

2017-1460

IN THE
United States Court of Appeals
for the Federal Circuit

DEE FULCHER, GIULIANO SILVA, and the
TRANSGENDER AMERICAN VETERANS ASSOCIATION,
Petitioners,
v.
SECRETARY OF VETERANS AFFAIRS,
Respondent.

On Petition for Review Pursuant to 38 U.S.C. § 502

**BRIEF OF *AMICI CURIAE* CITIES, COUNTIES, AND BUSINESSES
IN SUPPORT OF PETITIONERS
AND URGING THE COURT TO GRANT THE PETITION**

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June 28, 2017

CERTIFICATE OF INTEREST

I, Philip J. Tassin, counsel for *amici curiae*, certify the following:

1. The full names of the *amici curiae* represented by me are:

American Airlines, Inc.; City of Austin, Texas; City of Cambridge, Massachusetts; City of Dayton, Ohio; City of Detroit, Michigan; City of Gainesville, Florida; City of Long Beach, California; City of Miami Beach, Florida; City of New York, New York; City of Portland, Maine; City of Portland, Oregon; City of Rochester, New York; City of Rockville, Maryland; City and County of San Francisco; County of Santa Clara, California; City of Stamford, Connecticut; Viacom Inc.; City of West Hollywood, California; and City of Yonkers, New York

2. The names of the real parties in interest represented by me are:

Not applicable.

3. The names of any parent corporations or publicly held companies that own 10% or more of the stock of an *amicus* represented by me are:

City and County *Amici*: None.

Viacom Inc.: None.

American Airlines, Inc.: American Airlines, Inc. is a wholly owned subsidiary of American Airlines Group Inc., a publicly traded company with no corporate parent. T. Rowe Price Group, Inc., PRIMECAP Management Company, and Berkshire Hathaway Inc. each own 10% or more of American Airlines Group Inc.'s stock.

4. The names of all law firms and the partners or associates that appeared for the *amici* now represented by me in the trial court or agency or are expected to appear in this court are:

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Dated: June 28, 2017

Respectfully submitted,

s/ Philip J. Tassin

PHILIP J. TASSIN

CERTIFICATE OF INTEREST

I, Julie Wilensky, counsel for *amicus curiae* County of Santa Clara, certify the following:

1. The full name of the *amicus curiae* represented by me is:
County of Santa Clara.
2. The names of the real parties in interest represented by me are:
Not applicable.
3. The names of any parent corporations or publicly held companies that own 10% or more of the stock of an *amicus* represented by me are:
None.
4. The names of all law firms and the partners or associates that appeared for the *amicus* now represented by me in the trial court or agency or are expected to appear in this court are:

OFFICE OF THE COUNTY COUNSEL: Cara H. Sandberg

Dated: June 28, 2017

Respectfully submitted,

s/ Julie Wilensky
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CERTIFICATE OF INTEREST

I, Patricia B. Palacios, counsel for *amici curiae*, certify the following:

1. The full names of the *amici curiae* represented by me are:

City of Seattle, Washington; CREDO Mobile, Inc.; Greater Seattle Business Association; MassMutual; and Replacements, Ltd.

2. The names of the real parties in interest represented by me are:

Not applicable.

3. The names of any parent corporations or publicly held companies that own 10% or more of the stock of an *amicus* represented by me are:

City of Seattle, Washington: None.

CREDO Mobile, Inc.: Working Assets, Inc. is the parent company of CREDO Mobile, Inc. Neither Working Assets, Inc. nor any of its subsidiaries are publicly held companies.

Greater Seattle Business Association: None.

MassMutual: None.

Replacements, Ltd.: None.

4. The names of all law firms and the partners or associates that appeared for the *amici* now represented by me in the trial court or agency or are expected to appear in this court are:

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Dated: June 28, 2017

Respectfully submitted,

s/ Patricia B. Palacios
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INTEREST OF *AMICI CURIAE*

Amici are American cities, counties, and businesses that offer transgender-inclusive medical benefits—including coverage for gender-confirmation surgery—for their employees, their employees’ family members, and, in some instances, for the public at large.¹ The public-entity *amici* are home to many of the country’s 1.4 million transgender adults, and many of the public-entity *amici* and business *amici* employ transgender people—including transgender veterans—or have employees with transgender family members. Although *amici* vary widely in size, location, and role in society, they share core values of equality, dignity, and respect for all people, regardless of their gender identity. Thus, *amici* have a strong interest in protecting transgender members of their communities from discriminatory and marginalizing policies, such as the regulation of the Department of Veterans Affairs (“Department” or “VA”) excluding gender-confirmation surgery from the suite of medical benefits available to veterans.

Amici submit this brief to share their broad, collective experience offering transgender-inclusive medical benefits, including coverage for gender-confirmation surgery. *Amici*’s extensive experience demonstrates the significant benefits, yet negligible costs, of providing comprehensive care for transgender individuals, and confirms that there can be no legitimate purpose to the VA’s ban

¹ A complete listing of *amici* is provided on the signature page and in the Addendum to this brief.

on coverage for gender-confirmation surgery. Such policies serve only to stigmatize individuals who already face severe discrimination.²

SUMMARY OF ARGUMENT

Prior to November 2016, the Department of Veterans Affairs was on the right course, having announced that it was reconsidering its discriminatory regulation excluding surgery for “[g]ender alterations” from the medical benefits offered to veterans. *See* 38 C.F.R. § 17.38(c)(4). In November 2016, however, the Department abruptly reversed course, denying Petitioners’ request to change its rule until “appropriated funding is available” from Congress. To *amici*—cities, counties, and major American businesses from every corner of the country—the Department’s purported justification for refusing to amend or repeal the exclusion rings hollow.

Amici all offer transgender-inclusive medical benefits, including coverage for gender-confirmation surgery—whether through their health plans as employers, or as the providers of health plans or programs to the public—and in their experience, providing such comprehensive care does not impose significant costs on health plans. Their collective experiences, and the VA’s own cost estimates,

² Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* affirm that that no counsel for a party authored this brief in whole or in part, and that no person other than *amici* and their counsel contributed money to fund its preparation or submission. Pursuant to Federal Rule of Appellate Procedure 29(a)(2) and Federal Circuit Rule 29(c), *amici* affirm that all parties have consented to the filing of this brief, so no motion for leave is required.

undermine any claim that additional appropriations are required for the Department to cover such care for transgender veterans. In *amici*'s view, providing such comprehensive care is essential for promoting their shared values of equal respect and dignity for all people, and denying such care can have only the illegitimate purpose of disadvantaging transgender people as a group. Accordingly, *amici* urge the Court to grant the Petition for Review and reverse the Department's unsupportable refusal to amend or repeal 38 C.F.R. § 17.38(c)(4).

ARGUMENT

I. *Amici*'s Experience Proves That Providing Transgender-Inclusive Medical Benefits, Including Gender-Confirmation Surgery, Promotes Important Interests Without Imposing Significant Costs.

A. Transgender People Are an Integral Part of *Amici*'s Communities, and *Amici* Share a Strong Interest in Protecting Them from Discrimination.

Scientific estimates of the size and characteristics of the transgender population confirm what *amici* already know: transgender people, including transgender veterans, are an integral strand in the fabric of our communities.³

³ At present, there are no national, population-based surveys that measure the exact size and characteristics of the transgender population in the United States. However, there are some state-level surveys that identify transgender respondents, which researchers can use to estimate the size of the national transgender population. Extrapolating from such state-level data, researchers with UCLA's Williams Institute estimate that 0.6% of adults in the United States identify as transgender, amounting to approximately 1.4 million people. Andrew Flores et al., *How Many Adults Identify as Transgender in the United States?* 2–3 (Williams Inst. June 2016), available at <https://perma.cc/KS3J-LVNI>. Transgender people live in every state, with populations ranging from 0.3% in North Dakota to 0.78%

They are our neighbors, our coworkers, and members of our families. Like anyone else living in the *amici* cities and counties, transgender residents pay taxes and rely on public services. And like anyone else, they work for a living, with many transgender people working as employees of the business *amici* as well as the public-entity *amici*. *Amici* are therefore united in their commitment to treating transgender people with equal dignity and respect.

Consistent with their shared values of equal dignity and respect for transgender people, *amici* have enacted laws, workplace policies, and other programs to protect transgender people from the discrimination, exclusion, and violence that many face in their daily lives. For example, since 2003, the Santa Clara County Board of Supervisors has explicitly included gender identity in its nondiscrimination policy on County employment and access to County programs, services, and contracting opportunities. *See* Cnty. of Santa Clara, Bd. of Supervisors, Policy Res. 03-06 (Aug. 5, 2003), *available at* <https://perma.cc/P388-L3QB>. In 2016, the County established the Office of LGBTQ Affairs to, among other things, promote equality and advance the rights of transgender residents. Likewise, since 2002, New York City's Human Rights Law has recognized the

in Hawaii. *Id.* at 3–4. Among them, an estimated 21.4% are serving or have served in the U.S. armed forces, more than double the rate for the general population. Gary J. Gates and Jody L. Herman, *Transgender Military Service in the United States* 3–4 (Williams Inst. May 2014), *available at* <https://perma.cc/DX6H-NYTU>.

right of transgender and gender-nonconforming people to be free from unlawful discrimination in employment, public spaces, and housing. *See* N.Y.C. Admin. Code § 8-102(23). Moreover, and as further explained below, *amici* have taken steps to ensure that transgender members of their communities are treated equally with respect to their healthcare. *See infra* Section I.B. *Amici* see these measures as essential for ensuring a just society where all people, including transgender people, may lead lives with dignity and respect.

B. *Amici* Have Experience Providing Transgender-Inclusive Medical Benefits, Including Gender-Confirmation Surgery, for Employees and Residents, and Have Found That Doing So Promotes Important Interests.

An increasing number of businesses and local governments provide transgender-inclusive medical benefits. The Human Rights Campaign (“HRC”), which issues an annual report rating private companies on LGBT equality, reports that in 2017, a record 647 businesses (73% of those rated) offer employees a health plan that provides transgender-inclusive health care, including gender-confirmation surgery. Human Rights Campaign, *2017 Corporate Equality Index* at 25–26, *available at* <https://perma.cc/UP8E-U9WD>. Similarly, HRC’s Municipal Equality Index, which rates the LGBTQ-inclusiveness of cities across the United States, reports that in 2016, 86 of the 506 rated cities offered their employees a health plan that provides transgender-inclusive health care, including gender-confirmation

surgery. Human Rights Campaign, *2016 Municipal Equality Index* at 14, available at <https://perma.cc/AY65-HKHR>.

All *amici* have direct experience providing health plans to their employees that cover medical care for transgender people, including gender-confirmation surgery. For example, the County of Santa Clara offers its employees a choice of plans through three medical benefit providers, all of which provide coverage for transition-related care, including gender-confirmation surgery. Likewise, each of the private business *amici* offer at least one health plan that covers gender-confirmation surgery.

In addition to providing medical benefits to their employees, some of the public-entity *amici* operate health plans or other programs that provide medical care, including gender-confirmation surgery and other transition-related care, to their residents. Valley Health Plan (“VHP”), which is owned and operated by the County of Santa Clara, provides coverage for a broad range of services for plan members and Medi-Cal beneficiaries who are transgender, including gender-confirmation surgery.⁴ Telephone Interview with Dr. Dolly Goel (“Dr. Goel

⁴ VHP, which has served the Santa Clara County community for more than 30 years, has approximately 21,000 commercial members (including County employees and other employee groups) and 8,000 members through Covered California, California’s health insurance marketplace for individuals and families under the Affordable Care Act. VHP also manages the care of approximately 140,000 Medi-Cal beneficiaries. Telephone Interview with Dr. Dolly Goel (“Dr. Goel Interview”), Chief Medical Officer, Valley Health Plan, in San José, Cal.

Interview”), Chief Medical Officer, Valley Health Plan, in San José, Cal. (May 25, 2017).⁵ VHP covers gender-confirmation surgery, like any other surgery, when it is medically indicated for the patient and consistent with current clinical guidelines. *Id.* As VHP’s Chief Medical Officer Dr. Dolly Goel explained:

We cover the comprehensive health care needs of transgender people in the same way we cover the comprehensive health care needs of people who aren’t transgender. . . . We don’t see gender reassignment surgery or other services for transgender people as “special” services—these are the kind of services we provide to any plan member.

Id.

Amici have universally found that covering transition-related medical care, including gender-confirmation surgery, furthers essential interests: it benefits *amici*’s transgender employees, it benefits *amici*’s employees who have transgender children, it bolsters *amici*’s ability to recruit and retain employees, and it benefits the health and wellbeing of transgender people generally.

1. Providing Transgender-Inclusive Medical Benefits, Including Gender-Confirmation Surgery, Benefits *Amici*’s Transgender Employees.

“The intent of employer-provided health care coverage is to promote a productive and healthy workforce,” and “[i]nclusive coverage options for transition-related care help to achieve the goal of promoting health and wellness

(May 25, 2017).

⁵ Synopses of this and other interviews with employees of the County of Santa Clara are on file with the Office of the County Counsel.

across the spectrum of workforce diversity.” Human Rights Campaign, *Transgender-Inclusive Health Care Coverage and the Corporate Equality Index* at 4 (2012), available at <https://perma.cc/H2GL-CQNQ>. A diverse, inclusive workplace environment “increases the total human energy available to the organization. People can bring far more of themselves to their jobs because they are required to suppress far less.” *Only Skin Deep? Re-examining the Business Case for Diversity*, Deloitte Point of View (Sept. 2011), available at <https://perma.cc/WY4J-M3PT> (citing Frederick A. Miller & Judith H. Katz, *The Inclusion Breakthrough* (2002)). Working in an LGBT-supportive workplace results in “greater job commitment, improved workplace relationships, increased job satisfaction, improved health outcomes, and increased productivity among LGBT employees.” M.V. Badgett et al., *The Business Impact of LGBT-Supportive Workplace Policies* at 1 (Williams Inst. May 2013), available at <https://perma.cc/9QEP-VNYV>.

2. Providing Transgender-Inclusive Medical Benefits, Including Gender-Confirmation Surgery, Benefits *Amici*’s Employees Who Have Transgender Family Members.

For *amici*’s employees who have transgender family members, the value of transgender-inclusive health care policies, including ones that cover gender-confirmation surgery, cannot be overstated. As an executive-level employee of the County of Santa Clara put it, “having access to the health care my daughter needs

is everything to us.” Interview with County of Santa Clara Department Head (“County Department Head Interview”), San José, Cal. (May 23, 2017).⁶ Since he started working at the County in 2010, the Department Head has had medical benefits through Health Net (one of the standard health plans offered to employees), which has covered a wide range of medical care related to his teenage daughter’s gender transition, including extensive counseling for the child and parents, placement of a “puberty blocker” through a surgical procedure, and most recently, hormone therapy. As he explained:

Having a teen is hard enough, it’s so emotional, and the suicide rates of transgender kids are so high, that we need to make sure our child is getting appropriate medical care. . . . We are lucky to have a team of well-trained, culturally competent doctors delivering services in a way that’s allowed my daughter to flourish—she gets straight As, is a double black belt in martial arts, and is a musician. She’s an amazing child. And she has been able to do all these things because we haven’t had to spend our time and energy fighting the health plan to get medical care. . . . I can’t imagine what it would be like if we didn’t have this health coverage.

Id. He also spoke about the importance of the plan covering gender-confirmation surgery:

[My daughter] has always wanted to have surgery once she is 18, right before her transition to college. This is a medical decision she will make for herself when she is 18, but we all feel relieved knowing that that can be her choice, rather than something determined by our family finances. And this way we can focus on thinking about

⁶ The employee’s identifying characteristics have been changed or omitted to protect the privacy of the employee’s child.

colleges instead of worrying about her medical care. She'll be able to start college like every other girl.

Id.

3. Providing Transgender-Inclusive Medical Benefits, Including Gender-Confirmation Surgery, Bolster *Amici*'s Ability to Recruit and Retain Employees.

Providing transgender-inclusive health benefits, including gender-confirmation surgery, bolsters *amici*'s ability to recruit and retain employees. As the Santa Clara County Department Head stated, "I wouldn't be working at the County if I couldn't get these health benefits for my family. I would go someplace else that had these benefits. It's that important." *Id.* He also stressed how having this care available for his family "keeps me able to be focused on work." *Id.* The business *amici* share the same view, understanding that if they are to attract the best talent, they must offer health care benefits that cover the full range of medically necessary procedures.

4. Transgender-Inclusive Medical Benefits Significantly Improve the Health and Wellbeing of Transgender People.

Transgender-inclusive health policies that cover comprehensive care, including gender-confirmation surgery, promote *amici*'s interest in the health and wellbeing of their employees and residents. Studies show that gender-confirming surgery "plays an undisputed role in contributing toward favorable outcomes" for transgender people. World Prof'l Ass'n for Transgender Health ("WPATH"),

Position Statement on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A. (“WPATH Med. Necessity Stmt.”) at 2 (Dec. 21, 2016), available at <https://perma.cc/7P79-M4JP>. “In some cases, such surgery is the **only** effective treatment for the condition [of gender dysphoria], and for some people genital surgery is essential and life-saving.” *Id.* at 3. For example, one study showed that transgender men who had undergone chest reconstruction surgery “had significantly higher scores for general health, social functioning, as well as mental health.” *Id.* (citing E. Newfield et al., *Female-to-Male Transgender Quality of Life*, *Quality of Life Research*, 15(9): 1447–57 (Nov. 2006)). In another study, transgender women who had undergone gender-confirming surgeries had mental health scores comparable to other women, while those who could not access needed surgical care scored much lower on mental health measures. Cal. Dep’t of Ins., *Economic Impact Assessment: Gender Nondiscrimination in Health Insurance* (“*Economic Impact Assessment*”) at 11 (Apr. 13, 2012), available at <https://perma.cc/XBU7-CXG7> (citing T. Ainsworth et al., *Quality of Life of Individuals With and Without Facial Feminization Surgery or Gender Reassignment Surgery*, *Quality of Life Research*, 19: 1019–1024 (2010)).

In reviewing the empirical research, the California Department of Insurance has noted that “[o]ne of the most severe results of denying coverage of treatments to transgender insureds . . . is suicidal ideation and attempts,” while “studies

provide overwhelming evidence that removing discriminatory barriers to treatment results in significantly lower suicide rates.” *Economic Impact Assessment* at 9, 10. Thus, the California Department of Insurance concluded that prohibiting discrimination against transgender people in insurance plans would have a “significant beneficial impact on the health, welfare and safety of the transgender population.” *Id.* at 9.

C. Providing Transgender-Inclusive Medical Benefits, Including Gender-Confirmation Surgery, Does Not Impose Significant Costs.

Amici share the VA’s interest in ensuring the efficient and cost-effective provision of medical benefits. But contrary to the VA’s apparent belief that an additional congressional appropriation is necessary to cover gender-confirmation surgery for veterans, empirical research, *amici*’s experience, and the VA’s own cost estimates demonstrate that covering health care for transgender people—including gender-confirmation surgery—does not result in significant costs.

Many studies show that providing comprehensive transition-related care, including gender-confirmation surgery, does not result in significantly higher costs for health plans or coverage providers. For instance, a 2013 study of thirty-four public and private employers found that employers reported very low actual costs, if any, from providing transition-related coverage in their health benefits plans.

Jody L. Herman, *Costs and Benefits of Providing Transition-Related Health Care*

Coverage in Employee Health Benefits Plans (Williams Inst. Sept. 2013), available at <https://perma.cc/B6WN-U8XZ>. Similarly, a study of the actual costs from the first five years that the City and County of San Francisco covered its transgender employees' health needs showed that claims for transition-related care represented only "a tiny fraction of total claims (whether for surgical services or for all services combined)." Human Rights Campaign, *San Francisco Transgender Benefit: Actual Cost & Utilization (2001-2006)*, available at <https://perma.cc/LD7W-N2GQ> (last visited May 23, 2017).

These studies attribute the minimal costs associated with transgender-inclusive benefits, including coverage of gender-confirmation surgery, to several factors. The first is low utilization. Transgender people are a small portion of the population, and not all transgender people undergo medical treatment or seek the same treatment. Madeleine B. Deutsch, *Overview of Gender Affirming Treatments and Procedures*, UCSF Ctr. of Excellence for Transgender Health, available at <https://perma.cc/F2K6-4YHF> (last visited May 26, 2017). For example, in the first five years that San Francisco offered transition-related care to its employees, only thirty-seven surgical benefit claims were made; San Francisco initially estimated that providing this coverage would cost \$1.75 million per year, but found that the actual cost was only \$77,283 per year. Aaron Belkin, *Cost to VHA of Providing Transition-Related Surgery*, Palm Center, available at [13](https://perma.cc/4AZZ-</p></div><div data-bbox=)

D8F4; *Economic Impact Assessment* at 5. Similarly, a study of thirty-four public and private employers found the following utilization rates for transition-related health care benefits: 1 out of 10,000 employees for employers with 1,000–10,000 employees, and 1 out of 20,000 employees for employers with 10,000–50,000 employees. Herman, *supra*, at 2. While the number of gender-confirming surgeries has increased in recent years due to improved access to health care generally, the total number of gender-confirming surgeries performed each year in the United States remains very small: approximately 2,300 in 2016. Mary Bowerman, *Gender Confirmation Surgeries on the Rise Shows Report by American Society of Plastic Surgeons*, USA Today Network (May 22, 2017), available at <https://perma.cc/5VJG-WWZN> (last accessed May 25, 2017).

Second, the provision of gender-confirmation surgery can result in cost savings due to improved continuity of care. Employers who—like the VA—already cover most transition-related care, but exclude surgery, must cover post-operative complications and other medical issues arising from surgeries performed outside of the designated medical care system. Belkin, *supra*, at 3. Thus, providing coverage for a wide range of transition-related medical benefits, including surgery, ensures that all medical care is handled within one system and increases financial savings from enhanced continuity of care. *Id.*

Third, coverage for gender-confirmation surgery can mitigate other serious and expensive medical conditions such as suicidality, substance abuse, and other conditions resulting from lack of treatment for gender dysphoria, all of which impose substantial costs on a benefits plan. *Id.*; see generally *Economic Impact Assessment*. Because of this, any negligible increase in costs is offset in whole or in part by reduced costs in health care that may otherwise be necessary for medical conditions left untreated when transition-related surgery is excluded from benefits coverage. See *Economic Impact Assessment* at 9–12.

The Department’s own economic impact analysis of the rule change requested here is consistent with these studies, and shows that removing the restriction on gender-confirmation surgery from the VA’s medical benefits package would *not* have a significant economic impact on the VA’s budget. Indeed, when considering the potential economic impact of the requested rule change, the Department estimated that the VA would provide transition-related care of *all* kinds—including hormone therapy, surgery, and other therapies—to only 687 veterans a year. J.A. 323 (U.S. Dep’t of Veterans Affairs, *Economic Impact Analysis for RIN 2900-AP69, Removing Gender Alterations Restriction from the Medical Benefits Package*, Attachment 1 at 3 (July 29, 2016)) (“VA *Economic Impact Analysis*”); see also Belkin, *supra*, at 1. Only a fraction of those estimated 687 veterans will actually seek surgical care, a number that pales in

comparison to the approximately 8.9 million veterans served by the VA (some of which already receive the same surgical care for reasons other than gender dysphoria). *See* U.S. Dep’t of Veterans Affairs, *About VHA*, archived at <https://perma.cc/3XNP-GLFM> (last visited June 2, 2017). Even using “the most conservative (highest) cost projection possible,” the Department estimates that if each of these individuals used “every possible” medical service available to them—which they will not—it would cost the Department just over \$17.9 million in the first three years. *VA Economic Impact Analysis* at 3, 4, 8. Because not all of the 687 veterans will seek surgical transition-related care, the actual cost will be a tiny fraction of the \$186.5 billion budget the President has proposed for the Department for 2018. *See* Press Release, U.S. Dep’t of Veterans Affairs, Care and Benefits for Veterans Strengthened by \$186 Billion VA Budget (May 23, 2017), available at <https://perma.cc/QX9T-BBFV>.

Amici’s experience has been consistent with both the Department’s cost projection and the general studies discussed above. Indeed, Dr. Dolly Goel, the Chief Medical Officer of the County of Santa Clara’s Valley Health Plan, said that “providing gender-reassignment surgery has not imposed significant costs on our system.” Dr. Goel Interview. Dr. Goel also stated that utilization is low—she recalls fewer than 10 VHP plan members or Medi-Cal beneficiaries having gender-confirmation surgery in the past several years. *Id.* In addition, some of the

procedures associated with gender confirmation are frequently performed for purposes other than treating gender dysphoria: “We provide a mastectomy for people who have breast cancer, and we provide a mastectomy for transgender men.” *Id.* Given all of this empirical evidence, the Department’s suggestion that offering transgender-inclusive medical benefits would be cost-prohibitive is untenable.

II. In Light of *Amici*’s Experience, the VA’s Refusal to End its Exclusion of Gender-Confirmation Surgery from Veterans’ Health Benefits Cannot Withstand Even the Most Deferential Standard of Review.

A. The VA’s Refusal to Cover Gender-Confirmation Surgery Worsens Already Pervasive Discrimination Against Transgender People, Undermining *Amici*’s Core Values and Harming Public Health.

Although *amici* have taken a number of steps to ensure that transgender people are treated with respect within their jurisdictions and workplaces, they hold no illusions that their protections have eliminated all discrimination and injustice from the lives of their transgender residents and employees. Indeed, despite protective laws and policies like those that *amici* have enacted, transgender individuals continue to face severe hardships and barriers in many aspects of their daily existence. *See generally* Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey* at 3–5 (Nat’l Ctr. for Transgender Equality 2016), *available at* <https://perma.cc/ZS7W-GTQM>; *see also* Jaime M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* (Nat’l Ctr. for

Transgender Equality and Nat'l Gay & Lesbian Task Force 2011), *available at* <https://perma.cc/5G32-JXSV>.

For example, in the most comprehensive nationwide survey of transgender people to date, nearly 48% of the respondents reported that they were denied equal treatment, verbally harassed, or physically attacked in the preceding year because of their transgender identity. James et al., *Transgender Survey*, *supra*, at 198–204. Nearly a quarter of transgender people have experienced housing discrimination, such as being evicted or denied a home, while one-third of transgender Americans have experienced homelessness. *Id.* at 176–80. The hardships transgender individuals face extend to the healthcare realm, with 33% of respondents reporting negative experiences with a health care provider, and 23% declining to seek needed medical care for fear of mistreatment. *Id.* at 92–99.

For transgender veterans, the VA's categorical refusal to cover gender-confirmation surgery is an especially painful form of discrimination. Not every transgender person needs or wants surgical care—or transition-related medical care at all—but many do, and having access to that treatment is essential for their physical and mental wellbeing. See WPATH, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* at 54–55 (version 7) (collecting studies), *available at* <https://perma.cc/ZY3Q-GHGR>. Left untreated, such individuals may never find relief from the debilitating anxiety and depression

that often accompany gender dysphoria. *Id.* And more generally, singling out transgender people for exclusion, as the VA's policy does, further stigmatizes the transgender population, contributing to the well-documented link between discrimination and significant health disparities in the transgender population. *See* James et al., *Transgender Survey, supra*, at 103–07 (finding that transgender individuals were eight times more likely to experience serious psychological distress as a result of societal marginalization); *id.* at 114 (finding that 82% of transgender individuals had seriously thought about killing themselves at some point in their lives, and that 40% had attempted suicide—nine times the rate for the general population).

By refusing to provide medically-necessary health care for transgender veterans—including procedures that the VA covers for veterans who are not transgender—the VA not only harms the health of these veterans, but also undermines the core values of equality and respect that public institutions like the VA should promote and advance. As explained below, *amici's* collective experience reveals that there can be no legitimate purpose behind the VA's ban on gender-confirmation surgery, leading to the unavoidable conclusion that the policy is intended to discriminate against transgender veterans. When an institution as vast and essential as the VA singles out an already vulnerable population for discrimination, it thwarts the public's interest in maintaining just and peaceful

communities where all members may live to their maximum potential. For that reason and the reasons explained below, the VA's refusal to change its discriminatory policy must be reversed.

B. There Is No Legitimate, Rational Basis for the VA's Exclusion of Gender-Confirmation Surgery from Veterans' Health Benefits.

Amici agree with Petitioners that the VA's regulation excluding gender-confirmation surgery from veterans' health benefits should be reviewed with strict, or at least heightened, scrutiny, for two reasons. *See* Pet., Ex. 1 at 28–33, ECF No. 1-2. First, as federal agencies and the majority of federal appellate courts to consider the issue have concluded, discrimination against transgender people is a form of sex discrimination. *See, e.g., Ashton Whitaker v. Kenosha Unified Sch. Dist.*, — F.3d —, No. 16-3522, 2017 WL 2331751, at *1, *11 (7th Cir. May 30, 2017); *Glenn v. Brumby*, 663 F.3d 1312, 1316–20 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 571–75 (6th Cir. 2004); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000), *Schwenk v. Hartford*, 204 F.3d 1187, 1201–02 (9th Cir. 2000); *Lusardi v. McHugh*, No. 0120133395, 2015 WL 1607756, at *1–3 (E.E.O.C. Apr. 1, 2015); *Macy v. Holder*, No. 0120120821, 2012 WL 1435995, at *11 (E.E.O.C. Apr. 20, 2012). The VA's regulation discriminates against transgender veterans based on sex, so it must be reviewed closely, as classifications based on sex and gender have long triggered heightened scrutiny. *See Whitaker*, 2017 WL 2331751, at *12 (applying heightened scrutiny to a

transgender student’s equal protection claims, as the challenged school restroom policy was “inherently based upon a sex-classification”); *Glenn*, 663 F.3d at 1321 (applying heightened scrutiny to equal protection claims brought by a transgender woman in the employment discrimination context). Thus, the Department must “demonstrate an ‘exceedingly persuasive justification’” for its refusal to rescind the discriminatory regulation. *United States v. Virginia*, 518 U.S. 515, 531 (1996). Moreover, the Department must show that its policy “substantially serve[s] an important governmental interest *today*, for ‘in interpreting the [e]qual [p]rotection [guarantee], [we have] recognized that new insights and societal understandings can reveal unjustified inequality . . . that once passed unnoticed and unchallenged.’” *Sessions v. Morales-Santana*, No. 15-1191, —S. Ct.—, 2017 WL 2507339, at *9 (U.S. June 12, 2017) (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015)).

Second, even apart from its link to sex discrimination, governmental action that targets people based on their transgender status warrants strict or heightened scrutiny because transgender people as a class have long suffered marginalization based on an immutable characteristic that is irrelevant to their ability to contribute to society. *See Adkins v. City of New York*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. Nov. 16, 2015); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015).

For either of these two reasons, the VA’s exclusion of transition-related surgical care—which is undoubtedly discriminatory—must be reviewed with strict or heightened scrutiny, and under that standard, the exclusion cannot stand because it serves no “important governmental objectives.” *Craig v. Boren*, 429 U.S. 190, 197 (1976); *see Norsworthy*, 87 F. Supp. 3d at 1120 (finding that a ban on surgical care for transgender inmates could serve no important governmental interest when the same treatment was provided for cisgender inmates).

But even if the Court were to review the VA’s refusal to cover transition-related surgical care under the most deferential standard, the policy would still fail. Under rational basis review, governmental action must “bear[] a rational relation to some legitimate end,” and the Court’s review must be more searching where the action targets a vulnerable group, as it does here. *Romer v. Evans*, 517 U.S. 620, 631, 634–35 (1996). The only purported reason that the VA has given for refusing to change its exclusionary policy is that it can explore a regulatory change only “when appropriated funding is available.” Pet., Ex. 2 (Ltrs. from David J. Shulkin, M.D., Under Secretary for Health, Dep’t of Veterans Affairs, to Members of Congress, Nov. 10, 2016), ECF No. 1-2. But as *amici*’s collective experience and the Department’s own cost projection show, no appropriation is necessary, since coverage for surgical care imposes no significant net costs on health plans. *See supra* Section I.C. This is all the more true for the VA, which already covers other

transition-related care for veterans, and which already covers the same surgical procedures for reasons other than gender confirmation. *See* 38 C.F.R. § 17.38(a)(1)(x) and VHA Directive 1091 (Feb. 21, 2014) (covering “[r]econstructive (plastic) surgery required as a result of disease or trauma,” including “those surgical procedures performed for the revision of external bodily structures which deviate from normal either from congenital or acquired causes”); VHA Directive 2013-003 (Feb. 8, 2013, revised Jan. 19, 2017) (covering surgery for veterans “in need of surgery to correct inborn conditions related to reproductive or sexual anatomy”).

Given the relatively small number of transgender veterans, the low utilization rate for transition-related surgery, and the cost savings that accompany the provision of medically-necessary surgical treatment, there can be no legitimate reason to deny transgender veterans such care. *See U.S. Dep’t of Ag. v. Moreno*, 413 U.S. 528, 534 (1973) (excluding a “politically unpopular group” from receiving public benefits “cannot constitute a legitimate governmental interest”); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985) (“[M]ere negative attitudes, or fear . . . are not permissible bases” for disadvantaging a group of people). Thus, the VA’s refusal to change its exclusionary regulation violates the equal protection component of the Fifth Amendment’s Due Process Clause.

For much the same reasons that the VA's refusal to change its exclusionary regulation fails under the Fifth Amendment, it also fails under the Administrative Procedure Act. This Court may reverse the VA's denial of the petition for rulemaking if the agency's decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). As Petitioners have pointed out, the VA has provided no explanation or examination of relevant data to justify its exclusionary policy. *See* Pet., Ex. 1 at 26–27, ECF No. 1-2. Nor could it. The VA already covers transition-related care other than surgery, and it already covers the same surgical procedures for a variety of purposes other than treating gender dysphoria. Moreover, *amici's* experience shows that covering surgery for transition-related purposes would have a negligible to nonexistent impact on costs and administration. The VA's denial of the petition for rulemaking is therefore arbitrary and capricious, separately meriting reversal.

CONCLUSION

The Department of Veterans Affairs provided scant explanation for its refusal to change its discriminatory exclusion of gender-confirmation surgery from veterans' health benefits, claiming that a congressional appropriation was necessary. *Amici's* experience proves otherwise, and further shows that there can be no legitimate, nondiscriminatory reason for denying such medically-necessary

care to our nation's veterans. The Court should therefore grant the Petition and order the VA to proceed with amending or repealing its exclusionary rule.

Respectfully submitted,

Dated: June 28, 2017

s/ Philip J. Tassin

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CERTIFICATION OF CONSENT

I, Philip J. Tassin, am the ECF user whose ID and password are being used to file this brief. Pursuant to the Court's Administrative Order Regarding Electronic Case Filing, ECF-3(B), I hereby attest that I have obtained the consent of each signatory to this document.

Dated: June 28, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2017, I electronically filed the foregoing **Brief of *Amici Curiae*** with the Clerk of the Court using the appellate CM/ECF system, which will serve, via email, notice of such filing on all counsel registered as CM/ECF users:

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Upon acceptance by the Court of the e-filed document, six paper copies will be filed with the Court within the time provided in the Court's rules.

Dated: June 28, 2017

s/ Philip J. Tassin

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CERTIFICATE OF COMPLIANCE

I hereby certify as follows:

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) and Federal Circuit Rule 32(a). The brief contains 5,466 words according to the word count of the word-processing system used to prepare the brief, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Federal Circuit Rule 32(b).

2. 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). The brief has been prepared in a 14-point, proportionally spaced Times New Roman font.

Dated: June 28, 2017

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