

No. 24-108

**In the United States Court of Appeals
for the Federal Circuit**

IN RE TRANSGENDER AMERICAN VETERANS
ASSOCIATION, PETITIONER.

**MOTION FOR LEAVE TO FILE *AMICUS CURIAE* ON
BEHALF OF WASHINGTON, CALIFORNIA, COLORADO,
CONNECTICUT, DELAWARE, DISTRICT OF COLUMBIA,
HAWAII, ILLINOIS, MARYLAND, MASSACHUSETTS,
MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW
YORK, OREGON, PENNSYLVANIA, RHODE ISLAND, and
VERMONT
IN SUPPORT OF PETITIONER'S PETITION
FOR WRIT OF MANDAMUS
TO THE DEPARTMENT OF VETERANS AFFAIRS**

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Pursuant to Fed. Cir. R. 21(e) and Fed. R. App. P. 29(a)(3), amici States of Washington, California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, and Vermont (collectively, the “amici States”), respectfully requests this Court’s leave to file the accompanying *amicus curiae* brief in support of the petition for writ of mandamus to the Department of Veterans Affairs filed by the Petitioner, Transgender America Veterans Association.

The amici States strongly support the rights of transgender veterans to live with dignity, be free from discrimination, and have equal access to employment, housing, public accommodations, and other necessities of life, including health care. Many of the amici States provide explicit civil rights protections for transgender people, as well as non-discriminatory coverage of gender affirming surgery, and our experience demonstrates that ensuring equal access to health care helps us all. In contrast, the VA’s regulation and implementing directives can cause real, observed harms to the amici States’ resident veterans. The amici States therefore have a strong interest in seeing the regulation amended or repealed.

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RESPECTFULLY SUBMITTED this 29th day of January 2024.

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DECLARATION OF SERVICE

I hereby certify that on January 29, 2024, I electronically filed the forgoing motion and its accompanying brief with the Clerk of the United States Court of Appeals for the Federal Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

Dated this 29th day of January 2024.

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MINNESOTA, NEVADA, NEW JERSEY, NEW YORK,
OREGON, PENNSYLVANIA, RHODE ISLAND, and
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INTRODUCTION

The mission of the U.S. Department of Veterans Affairs (the “Department” or the “VA”) is to fulfill President Abraham Lincoln’s simple promise: “to care for those who have served in our nation’s military and for their families, caregivers, and survivors.”¹ Under the Veterans Healthcare Eligibility Reform Act of 1996, all veterans are eligible to receive “needed” healthcare as long as the Department has the resources to provide or pay for such care.² Indeed, the vision of the Department’s Veterans Health Administration (“VHA”) is to “be truly Veteran-centric by identifying, fully considering, and appropriately advancing the interests of Veterans and other beneficiaries.”³

Yet, the regulation at issue here belies the VA’s mission. Adopted in 1999, the Department’s regulation contains a blanket exclusion for “gender alterations” from the “medical benefits package” provided to eligible veterans,⁴ and the regulation’s implementing directive states that the “VA does not provide or fund gender confirming/affirming surgeries because VA regulation excludes them from

¹ U.S. Dep’t of Veterans Affairs, Veterans Admin., *I CARE. VA’s Mission*, <https://www.va.gov/icare/index.asp> (last visited Jan. 17, 2024).

² 38 U.S.C. § 1710.

³ U.S. Dep’t of Veterans Affairs, Veterans Admin., *I CARE Core Values, Characteristics, and Customer Experience Principles*, <https://www.va.gov/icare/core-values.asp> (last visited January 18, 2024).

⁴ 38 C.F.R. § 17.38(c)(4).

the medical benefits package.”⁵ Taken together, the regulation and implementing directive render President Lincoln’s promise an empty one for many transgender veterans. Although the VA recognizes the existence of transgender veterans,⁶ the VA falls short of serving and caring for *all* veterans when it prevents transgender veterans from accessing medically necessary and potentially life-saving treatment. The VA’s longstanding and discriminatory regulation breaks faith with the more than 150,000 veterans, active duty service members, and members of the guard and reserves who identify as transgender – and who serve in our armed forces at nearly twice the rate of their cisgender counterparts.

The Department’s categorical exclusion not only fails to be “Veteran centered,” it threatens the welfare of amici States’ residents. Transgender veterans with gender dysphoria are left without life-saving healthcare, and are vulnerable to physical suffering, depression, and suicidal ideation.⁷ Further, the VA’s approach

⁵ U.S. Dep’t of Veterans Affairs, Veterans Health Admin., VHA Directive 1341(3), *Providing Health Care for Transgender and Intersex Veterans*, at 3 (May 23, 2018), https://www.patientcare.va.gov/LGBT/docs/directives/VHA_DIRECTIVE_1341.pdf.

⁶ Ashley Carothers, *Center for Minority Veterans hosts fireside chat for Transgender Day of Remembrance*, VA News (Dec. 8, 2023), <https://news.va.gov/126825/center-for-minority-veterans-hosts-fireside-chat-for-transgender-day-of-remembrance/>.

⁷ *See infra* pp. 7-10. *See also Glenn v. Brumby*, 724 F. Supp. 2d 1284, 1289 (N.D. Ga. 2010) (accepting the World Professional Association for Transgender Health’s triadic therapeutic protocol of hormone therapy, real-life experience as a member of the new gender, and gender affirming surgeries as the standard for treating gender identity dysphoria in the medical community).

stands in tension with the experience of the amici States—which have found giving transgender people access to comprehensive healthcare, including medically necessary surgery—provides significant benefits at negligible costs.⁸ Indeed, the amici States recognize that covering the same or substantially similar surgeries for cisgender veterans, such as mastectomies or hysterectomies to treat cancer while refusing to cover similar, necessary procedures for transgender veterans harms our residents and public health systems. The absence of action in responding to the petition for rulemaking has harmed amici States’ transgender veterans and potentially hurts our states’ ability to retain service members for our national guards. The VA’s discriminatory and unreasonable regulation should be repealed or amended.

IDENTITY AND INTEREST OF AMICI CURIAE

The States of Washington, California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, and Vermont (collectively, “the amici States”) submit this amicus brief pursuant to the Fed. R. App. P. 29 and Fed. Cir. R. 21(e).

The amici States strongly support the rights of transgender veterans to live with dignity, be free from discrimination, and have equal access to healthcare. Many

⁸ See *infra* pp. 10-12.

of the amici States provide explicit civil rights protections for transgender people, as well as non-discriminatory coverage of gender affirming surgery, and our experience demonstrates that ensuring equal access to healthcare helps us all. In contrast, the VA's regulation and implementing directives can cause real, observed harms to the amici States' resident veterans. The amici States therefore have a strong interest in seeing the regulation amended or repealed.

ARGUMENT

Though the immediate petition seeks an order compelling the Department to respond to a request for rulemaking, much more is at stake here. The Petitioners call upon the Court to determine whether one of the largest health providers in the country should remain free to deny needed medical care solely based on a person's gender identity. Such an outcome harms both the amici States' transgender veteran residents, many of whom would be left without access to medically necessary treatment options, and the amici States themselves, by allowing a deprivation of civil rights in our nation's healthcare system that forces States to bear the resulting costs. The Court should reject this blanket deprivation of medical care and order the VA to formally respond to the 2016 petition for rulemaking, and honor its commitment to provide patient-centered and evidence-based care to our nation's veterans.

A. Discrimination Against Transgender Veterans Harms the Amici States and Their Residents.

1. Transgender veterans are an important part of the population of the amici States, yet face pervasive discrimination.

Transgender veterans are an essential part of the amici States' communities—more than 150,000 veterans, active duty service members, and members of the guard and reserves identify as transgender nationwide.⁹ Transgender people serve in the military at about twice the rate of adults in the general population.¹⁰

Rather than honor these veterans, the VA often repays transgender veterans for their service with discrimination. In the 2015 U.S. Transgender Survey (“2015 USTS”), the largest survey of transgender people to date,¹¹ nearly one-quarter of veterans and current service-member respondents said that leadership acted to discharge them when their commanding officers knew or thought they were

⁹ Gary J. Gates & Jody L. Herman, *Transgender Military Service in the United States*, THE WILLIAMS INST., at 1 (May 2014), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Transgender-Military-Service-May-2014.pdf> (estimating 134,300 transgender veterans and 15,500 on active duty or in the National Guard or Reserve forces).

¹⁰ *Id.*, at 3.

¹¹ Results from the 2022 U.S. Transgender survey are expected to be published in 2024. See 2022 U.S. Trans Survey, *The National Center for Transgender Equality*, <https://www.ustranssurvey.org/> (last visited Jan. 14, 2024). *Id.*

transgender.¹² In fact, the U.S. Department of Defense barred transgender people from openly serving in the military until 2016.¹³

This reflects the striking levels of discrimination, harassment, and even violence that transgender people, including veterans, endure even when it comes to the most basic elements of life, such as finding a job, having a place to live, and enjoying the support of family and community.¹⁴ This is no less true when it comes to healthcare, where transgender people face significant barriers to receiving both routine and transition-related care, including lack of adequate insurance coverage, provider ignorance about the health needs of transgender people, and outright denial of service.¹⁵ In the 2015 NTDS, 23% of people reported that they avoided seeking

¹² Sandy E. James, et al., *The Report of the 2015 U.S. Transgender Survey*, NAT'L CTR. FOR TRANSGENDER EQUALITY, at 167, 169 (Dec. 2016), <http://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf> (hereinafter, "2015 NTDS").

¹³ See Matthew Rosenberg, *Transgender People Will Be Allowed to Serve Openly in Military*, NEW YORK TIMES (June 30, 2016), https://www.nytimes.com/2016/07/01/us/transgender-military.html?_r=0.

¹⁴ 2015 NTDS, at 93; see also Sara Jean Green, *Police, FBI Investigating Brutal Attack on Transgender Activist on Capitol Hill*, THE SEATTLE TIMES (June 24, 2016), <http://www.seattletimes.com/seattle-news/crime/police-fbi-investigating-brutal-attack-on-transgender-man-on-capitol-hill/> (reporting that a man used sexualized slurs while attacking a transgender activist as they left a fundraiser).

¹⁵ 2015 NTDS, at 93; see also Jaime M. Grant, et al., *Injustice at Every Turn: A Report of National Transgender Discrimination Survey*, NAT'L CTR. FOR TRANSGENDER EQUAL. & NAT'L GAY & LESBIAN TASK FORCE, at 5-6 (Oct. 2010), http://www.thetaskforce.org/static_html/downloads/resources_and_tools/ntds_report_on_health.pdf (hereinafter, "2010 Health Care Survey") (reporting that 28% of transgender and gender non-conforming participants faced either verbal or physical harassment in medical settings, and 19% were refused medical care altogether).

healthcare they needed in the past year alone due to fear of being mistreated or harassed as a transgender person.¹⁶ This lack of coverage is in direct conflict with the opinions of most major medical organizations, which consider gender-affirming care, including surgeries, to be life-saving, necessary treatments for transgender people.¹⁷

Moreover, stigmatizing medical care for transgender veterans by excluding, the same care that is offered to cisgender veterans discriminates against transgender people. Instead of ensuring the safety, efficacy, and health of the veterans who serve our country, the VA restricts the type of gender-affirming care available. The VA's exclusionary regulations could not be based on safety concerns for transgender veterans, because they lack any medical support; instead, the VA's regulations merely codify insidious discrimination into law.

¹⁶ 2015 NTDS, at 96.

¹⁷ See, e.g., E. Coleman, et. al., *Standards of Care for the Health of Transgender and Gender Diverse People, Version 8*, Int'l J. of Transgender Health Vol. 23, Issue Supl, at 5, 16-18 (2022), <https://doi.org/10.1080/26895269.2022.2100644> (World Professional Association for Transgender Health's Standards of Care – Eighth Edition (WPATH SOC-8)); *Edmo v. Corizon, Inc.*, 935 F.3d 757, 769 (9th Cir. 2019) (listing major medical organizations that recognize WPATH Standards of Care as “the appropriate treatment for transgender and gender dysphoric individuals”).

2. The VA’s discriminatory regulation harms transgender veterans and the amici States.

The blanket denial of access to medically necessary care is stigmatizing and discriminatory, which has serious consequences for transgender residents and public health generally in the amici States.

Transgender people often suffer from severe emotional and psychological distress due to the stigma associated with being transgender.¹⁸ In the 2015 NTDS, for example, 80% of respondents reported seriously contemplating taking their own life, and 40% of respondents reported having attempted suicide—a rate drastically higher than the rate of suicide attempts for the overall U.S. population (4.6%) or even for lesbian, gay, and bisexual individuals (10-20%) and “transgender adults have a prevalence of lifetime suicidal thoughts about four times higher, and lifetime suicide attempts about six times higher, than the U.S. population.”¹⁹

¹⁸ See Am. Psychological Ass’n, *Understanding transgender people, gender identity and gender expression* (updated June 6, 2023), <http://www.apa.org/topics/lgbt/transgender.aspx>; Wynne Parry, *Gender Dysphoria: DSM-5 Reflects Shift in Perspective on Gender Identity*, Huffington Post (updated Aug. 4, 2013), http://www.huffingtonpost.com/2013/06/04/gender-dysphoria-dsm-5_n_3385287.html (“[T]he distress that accompanies gender dysphoria arises as a result of a culture that stigmatizes people who do not conform to gender norms[.]”).

¹⁹ Jody L. Herman et al., *Suicide Attempts Among Transgender and Gender Non-Conforming Adults: Findings of the National Transgender Discrimination Survey*, AM. FOUND. FOR SUICIDE PREVENTION & THE WILLIAMS INST., at 1-3 (Sept. 2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/AFSP-Williams-Suicide-Report-Final.pdf>; see also Jeremy D. Kidd, et. al., *Prevalence of Substance Use and Mental Health Problems Among Transgender and Cisgender U.S. Adults*, UCLA Williams Inst. Press Release (July 20, 2023),

The devastating reality for transgender Americans who do not have access to gender-affirming care does not end with the high risk of suicide associated with the inability to access care. For instance, if unaddressed, gender dysphoria can impact quality of life, cause fatigue, and trigger decreased social functioning.²⁰ Specifically, 93% of transgender veterans reported at least one instance of stigma in the military because of their gender identity, including bullying and barriers to obtaining gender-affirming care.²¹ Likewise, the Centers for Disease Control and Prevention found that social rejection, stigma, and inadequate access to transgender-competent care all contribute to an increased risk of HIV and AIDS for transgender people.²²

<https://williamsinstitute.law.ucla.edu/press/transpop-suicide-press-release/> (a new study finds that 81% of U.S. transgender adults have thought about suicide); Laura Ungar, *Transgender People Face Alarming High Risk of Suicide*, USA Today (Aug. 16, 2015), <https://www.usatoday.com/story/news/nation/2015/08/16/transgender-individuals-face-high-rates--suicide-attempts/31626633/>.

²⁰ See Emily Newfield, et al., *Female-to-Male Transgender Quality of Life*, QUALITY OF LIFE RESEARCH (Nov. 2006), <https://www.ncbi.nlm.nih.gov/pubmed/16758113> (observing that transgender people who received transition-related care reported having a higher health-related quality of life).

²¹Lindsay Mahowald, *LGBTQ+ Military Members and Veterans Face Economic, Housing, and Health Insecurities*, Center for Am. Progress (Apr. 28, 2022), <https://www.americanprogress.org/article/lgbtq-military-members-and-veterans-face-economic-housing-and-health-insecurities/#:~:text=A%20new%20Center%20for%20American,housing%20instability%2C%20and%20mental%20health> (citing N. A. Schvey, et. al., *Stigma, Health, and Psychosocial Functioning Among Transgender Active Duty Service Members in the U.S. Military*, Am. Psychology Ass'n (2020), <https://psycnet.apa.org/doiLanding?doi=10.1037%2Fsah0000190>).

²² Ctrs. for Disease Control & Prevention, *HIV and Transgender Communities*, at 1 <https://www.cdc.gov/hiv/pdf/policies/data/cdc-hiv-policy-issue-brief-transgender.pdf> (last visited Jan. 18, 2024).

These negative health consequences also harm the amici States. If transgender veterans are unable to receive non-discriminatory, comprehensive healthcare from the VA, they may turn to other providers for their healthcare coverage.²³ Transgender and gender non-conforming individuals are less likely than the general population to have health insurance, and more likely to be covered by state-run programs such as Medicaid.²⁴ Even when transgender veterans are enrolled with the VA, those with serious problems may end up relying upon the front-line services of the state healthcare systems in times of crisis. It is therefore our state Medicaid programs that likely bear the burden of addressing the enormous attendant consequences of denying transgender veterans medically necessary care.²⁵ Simply put, it is often our state Medicaid programs that cover the doctor visits, emergency services, chronic disease management, mental health, and substance abuse disorder services that are required when the VA fails to provide medically necessary treatment for gender dysphoria.²⁶

²³ See, e.g., Sidath Viranga Panangala, et. al., *Health Care for Veterans: Answers to Frequently Asked Questions*, Congressional Research Service, at 10 (updated March 4, 2020), <https://fas.org/sgp/crs/misc/R42747.pdf>.

²⁴ 2010 Health Care Survey, at 8.

²⁵ See Ctrs. for Disease Control & Prevention, *Cost of Injury Reports*, <https://wisqars.cdc.gov:8443/costT/> (last reviewed Nov. 8. 2023) (check “Fatal Injury Data,” then click on “Cost of Fatal Injury.” See item line, “Suicide.” (estimating the average medical cost of a suicide attempt is \$5,735)).

²⁶ See, e.g., Wash. Admin. Code § 182-501-0060; Cal. Code Regs. tit. 22 §§ 51301, *et seq.*; 18 N.Y.C.R.R. 505 (listing each program’s benefit packages).

In sum, the Department's regulation singles out an already-marginalized population, and it does so with respect to one of the most important health issues transgender veterans may face in their lifetimes. In refusing transgender veterans needed healthcare, the Department places avoidable stress on amici States' healthcare systems.

B. Amici States' Experience Shows that the VA Can Provide Healthcare to Transgender Veterans, Including Gender-affirming Surgery, Without Significant Costs.

1. Many of the amici States have experience covering transition-related care.

To prevent the tangible economic, emotional, and health consequences of excluding individuals from needed healthcare, many of the amici States explicitly prohibit insurers from excluding transition-related care, like gender-affirming surgeries, from coverage.²⁷ In Washington, for example, the Health Care Authority provides coverage of surgical and non-surgical transition-related services in both the state's Medicaid program (known as "Apple Health") and the public employees' insurance benefits program (known as "PEBB").²⁸ Similarly, the Office of the

²⁷ See Katie Keith, *15 States and DC Now Prohibit Transgender Insurance Exclusions*, GEORGETOWN UNIV. HEALTH POLICY INSTITUTE CTR ON HEALTH INS. REFORMS (Mar. 30, 2016), <http://chirblog.org/15-states-and-dc-now-prohibit-transgender-insurance-exclusions/>.

²⁸ See Wash. Admin. Code § 182.531.1675 (listing surgical and hormone therapy as available under Apple Health's "gender dysphoria treatment program"); Brad Shannon, *PEBB Votes to Add Transgender Services to Health Coverage*

Insurance Commissioner (“Washington OIC”) mandates that private insurers cover medically necessary services for transgender individuals “to the same extent that those services are covered for non-transgender individuals.”²⁹ Indeed, as the Washington OIC states in an accompanying guidance, an exclusion for gender-affirming surgery constitutes “an impermissible discriminatory exclusion.”³⁰

Other amici States are equally committed to ensuring transgender people are treated with dignity and respect when accessing healthcare. In California, the state’s Medicaid program (“Medi-Cal”) has prohibited transition-related exclusions from its coverage since 2001, and Medi-Cal covers gender-affirming surgery when medically necessary.³¹ Moreover, California’s public employees’ insurance benefits program (“CalPERs”) covers all medically necessary care for transgender

Starting in January, THE NEWS TRIBUNE (July 31, 2014), <https://www.thenewstribune.com/news/politics-government/article25874317.html>.

²⁹ Letter from Mike Kreidler to Health Ins. Carriers in Wash. State, Office of the Ins. Commissioner of Wash. State (June 25, 2014), <https://www.insurance.wa.gov/sites/default/files/documents/gender-identity-discrimination-letter.pdf>.

³⁰ Office of the Ins. Commissioner of Wash. State, *Transgender enrollee coverage frequently asked questions*, <https://www.insurance.wa.gov/faq-about-coverage-transgender-enrollees> (last visited Jan. 18, 2024).

³¹ See Cal. Dep’t of Health Care Servs., *Ensuring Access to Medi-Cal Services for Transgender Beneficiaries* (Oct. 6, 2016), <http://www.dhcs.ca.gov/formsandpubs/Documents/MMCDAPLsandPolicyLetters/APL2016/APL16-013.pdf>; Medi-Cal Update General Medicine, *Policy Clarification: Gender Identity Disorder*, Bulletin 465 (March 2013), <http://files.medi-cal.ca.gov/pubsdoco/bulletins/artfull/gm201303.asp#>.

members.³² In 2012, the California Insurance Commissioner adopted regulations prohibiting private insurers from denying coverage for transition-related services if the same services are available when unrelated to gender transition.³³ Other amici States provide similar protections.³⁴

³² Trudy Ring, *Calif. Public Employees Will Get Coverage for Gender Transition*, The Advocate (June 21, 2013), <https://www.advocate.com/politics/transgender/2013/06/21/calif-public-employees-will-get-coverage-gender-transition>.

³³ Cal. Code Regs. tit. 10 § 2561.2(a).

³⁴ See, e.g., 3 Colo. Code Regs. 702-4-2-62-5(E)(3); Conn. Ins. Dep't, Bulletin IC-37, renumbered as Bulletin IC-34 (Dec. 19, 2013), <https://portal.ct.gov/-/media/CID/BulletinIC37GenderIdentityNondiscriminationRequirementspdf.pdf?la=en>; Del. Code tit.18 § 2304(22); D.C. Official Code § 31-2231.11(c); Letter from D.C. Comm'r William P. White to All Ins. Cos., Health Maintenance Orgs., and Hospital and Med. Serv. Corps. Authorized to Write Health Ins. in the Dist., Gov. of the Dist. Of Columbia, Dep't of Ins, Securities and Banking, Bulletin 13-IB-01-30/15 (March 15, 2013), <https://disb.dc.gov/sites/default/files/dc/sites/disb/publication/attachments/Bulletin13-IB-01-30-15.pdf>; Haw. Rev. Stat. § 431:10A-118.3(a); Haw. Rev. Stat. § 432:1-607.3; Haw. Rev. Stat. § 432D-26.3 (2016); 775 Ill. Comp. 5/1-103(O-1); 50 Ill. Adm. Code 2603.35; Md. Code Ann., Health-Gen. § 15-103(a)(2)(xxii); Mass. Division of Ins., Office of Consumer Affairs & Business Regulation, Bulletin 2014-03 (June 20, 2014), <https://www.mass.gov/doc/division-of-insurance-bulletin-2014-03-guidance-regarding-prohibited-discrimination-on-the/download>; Mass. Dep't Health & Human Services, *MassHealth Guidelines for Medical Necessity Determination for Gender Affirming Surgery*, <https://www.mass.gov/guides/masshealth-guidelines-for-medical-necessity-determination-for-gender-affirming-surgery> (last visited Jan. 18, 2024) ; Mich. Comp. Laws § 500.2027(a)(i), amend. 2023, Act of 156 (effective Feb. 12, 2024); Minn. Stat. § 363A.17(3); NJ Dep't of Banking and Ins, Bulletin No. 23-05, https://www.nj.gov/dobi/bulletins/blt23_05.pdf; NV S.B. 163, 2023 Leg., 82nd Sess. (effective July 1, 2023); 18 N.Y.C.R.R. 505.2(l); N.Y. Dep't of Financial Servs. Ins. Circular Letter No. 7 (Apr. 22, 2022), https://www.dfs.ny.gov/industry_guidance/circular_letters/cl2022_07; OR H.B. 2002, 82nd OR Leg. Assy., Reg. Sess. (Or. 2023); OR Dep't of Consumer and Business Servs. Div. of Financial Reg., Bulletin DFR 2023 (Dec. 6, 2023), <https://dfr.oregon.gov/laws-rules/Documents/Bulletins/proposed/guidance-gender-affirming-treatment.pdf>; The Pennsylvania Bulletin, *Notice Regarding Nondiscrimination; Notice 2016-05*, 46 Pa.B. 2251 (April 30, 2016),

The amici States' laws, regulations, and healthcare bulletins prohibit many insurers from excluding gender-affirming surgeries in a discriminatory manner. Taken together, these protections reflect our core commitment to protecting the equality of all people, regardless of their gender identity.

2. Amici States have found that covering comprehensive healthcare for transgender people, including surgeries, furthers essential interests without imposing undue financial costs.

The VA may argue that covering gender-affirming surgery imposes a significant cost burden on its health system. However, in amici States, where equal access to medically necessary care is already the law, this prophesied fear has not materialized.

In several amici States, the removal of transgender exclusions has not led to increased financial costs or premiums. In California, for example, the Insurance Commissioner conducted economic impact findings and determined that ensuring

<https://www.pacodeandbulletin.gov/Display/pabull?file=/secure/pabulletin/data/vol46/46-18/762.html>; PA Dep't of Human Servs. Med. Assist., Bulletin 99-16-11 (July 18, 2016), <https://transequality.org/sites/default/files/PA-Medical-Assistance-Bulletin.pdf>; RI Health Ins Comms, Bulletin 2015-3 (Nov. 23, 2015), <https://ohic.ri.gov/sites/g/files/xkgbur736/files/bulletins/Bulletin-2015-3-Guidance-Regarding-Prohibited-Discrimination.pdf>; VT. Dep't of Fin. Reg., Div. of Ins., Ins. Bulletin No. 174, *Guidance Regarding Prohibited Discrimination on the Basis of Gender Identity including Medically Necessary Gender Dysphoria Surgery and Related Health Care* (revised June 12, 2019), <https://dfr.vermont.gov/sites/finreg/files/regbul/dfr-bulletin-insurance-174-gender-dysphoria-surgery.pdf>; VT. Dep't of Health Access, Medical Policy re: Gender Affirmation Surgery for the Treatment of Gender Dysphoria (last review Nov. 1, 2019), <https://dvha.vermont.gov/sites/dvha/files/documents/providers/Forms/1gender-affirmation-surgery-w-icd-10-coded-110119.pdf>.

equal access to healthcare regardless of gender identity would have an “insignificant and immaterial economic impact” on California businesses.³⁵ While providing medically necessary care is important regardless of the number of persons who need such care, the California Department of Insurance’s assessment that any economic impact would be insignificant makes sense because the transgender population in the United States is quite small³⁶—and the transgender veteran population is even smaller. Insurers are rarely called upon to provide transition-related services.³⁷ In fact, with respect to surgeries, the “utilization rate,” or degree at which insureds seek a covered service, is lower than the percentage of transgender people in the population, since many rely on counseling and hormone therapy alone to treat their

³⁵ Cal. Dep’t of Ins., *Economic Impact Assessment of Gender Nondiscrimination in Health Insurance* 1-2, Reg. File No. REG-2011-00023 (Apr. 13, 2012), <http://transgenderlawcenter.org/wp-content/uploads/2013/04/Economic-Impact-Assessment-Gender-Nondiscrimination-In-Health-Insurance.pdf> (hereinafter, “California Assessment”).

³⁶ Compare Jody L. Herman, et al., *How Many Adults Identify as Transgender in the United States?* UCLA, THE WILLIAMS INST., at 4 (June 2022), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Pop-Update-Jun-2022.pdf> (estimating 1.3 million people identify as transgender), with U.S. Census Bureau, *Annual Population Estimates* (last visited January 17, 2024), <https://www.census.gov/popclock/> (estimating 335 million people in the United States).

³⁷ See, e.g., California Assessment, at 4-5 (observing, at one employer, less than 27 employees sought transition-related treatments in over five years despite the employer plan covering 95,000 employees).

symptoms and may not seek surgery.³⁸ The City of San Francisco, for example, initially charged employees a \$1.70 premium to cover the cost of extending coverage to transgender people only to wholly eliminate that charge three years later because of low utilization rates.³⁹ Similarly, the City of Seattle easily absorbed the predicted increase of \$200,000 for extending coverage because the amount represented just two-tenths of one percent of Seattle's total \$105 million healthcare budget.⁴⁰

Most importantly, in the amici States' experience, the tangible benefits to public health and to the affected individuals greatly outweigh the cost of extending coverage. This is because the mental health of transgender people markedly improves when they receive non-discriminatory healthcare. Several studies suggest surgical treatments improve the overall mental health of transgender insureds and decrease substance abuse rates.⁴¹ Suicidal ideation, for example, significantly

³⁸ California Assessment, at 8 (noting not all transgender people have medical need for surgery). *See also* 2015 NTDS, at 99-101 (only 25% of respondents reported having some form of transition-related surgery).

³⁹ California Assessment, at 6.

⁴⁰ California Assessment, at 6.

⁴¹ *See* William V. Padula, et. al., *Societal Implications of Health Ins. Coverage for Medically Necessary Svcs. in the U.S. Transgender Population: A Cost-Effectiveness Analysis*, J. GEN. INTERN. MED. (Oct. 19 2015), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4803686/pdf/11606_2015_Article_3529.pdf (estimating decreased risk of HIV, depression, suicidality, and drug abuse means comprehensive coverage of transition-related care is cost-effective 85% of the time); Mohamed Hassan Murad, et. al., *Hormonal Therapy and Sex Reassignment: A Systematic Review and Meta-analysis of Quality of Life and Psychosocial Outcomes*, Clinical Endocrinology, Vol. 72, Iss. 2 (Feb. 2010), <https://pubmed.ncbi.nlm.nih.gov/19473181/>.

decreases after gender-affirming surgery.⁴² Providing coverage also creates cost savings for insurers.⁴³ For example, after the Medicaid expansion as part of the Affordable Care Act, Medi-Cal (California’s Medicaid program) was better able to contract with surgeons that could perform gender-affirming surgeries at Medi-Cal reimbursement rates. Not only are such outcomes good for a State’s transgender residents, they are good for the public health and fiscal outcomes of the States themselves.

In sum, the public health benefits of providing comprehensive healthcare to transgender people overwhelmingly offset the negligible costs in covering medically necessary, life-saving gender-affirming surgery. Any argument the Department puts forth to suggest otherwise is contrary to the amici States’ experience.

CONCLUSION

The Department’s categorical exclusion surgical “gender alterations” from its medical benefits package for veterans directly harms amici States and their residents. As amici States’ experience shows, providing such care leads to significant benefits without serious costs, and supports a decision to amend or repeal the VA’s discriminatory regulation.

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⁴² California Assessment, at 10.

⁴³ California Assessment, at 10.

DATED this 29th day of January 2024.

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