

17-1460

IN THE
United States Court of Appeals
FOR THE FEDERAL CIRCUIT

DEE FULCHER, GIULIANO SILVA,
TRANSGENDER AMERICAN VETERANS ASSOCIATION,

Petitioners,

— v. —

SECRETARY OF VETERANS AFFAIRS,

Respondent.

ON PETITION FOR REVIEW FROM THE UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
PURSUANT TO 38 U.S.C. § 502

BRIEF OF AMICI CURIAE
THE AMERICAN MILITARY PARTNER ASSOCIATION AND OUTSERVE-SLDN
IN SUPPORT OF PETITIONERS

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CERTIFICATE OF INTEREST

Counsel for *Amici Curiae* certifies the following:

1. The full name of every party or amicus represented by me is:

American Military Partner Association; OutServe-SLDN, Inc.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

The parties named above in (1) are the real parties in interest.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

No publicly-held corporation owns 10% or more of the stock of *Amici Curiae*.

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

Katrina M. Quicker, Samuel M. Light, and Kaitlyn Appleby, Baker & Hostetler LLP.

June 28, 2017
Date

/s/ Katrina M. Quicker
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INTERESTS OF THE *AMICI CURIAE*

Amici Curiae the American Military Partner Association (“AMPA”) and OutServe-Servicemembers Legal Defense Network (“OutServe-SLDN”) are non-profit organizations that support lesbian, gay, bisexual and transgender (“LGBT”) current and former members of the United States military and their families.

AMPA and OutServe-SLDN submit this brief to highlight the significant implications of the Court’s decision in this matter for the well-being of LGBT veterans and members of the armed forces, their families, and our nation’s military as a whole.¹

AMPA was founded by partners of active duty service members to connect the families of LGBT service members, support them through the challenges of military service, and advocate on their behalf. AMPA began in 2009 as a “Campaign for Military Partners” by Servicemembers United, an organization focused on repealing the Don’t Ask, Don’t Tell policy (“DADT”). When DADT was repealed in 2011, Servicemembers United wound down its affairs and AMPA formed. The military has long recognized the need for support services for military families, and numerous organizations serve that purpose, but none could extend

¹ No counsel for a party authored this brief in whole or in part, and no such counsel of a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *Amici Curiae* or its counsel made a monetary contribution to its preparation or submission. *Amici Curiae* file this brief with the consent of the parties as required by Federal Rule of Appellate Procedure 29(a) and Federal Circuit Rule 29(c).

those services to the families of LGBT service members while DADT was in effect. Even with the repeal of DADT and the growing acceptance of LGBT service members and their families by other military family organizations, LGBT service member families continue to face unique challenges. AMPA provides a supportive environment for these families to share their experiences and work together to improve their lives. AMPA also advocates for policy changes to improve the lives of LGBT service members and their families. Today, AMPA has more than 40,000 members.

OutServe-SLDN comprises two formerly separate organizations, which merged in 2012: Servicemembers Legal Defense Network (“SLDN”) and OutServe. Since 1993, OutServe-SLDN advocates and provides legal services and assistance to LGBT military, veterans and their families worldwide. SLDN was founded in 1993, in response to Congress enacting DADT to provide free legal services to LGBT service members and veterans affected by DADT. SLDN assisted more than 12,000 active and former service members, and was instrumental in the successful effort to repeal DADT. After DADT’s repeal, SLDN assisted veterans discharged under DADT by correcting discharge records and helping those who wished to return to service; supported transgender military service; helped defend LGBT service members and veterans facing discrimination; and worked to secure equal benefits for LGBT service members, veterans and their

families. OutServe began in 2010 as an underground network of LGBT service members connected via Facebook, and had more than 6,000 members worldwide. During the fight to repeal DADT, OutServe facilitated telling the stories of active duty LGBT service members in the media and at the Pentagon, allowing the voices of those who were serving in silence to be heard.

SUMMARY OF THE ARGUMENT

Petitioners in this case submitted to the United States Department of Veterans Affairs (the “VA” or the “Department”) a petition for rulemaking, requesting that the VA amend or repeal its current rules and regulations that exclude medically necessary sex reassignment surgery from the VA’s Medical Benefits Package, 38 C.F.R. § 17.38 (the “Regulation”). After Members of Congress asked the VA about the status of any proposed rulemaking, the VA responded with letters to those Members of Congress, explaining that the VA would not “explore a regulatory change in the medical benefits package” until “appropriated funding is available.” (Appx1–47.)²

Amici Curiae submit this brief to the Court to argue that the VA’s proffered reason for refusing to engage in the rulemaking process—that the Department requires “appropriated funding”—is antithetical to research, including research conducted by the VA itself, that adding medically necessary sex reassignment surgery to the Medical Benefits Package will, at most, have a minimal impact on the VA’s budget, and could actually provide cost savings to the VA.

² *Amici* refer to items contained in the Joint Appendix using the prefix “Appx__.”

ARGUMENT

A. The United States Department of Veterans Affairs’ Stated Reason For Denying the Petition Does Not Comport With Financial Analyses

The Veterans Health Administration (“VHA”) is the largest of the three administrations that comprise the VA. The VHA functions to “meet Veterans’ changing medical, surgical and quality-of-life needs.”³ In order to fulfill these obligations, the VHA is required to “furnish hospital care and medical services which the Secretary [of Veterans Affairs] determines to be needed for eligible veterans.”⁴ To that end, Congress passed the Veterans Health Care Eligibility Reform Act of 1996,⁵ thus enacting the Veteran’s Medical Benefits Package (the “Package”).⁶ The care provided under the Package is authorized only if it is “needed to promote, preserve, or restore” the health of the individual.⁷ The Package expressly disallows “gender alterations,”⁸ thereby contending that sex reassignment surgeries are not needed by eligible veterans.

This express prohibition is no longer in line with the VHA’s mission to provide medically necessary care to eligible veterans. The American Medical

³ HISTORY—V.A. HISTORY, https://www.va.gov/about_va/vahistory.asp (last visited June 28, 2017).

⁴ 38 U.S.C. § 1710.

⁵ H.R. 3118, 104th Cong. (1996).

⁶ 38 C.F.R. § 17.38

⁷ 38 C.F.R. § 17.38(b); 63 Fed. Reg. 37299, 37300

⁸ 38 C.F.R. § 17.38(c)(4).

Association publicly recognized “an established body of medical research” that “demonstrates the effectiveness and medical necessity of mental health care, hormone therapy, and gender-affirming surgery” as forms of treatment for many patients diagnosed with gender dysphoria.⁹ Similar policy statements have been issued by a range of medical organizations, including the American Psychiatric Association, the American Psychological Association, the American Academy of Family Physicians, the American Academy of Physician Assistants, the National Association of Social Workers and the World Professional Association for Transgender Health, Inc.¹⁰ These organizations all contend that, for a number of transgender people, sex reassignment surgery is a medically necessary treatment that helps alleviate gender dysphoria by bringing one’s physical characteristics into alignment with one’s core, internal sense of gender.¹¹ These services are needed to promote, preserve, and restore the health of a transgender individual.

Sometime after Petitioners submitted their petition for rulemaking to the VA, the VA drafted a Notice of Proposed Rulemaking, which proposed to amend or repeal the Regulation. This would allow the VA to provide medically necessary

⁹ AMERICAN MEDICAL ASSOCIATION HOUSE OF DELEGATES: RESOLUTION 122, *available at* <http://bit.ly/1zJ7Q20> (last visited June 28, 2017).

¹⁰ *See* LAMBDA LEGAL, PROFESSIONAL ORGANIZATION STATEMENTS SUPPORTING TRANSGENDER PEOPLE IN HEALTH CARE INFORMATION SHEET 1–7 (2016), *available at* <http://bit.ly/2rXH2Nd>.

¹¹ WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER-NONCONFORMING PEOPLE 13 (7th Version, 2011), <http://bit.ly/2ev2aHy>

sex reassignment surgery, as part of the Medical Benefits Package. As part of the Notice of Proposed Rulemaking, the VA also conducted an economic impact analysis, (Appx320–330), that reviewed the costs associated with allowing medically necessary sex reassignment surgery as part of the Package. This economic impact analysis, conducted by the VA, examines the low cost to the VA of providing this treatment as well as the potential cost savings to the VA that would come with providing the treatment.

B. The Proposed Rule Will Either Have a Negligible Impact on the VA’s Budget or Will Save the VA Money Through an Offset of Other Medical Costs

As the VA has already recognized with its economic impact analysis, the projected cost of permitting medically necessary sex reassignment surgery for veterans is minuscule when viewed in the full context of the VA’s annual budget. Out of a submitted \$186.5 billion budget for 2018,¹² the total projected costs of providing sex reassignment surgery are about \$18 million: less than 0.01% of the VA’s annual budget. Further, this small cost will likely be offset by a reduction in other costs relating to transgender veterans’ medical needs.

¹² *Annual Budget Submission*, OFFICE OF BUDGET, U.S. DEPARTMENT OF VETERANS AFFAIRS, <https://www.va.gov/budget/products.asp> (last visited June 28, 2017).

1. The VA Has Already Shown the Low Cost of Providing Medically Necessary Sex Reassignment Surgery

There are approximately 700,000 transgender adults in the United States and an estimated 15,500 transgender adults currently serving in the military. *See* GARY J. GATES & JODY L. HERMAN, THE WILLIAMS INSTITUTE, *TRANSGENDER MILITARY SERVICE IN THE UNITED STATES* 1, 4 (2014). Out of a total veteran population of approximately 21 million adults,¹³ there are an estimated 134,300 transgender veterans. *Id.* at 4. Notably, transgender individuals make up 0.6% of the overall veteran population, compared to 0.3% of the civilian adult population, “implying that transgender individuals are about twice as likely as adults in the US to have served their country in the armed forces.” *Id.*; *see* RAND CORPORATION, *ASSESSING THE IMPLICATIONS OF ALLOWING TRANSGENDER PERSONNEL TO SERVE OPENLY* 35–36 (2016), <http://bit.ly/2tidjCG>.

In order to accurately estimate the cost of providing sex reassignment surgery, the VA’s own impact analysis¹⁴ turns first to research suggesting that, for large civilian employers with insurance places that offer transition-related care, “an average of 0.044 per thousand employees file claims for transition related-care

¹³ This figure is based on the statistics released by the United States Census Bureau. *See* U.S. CENSUS BUREAU: *VETERANS STATISTICS – VETERANS DAY 2015*, (Nov. 11, 2015), <http://bit.ly/2sUIPfr>.

¹⁴ The VA’s economic impact analysis was drafted by agency staff, reviewed and approved by the Acting Director for Regulation Policy and Management, and concurred in by the VA’s Chief Financial Officer. (Appx320, Appx330.)

annually.” (Appx332.) This includes any type of transition-related care, including sex reassignment surgery. *See* JODY L. HERMAN, THE WILLIAMS INSTITUTE, COSTS AND BENEFITS OF PROVIDING TRANSITION-RELATED HEALTH CARE COVERAGE IN EMPLOYEE HEALTH BENEFITS PLANS 13 (2013) [hereinafter HERMAN, EMPLOYER SURVEY]. Extrapolating the civilian usage rate for transition related-care to VA, with the transgender adult population being twice the average when compared to the civilian population, the VA estimates that 0.088 per thousand veterans will utilize transition care annually. (Appx323.) Thus, the impact analysis predicts that “687 unique VHA utilizing veterans will require transition-related care each year.” (*Id.*) And, to verify the validity of this estimate, recent research has shown that in 2013, the VHA system saw 522 new transgender diagnoses. Michael R. Keith et al., *Access to Care for Transgender Veterans in the Veterans Health Administration: 2006–2013*, S532 AM. J. PUB. HEALTH 104 (Supp. 4) (Sept. 2014).

In order to estimate the costs of “the addition of medically necessary transition-related procedures,” the VA first determined that “the addition of medically necessary transition-related procedures is viewed as an event-based expense per unique veteran.” (Appx323.) This is in contrast to an “ongoing medical expense.” (*Id.*) Next, the VA used the “687 unique VHA utilizing veterans” figure when calculating cost—as many of the theoretical 687 individuals will not have any sex reassignment surgery—thus providing the most conservative

cost projection. (*Id.*) If this Court directs the VA to undertake a rulemaking to amend or repeal the Regulation, there will be an initial period of adjustment during which “VHA will meet the surgical needs of veterans who already have transgender diagnoses and who are already enrolled in the system.” (*Id.*) After that period, “the annual number of VHA enrollees seeking transition-related surgery should not, in general, exceed the number of new transgender diagnoses each year.” (*Id.*)

Because it can be difficult to determine the actual costs of healthcare procedures, the VA used a combination of two data sources: (1) published data on the average costs of procedures not currently performed by the VHA; and (2) actual VHA cost data from currently permitted procedures being performed by the VHA for “reasons other than gender transition.” (Appx323–324.) Then, the VA had to estimate how many veterans would seek feminizing procedures and how many would seek masculinizing procedures, as the costs differ.¹⁵ (Appx324.) The VA used an assumption that two-thirds of the 687 unique VHA utilizing veterans would seek feminizing procedures, while one-third would seek masculinizing procedures. (*Id.*)

¹⁵ For example, feminizing procedures can include breast augmentation, facial feminization, and electrolysis, while masculinizing procedures can include breast reduction, chest reconstruction, and hysterectomy. (Appx324.)

After making these assumptions, the financial analysis—continuing with a conservative-estimate approach—assumes that a VHA-utilizing veteran would both seek out every available transition related procedures and would be medically cleared for those procedures. (*Id.*) Of course, it would be “highly unlikely” for a veteran to seek out, attain, or be cleared for each procedure available to them. But using this most conservative estimate, the VA estimates that the “maximum estimated per person costs range between \$96,017 and \$121,618 per veteran,” (Appx325), meaning that the total *unadjusted* cost to the VHA could be as high as approximately \$78 million per year to provide both feminizing and masculinizing procedures to the 687 veterans.¹⁶

But in order to better estimate the costs, while still sticking to conservative estimate, the VA *adjusted* the estimated cost based on real-world data collected by the City and County of San Francisco when it estimated, and then offered, transition-related care to its employees. *Id.*; see HERMAN, EMPLOYER SURVEY, *supra*. This research showed that when San Francisco originally estimated the costs of providing transition-related coverage, it had estimated an overall yearly cost of \$1.75 million. Yet, when reviewed over the course of five years, the actual

¹⁶ These per person cost estimates are higher than some studies, which show a base cost of \$17,675 for masculinizing procedures and \$10,308 for feminizing procedures. William V. Padula et al., *Societal Implications of Health Insurance Coverage for Medically Necessary Services in the U.S. Transgender Population: A Cost-Effectiveness Analysis*, 31(4) J. GEN. INTERN. MED. 394–401 (2015).

overall yearly cost was only \$77,283, meaning that the estimate was “more than 22x too high.” (Appx325.) The VA used this “data-driven” estimate to project more accurate, *adjusted* costs for providing transition related coverage; that is, the VA divided the unadjusted cost figured by a factor of 22. (*Id.*) This adjusted cost per year is \$3,531,409, compared to the unadjusted cost of almost \$78 million.

(*Id.*)

Building out on this adjusted cost analysis, the VA’s impact analysis recognized that for the first year of newly covered sex reassignment surgery, there will likely be less usage as the VHA develops “systems of referral for more complex transition-related procedures.” (Appx327.) As these procedures become widely available, more veterans will be referred for care, potentially doubling costs in the two years after implementation. (*Id.*) After taking this into account, the final projected costs, as determined by the VA, are:

Fiscal Year	Projected Costs
2018	\$3,531,409
2019	\$7,062,818
2020	\$7,338,268
Total (over 3 years)	\$17,932,495

(*Id.*)

Thus, out of a submitted \$186.5 billion budget for 2018,¹⁷ the total projected costs of providing sex reassignment surgery over three years would be less than 0.01% of just the VA's one-year, annual budget.¹⁸

2. Covering Sex Reassignment Surgery Is a Cost Saving Mechanism for the Department of Defense, Department of Veterans Administration, and Veterans Health Administration.

The negligible increase in health insurance costs associated with covering sex reassignment surgery will be more than offset by the cost savings realized by covering these services. These cost savings come in the form of: (1) continuity of care; and (2) decreased mental health care related costs.

First, covering sex reassignment surgery would allow for each veteran's treatment to take place wholly within the VHA system, thus providing continuity of care. (Appx327.) Continuity of care is the process of the patient and patient's care team all working cooperatively in the patient's ongoing health care

¹⁷ *Annual Budget Submission*, OFFICE OF BUDGET, U.S. DEPARTMENT OF VETERANS AFFAIRS, <https://www.va.gov/budget/products.asp> (last visited June 28, 2017).

¹⁸ The VA's impact analysis is further supported by reports from the University of California, which reviewed data from 113,316 individuals covered by its health insurance per year over a 6.5 year period. DEP'T OF INS., STATE OF CAL., ECONOMIC IMPACT ASSESSMENT: GENDER NONDISCRIMINATION IN HEALTH INSURANCE 8 (2012). During this time, the University of California offered transition-related care, including sex reassignment surgery, to its employees and other covered persons. *Id.* It found that for persons needing treatment, transition-related care averaged \$29,929 per claimant over the 6.5 year period. *Id.* This data-driven, per-year cost-per-claimant is even less expensive than the figure used in the impact analysis (\$77,283 per year). See HERMAN, EMPLOYER SURVEY, *supra*.

management. As the VHA already covers post-operative complications from transition surgeries currently provided outside of the VHA system, keeping all transgender medical services within the VHA system will ensure efficient and cost effective care. (*Id.*) See PALM CENTER, COST TO VHA OF PROVIDING TRANSITION RELATED SURGERY 4 (2016), <http://bit.ly/2tibW6y>. For example, the VA has already learned of veterans “who sought transition-related surgeries outside of the U.S. and then returned home, sitting on the surgical site for an extended airline trip.” (*Id.*) After returning home, these veterans “then presented to VHA emergency rooms seeking assistance,” increase costs to the system. (*Id.*) Further outcomes for veterans “are poorer” if there is not “planned post-surgical care.” (*Id.*)

Second, access to sex reassignment surgery has been proven effective at mitigating serious health conditions including suicidality, depression, and substance abuse. (Appx327.) See Department of Health and Human Services, Department Appeal Board (Appellate Division), NCD 140.3, Docket No. A-13-87, Decision No. 2576, at 16 (May 30, 2014) (“Many patients report a dramatic improvement in mental health following surgery, and patients have been able to become productive members of society, no longer disabled with severe depression and gender dysphoria.”); WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER,

AND GENDER- NONCONFORMING PEOPLE 55 (7th Version, 2011),

<http://bit.ly/2ev2aHy> (“Follow-up studies have shown an undeniable beneficial effect of sex reassignment surgery on postoperative outcomes such as subjective well being.”); William V. Padula et al., *supra* n. 16. Suicidality, depression, and substance abuse in veterans can lead to increased treatments costs on the VHA system. (Appx327.)

CONCLUSION

Amici Curiae respectfully urge this Court to direct the United States Department of Veterans Affairs to undertake a rulemaking to amend or repeal the Regulation, 38 C.F.R. § 17.38(b), which excludes sex reassignment surgery from the Department's Medical Benefits Package.

Dated: June 28, 2017

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Fulcher v. Secretary of Veterans Affairs

I hereby certify that I caused the foregoing **Brief of Amici Curiae the American Military Partner Association and OutServe-S in Support of Petitioners** to be served on all counsel via Electronic Mail generated by the Court's electronic filing system (CM/ECF) with a Notice of Docket Activity pursuant to Local Appellate Rule 25.1.

I also certify that an electronic copy was uploaded to the Court's electronic filing system. Upon acceptance of the Court, six (6) paper copies of the foregoing **Brief of Amici Curiae the American Military Partner Association and OutServe-S in Support of Petitioners** will be sent to the Clerk's Office by Federal Express Next Business Day delivery to:

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/s/ Nadia Oswald-Hamid
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 3,045 words, excluding the parts of the brief exempted by Rule 32(f).

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

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