial of this medically necessary care for transgender people violates the Equal Protection Clause of the Fourteenth Amendment, the Affordable Care Act, and the Medicaid Act.

If the State's Medicaid program is allowed to retain its blanket exclusion, medically necessary gender-affirming care is effectively placed out of reach for hundreds (if not thousands) of transgender West Virginians. This lack of treatment, in turn, will needlessly exacerbate negative mental-health outcomes, substance abuse, and suicide risks for vulnerable transgender West Virginians. This Court should affirm.

ARGUMENT

One in three West Virginians relies on Medicaid to obtain medically necessary care. And transgender West Virginians, a vulnerable subset of the population, heavily depend on the program.

Transgender West Virginians face prejudice and discrimination at every turn, including in education, employment, housing, and health care. As a result, they typically cannot access the same level of resources as their cisgender counterparts and face heightened risks to their mental and physical wellbeing. Transgender West Virginians are therefore especially in need of and reliant on critical public programs like Medicaid to receive medically necessary gender-affirming treatment.

Gender-affirming surgery is a critical remedy for people diagnosed with gender dysphoria—a condition marked by clinically significant

distress and anxiety resulting from the incongruence between an individual's gender identity and their sex assigned at birth.² But at present, West Virginia needlessly leaves its transgender citizens without access to gender-affirming surgical care.

Transgender West Virginians need this care and need it to be provided by Medicaid, because all too often they are without other means of obtaining treatment. Put simply, if West Virginia Medicaid does not cover it, many will go without any care at all. The district court correctly entered summary judgment in Appellees' favor and enjoined Appellants from applying the exclusion. This Court should affirm.

I. Under Medicaid, Transgender West Virginians Cannot Access the Same Care as their Cisgender Peers.

Medicaid is the largest insurer in the nation. Indeed, it is the primary source of health care for hundreds of thousands of West Virginians. The raw numbers are stark: over 584,000 of West Virginia's 1.7 million residents—one third of the state—are enrolled in the program.³ That is the highest rate in the Fourth Circuit, as well as one

² See AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 451–53 (5th ed. 2013) ["DSM-5"].

³ Rhonda Rogombe, *Medicaid in the Mountain State: A Health and Economic Necessity*, W.V. CTR. ON BUDGET & POLICY at 4, 6 (2021),

of the steepest in the country.⁴ If this rate holds true for the transgender population, then out of the approximately 6,100 transgender people in the State, 2,000 would rely on Medicaid in order to receive medically necessary treatments.⁵

Transgender West Virginians have health care needs that often can only be addressed by the very surgery West Virginia Medicaid denies them: gender-affirming surgery. As the district court correctly found, excluding coverage for this care denies critical care to a very vulnerable subset of the population. *See* JA2566-2591. Denying this coverage thus deprives medically necessary treatment for gender dysphoria. It has real consequences. Without access to surgery, transgender West Virginians reliant on Medicaid stand to suffer from increased psychological distress, exacerbated physical health conditions, and suicide risk.

<https://wvpolicy.org/wp-content/uploads/2021/07/WVCBP-Medicaid-Budget-Report.pdf>.

⁴ *Id.*; *see* MEDICAID, PERCENTAGE OF POPULATION ENROLLED IN MEDICAID OR CHIP BY STATE, <https://www.medicare.gov/state-overviews/scorecard/percentage-of-population-enrolled-medicare-or-chip-state/index.html>.

⁵ Christy Mallory & William Tentindo, *Medicaid Coverage for Gender-Affirming Care*, WILLIAMS INSTITUTE at 10 (Oct. 2019), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Medicaid-Gender-Care-Oct-2019.pdf>.

Yet, as the largest insurer in the country, and in a state with historic budget surpluses, West Virginia Medicaid has chosen to deny life-saving care to one of its most vulnerable populations *without reason*. As pointed out by Appellants, the rationale for adopting the policy exclusion is unknown. Appellants' Br. at 4 (citing JA1127).

The same surgeries at issue are covered by Medicaid for cisgender patients. In fact, the vast majority of West Virginia's Medicaid enrollees (the cisgender population) can obtain surgeries such as hysterectomies and mastectomies when deemed medically necessary—but the State's transgender Medicaid enrollees cannot. JA2568-2569. The district court correctly determined that this difference in treatment is facially discriminatory; the *sole* reason the transgender enrollees cannot obtain coverage for the same surgeries is *because* they are transgender. JA2576-2578. Gender-affirming surgical care—potentially lifesaving—should certainly not be excluded from only one subclass of the population.

A. Without Medicaid, Transgender West Virginians Have Difficulty Accessing Health Care.

For many West Virginians, it is Medicaid or nothing. Medicaid is intended as a “payer of last resort” that steps in only when an individual's other resources are exhausted. *Cf. Ark. Dep't of Health & Human Servs.*

v. Ahlborn, 547 U.S. 268, 291 (2006) (quoting S. Rep. No. 99-146 313 (1985)). As with other states, many of those enrolled in West Virginia’s Medicaid program lack sufficient resources to independently cover their health care costs. So, when the program excludes coverage for medically necessary procedures, those services become effectively “inaccessible.”⁶

This dynamic—wherein West Virginians are left without access to medically necessary treatment when Medicaid coverage is not provided—is magnified for transgender West Virginians. Compared to their cisgender peers, transgender people experience significantly worse economic outcomes, higher barriers to academic and professional success, and alarming poverty rates.⁷ Many of the transgender community’s challenges stem from incomplete protections against discrimination, hate-motivated physical violence⁸, or compounded pressures, prejudice,

⁶ Rogombe, *Medicaid in the Mountain State* at 6.

⁷ Movement Advancement Project, National Center for Transgender Equality, and Transgender Law Center, *Understanding Issues Facing Transgender Americans* (Feb. 2015, updated July 2016), <https://www.lgbtmap.org/file/understanding-issues-facing-transgender-americans.pdf>.

⁸ Press Release, *Transgender people over four times more likely than cisgender people to be victims of violent crime*, WILLIAMS INSTITUTE (Mar. 23, 2021), <https://williamsinstitute.law.ucla.edu/press/ncvs-trans-press-release/> (noting that transgender people are at increased likelihood of

and discrimination from being members of multiple disadvantaged communities. At bottom, transgender West Virginians as a population face an uphill battle getting the resources and services they need.

Transgender people are less likely to have other, non-Medicaid resources to draw on relative to their non-transgender peers. Nationally, about 25% of transgender adults make less than \$20,000 in annual income—compared to only 15% of cisgender adults.⁹ Transgender people are also more likely to be unemployed (9% of transgender adults nationally are unemployed, relative to 5% of cisgender adults), and to lack a high school diploma (23% compared to 13%) or further degree.¹⁰ Many transgender people are also members of other marginalized

facing violent crime—including rape, sexual assault, and aggravated and simple assaults—than cisgender counterparts).

⁹ Wyatt Koma et al., *Demographics, Insurance Coverage, and Access to Care Among Transgender Adults*, KAISER FAMILY FOUNDATION (Oct. 21, 2020), <https://www.kff.org/health-reform/issue-brief/demographics-insurance-coverage-and-access-to-care-among-transgender-adults/>.

¹⁰ *Id.*; see also Kerith J. Conron et al., *Educational Experiences of Transgender People*, WILLIAMS INSTITUTE at 2–4 (Apr. 2022) (providing data on the continued discrimination transgender people experience in pursuing higher education), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Higher-Ed-Apr-2022.pdf>.

groups. Perhaps, most significantly, transgender people are more likely to be racial and or ethnic minorities.¹¹

Similar considerations impact West Virginians. As part of West Virginia's LGBTQ community, transgender people generally earn lower incomes, face greater food insecurity, and are more likely to face unemployment than their non-LGBTQ peers in the State.¹² To consider just a handful of data points from West Virginia:

- 39% of LGBTQ adults report household incomes less than \$24,000, compared to only 26% of non-LGBTQ West Virginians;¹³
- 33% of LGBTQ adults report lacking enough money for food, compared to only 20% of non-LGBTQ adults;¹⁴ and
- 14% of LGBTQ adults report being unemployed, compared to only 7% for non-LGBTQ adults.¹⁵

¹¹ Jody L. Herman et al., *How Many Adults and Youth Identify as Transgender in the United States?*, WILLIAMS INSTITUTE at 6–8 (June 2022), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Pop-Update-Jun-2022.pdf>.

¹² Christy Mallory et al., *The Impact of Stigma and Discrimination Against LGBT People In West Virginia*, WILLIAMS INSTITUTE at 4 (Feb. 2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Impact-LGBT-Discrimination-WV-Feb-2021.pdf>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

Consequently, Medicaid is the critical source of health care services for many transgender people in West Virginia.

B. Transgender People Need Access to Gender-Affirming Care.

In addition to facing high levels of prejudice, discrimination, and violence, transgender people face enormous health disparities and barriers to access in obtaining preventative medicine, routine and emergency care, and transgender-related services. In light of these systemic hurdles, transgender people are more likely to require medical treatment.^{16, 17}

It is without a doubt that bigotry, inequity, stigma, and violence directly affect the physical, mental, and behavioral health of transgender people. Nationally, transgender people are twice as likely as their cisgender peers to report being in poor health generally (10% compared

¹⁶ Jamie M. Grant, et al., *National Transgender Discrimination Survey Report on Health and Health Care, Findings of a Study by the National Center for Transgender Equality and the National Gay and Lesbian Task Force* (Oct. 2010), https://cancer-network.org/wp-content/uploads/2017/02/National_Transgender_Discrimination_Survey_Report_on_health_and_health_care.pdf.

¹⁷ *Protecting and Advancing Health Care for Transgender Adult Communities*, CENTER FOR AMERICAN PROGRESS (Aug. 18, 2021), <https://www.americanprogress.org/article/protecting-advancing-health-care-transgender-adult-communities/#Ca=10>.

to 5%) and to report lifetime depression (38% compared to 19%).¹⁸ They are at increased risk of suffering from anxiety, substance abuse, and somatization.¹⁹ Studies also show that transgender people experience alarming levels of suicidality and self-harm. Disturbingly, statistics reveal transgender people are about 18 times more likely than the general population to have attempted to commit suicide.²⁰

The local data shows that transgender West Virginians, as part of the greater LGBTQ West Virginian community, face similar risks. LGBTQ adults in West Virginia are nearly twice as likely as their non-LGBTQ peers to have been diagnosed with a depressive disorder or to grapple with a substance abuse problem.²¹ Many of these mental health

¹⁸ Koma et al., *Access to Care Among Transgender Adults*.

¹⁹ Talal Alzahrani et al., *Cardiovascular Disease and Myocardial Infarction in the Transgender Population*, 12 CIRCULATION: CARDIOVASCULAR QUALITY & OUTCOMES Issue 4 (Apr. 2019); Walter O. Bockting et al., *Stigma, Mental Health, and Resilience in an Online Sample of the US Transgender Population*, 103 AM. J. PUB. HEALTH 943, 948–50 (May 2013).

²⁰ Jody L. Herman et al., *Suicide Thoughts and Attempts Among Transgender Adults*, WILLIAMS INSTITUTE at 1 (Sept. 2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Suicidality-Transgender-Sep-2019.pdf>.

²¹ Mallory et al., *The Impact of Stigma and Discrimination Against LGBT People In West Virginia*, WILLIAMS INSTITUTE at 4 (identifying that 40% of LGBTQ adults in West Virginia have been diagnosed with a

concerns, in large part, stem from an inability to access proper care. As specifically relevant here, receiving gender-affirming surgery can substantially reduce the risk of depression, substance abuse, and suicidal tendencies in the transgender population.²² Indeed, for some, such care can diminish those risks to roughly the same level as that experienced by the general population.²³ The bottom line is: these are life-saving surgeries from which many transgender West Virginians would immeasurably benefit.

C. Covering Such Care Would Be Cost-Effective For West Virginia Medicaid.

Covering gender-affirming surgeries most importantly saves lives, but coverage is also fiscally responsible. While the cost of particular procedures may put them out of reach for a person with low income, covering them can pay dividends (for both the recipient and health care

depressive disorder, compared to 23% of non-LGBTQ West Virginians; and that 18% of LGBTQ adults report binge drinking, compared to 10% for non-LGBTQ West Virginians).

²² Anthony M. Almazan et al., *Association Between Gender Affirming Surgeries and Mental Health Outcomes*, 156 J. AM. MED. ASS'N SURGERY 611, 615 Table 2 (April 28, 2021).

²³ *Id.*

plan) well into the future.²⁴ According to one 2015 study, for example, the budget impact of covering medically necessary services meant that gender-affirming care cost insurance plans only \$0.016 per member per month over the long run.²⁵ The study showed the minimal expense of coverage held great value for reducing depression and suicidality in the transgender population. Medically necessary gender-affirming surgery can thus save a transgender person's life for pennies on the dollar.

For similar reasons, covering such procedures would not threaten the financial stability of West Virginia's Medicaid program, as Appellants and the State insist it would. *Contra* Appellants' Br. at 33; West Virginia Amicus Br. at 11. There is, for starters, reason to doubt that West Virginia is as financially strapped as Appellants assert. In 2022, West Virginia reported a record \$1.3 billion budget surplus that could, by itself, more than double the State's annual \$979 million in state-wide Medicaid

²⁴ William V. Padula et al., *Societal Implications of Health Insurance Coverage for Medically Necessary Services in the U.S. Transgender Population: A Cost-Effectiveness Analysis*, 31 J. GEN. INTERNAL MED. 394, 398–99 (Oct. 19, 2015).

²⁵ *Id.*

spending.²⁶ With such resources available, it is hard to imagine how covering life-saving procedures for a small segment of the State's population would "jeopardiz[e] coverage for existing services." Appellants' Br. at 33.²⁷

But even if West Virginia were as pinched for cash as Appellants and the State claim, excluding medically necessary gender-affirming surgeries is a short-sighted way to cut costs. Quite the opposite; covering this care is likely to produce long-term health care efficacies for West Virginia's Medicaid program. Studies show that gender-affirming medical procedures can dramatically reduce the likelihood of other long-

²⁶ Compare Press Release, *Gov. Justice: Record-setting revenue surpluses prove West Virginia ready for personal income tax cut*, OFFICE OF THE GOVERNOR JIM JUSTICE (Oct. 3, 2022) (noting that the state had a \$1.3 billion surplus in Fiscal Year 2022), <https://governor.wv.gov/News/press-releases/2022/Pages/Gov.-Justice-Record-setting-revenue-surpluses-prove-West-Virginia-ready-for-personal-income-tax-cut.aspx>, with W.V. BUR. FOR MED. SERVS., *2021 Mountain Health Trust Annual Report* at 5 (June 2021) (noting that the State spent \$979 million on Medicaid in fiscal year 2021), https://dhhr.wv.gov/bms/Members/Managed%20Care/Documents/Reports/Annual%20Reports/SFY21_WV_BMS_MHT_AnnualReport_Final%20%281%29.pdf.

²⁷ To be specific, according to the record, there were 686 individuals with the diagnosis code for gender dysphoria or gender incongruence. JA2172-2173.

term health concerns²⁸ and, therefore, the long-term costs of health care.²⁹ In most cases, those savings can significantly offset the upfront expense of the surgery. This, of course, is on top of providing medically necessary treatment that patients are overwhelmingly satisfied with receiving and which greatly improves their overall quality of life.³⁰

The upshot is that even when setting aside the life-altering impact gender-affirming surgery can play in a transgender person's life, covering such care is also a good overall investment for West Virginia Medicaid.

* * *

West Virginia chooses to deny life-saving medical procedures to one of its most vulnerable populations. This categorical and unreasoned

²⁸ Almazan et al., *Association Between Gender Affirming Surgeries and Mental Health Outcomes*, 156 J. AM. MED. ASS'N SURGERY at 615.

²⁹ Padula et al., *Medically Necessary Services*, 31 J. GEN. INTERNAL MED. at 398–99.

³⁰ See, e.g., Hadal El-Hadi et al., *Gender-Affirming Surgery for Transgender Individuals: Perceived Satisfaction and Barriers to Care*, 26 PLASTIC SURGERY 263, 266 (2018) (finding that, for 91% of gender-affirming surgery recipients, surgical transition was important to quality of life and noting that 100% of the study's participants were happy with their decision to receive the treatment), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6236505/pdf/10.1177_2292550318767437.pdf; Tim C. van de Grift et al., *Surgical Satisfaction, Quality of Life, and Their Association After Gender-Affirming Surgery: A Follow-up Study*, 44 J. SEX & MARITAL THERAPY 138, 143 (2018).

denial of care leads to negative mental and physical health outcomes as well as unnecessary long-term costs resulting from the treatment of secondary conditions arising from the denial of the procedures. The district court was correct to grant Appellees' summary judgment, enjoin the exclusion, and guarantee access to that care for thousands of the State's transgender residents.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to affirm the ruling of the district court granting summary judgment to Plaintiffs-Appellees.

Dated: December 7, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), the type-style requirements of Fed. R. App. P. 32(a)(6), and the type-volume limitations of Fed. R. App. P. 29(a)(5). The brief is proportionally spaced, has a typeface of 14-point Century Schoolbook font, and contains 3,061 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2022, the foregoing was filed with the Clerk of the United States Court of Appeals for the Fourth Circuit using the CM/ECF system. The system will serve counsel of record.

/s/ Jah Akande
Jah Akande

Counsel for Amici Curiae

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
APPEARANCE OF COUNSEL FORM

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THE CLERK WILL ENTER MY APPEARANCE IN APPEAL NO. 22-1927 as

Retained Court-appointed(CJA) CJA associate Court-assigned(non-CJA) Federal Defender

Pro Bono Government

COUNSEL FOR: Fairness West Virginia and Mountain State Justice, Inc.

_____ as the
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appellant(s) appellee(s) petitioner(s) respondent(s) amicus curiae intervenor(s) movant(s)

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COUNSEL FOR: Fairness West Virginia and Mountain State Justice, Inc.

(party name) as the

- appellant(s) appellee(s) petitioner(s) respondent(s) amicus curiae intervenor(s) movant(s)

/s/ Alicia M. Penn
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COUNSEL FOR: Fairness West Virginia and Mountain State Justice, Inc.

_____ as the
 (party name)

appellant(s) appellee(s) petitioner(s) respondent(s) amicus curiae intervenor(s) movant(s)

/s/ Evan X. Tucker

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