No. 17-1460

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rule 47.4, Barry Levenstam, counsel for *amici curiae* the American Academy of Nursing, the American College of Physicians, the American Medical Student Association, the American Nurses Association, GLMA: Health Professionals Advancing LGBT Equality, the Lesbian, Gay, Bisexual, and Transgender Caucus of Public Health Professionals, the Lesbian, Bisexual, Gay and Transgender Physician Assistant Caucus of the American Academy of PAs, Inc., and the World Professional Association for Transgender Health, certifies the following:

1. The full names of the *amici curiae* represented by me are the American Academy of Nursing, the American College of Physicians, the American Medical Student Association, the American Nurses Association, GLMA: Health Professionals Advancing LGBT Equality, the Lesbian, Gay, Bisexual, and Transgender Caucus of Public Health Professionals, the Lesbian, Bisexual, Gay and Transgender Physician Assistant Caucus of the American Academy of PAs, Inc., and the World Professional Association for Transgender Health.

2. The names of the real parties in interest represented by me are the American Academy of Nursing, the American College of Physicians, the American Medical Student Association, the American Nurses Association, GLMA: Health Professionals Advancing LGBT Equality, the Lesbian, Gay, Bisexual, and

Transgender Caucus of Public Health Professionals, the Lesbian, Bisexual, Gay and Transgender Physician Assistant Caucus of the American Academy of PAs, Inc., and the World Professional Association for Transgender Health.

3. No publicly held corporation owns 10% or more of the stock of the American Academy of Nursing, the American College of Physicians, the American Medical Student Association, the American Nurses Association, GLMA: Health Professionals Advancing LGBT Equality, the Lesbian, Gay, Bisexual, and Transgender Caucus of Public Health Professionals, the Lesbian, Bisexual, Gay and Transgender Physician Assistant Caucus of the American Academy of PAs, Inc., or 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: Jenner & Block LLP; Barry Levenstam; and Devi M. Rao.

June 28, 2017

/s/ Barry Levenstam
Barry Levenstam
Counsel for *Amici Curiae*

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or gender identity. The Academy supports initiatives to address the health needs of transgender individuals and supports policy initiatives which support transgender individuals' unique health concerns and reduce the health care barriers that transgender individuals encounter.

The American College of Physicians ("ACP") is the largest medical specialty organization in the United States. ACP members include 148,000 internal medicine physicians (internists), related subspecialists, and medical students. Internal medicine physicians are specialists who apply scientific knowledge and clinical expertise to the

GLMA: Health Professionals Advancing LGBT Equality ("GLMA") is the largest and oldest association of LGBT healthcare professionals. GLMA's mission is to ensure equality in healthcare for LGBT individuals and healthcare professionals, using the medical and health expertise of GLMA members in public policy and advocacy, professional education, patient education and referrals, and the promotion of research. GLMA (formerly known as the Gay & Lesbian Medical Association) was founded in 1981 in part as a response to the call to advocate for policy and services to address the growing health crisis that would become the HIV/AIDS epidemic. Since then, GLMA's mission has broadened to address the full range of health issues affecting LGBT people and GLMA has become a leader in public policy advocacy related to LGBT health. To advance its mission, GLMA provides cultural competency courses for medical providers, including in transgender health.

Since it was established in 1975, the Lesbian, Gay, Bisexual, and Transgender Caucus of Public Health Professionals (the "LGBT Caucus") has been an active group of interdisciplinary public health professionals committed to furthering LGBT issues within the American Public Health Association, and the field of public health at large. The LGBT Caucus is especially aligned with

necessary surgeries in addition to other transition related care. The LGBT Caucus includes public health professionals from many diverse disciplines, including researchers, clinicians, community health workers, public health students, and a diverse group of other public health professionals. The LGBT Caucus supports access and coverage of transition surgery for America's veterans. The VA has previously been at the forefront of ensuring that America's veterans receive the best world class healthcare for the entire range of their health needs, and the LGBT Caucus strongly urges the VA to not stop short of ensuring full coverage for surgery.

The Lesbian, Bisexual, Gay and Transg

Caucus joins the brief for reasons expresse

ARGUMENT

I. Sex Reassignment Surgery Is A Clinically Effective, Medically Necessary Treatment For Certain Patients For Whom Psychotherapy And Hormone Therapy Are Not Sufficient To Treat Gender Dysphoria.

A. Many Individuals With Gender Dysphoria Require Medical Treatment.

Gender dysphoria is the medical term for the distress indicated by a strong, persistent cross-gender identification in which individuals "are cruelly imprisoned in a body incompatible with their subjective gender identity." *Merck Manual of Diagnosis and Therapy* 1568 (Robert S. Porter et al TD6i8sh., 19J/4,aiie(A.)TJtain Pa

The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders recognizes the following diagnostic criteria for gender dysphoria in adolescents and adults:

> A) 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 a

disability within the meaning of the Americans with Disabilities Act. *Blatt v. Cabela's Retail, Inc.*, No. 5:14-cv-04822, 2017 WL 2178123, at *4 (E.D. Pa. May 18, 2017).

At the core of the assessment of gender dysphoria are the persistent cross-gender identification and discomfort and distress that result from gender incongruence. The World Health Organization has recognized that gender dysphoria involves a "profound disturbance" with an individual's gender identity and "a persistent preoccupation with the dress and/or activities of the opposite sex and/or repudiation of the patient's own sex." WHO, *supra* p. 10, F64.2. Before treatment begins, individuals with gender dysphoria "live in a dissociated state of mind and body." David Seil, *The Diagnosis and Treatment of Transgendered Patients*, 8 J. Gay & Lesbian Psychotherapy 99, 115 (2004) (describing the diagnosis and treatment of 271 transgender patients between 1979 and 2001). In these individuals, "[t]he mind is of one gender, and the body is of the other." *Id.*

As a result of the gender dysphoria, some male-to-female individuals resort to self-treatment with hormones or, in some cases, attempt their own castration or penectomy. DSM-5 at 454; Brown, *Autocastration and Autopenectomy as Surgical Self-Treatment*, at 33. In these cases, individuals with gender dysphoria before gender reassignment are at increased risk for suicidal ideation, suicide attempts, and suicide. *Id.* The literature in the field is replete with accounts of

individuals who have taken their own lives or attempted to do so because their gender dysphoria was not properly assessed and treated, with some studies finding

gender identity disorders"). Informed by current consensus in medical research and clinical practice, the WPATH Standards of Care emphasize that treatment must consider each patient's unique anatomic, social, and psychological situation. WPATH, *Standards of Care*, at 2. "Treatment is individualized: What helps one person alleviate gender dysphoria might be very different from what helps another person." *Id.* at 5. "While many transsexual, transgender, and gender-nonconforming individuals find comfort with their gender identity, role, and expression without surgery, for many others surgery is essential and medically necessary to alleviate their gender dysphoria." *Id.* at 54. Studies have shown that SRS is a safe and effective treatment for gender dysphoria. *See id.*

most appropriate care plan unique to the patient's needs." *Id.* In other words, "[g]enital and breast/chest surgical treatments for gender dysphoria are not merely another set of elective procedures." *See* WPATH, *Standards of Care*, at 55. They are medically necessary treatments for gender dysphoria to be undertaken only after "assessment of the patient by qualified mental health professionals" to determine that the patient has "met the criteria for a specific surgical treatment." *Id.*

C. Some Individuals With Severe Gender Dysphoria Cannot Manage Their Gender Dysphoria With Psychotherapy And Hormone Therapy.

Medical and mental health professionals widely recognize that for some individuals, especially those with severe gender dysphoria, it is impossible to manage their distress with psychotherapy and/or hormone therapy alone. Seil, *The Diagnosis and Treatment of Transgendered Patients* at 114-16; Yolanda L.S. Smith, *et al*., *Adolescents With Gender Identity Disorder Who Were Accepted or Rejected for Sex Reassignment Surgery: A Prospective Follow-up Study*, 40 J. Am. Academy Child Adolescent Psychiatry 472, 473 (2001); Walter O. Bockting & Eli Coleman, *A Comprehensive Approach to the Treatment of Gender Dysphoria*, 5 J. Psychol. & Human Sexuality, vol. 4 1993, at 131, 150. For these patients, "relief from gender dysphoria cannot be achieved without modification of their primary

and/or secondary sex characteristics to establish greater congruence with their gender identity." WPATH, *Standards of Care*, at 54-55.

As medical and mental health professionals have recognized, gender identity cannot be changed through psychotherapy, "[h]owever, the body can be changed, and when a proper transition to the other gender has been completed, the dissociation" of gender dysphoria may be lessened. Seil, *The Diagnosis and Treatment of Transgendered Patients*, at 115. Research has shown that many of those seeking treatment for gender dysphoria regard their genitals and sexual features with repugnance. *Merck Manual*, at 1570. As a result, some individuals with gender dysphoria prioritize "obtain[ing] hormones and genital surgery that will make their physical appearance approximate their felt gender identity." *Id.* It is the combination of psychotherapy, hormone therapy, and SRS that "is often curative when the disorder is appropriately diagnosed and clinicians follow the internationally accepted standards of care." *Id.* Empirical studies reflect the importance of the interplay among treatments, finding hormone therapy in conjunction with psychotherapy and, for some, SRS, to be necessary elements of treating severe levels of gender dysphoria. *See* Gianna E. Israel & Donald E. Tarver II, *Transgender Care: Recommended Guidelines, Practical Information & Personal Accounts* 56-73 (1997).

Treatment utilizing SRS for individuals with severe gender dysphoria may be vital to a patient's health. *See* Smith, 40 J. Am. Academy Child & Adolescent

a mastectomy, Mr. Silva continued to have breasts, causing him mental, emotional, and physical pain. Appx127, ¶ 16. Mr. Silva finds it "hard to put into words how profoundly [he is] affected by the VA's policy of denying transition-related surgical care to people like [him]." *Id*. Mr. Silva has "attempted suicide many times because of [his] inability to access the medical care" he needs. Appx127, ¶ 17. Mr. Silva believes that he "will no longer be as anxious and depressed after [his] transition," which he cannot afford without VA coverage. Appx127, ¶ 18.

Unfortunately, these stories are not unusual. Many transgender veterans "have experienced and continue to experience extreme and sometimes life-threatening hardships because they cannot obtain coverage" for medically-necessary healthcare services to complete their transition. Appx114, ¶ 13. For example, in June 2015 a transgender veteran, a retired Sergeant, took her own life, referencing in her suicide note her inability to have "medical procedures covered as a reason for her desperation and hopelessness." Appx114, ¶ 14. Thus, "[i]f the VA were to amend its regulations to include coverage of sex reassignment surgery, such an amendment would significantly improve the physical and mental health of . . . transgender veterans with gender dysphoria." Appx114, ¶ 12. In short, SRS is an effective and medically necessary treatment for certain patients, like Ms. Fulcher, Mr. Silva, and other transgender veterans, for whom psychotherapy and hormone therapy are insufficient treatment for gender dysphoria.

II. Case-By-Case Assessment And Appropriate Treatment Of Veterans With Gender Dysphoria Is Necessary To Prevent Physical And Emotional Harm.

A. Medical And Mental Health Organizations, Courts, And The Federal Government Have All Recognized The Importance Of Individualized Care.

Because not all patients require the same therapeutic care, medical and mental health professionals must make treatment decisions on a case-by-case basis. This is a fundamental principle of the WPATH Standards of Care, which state: "While many transsexual, transgender, and gender nonconforming individuals find comfort with their gender identity, role, and expression without surgery, for many others surgery is essential and medically necessary to alleviate their gender dysphoria." *See* WPATH, *Standards of Care*, at 54.

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:

- "The American College of Physicians recommends that public and private health benefit plans include comprehensive transgender health care services and provide all covered services to transgender persons as they would all other beneficiaries." Daniel & Butkus, 163 Annals of Internal Med. 135, 136.

- In its Standards of Care, WPATH "urges health insurance companies and other third-party payers to cover the medically necessary treatment to alleviate gender dysphoria." WPATH, *Standards of Care*, at 33.
- The American Medical Association ("AMA") "supports public and private health insurance coverage for treatment of gender dysphoria as recommended by the patient's physician." AMA Policy H-185.950, https://policysearch.ama-assn.org/policyfinder/detail/H-185.950?uri=%2FAMADoc%2FHOD.xml-0-1128.xml.
- "The American College of Obstetricians and Gynecologists opposes discrimination on the basis of gender identity and urges public and private health insurance plans to cover the treatment of gender identity disorder." American College of Obstetricians & Gynecologists, Committee Opinion of the Committee on Healthcare for Underserved Women, No. 512, *Health Care for Transgender Individuals* (Dec. 2011).
- The American Psychiatric Association "[a]dvocates for removal of barriers to care and supports both public and private health insurance coverage for gender transition treatment" and "[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 Variant Individuals* (2012),

https://www.psychiatry.org/file%20library/about-apa/organization-documents-policies/policies/position-2012-transgende

the psychological distress." *Id.* at 554. Following this individualized course of treatment depending on an individual's needs, "[i]n the most severe cases, sexual reassignment surgery may be appropriate." *Id.*;

and treatment: HHS recently overturned a blanket ban on providing Medicare coverage for SRS. *See In re NCD 140.3, Transsexual Surgery*, DAB Dec. No. 2576, Docket No. A-13-87 (HHS, Appeals Bd., May 30, 2014), https://www.hhs.gov/sites/default/files/static/dab/decisions/board-decisions/2014/dab2576.pdf. In May 2014, the HHS Appeals Board determined that the blanket denial of "Medicare coverage of all transsexual surgery as a treatment for transsexualism" failed the Board's "reasonableness standard." *Id.* at 1. The Board found that SRS "is an effective treatment option in appropriate cases," *id.* at 15, and that the WPATH Standards of Care, which have "attained widespread acceptance," *id.* at 23, include "criteria for the use of" SRS, *id.* at 15 n.22.

Empirical studies of individuals who have undergone the full treatment prescribed by medical and mental health professionals for their diagnosis further demonstrate that gender dysphoria "is not a homogenous phenomenon," and that it requires "a more varied treatment approach." P.T. Cohen-Kettenis & L.J.G. Gooren, *Transsexualism: A Review of Etiology, Diagnosis and Treatment*, 46 J. Psychosomatic Res. 315, 328 (1999) (reviewing empirical studies on those with gender dysphoria).

Further, despite actuarial fears of over-utilization and a potentially expensive benefit, programs that have expanded to include coverage of SRS have found the

economic costs to be minimal compared to other insurance costs. *See* Jody L. Herman, The Williams Institute, *Costs and Benefits of Providing Transition-Related Health Care Coverage in Employee Health Benefits Plans: Findings From a Survey of Employers* 2, 11, 15, 16 (Sept. 2013), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Herman-Cost-Benefit-of-Trans-Health-Benefits-Sept-2013.pdf; Human Rights Campaign, *San Francisco Transgender Benefit: Actual Cost & Utilization (2001-2006)*, http://www.hrc.org/resources/entry/san-francisco-transgender-benefit-actual-cost-utilization-2001-2006 (last visited June 19, 2017).

B. The VA's Blanket Ban On Sex Reassignment Surgery Denies Individualized Care And Disrupts Continuity Of Patient Care.

Blanket bans on SRS—such as the VA's ban—disrupt continuity of patient care. Continuity of care for transgender patients is an important principle in the WPATH Standards of Care. The Standards of Care advise that "[h]ealth professionals should stress the importance of postoperative follow-up care with their patients and offer continuity of care." *See* WPATH, *Standards of Care*, at 3, 65. In conflict with this important standard of care, the VA covers all medically necessary care for transgender veterans *except* for SRS:

> It is VHA policy that medically necessary care is provided to enrolled or otherwise eligible intersex and transgender Veterans, including hormonal therapy, mental health care, preoperative evaluation, and medically necessary post-operative and long-term care following sex

This can lead to terrible and absurd results. For example, when one transgender veteran was denied coverage of her medically-necessary SRS, she went to Tijuana, Mexico to obtain that surgery. She did this because the VA's denial of coverage required her to pay for the surgery out-of-pocket and had she obtained the surgery in the U.S. it would have been three times as expensive. After the Mexican doctor botched her surgery, she was forced to undergo years of post-operative care, including corrective surgeries, through the VA. *See, e.g.*, Nicole Comstock, California Veteran Shares Story of Gender Transition, FOX40 (May 11, 2015), http://fox40.com/2015/05/11/california-veteran-shares-story-of-gender-transition/. Had the VA provided coverage of the veteran's surgery at the outset, her operation would have been conducted correctly, sparing the patient years of pain and, likely, saving taxpayers money.

The VA's refusal to cover such care has no basis in medicine. In fact, the VA has repeatedly recognized that surgical care is medically necessary. In letters to a number of Members of Congress explaining that the agency was not in the process of rulemaking on this issue, the VA's Under Secretary for Health unequivocally stated that "[i]ncreased understanding of both gender dysphoria and surgical techniques in this area has improved significantly and is now widely accepted as medically necessary treatment." Appx1-47 (Letters from Shulkin, to Sen. Warren et al.); *see also* Appx305 (Removing Gender Alterations Restriction

In sum, because of the individual nature of gender dysphoria and its treatment, medical and mental health professionals must evaluate each patient with gender dysphoria on a case-by-case basis to prescribe the proper therapeutic treatment. Some transgender veterans require SRS, and the VA's blanket policy of denying SRS precludes case-by-case assessment and treatment of individuals with gender dysphoria. Thus, this blanket ban prevents medical and mental health professionals from prescribing the proper treatment and places veterans at substantially greater risk of physical and emotional harm.

519 (Oct. 25, 2007), https://www.va.gov/vetapp07/files4/0733550.txt (noting that the patient had undergone a total penectomy at a VA hospital due to cancer).

CONCLUSION

For all of these reasons, *amici curiae* respectfully submit that the Court should grant the petition.

Dated: June 28, 2017

Respectfully submitted,

By: /s/ Barry Levenstam

Barry Levenstam
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, Illinois 60654-3456
Telephone: (312) 923-2735
Facsimile: (312) 840-7735

Devi M. Rao
JENNER & BLOCK LLP
1099 New York Avenue, NW
Washington, D.C. 20001-4412
Telephone: (202) 639-6000
Facsimile: (202) 639-6066

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that, on the 28th day of June, 2017, 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.

/s/ Barry Levenstam

Barry Levenstam
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, Illinois 60654-3456
Telephone: (312) 923-2735
Facsimile: (312) 840-7735

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Circuit Rule 32(a) because this brief contains 5,536 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Times New Roman 14-point font.

/s/ Barry Levenstam

Barry Levenstam
JENNER & BLOCK LLP
353 N. Clark Street
Chicago, Illinois 60654-3456
Telephone: (312) 923-2735
Facsimile: (312) 840-7735

Counsel for Amici Curiae

Date: June 28, 2017