

Health Professionals Advancing LGBTQ+ Equality, Lesbian, Bisexual, Gay and Transgender Physician Assistant Caucus of the American Academy of PAs, Inc., the LGBTQ Health Caucus, North American Society for Pediatric and Adolescent Gynecology, and the World Professional Association for Transgender Health.

3. No publicly held corporation owns 10% or more of the stock of American Academy of Family Physicians, American College Health Association, American College of Physicians, American Medical Student Association, GLMA: Health Professionals Advancing LGBTQ+ Equality, Lesbian, Bisexual, Gay and Transgender Physician Assistant Caucus of the American Academy of PAs, Inc., the LGBTQ Health Caucus, North American Society for Pediatric and Adolescent Gynecology, and the World Professional Association for Transgender Health.

4. The names of all law firms and the partners and associates that appeared for the *amici curiae* now represented by me in this proceeding are: Simpson Thacher & Bartlett LLP and Jonathan Youngwood.

5. The related cases tag is not applicable (“N/A”) because this is an amicus brief.

6. The organizational victims and bankruptcy cases tag is N/A.

Dated: January 29, 2024

Respectfully submitted,

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INTERESTS OF AMICI CURIAE ¹

Amici Curiae represent well-recognized organizations that promulgate the leading standards of care in the field, individual medical professionals charged with ensuring proper treatment for their patients, and organizations that advocate for the interests of its LGBTQ+ and gender diverse veteran members. *Amici* offer this brief to explain that the VA’s categorical exclusion of medically necessary gender-affirming surgeries from its medical benefits package impinges upon medical and mental health professionals’ ability to provide medically necessary care to each veteran patient with gender dysphoria.

Amicus the American Academy of Family Physicians (“AAFP”) is one of the largest national medical organizations, representing 129,600 family physicians and medical students nationwide. Founded in 1947, AAFP seeks to improve the health of patients, families, and communities by advocating for the health of the public and by supporting its members in providing continuous comprehensive health care to all.

Amicus the American College Health Association (“ACHA”) represents over 700 institutions of higher education and the collective health and wellness needs of 20 million college students. ACHA serves over 8,500 individual college health and

¹ All parties consented to the filing of this brief. Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici curiae* state that no party’s counsel authored this brief in whole or in part, and no person other than *amici curiae*, their members, or their counsel contributed money that

wellness professionals and leaders of all disciplines united together to advance the health and wellness of college students.

~~Anicus~~ ~~the~~ American College of Physicians (“ACP”) is the largest medical specialty organization and the second largest physician membership society in the United States. ACP members include 161,000 internal medicine physicians, related subspecialists, and medical students. Internal medicine physicians are specialists

equality for LGBTQ+ health professionals in their work and learning environments. To achieve this mission, GLMA utilizes the scientific expertise of its diverse multidisciplinary membership to inform and drive advocacy, education, and research.

Amicus The Lesbian, Bisexual, Gay and Transgender (“LBGT”) Physician Assistant (“PA”) Caucus of the American Academy of PAs, Inc. is the national professional society for PAs and PA students who share a common interest in the art of LGBTQ+ health. It is an officially recognized constituent organization of the American Academy of PAs. Since 1979, the LBGT PA Caucus has been serving the PA profession on all aspects of sexual and gender minority diversity and inclusion in the PA workforce, PA education, and the health of the public.

Amicus the Lesbian, Gay, Bisexual, and Transgender Health Caucus of the within the American Public Health Association (the “LGBTQ Health Caucus”) is an active group of interdisciplinary public health professionals committed to furthering LGBTQ+ issues within the American Public Health Association, and the field of public health at large since 1975.

Amicus the North American Society for Pediatric and Adolescent Gynecology (“NASPAG”) is a voluntary, non-profit organization devoted to conducting, encouraging, and supporting programs of medical education and professional training in the field of pediatric and adolescent gynecology. It provides leadership

while serving as a forum for research and promoting communication and collaboration among health care professionals on issues related to pediatric and adolescent gynecology. NASPAG members reside in all 50 states and in countries abroad.

Amicus

SUMMARY OF ARGUMENT

Many transgender people experience gender dysphoria, a serious condition characterized by significant distress. The internationally-recognized standards of care for gender dysphoria provide that transition-related care, including surgery, is clinically effective and medically necessary. These standards recognize that there is no “one size fits all treatment plan” for gender dysphoria. Instead, health professionals must make a case-by-case assessment and treatment plan for each patient. For that reason, nearly every major medical organization (and multiple courts) oppose the categorical exclusion of, or bans on, gender affirming surgery. And the federal government—in providing health coverage to non-veterans—routinely recognizes that gender affirming surgery may be necessary for individual patients. The VA’s blanket ban on gender affirming surgery is inconsistent with the weight of this authority and places transgender veterans at a heightened risk of physical and emotional trauma.

ARGUMENT

I. Gender Affirming Surgery Is a Medically Necessary Treatment for Certain Patients with Gender Dysphoria

It is well-established that gender dysphoria can be a serious medical condition that, if left untreated, elevates risk of depression, thoughts of suicide, and suicide attempts—risks which are already elevated in veterans compared to the general population. And it is similarly well-established that, for some individuals, gender affirming surgery is medically necessary.

A. Gender Dysphoria Is a Serious Medical Condition

Transgender individuals have a “gender identity”—a “deeply felt, inherent sense” of their gender²—that does not align with their sex assigned at birth. Although being transgender “implies no impairment in judgment, stability, reliability, or general social or vocational capabilities,”³ many transgender individuals experience gender dysphoria, a condition characterized by clinically

² Am. Psychol. Ass’n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 AM. PSYCH. 832, 834 (2015).

³ Am. Psychiatric Ass’n, *Position Statement on Discrimination Against Transgender and Gender Diverse Individuals* (2018), <https://www.psychiatry.org/File%20Library/About-APA/Organization-Documents-Policies/Policies/Position-2018-Discrimination-Against-Transgender-and-Gender-Diverse-Individuals.pdf>

significant distress resulting from the incongruence between an individual's gender and assigned sex at birth.⁴

The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders sets forth two conditions for a gender dysphoria diagnosis. First, there must be a "marked incongruence between one's experienced/expressed gender and assigned gender, of at least 6 months' duration, as manifested by at least two of the following:" (1) "a marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics"; (2) "a strong desire to be rid of one's primary and/or secondary sex characteristics"; (3) "a strong desire for the primary and/or secondary sex characteristics of the other gender"; (4) "a strong desire to be of the other gender (or some alternative gender . . .)"; (5) "a strong desire to be treated as the other gender (or some alternative gender . . .)"; or (6) "a strong conviction that one has the typical feelings and reactions of the other gender."

health providers play an important role in the care of people transitioning,¹⁹ some people “will not require therapy or other forms of mental health care as part of their transition.”²⁰ Gender affirming hormone therapy is “the primary medical intervention sought by transgender people,” though “the current standard of care is

meaningful sense, but are understood to be medically necessary for the treatment of the diagnosed condition.”²³

Medical research continues to show gender affirming surgery provides tangible, potentially life-saving, benefits. A 2021 landmark study of 27,715 transgender individuals demonstrated that gender affirming surgery is associated with decreased severe psychological distress and past-year suicidal ideation.²⁴ Other studies link gender affirming surgery to “a consistent and direct increase in health-related quality of life” and “a significant decrease in gender dysphoria.”²⁵ Studies similarly confirm that transgender individuals who have received gender affirming surgery have very “low levels of decisional regret.”²⁶

²³ *Id.*

²⁴ Anthony N. Almazan and Alex S. Keuroghlian, *Association Between Gender-*
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II. Case-By-Case Assessment and Treatment of Veterans with Gender Dysphoria Is Necessary

“[T]here is no ‘one-size-fits-all approach’ to treating gender dysphoria.”²⁷

Transgender people “represent a diverse array of gender identifies and have differing needs for [gender affirming care],” and they “may need to undergo all, some, or none of [the medical] interventions to support their gender affirmation.”²⁸ Empirical studies demonstrate that gender dysphoria “is not a homogenous phenomenon,” and that it requires “a more varied treatment approach.”²⁹ Accordingly, the WPATH guidelines recommend individualized assessment and treatment.³⁰

For that reason, major medical associations, courts, and the federal government eschew categorical bans of gender affirming surgery, in favor of an individualized assessment of the patient’s specific needs. The VA’s categorical ban here conflicts with this weight of authority.

²⁷ WPATH Standards of Care, at S7.

²⁸ *Id*

A. Medical and Mental Health Associations Oppose Categorical Exclusion of Gender Affirming Surgery

Recognizing the importance of individualized care for transgender patients, major medical and mental health organizations have called for an end to blanket exclusions in health insurance coverage for treatment of gender dysphoria:

- x The American Medical Association “supports public and private health insurance coverage for treatment of gender dysphoria as recommended by the patient’s physician.” AMA Policy H-185.950 (2022), <https://policysearch.ama-assn.org/policyfinder/detail/H-185.950?uri=%2FAMADoc%2FHOD.xml-0-1128.xml>.
- x The American Psychiatric Association “[o]pposes categorical exclusions of coverage for such medically necessary treatment when prescribed by a physician.” Am. Psychiatric Ass’n, Position Statement on Access to Care for Transgender and Gender Diverse Individuals, at 1 (May 2018).
- x The American Psychological Association “recognizes the efficacy, benefit, and necessity of gender transition treatments for appropriately evaluated

individuals’ gender dysphoria” and that “[t]reatment can and should include [gender affirming surgery] when medically necessary.” *Edmo*, 935 F.3d at 771 (emphasis added); *Hundley v. Aranas*, No. 21-15757, 2023 U.S. App. LEXIS 731, at *2–3 (9th Cir. Jan. 12, 2023) (“[T]he prison must make an individualized decision about whether Hundley should have her gender dysphoria treated by [gender affirming surgery].”). For that reason, in the Eighth Amendment context, courts have held that denial of gender affirming surgery must be based on individualized assessments, not categorical bans.

For example, in *Edmo*, the Ninth Circuit affirmed a district court order requiring the Idaho Department of Corrections to provide gender affirming surgery to Edmo, a transgender prisoner. 935 F.3d at 771. Therein, Edmo received hormone therapy after being diagnosed with gender dysphoria. *Id.*

surgery.³⁴ Defense Health Agency guidance recognizes that transition is “variable and individualized,”³⁵ and that “[f]or some, this may involve surgical procedures.”

Further, the Federal Bureau of Prisons has recognized that, for certain transgender prisoners, “surgery may be the final stage in the transition process.”³⁶ Accordingly, transgender prisoners are permitted to submit a request for “surgical consideration” after certain conditions are satisfied.³⁷ The relevant medical director then conducts an “*individualized assessment*” to “determine if the surgery is medically appropriate for referral to a gender affirming surgeon.”³⁸

In all, the federal government recognizes that coverage for gender affirming surgery depends on a case-by-case assessment. And it recognizes, at least for its own employees, that these determinations should be “consistent with” recognized

³⁴ See DEFENSE HEALTH AGENCY, PROCEDURAL INSTRUCTIONS GUIDANCE FOR GENDER-AFFIRMING HEALTH CARE OF TRANSGENDER AND GENDER-DIVERSE ACTIVE AND RESERVE COMPONENT SERVICE MEMBERS (May 12, 2023).

³⁵ *Id.* at 44.

³⁶ U.S. DEPT. OF JUST., FED. BUREAU OF PRISONS, TRANSGENDER OFFENDER MANUAL (2022), <https://www.bop.gov/policy/progstat/5200-08-cn-1.pdf>.

³⁷ *Id.*

³⁸ *Id.*

“hormonal therapy, mental health care, preoperative evaluation, and medically

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitation of Federal Circuit Rule 27(d) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and Federal Circuit Rule 32(b)(2), this document contains 3,896 words.

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Dated: January 29, 2024

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CERTIFICATE OF SERVICE

I hereby certify that, on the 29th day of January, 2024, I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

Dated: January 29, 2024

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