

No. 17-1460

**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. Section 502

**BRIEF OF REAR ADMIRAL DR. ALAN STEINMAN, MAJOR
GENERAL PATRICIA A. ROSE, REAR ADMIRAL MICHAEL E.
SMITH, AND SWORDS TO PLOWSHARES
AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS**

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2. The names of the real parties in interest are as listed above.
3. *Amici* have no parent corporation, and no publicly owned corporation owns 10% or more of stock in any *amici curiae*.
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/s/ Roy T. Englert, Jr.

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INTERESTS OF *AMICI CURIAE*

Amici are retired flag and general officers of the United States military and a leading veterans' service organization.¹ They have a significant interest in this case because they understand that, if veterans are denied the medical care they need because of their transgender status, it will undermine the military's recruitment and retention efforts. Furthermore, by violating the military's core values, denying transgender veterans essential medical services will also undermine military morale. *Amici* therefore urge this court to grant the petition for review and direct the Secretary of Veterans Affairs to consider the petition for rulemaking in a manner consistent with military necessity, military values, and the law.

Amici's views are based on decades of experience and accomplishments at the highest positions in our country's military leadership, as well as decades representing the interests of veterans:

- Rear Admiral Alan Steinman, M.D., USCG/USPHS, Ret., is an expert on occupational and preventive medicine with more than 25 years of service in the United States Coast Guard and the Public Health Service. He has served as Director of Health and Safety (equivalent to the Surgeon General) for the

¹ No counsel for a party authored this brief in whole or in part, and no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

U.S. Coast Guard, as medical advisor to the Coast Guard's Chief of Operations, and as rescue physician on numerous Coast Guard search and rescue missions.

- Major General Patricia A. Rose, USAF, Ret., retired after 33 years of service in the U.S. Air Force. Most recently, she served as the Mobilization Assistant to the Deputy Chief of Staff for Logistics, Engineering and Force Protection, Headquarters U.S. Air Force, Washington, D.C. In that role, she supported the Deputy Chief of Staff in leadership, management, and integration of Air Force logistics readiness, aircraft and missile maintenance, civil engineering, and security forces, as well as setting policy and preparing budget estimates that reflected enhancements to productivity, combat readiness, and quality of life for Air Force members. She was previously Mobilization Assistant to the Director for Logistics, Engineering, and Security Assistance, U.S. Pacific Command, and Mission Director for the U.S. Central Command Deployment and Distribution Operations Center in Southwest Asia, where she directed joint logistics for operations Iraqi Freedom and Enduring Freedom.
- Rear Admiral Michael E. Smith, USN, Ret., retired in 2015 after 32 years of service. A 1983 graduate of the Naval Academy, his Flag assignments

included Commander of Carrier Strike Group 3, President of the Board of Inspection and Survey, and on the Navy Staff as the Division Director responsible for Navy Strategy and Policy. He served as flag secretary to the commander, U.S. 6th Fleet, during the build-up to and operations in Kosovo and as commander, Destroyer Squadron 23, and the deputy task force commander overseeing coalition maritime operations in the Northern Arabian Gulf during Operation Iraqi Freedom. He also served as special assistant to two Chairmen of the Joint Chiefs of Staff and as the executive assistant to the commander, U.S. Pacific Command.

- Swords to Plowshares is a community-based not-for-profit 501(c)(3) organization that provides needs assessment and case management, employment and training, housing, and legal assistance to approximately 3,000 veterans in the San Francisco Bay Area each year. Swords to Plowshares' mission is to heal the wounds of war, to restore dignity, hope, and self-sufficiency to all veterans in need, and to prevent and end homelessness and poverty among veterans.

SUMMARY OF ARGUMENT

Since the Nation's earliest days, our military leadership has recognized that recruiting and retaining a volunteer force necessary to protect national security

requires a firm commitment to providing essential benefits to veterans after they leave the service. Chief among those benefits today are the healthcare services that the Department of Veterans Affairs (VA) provides to all veterans—both those with service-related disability and those without.

The military has begun to open its ranks to transgender servicemembers so that it will be able to avail itself of the full pool of potential recruits—and ensure the continued effectiveness of the Nation’s armed forces. But that ongoing process is only half the battle. To recruit the best and the brightest, the military must fulfill its promise to provide essential benefits to veterans, including medically necessary healthcare services. By excluding medically necessary sex reassignment surgery for transgender veterans, however, the VA’s current policy will only shrink the pool of available military recruits—and threaten the continued effectiveness of our armed forces.

Discrimination in the provision of essential healthcare benefits violates the military’s, and the VA’s, core values. The VA’s policy—which denies transgender veterans the medical care that their VA doctors have deemed medically necessary—is discrimination against transgender veterans. Indeed, as the Department of Defense recognizes, discrimination on the basis of transgender status *is* discrimination on the basis of sex. Discrimination of any kind has no

place in our military—or in the VA, which is tasked with providing comprehensive medical services to all veterans.

We urge this Court to grant the petition and require the VA to bring its policy in line with core military values and the recruitment and retention needs of our fighting forces.

ARGUMENT

I. PROVIDING ALL MEDICALLY NECESSARY HEALTHCARE TO VETERANS—INCLUDING TRANSGENDER VETERANS—IS ESSENTIAL TO THE EFFECTIVENESS OF THE MILITARY

“It is ‘obvious and unarguable’ that no governmental interest is more compelling than the security of the Nation.” *Haig v. Agee*, 453 U.S. 280, 307 (1981) (quoting *Aptheker v. Secretary of State*, 378 U.S. 500, 509 (1964)). Our national security today is protected by an all-volunteer military. Today, as throughout our Nation’s history, an essential component of the recruitment pitch to would-be volunteer servicemembers is the array of benefits provided to veterans after service. Those benefits serve as a critical “inducement for enlistment and re-enlistment.” *McCarty v. McCarty*, 453 U.S. 210, 234 (1981).

Congress, the military, and the VA have made these commitments out of both rational self-interest and moral obligation: Taking care of veterans not only is an essential part of the military’s recruitment efforts, but also is the right thing to do. Thus the recruitment offer to prospective servicemembers has always included

a promise that, after honorable service, recruits would benefit from a series of programs intended to ease their transition to civilian life and to help them flourish.

Today, the promise of healthcare benefits is a central component of the commitment that the military makes to incoming recruits. To make that promise a reality, Congress has provided that veterans will receive all medically necessary care, to the extent Congress appropriates sufficient funds. 38 U.S.C. § 1710. By denying transgender veterans the medical benefits that their VA doctors have deemed medically necessary, however, the VA has broken that core promise—and risks harming the effectiveness of the Nation’s volunteer military.

A. Military Recruiting Depends On The Commitment To Provide Benefits To Veterans

Since the Revolution, promises to care for veterans have been an essential part of the military’s recruitment effort. During the Revolutionary War, for example, General Washington insisted that the Continental Congress provide benefits to veterans, out of concern that his fledgling army would otherwise be unable to recruit soldiers. He worried that volunteers would be unwilling “to sacrifice all views of present interest, and encounter the numerous vicissitudes of War” unless Congress pledged “to make a decent provision for their future support.” Letter from George Washington to John Banister, in George Washington: A Collection 98 (W.B. Allen, ed. 1988), http://lf-oll.s3.amazonaws.com/titles/848/0026_Bk.pdf. Without such a commitment to

provide for veterans after their service, General Washington feared that his military would be “without discipline, without energy, incapable of acting with vigor, and destitute of those cements necessary to promise success, on the one hand, or to withstand the shocks of adversity, on the other.” *Id.* at 99.

Over the next two centuries, benefits to veterans took many forms, but the basic commitment for which Washington advocated has remained. In 1789, the First Congress enacted legislation providing disability compensation for wounded veterans. Act of Sept. 29, 1789, Ch. 24, 1 Stat. 95. In 1818, the Service Pension Law provided that every veteran who had served in the Revolutionary War and was in need of assistance would receive a fixed pension for life. Act of March 18, 1818, 3 Stat. 410. And, during the antebellum era, Congress provided veterans with land for service. See James D. Ridgway, *The Splendid Isolation Revisited: Lessons from the History of Veterans’ Benefits Before Judicial Review*, 3 Veterans L. Rev. 135, 149-50 (2011).

The current system of providing healthcare benefits to veterans can be traced to the Civil War. The day before his second inauguration, President Lincoln signed a law establishing a national asylum for soldiers—the first government institution created specifically for honorably discharged volunteer soldiers. See U.S. Dep’t of Veterans Affairs, *History—Department of Veterans Affairs (VA)*, https://www.va.gov/about_va/vahistory.asp. In his second inaugural address,

Lincoln called on Congress “to care for him who shall have borne the battle and for his widow, and his orphan”—an exhortation that later became the VA’s motto. Second Inaugural Address of Abraham Lincoln, March 4, 1865, http://avalon.law.yale.edu/19th_century/lincoln2.asp. By 1930, there were eleven government-run healthcare facilities for veterans—facilities that exist to this day as VA Medical Centers. See U.S. Dep’t of Veterans Affairs, *The Civil War: The Origins of Veterans’ Health Care*, <https://www.va.gov/health/newsfeatures/20110413a.asp>.

In the aftermath of World War I, Congress consolidated veterans programs (including medical centers) managed by several overburdened agencies to create a single Veterans Administration. An Act to Authorize the President to Consolidate and Coordinate Governmental Activities Affecting War Veterans, Pub. L. No. 71-536, 46 Stat. 1016 (1930). Congress and the President subsequently expanded VA medical coverage to extend to *all* conditions, whether service-related or not, and to *all* veterans, whether their service had been in wartime or peacetime. See Exec. Order No. 6232 (1933); see also Ridgway, *supra*, at 219. After World War II, the GI Bill of Rights further expanded the scope of benefits provided to veterans,

while the VA health system was transformed “from an acute disability treatment service to a general health care system for veterans.” Ridgway, *supra*, at 188.²

B. The 1996 Act Guaranteed A New Promise To America’s Military Recruits: Health Care As Necessary

Consistent with the federal government’s guarantee to provide veterans necessary healthcare coverage, the Veterans’ Health Care Eligibility Reform Act of 1996, Pub. L. No. 104-262, 110 Stat. 3177, § 101 (codified at 38 U.S.C. § 1710), further expanded access to VA benefits for all veterans. The 1996 Act set a new “simple” standard for eligibility: a “clinically appropriate ‘need for care’ test,” under which “medical judgment rather than legal criteria will determine when care will be provided and the level at which that care will be furnished.” H.R. Rep. No. 104-690, at 4 (1996). Medical necessity thus sets the standard for whether veterans are eligible for care.³ All veterans who enroll in the VA health care system are now eligible to receive the care their VA doctor determines they need. See 38 C.F.R. § 17.36(b).

² Benefits to veterans today take many forms, including home-loan assistance, job training, educational benefits, and life insurance, among others. See 38 C.F.R. Parts 9, 17, 21, 36; U.S. Dep’t of Veterans Affairs, *Veterans Benefit Administration*, <http://www.benefits.va.gov/benefits/>.

³ Whether Congress provides adequate funding to provide care for all those who are eligible for it is a distinct question, separate from a veteran’s eligibility for care.

Thus, beyond the coverage that the VA is required to provide to specific classes of veterans (such as those with service-connected disabilities, former prisoners of war, and veterans unable “to defray the expenses of necessary care”), Section 1710 also authorizes the VA to provide “needed” “medical services” to *all* veterans “to the extent resources and facilities are available.” 38 U.S.C. § 1710(a)(3); see generally *E. Paralyzed Veterans Ass’n, Inc. v. Sec’y of Veterans Affairs*, 257 F.3d 1352, 1355 (Fed. Cir. 2001).

Expanding eligibility to VA benefits was an effort to fulfill promises made to servicemembers, as well as a promise to recruits—the core bargain necessary to recruit an effective volunteer military. As Congressman Hayworth said to his colleagues during debate on the 1996 Act, “Veterans have kept their promises to the Government. We must honor our commitment to them by providing veterans with the necessary tools for survival.” 142 Cong. Rec. E1441-01, 1996 WL 434824 (statement of Congressman Hayworth, August 1, 1996). As we show below, the VA cannot fully honor that commitment unless it provides healthcare coverage to all veterans, including veterans who—according to their VA physicians—require sex reassignment surgery.

C. As The Pool Of Potential Military Recruits Widens, The Benefits Provided To Veterans Must Also Change

The commitments that the federal government has made to veterans have furthered the military’s substantial interest in recruiting servicemembers from as

broad a pool of potential recruits as possible. Denying coverage for transgender veterans' needed medical services, however, will serve only to shrink the pool of available recruits—and thus the military's ability to recruit individuals necessary to accomplish the military's mission.

As then-Secretary of Defense Ash Carter recently explained, “the Defense Department and the military need to avail ourselves of all talent possible in order to remain what we are now, the finest fighting force the world has ever known.” Secretary of Defense Ash Carter, Department of Defense Press Briefing by Secretary Carter on Transgender Service Policies in the Pentagon Briefing Room (June 30, 2016), <https://www.defense.gov/News/Transcripts/Transcript-View/Article/822347/department-of-defense-press-briefing-by-secretary-carter-on-transgender-service/> [hereinafter *Press Briefing*]. “We have to have access to 100 percent of America's population for our all-volunteer force to be able to recruit from among them the most highly qualified and to retain them.” *Ibid.*

Secretary Carter therefore announced in 2016 that transgender individuals would be able to serve openly in the U.S. armed forces. *Ibid.* Although that policy (whose implementation is ongoing) is a necessary step toward exploiting the full pool of potential military recruits—and thus toward maximizing military effectiveness—it is not sufficient. Expanding the pool of possible servicemembers

also requires expanding the scope of available benefits to servicemembers and veterans.

That is the lesson from the expanded role that women have played in the armed forces. As the number of female servicemembers has increased, the VA has expanded access to women-specific healthcare. Department of Veterans Affairs Women Veterans Task Force, *Strategies for Serving Our Women Veterans 2012 Report* (2012), https://www.va.gov/opa/publications/Draft_2012_Women-Veterans_StrategicPlan.pdf. The VA now has Women's Health Centers in 80 VA Medical Centers, and a women's healthcare provider in each of the VA's 140 health systems with primary care services. See Iraq and Afghanistan Veterans of America, *Fully Recognize and Improve Services for Women Vets*, <https://iava.org/fully-recognize-and-improve-services-for-women-vets/>; see also Disabled American Veterans, *Women Veterans: The Long Journey Home*, <https://www.dav.org/wp-content/uploads/women-veterans-study.pdf>; Samantha Michaels, *Is the VA Ready For An Influx of Female Veterans?*, Mother Jones (Feb. 11, 2016), <http://www.motherjones.com/politics/2016/02/congress-might-make-women-register-draft-are-veterans-hospitals-ready/>.

The VA has therefore recognized that it is not enough simply to *allow* a class of individuals—for example, women—to serve in the military; it must also provide the full panoply of benefits to those individuals, including necessary

healthcare. By the same token, it is insufficient to open the military to transgender individuals without expanding the scope of benefits afforded to those servicemembers as veterans. The service branches cannot effectively recruit from this newly available pool of Americans if they must admit to potential recruits that essential, medically necessary healthcare will be denied to them simply because they are transgender.

Denying medically necessary coverage for transgender veterans not only calls into question the military's commitment to transgender recruits, but also undermines the military's promises to *all* recruits. A VA that denies medically necessary healthcare to some veterans is a VA that cannot be counted on to stand by its commitment to provide medically necessary healthcare to others.

II. DISCRIMINATING AGAINST TRANSGENDER SERVICE-MEMBERS IS ANTITHETICAL TO THE MILITARY'S CORE VALUES

Discrimination against transgender veterans in the provision of medically necessary healthcare contravenes the core values of the service branches, the Department of Defense, and the VA.

A. The Military Abides By Core Values

The Department of Defense, each of the service branches, and the VA have established core values that guide and define their service. As the VA explains, “[o]ur values are more than just words—they affect outcomes in our daily

interactions with Veterans and eligible beneficiaries and with each other.” U.S. Dep’t of Veteran Affairs, *About the VA, Mission, Vision, Core Values & Goals*, https://www.va.gov/about_va/mission.asp. Army soldiers live their core values “every day in everything they do.” U.S. Army, *The Army Values*, <https://www.army.mil/values/>.

Denying transgender veterans the healthcare they need is contrary to those values. For example, the Navy’s Core Values are honor, courage, and commitment. Commitment, the Navy explains, includes a commitment to “[s]how respect toward all people without regard to race, religion, or gender”; and to “[t]reat each individual with human dignity.” U.S. Navy, *Honor, Courage, Commitment*, http://www.navy.mil/navydata/nav_legacy.asp?id=193. And the Marine Corps understands its core value of Honor—the “bedrock” of Marines’ “character”—to include a commitment to “respect human dignity; and to have respect and concern for each other.” U.S. Marines, *Human Resources and Organizational Management*, <http://www.hqmc.marines.mil/hrom/New-Employees/About-the-Marine-Corps/Values/>.

The VA’s core values, too, compel equal treatment for all veterans, regardless of gender or transgender status. The VA’s core values are Integrity, Commitment, Advocacy, Respect, and Excellence. U.S. Dep’t of Veteran Affairs, *About the VA, Mission, Vision, Core Values & Goals, supra*. Respect, the VA

explains, includes a commitment to “[t]reat[ing] all those I serve and with whom I work with dignity and respect.” *Ibid.* Indeed, the VA’s Directive on Providing Health Care for Transgender and Intersex Veterans expressly commits to the “respectful delivery of health care to transgender and intersex Veterans” enrolled in the VA health system. VA Directive 2013-003 at 1 (Feb 8, 2013, rev. Jan 19, 2017), https://www.va.gov/vhapublications/ViewPublication.asp?pub_ID=2863. The VA’s decision not to cover medically necessary sex reassignment surgery reneges on that commitment.

B. Discrimination On The Basis Of Transgender Status Violates The Military’s Core Values

The VA’s discrimination on the basis of transgender status violates the military’s core values in four way ways.

First, as the Defense Department itself has recognized, discrimination on the basis of transgender status is a form of sex discrimination. See Directive-type Memorandum (DTM) 16-005, *Military Service of Transgender Service Members*, Attachment at 2, June 30, 2016 (“It is the Department’s position, consistent with the U.S. Attorney General’s opinion, that discrimination based on gender identity is a form of sex discrimination.”).⁴ Thus, discrimination on the basis of

⁴ See also *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, No. 16-3522, 2017 WL 2331751, at *9 (7th Cir. May 30, 2017); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); Memorandum from the Attorney General,

transgender status is inconsistent with the military's commitment to "an environment free from sexual harassment and unlawful discrimination on the basis of race, color, national origin, religion, sex or sexual orientation." *Ibid.*

Second, as noted, denying medically necessary healthcare to transgender veterans abandons promises that the military made to those servicemembers. As Secretary Carter explained when he announced his decision to allow transgender servicemembers to serve openly, "most of our transgender servicemembers must go outside the military medical system in order to obtain medical care [that] is judged by doctors to be necessary, and they have to pay for it out of their own pockets." Secretary of Defense Ash Carter, *Press Briefing, supra*. Forcing servicemembers to bear those costs "is inconsistent with our promise to all our troops that we will take care of them and pay for necessary medical treat[ment]." *Ibid.*

Third, denying transgender veterans the healthcare they need violates the military's core values by failing to respect those veterans' fundamental human dignity. For the transgender veteran for whom sex reassignment surgery is medically necessary—including Petitioners in this case—such surgery is essential to living a life of dignity and fulfillment. Indeed, for many transgender veterans, such surgery literally may be a matter of life or death. See Agnes Gereben

Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964 (Dec. 15, 2014).

Schaefer et al., Rand Center, *Assessing the Implications of Allowing Transgender Personnel to Serve Openly* at 9-10 (2016).

Finally, denying transgender veterans medically necessary care is a further insult to the servicemembers against whom the military has discriminated for generations. There are thousands of transgender veterans who served their country honorably but were forced to serve in silence—or were separated out of the military if found out—for no reason other than ignorance and prejudice. Just as repealing the “Don’t Ask, Don’t Tell” policy freed many gay and lesbian servicemembers from the burden of having to “lie about who they are in order to defend their fellow citizens,” so too has the repeal of the military’s transgender service ban freed transgender servicemembers of that burden. Elisabeth Bumiller, Top Defense Officials Seek to End “Don’t Ask, Don’t Tell,” N.Y. Times (February 2, 2010), <http://www.nytimes.com/2010/02/03/us/politics/03military.html> (statement of Adm. Mike Mullen to Senate Armed Services Committee).

But continuing to deny medically necessary healthcare to transgender veterans sends a harmful message to serving service members: that being transgender marks those soldiers, sailors, airmen, and marines as less than equal members of the military. That message perpetuates a corrosive bias against transgender service members that will continue to prevent their complete acceptance. Put simply, a tiered system of benefits that openly discriminates

against transgender veterans will ultimately corrode morale by perpetuating bias against a minority group.

The strength of our all-volunteer military is its people. For two centuries, the military has promised recruits that they would be taken care of as veterans; the benefits the VA provides are essential to the service branches' recruiting capability. And no benefit the VA provides is more important to veterans than the healthcare it provides to those veterans. To discriminate in the provision of that essential benefit on the basis of transgender status undermines the military's recruitment efforts and flies in the face of the branches' core values.

CONCLUSION

For the foregoing reasons, this Court should to grant the petition.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), the undersigned hereby certifies that this brief complies with the type-volume limitations of Circuit Rule 32(a).

1. Exclusive of the exempted portions of this brief, as provided in Fed. R. App. P. 32(f), the brief contains 3,629 words.

2. The brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(g), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate

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June 28, 2017

CERTIFICATE OF SERVICE

I hereby certify that, on this 28th day of June, 2017, I filed the foregoing Brief of *Amici Curiae* in Support of Petitioners with the Clerk of the United States Court of Appeals for the Federal Circuit via the CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

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