No. 2017-1460

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 from the United States Department of Veterans Affairs

BRIEF OF AMICI CURIAE IMPACT FUND, BAY AREA LAWYERS FOR INDIVIDUAL FREEDOM (BALIF), NATIONAL WOMEN'S LAW CENTER, AND 13 LEGAL AND ADVOCACY ORGANIZATIONS IN SUPPORT OF PETITIONERS AND REVERSAL

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June 28, 2017

CERTIFICATE OF INTEREST

Counsel for Amici Impact Fund, Bay Area Lawyers for Individual Freedom, and the National Women's Law Center, *et al.*, certifies the following:

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

    - Impact Fund
    - Bay Area Lawyers for Individual Freedom
    - National Women's Law Center
    - A Better Balance: The Work and Family Legal Center
    - California Women's Law Center
    - Center for Reproductive Rights
    - If/When/How: Lawyering for Reproductive Justice
    - Legal Aid at Work
    - Legal Voice
    - NARAL Pro-Choice America
    - National Council of Jewish Women
    - National Organization for Women Foundation
    - National Women's Political Caucus
    - New Voices for Reproductive Justice
    - Southwest Women's Law Center
    - Women's Law Project

2. The names of the real parties in interest represented by me are:

    Not applicable

3. The names of all parent corporations and publicly held companies that own 10 percent or more of stock in the parties represented are:

    None

4. The names of all law firms and the partners or associates that appeared for the amici now represented by me in the trial court or agency or are expected to appear in this court (and who have not or will not enter an appearance in this case) are:

    Not applicable

/s/ Lindsay Nako
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June 28, 2017

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INTEREST OF AMICI CURIAE[1]

This brief is submitted by the Impact Fund, Bay Area Lawyers for Individual Freedom, National Women's Law Center, and thirteen (13) non-profit legal and advocacy organizations as Amici Curiae. The parties have consented to the filing of this brief.

The Impact Fund is a non-profit legal foundation that provides strategic leadership and support for impact litigation to achieve economic and social justice. The Impact Fund provides funding, offers innovative training and support, and serves as counsel for impact litigation across the country. The Impact Fund has served as counsel in a number of major civil rights cases, including cases challenging employment discrimination, lack of access for those with disabilities, and violations of fair housing laws. Through its work, the Impact Fund seeks to use and support impact litigation to achieve social justice for all communities.

Bay Area Lawyers for Individual Freedom ("BALIF") is a bar association of about 500 lesbian, gay, bisexual, and transgender ("LGBT") members of the San Francisco Bay Area legal community. As the nation's oldest and one of the largest LGBT bar associations, BALIF promotes the professional interests of its members

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), counsel for Amici Curiae certify that (i) no counsel for a party authored this brief in whole or in part; (ii) no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; and (iii) no person other than Amici Curiae, their members, or their counsel made a monetary contribution intended to fund its preparation or submission.

and the legal interests of the LGBT community at large. To accomplish this mission, BALIF actively participates in public policy debates concerning the rights of LGBT people. For more than thirty years, BALIF has appeared as amicus curiae in cases where it believes it can provide valuable perspective and argument that will inform court decisions on matters of broad public importance.

The National Women's Law Center ("NWLC") is a non-profit legal organization that has been working since 1972 to advance and protect women's legal rights. NWLC focuses on issues of key importance to women and their families, including economic security, employment, education, health, and reproductive rights, with special attention to the needs of low-income women and those who face multiple and intersecting forms of discrimination. Because gender discrimination is a severe threat to women's and other marginalized individuals' full equality, NWLC has worked to secure equal treatment and opportunity in all aspects of society through enforcement of the Constitution and laws prohibiting discrimination and has filed or participated in numerous amicus briefs in state and federal courts in cases involving gender discrimination.

Additional Amici include thirteen (13) legal and advocacy organizations, listed in the Addendum. Each organization supporting this amicus brief is dedicated to ensuring that its constituents and all others in this country, including LGBT people, receive equal treatment under the law.

SUMMARY OF ARGUMENT

Petitioners Dee Fulcher, Giuliano Silva, and the Transgender American Veterans Association seek review of the effective denial of their petition for rulemaking by the Department of Veterans Affairs ("VA"). Their petition requests that the VA amend or repeal rules and regulations, including 38 C.F.R. § 17.38(c)(4) (2016) and any implementing directives, that deny coverage for medically necessary sex reassignment surgery for transgender veterans, because they discriminate against transgender people on the basis of sex and violate the Equal Protection Clause of the Fifth Amendment.

Amici write separately to highlight the law establishing the rights of transgender people to be free from sex discrimination under the plain language of federal civil rights laws, including the Equal Protection Clause. This inquiry is critical to the Court's understanding of the petition. At least since the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), there has been a growing national consensus among courts and federal agencies that discriminating against transgender people because of their (1) perceived failure to conform to gender stereotypes; (2) transgender status; and/or (3) gender transition is unlawful sex discrimination. It is now recognized with "near-total uniformity" that the approach of pre-*Price Waterhouse* decisions excluding transgender people from protections against sex discrimination "has been eviscerated." *Glenn v.*

Brumby, 663 F.3d 1312, 1318 n.5 (11th Cir. 2011) (quoting *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004)).

ARGUMENT

I. The Supreme Court's Interpretation of Laws Prohibiting Sex Discrimination Has Evolved to Ensure Protective Laws Remain Relevant and Meaningful.

In the long, interrelated history of the Equal Protection Clause, Title VII, Title IX, and more recently Section 1557 of the Affordable Care Act ("ACA"),[2] courts have repeatedly explored what it means to discriminate "because of sex" or "on the basis of sex." Over time, the Supreme Court has permitted its interpretation of legal prohibitions on sex discrimination to evolve in order to fully effectuate their promise, including recognizing the discriminatory nature of penalizing individuals for failing to conform to gender stereotypes.

Nearly forty years ago, in the context of Title VII, the Supreme Court observed that it was "well recognized that employment decisions cannot be

[2] *See, e.g.*, 42 U.S.C. § 18116 (2012) (prohibiting discrimination on the basis of sex in Section 1557 of the ACA through cross-reference to Title IX's prohibition); *Murray v. N.Y. Univ. Coll. of Dentistry*, 57 F.3d 243, 249 (2d Cir. 1995) ("In reviewing claims of discrimination brought under Title IX by employees[] . . . courts have generally adopted the same legal standards that are applied to such claims under Title VII." (citing *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 896-98 (1st Cir. 1988); *Preston v. Commonwealth of Virginia ex rel. New River Cmty. Coll.*, 31 F.3d 203, 206 (4th Cir. 1994))); *Lipsett*, 864 F.2d at 896 ("Our analysis is simplified by the fact that we can draw upon the substantial body of case law developed under Title VII to assess the plaintiff's claims under both section 1983 (the equal protection clause) and Title IX." (footnote omitted)).

predicated on mere 'stereotyped' impressions about the characteristics of males or females." *City of L.A., Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 (1978). A decade later, in the watershed case *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), a plurality of the Supreme Court declared that Title VII's prohibition on differential treatment of employees "*because of* . . . sex" meant "gender must be irrelevant to employment decisions," *id.* at 240 (plurality opinion). The Court observed:

> [W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "'[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'"

Id. at 251 (second alteration in original) (quoting *Manhart*, 435 U.S. at 707 n.13 (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971))).

Since *Price Waterhouse*, the Supreme Court has repeatedly identified discrimination based on a failure to conform to sex stereotypes as actionable sex discrimination. For example, in striking down Virginia Military Institute's men-only admissions policy as violating the Constitution's guarantee of equal protection, the Court noted that "generalizations about 'the way women are,' estimates of what is appropriate for *most women*," did not justify excluding women "outside the average description." *United States v. Virginia*, 518 U.S. 515, 550 (1996); *see also J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 139 n.11 (1994)

("We have made abundantly clear in past cases that gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization.").

In *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), the Court held that same-sex sexual harassment is actionable sex discrimination under Title VII, *id.* at 82. In doing so, the Court voiced its intent to ensure prohibitions of sex discrimination remain relevant and meaningful, even when its decisions may reach beyond what was publicly contemplated at the time of drafting. "[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id.* at 79.

Recently, in *Sessions v. Morales-Santana*, No. 15-1191, 2017 WL 2507339 (U.S.S.C. June 12, 2017), the Supreme Court described the dangerous nature of laws themselves based in gender stereotypes, writing, "Overbroad generalizations of that order, the Court has come to comprehend, have a constraining impact, descriptive though they may be of the way many people still order their lives," *id.* at *11.

As set forth below, since *Price Waterhouse*, the Supreme Court's guidance in interpreting prohibitions on sex discrimination has led federal courts and agencies to conclude that discrimination against transgender people, whether based

on their failure to conform to sex stereotypes or their transgender status *per se*, is unlawful sex discrimination.

II. Following *Price Waterhouse*, Nearly All Circuit and District Courts to Consider the Issue Have Held That Transgender People Are Protected by Laws Prohibiting Sex Discrimination.

A. Multiple Circuits Have Recognized That Sex Stereotyping of Transgender People Is Sex Discrimination.

Price Waterhouse recognized that laws prohibiting sex discrimination protect transgender individuals who fail to conform to sex stereotypes. The First, Sixth, Seventh, Ninth, and Eleventh Circuits have relied on the *Price Waterhouse* plurality opinion and subsequent cases to hold that transgender individuals can establish sex discrimination claims when they are penalized for their perceived failure to conform to sex stereotypes. Two additional circuits—the Fourth and Tenth Circuits—have recognized the potential for such claims but have not conclusively ruled on the matter.

In *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000), the Ninth Circuit applied *Price Waterhouse* and concluded that violence against transgender people based on their failure to conform to sex stereotypes is prohibited sex discrimination under the Gender Motivated Violence Act. Plaintiff Crystal Marie Schwenk, a transgender woman incarcerated in a state prison for men, sued a prison guard and prison officials under the statute for attempted rape by the named guard. *Id.* at 1192-93. The panel concluded that the prison guard's crime was committed

"because of gender," looking to Title VII case law, including "the logic and language of *Price Waterhouse*."[3] *Id.* at 1201, 1202. It explained:

> What matters, for purposes of this part of the *Price Waterhouse* analysis, is that in the mind of the perpetrator the discrimination is related to the sex of the victim: here, for example, the perpetrator's actions stem from the fact that he believed that the victim was a man who "failed to act like" one. . . . Discrimination because one fails to act in the way expected of a man or woman is forbidden . . . .

Id. at 1202.

Later that year, the question came before the First Circuit in *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000), a lawsuit claiming discriminatory lending because the defendant bank had refused to provide a loan application to a customer, Lucas Rosa, who the loan officer believed was not dressed in accordance with his sex, *id.* at 214. The district court granted the defendant bank's motion to dismiss, holding "the [Equal Credit Opportunity Act] does not prohibit discrimination based on the manner in which someone dresses." *Id.* The First Circuit reversed and remanded, holding that the plaintiff may assert a valid claim for sex discrimination arising from the fact that the loan officer turned the plaintiff away "because she thought that Rosa's attire did not accord with his male gender." *Id.* at 215; *see id.* at 216.

[3] "Congress intended proof of gender motivation under the [Gender Motivated Violence Act] to proceed in the same way that proof of discrimination on the basis of sex or race is shown under Title VII." *Schwenk*, 204 F.3d at 1200-01.

The Sixth Circuit shortly followed suit with two decisions—*Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004), and *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005). In *Smith*, Jimmie Smith, a transgender employee of the city fire department, was suspended after beginning to transition to a more feminine appearance and disclosing a diagnosis of gender identity disorder (now known as gender dysphoria) and plans for treatment. 378 F.3d at 568. The panel reversed the district court's order dismissing the plaintiff's claims and remanded, holding that a transgender employee can state a sex discrimination claim under Title VII when an employer's action is based on the employee's failure to conform to sex stereotypes. *Id.* at 572.

A year later, in *Barnes*, the Sixth Circuit affirmed a jury verdict in favor of Philecia Barnes, a transgender woman employed as a police officer, who alleged that she was demoted based on a failure to conform to male stereotypes. 401 F.3d at 733. Relying on its previous holding in *Smith*, the court concluded that the plaintiff stated a claim for sex discrimination under Title VII based on her "failure to conform to sex stereotypes." *Id.* at 737 ("By alleging that [Smith's] failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind defendant's actions, Smith stated a claim for relief pursuant to Title VII's prohibition of sex discrimination." (citing *Smith*, 378 F.3d at 573, 575)); *see also Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 221 (6th Cir. 2016)

("Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination." (quoting *Smith*, 378 F.3d at 575)).

In 2007, the Tenth Circuit "assume[d], without deciding," that a transgender individual could raise a claim of discrimination "because of sex" under Title VII based on his or her failure to conform to sex stereotypes. *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224 (10th Cir. 2007). Plaintiff Krystal Etsitty, a transgender employee of the Utah Transit Authority, filed a claim of sex discrimination after she was terminated for using female public restrooms maintained by the Utah Transit Authority. *Id.* at 1219-20. The panel observed that "[a] number of courts have relied on *Price Waterhouse* to expressly recognize a Title VII cause of action for discrimination based on an employee's failure to conform to stereotypical gender norms," and proceeded based on the assumption that the plaintiff had established a prima facie case of discrimination under the *Price Waterhouse* theory of gender stereotyping. *Id.* at 1223, 1224.

The Eleventh Circuit joined the growing national consensus with its 2011 decision in *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011), an equal protection case. Vandiver Elizabeth Glenn, a transgender woman and employee of the Georgia General Assembly's Office of Legislative Counsel, brought a claim alleging sex discrimination under the Equal Protection Clause after she was terminated because of her gender transition. *Id.* at 1313-14. While employed, Ms.

Glenn informed her supervisor that she would be proceeding with a gender transition, changing her legal name, and coming to work as a woman. *Id.* at 1314. She was subsequently terminated because her employer felt her "intended gender transition was inappropriate, that it would be disruptive, that some people would view it as a moral issue, and that it would make Glenn's coworkers uncomfortable." *Id.*

In affirming the grant of summary judgment in favor of Ms. Glenn, the Eleventh Circuit observed, "A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes." *Id.* at 1316. The court interpreted *Price Waterhouse* to hold that "Title VII barred not just discrimination because of biological sex, but also gender stereotyping—failing to act and appear according to expectations defined by gender." *Id.* (citing *Price Waterhouse*, 490 U.S. at 250-51 (plurality opinion); *id.* at 258-61 (White, J., concurring); *id.* at 272-73 (O'Connor, J., concurring)). Relying on the long line of circuit and district court cases preceding it, the court held, "[D]iscrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender. Indeed, several circuits have so held." *Id.* at 1317 (citing and discussing *Schwenk*, 204 F.3d at 1198-1203; *Rosa*, 214 F.3d at 215-16; *Smith*, 378 F.3d at 569, 572; *Barnes*, 401 F.3d 729). The court went on to hold, "All persons, whether

transgender or not, are protected from discrimination on the basis of gender stereotype. . . . An individual cannot be punished because of his or her perceived gender non-conformity." *Id.* at 1318-19; *see also Chavez v. Credit Nation Auto Sales, LLC*, 641 F. App'x 883, 883 (11th Cir. 2016) (per curiam) ("Sex discrimination includes discrimination against a transgender person for gender nonconformity." (citing *Glenn*, 663 F.3d at 1316-17)).[4]

Most recently, the Seventh Circuit held that discrimination against a transgender person based on his or her failure to conform to sex stereotypes is impermissible sex discrimination under Title IX. *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, No. 16-3522, 2017 WL 2331751, at *1 (7th Cir. May 30, 2017). Defendant Kenosha Unified School District barred Plaintiff Ashton Whitaker, a transgender male high school student, from entering male-designated restrooms because his birth certificate listed his sex as female. *Id.* at *2-3. The Seventh Circuit held that the plaintiff could bring a claim of sex discrimination under Title IX under a theory of sex stereotyping. *Id.* at *9. Based

[4] In 2016, the Fourth Circuit considered the question of whether a transgender high school student could state a claim for sex discrimination under Title IX, based on a school board policy prohibiting transgender students from using restrooms that correspond to their gender identity. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 716 (4th Cir. 2016), *vacated and remanded*, 137 S. Ct. 1239 (2017). The panel decision, which reversed the dismissal of the plaintiff's Title IX claim and vacated the denial of a preliminary injunction, *id.* at 715, was ultimately vacated and remanded without argument by the Supreme Court, *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 1239 (2017).

on the voluminous case law on this issue, the court went on to find that the plaintiff "can demonstrate a likelihood of success on the merits of his claim because he has alleged that the School District denied him access to the boys' restroom because he is transgender." *Id.* at *11.

Before the Supreme Court decided *Price Waterhouse* in 1989, three circuit courts—the Seventh, Eighth, and Ninth Circuits—held that Title VII does not prohibit sex discrimination against transgender employees. *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084-87 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (per curiam); *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 664 (9th Cir. 1977). But *Price Waterhouse* changed the landscape. As the Eleventh Circuit made clear in *Glenn*:

> [S]ince the decision in *Price Waterhouse*, federal courts have recognized with near-total uniformity that "the approach in *Holloway*, *Sommers*, and *Ulane* . . . has been eviscerated" by *Price Waterhouse*'s holding that "Title VII's reference to 'sex' encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms."

Glenn, 663 F.3d at 1318 n.5 (quoting *Smith*, 378 F.3d at 573).

Both the Seventh and Ninth Circuits have revisited their previous holdings following *Price Waterhouse*. *Whitaker*, 2017 WL 2331751, at *9 ("This reasoning [as applied in *Ulane*], however, cannot and does not foreclose Ash and other transgender students from bringing sex-discrimination claims based upon a theory

of sex-stereotyping as articulated four years later by the Supreme Court in *Price Waterhouse v. Hopkins*[]. . . ."); *Schwenk*, 204 F.3d at 1201 ("The initial judicial approach taken in cases such as *Holloway* has been overruled by the logic and language of *Price Waterhouse*."). The Eighth Circuit has not had the opportunity to explicitly revisit the application of Title VII to transgender employees, however, it has recognized the change in law after *Price Waterhouse*. *See, e.g.*, *Lewis v. Heartland Inns of Am., L.L.C.*, 591 F.3d 1033, 1038-39 (8th Cir. 2010) ("Other circuits have upheld Title VII claims based on sex stereotyping subsequent to *Price Waterhouse*." (citing *Chadwick v. WellPoint, Inc.*, 561 F.3d 38 (1st Cir. 2009); *Back v. Hastings On Hudson Union Free Sch. Dist.*, 365 F.3d 107 (2d Cir. 2004); *Smith*, 378 F.3d 566; *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864 (9th Cir. 2001))).

Thus, the overwhelming tide of federal appellate jurisprudence supports the conclusion that discrimination against transgender individuals based on a failure to conform to sex stereotypes violates federal law.

B. District Courts Have Similarly Recognized That Sex Stereotyping of Transgender People Is Sex Discrimination.

In addition to the federal appellate decisions described above, the overwhelming majority of district courts to consider the issue—including those rendering decisions in the absence of clear circuit precedent—confirm that

discrimination against transgender people based on their failure to conform to sex stereotypes is a form of sex discrimination.

The District Court for the District of Connecticut recently reached this conclusion under Title VII. *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 512, 523 (D. Conn. 2016). Dr. Deborah Fabian was on the verge of being hired as an on-call orthopedic surgeon at the Hospital of Central Connecticut, but the hospital declined to hire her after she disclosed her identity as a transgender woman and her intent to begin work as a woman. *Id.* at 512. In denying the hospital's motion for summary judgment, the court held:

> *Price Waterhouse* shows that gender-stereotyping discrimination *is* sex discrimination *per se*. That is, the plurality and concurrences do not create a fundamentally new cause of action, but rather rely on an understanding of the scope of Title VII's prohibition against discrimination "because of sex" that reaches discrimination based on stereotypical ideas about sex.

Id. at 522.

The District Court for the District of Columbia has held that a transgender plaintiff may successfully establish unlawful sex discrimination under Title VII based on both a sex stereotyping theory and a *per se*, "literal" sex discrimination theory, discussed further below. *Schroer v. Billington*, 577 F. Supp. 2d 293, 300 (D.D.C. 2008); *see infra* Section II(C). Diane Schroer, who was offered a job at the Library of Congress when she presented as male, had the offer revoked after notifying the Library she intended to start work as a woman. *Schroer*, 577 F. Supp.

2d at 295-99. Following a bench trial, the court concluded that Ms. Schroer had successfully proven that she was discriminated based on a sex stereotyping theory:

> Ultimately, I do not think that it matters for purposes of Title VII liability whether the Library withdrew its offer of employment because it perceived Schroer to be an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual. One or more of [the decision-maker's] comments could be parsed in each of these three ways. . . . I would therefore conclude that Schroer is entitled to judgment based on a *Price Waterhouse*-type claim for sex stereotyping[]. . . .

Id. at 305.

Many other district courts have reached the same conclusion regarding protections for transgender people under statutes prohibiting sex discrimination. *See, e.g.*, *Brown v. Dep't of Health & Human Servs.*, No. 8:16CV569, 2017 WL 2414567, at *5-6 (D. Neb. June 2, 2017) (departing from the Eighth Circuit's ruling in *Sommers* and holding that transgender plaintiff's allegations that she was not provided adequate and safe care during civil commitment "are sufficient at the pleading stage to state an equal protection claim"); *Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001, 1005 (D. Nev. 2016) (concluding that school district's prohibition of transgender employee from using either the men's or women's restrooms "was based on precisely the sort of stereotyping that the Ninth Circuit has found Title VII to prohibit"); *Dawson v. H&H Elec., Inc.*, No. 4:14CV00583 SWW, 2015 WL 5437101, at *2-3 (E.D. Ark. Sept. 15, 2015) (departing from the Eighth Circuit's position in *Sommers* and noting that it is "well settled" that Title

VII "prohibits an employer from taking adverse action because an employee's behavior or appearance fails to conform to gender stereotypes"); *Finkle v. Howard Cty.*, 12 F. Supp. 3d 780, 788 (D. Md. 2014) (rejecting pre-*Price Waterhouse* case law and concluding "on the basis of the Supreme Court's holding in *Price Waterhouse*, and after careful consideration of its sister courts' reasoned opinions, . . . that Plaintiff's claim that she was discriminated against 'because of her obvious transgendered status' is a cognizable claim of sex discrimination under Title VII"); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008) ("Title VII is violated when an employer discriminates against any employee, transsexual or not, because he or she has failed to act or appear sufficiently masculine or feminine enough for an employer." (quoting *Schroer v. Billington*, 525 F. Supp. 2d 58, 63 (D.D.C. 2007)); *Mitchell v. Axcan Scandipharm, Inc.*, No. Civ.A. 05-243, 2006 WL 456173, at *2 (W.D. Pa. Feb. 17, 2006) (finding transgender plaintiff properly alleged sex discrimination claims under Title VII and Pennsylvania law based on "facts showing that his failure to conform to sex stereotypes of how a man should look and behave was the catalyst behind defendant's actions").

C. Courts Also Recognize That Differential Treatment of Transgender Individuals Based on Transgender Status or Gender Transition Is Sex Discrimination, Even Without Further Evidence of Sex Stereotyping.

Sex stereotyping is just one form of sex discrimination. Because gender identity is a component of sex, discrimination against a transgender person—who is defined as such because his or her gender identity does not match the sex given to the person at birth—constitutes sex discrimination. Multiple courts have determined that discrimination based on a person's transgender status and/or gender transition, even in the absence of evidence of sex stereotyping, is unlawful sex discrimination.

In *Schwenk*, the Ninth Circuit recognized that "sex" includes an individual's "sexual identity" or, as more commonly known, "gender . . . identity." *Schwenk*, 204 F.3d at 1201-02 (recognizing that conduct motivated by an individual's "gender or sexual identity" is because of "gender," which is "interchangeable" with "sex"). The Ninth Circuit rejected the view adopted by earlier, pre-*Price Waterhouse* cases that had excluded "gender" from the meaning of "sex" in Title VII and instead concluded that "under *Price Waterhouse*, 'sex' under Title VII encompasses both sex—that is, the biological differences between men and women—*and* gender." *Id.* at 1202. *Schwenk* was correct to do so. After all, if one's dress, hairstyle, and make-up usage constitute aspects of sex—as *Price Waterhouse* confirms that they do—then they also constitute aspects of gender

identity, which gives rise to those outward expressions of sex. *Cf. Smith*, 378 F.3d at 575; *Schroer*, 577 F. Supp. 2d at 306.

Moreover, the Equal Protection Clause's protections do not rise or fall depending upon whether particular sex-related characteristics are "biological . . . or socially-constructed." *Schwenk*, 204 F.3d at 1201. Both are protected. Scientific evidence shows that gender identity itself has biological roots. *See, e.g.*, Aruna Saraswat et al., *Evidence Supporting the Biologic Nature of Gender Identity*, 21 Endocrine Practice 199, 199-202 (2015) (comprehensively reviewing scientific literature regarding biological origins of gender identity, including studies of neuroanatomy and genetic factors). It is thus a mistake to make broad assumptions about what precisely constitutes "biological sex." In any event, case law already shows that gender identity is a component of "sex," no matter what its origins.

At least three district courts have held that discrimination based on transgender status *per se* constitutes discrimination "because of sex." *See Fabian*, 172 F. Supp. 3d at 527 ("Similarly, discrimination on the basis of gender stereotypes, or on the basis of being transgender, . . . constitutes discrimination on the basis of the properties or characteristics typically manifested in sum as male and female—and that discrimination is literally discrimination 'because of sex.'"); *Rumble v. Fairview Health Servs., Inc.*, No. 14-cv-2037 (SRN/FLN), 2015 WL 1197415, at *18 (D. Minn. Mar. 16, 2015) (classifying both harassment because of

"transgender status" and harassment because of "failure to conform with gender stereotypes" as impermissible sex discrimination under Section 1557 of the ACA); *Schroer*, 577 F. Supp. 2d at 300 ("the Library's conduct, whether viewed as sex stereotyping or as discrimination literally 'because of . . . sex,' violated Title VII").

As the court further explored in *Schroer*, discrimination based on gender transition is also necessarily based on sex. *Schroer*, 577 F. Supp. 2d at 308 ("[T]he Library's refusal to hire Schroer after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery was *literally* discrimination 'because of . . . sex.'"). Courts have found a change in religion to provide an apt analogy. Firing an employee because she converts from Christianity to Judaism "would be a clear case of discrimination 'because of religion.'" *Id.* at 306; *see Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850, 868 n.8 (S.D. Ohio 2016) (quoting *Schroer*, 577 F. Supp. 2d at 306); *Fabian*, 172 F. Supp. 3d at 527 (quoting *Schroer*, 577 F. Supp. 2d at 306). Even if the employer "harbors no bias toward either Christian or Jews but only 'converts[,]' . . . [n]o court would take seriously the notion that 'converts' are not covered by [Title VII]." *Schroer*, 577 F. Supp. 2d at 306. Similarly, a healthcare provider can treat women and men equally as a general matter but nonetheless unlawfully discriminate against those who must undergo medical procedures to bring their physical anatomy into harmony with their gender identity.

D. Actions Taken by Federal Agencies Further Demonstrate That Transgender People Are Protected by Laws Prohibiting Sex Discrimination.

Statutory interpretations and regulations implemented by federal agencies complement the significant body of case law recognizing that discrimination against a transgender person based on his or her transgender status and/or gender nonconformity is sex discrimination. For example, agency rulings issued by the Equal Employment Opportunity Commission ("EEOC") and regulations adopted by the Department of Labor ("DOL") Office of Federal Contract Compliance Programs ("OFCCP"), the Department of Housing and Urban Development ("HUD"), and the Department of Health and Human Services ("HHS") demonstrate a commitment to enforcing the anti-discrimination principles underlying the Equal Protection Clause, including through explicit prohibitions on discrimination based on gender identity.

In *Macy v. Holder*, EEOC DOC 0120120821, 2012 WL 1435995 (Apr. 20, 2012), the EEOC reviewed the administrative appeal of Mia Macy, a transgender woman who sought a position with the Bureau of Alcohol, Tobacco, Firearms, and Explosives, *id.* at *1. Ms. Macy discussed the position with the Bureau's local director while presenting as a man. *Id.* After the director confirmed that she had been accepted to fill the open position, pending a background check, Ms. Macy informed the third-party contractor that was handling the hiring that she was

transitioning from male to female and would be changing her name. *Id.* Within days, she received an email stating that the position had been eliminated, although she later learned someone else had been hired for the position. *Id.* at *1-2. Relying on *Price Waterhouse* and the appellate decisions discussed above, the EEOC found in Ms. Macy's favor. *Id.* at *11. It concluded that "gender discrimination occurs any time an employer treats an employee differently for failing to conform to any gender-based expectations or norms." *Id.* at *6.

The EEOC reached the same conclusion in a case involving a transgender federal employee's access to restrooms consistent with her gender identity. Complainant Tamara Lusardi, a transgender woman and civilian employee of the Army, alleged she was discriminated against based on sex when the Army restricted her access to the women's multi-user restroom and referred to her by her former male name and by male pronouns. *Lusardi v. McHugh*, EEOC DOC 0120133395, 2015 WL 1607756, at *1-3 (Apr. 1, 2015). In response to the employer's explanation that "co-workers would feel uncomfortable" with Ms. Lusardi using the common women's restroom, the EEOC stated:

> [S]upervisory or co-worker confusion or anxiety cannot justify discriminatory terms and conditions of employment. Title VII prohibits discrimination based on sex whether motivated by hostility, by a desire to protect people of a certain gender, by gender stereotypes, or by the desire to accommodate other people's prejudices or discomfort.

Id. at *9.

After the EEOC's recognition that federal law prohibits employment discrimination based on gender identity, the Secretary of Labor announced that the DOL was "updating its enforcement protocols and nondiscrimination guidance to clarify that DOL provides the full protection of the federal nondiscrimination laws that it enforces to individuals on the bases of gender identity and transgender status." U.S. Department of Labor, Office of Federal Contract Compliance Programs, Directive 2014-02 (Aug. 19, 2014). The OFCCP later adopted regulations requiring federal contractors to agree that they "will not discriminate against any employee or application for employment because of . . . sex . . . [or] gender identity." 41 C.F.R. § 60-1.4(a)(1) (2016).

HUD similarly clarified the comprehensive nature of sex discrimination protections in the Fair Housing Act through two rules reported in 2012 and 2015. *See* Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. 5662, 5666 (Feb. 3, 2012); Equal Access in Accordance With an Individual's Gender Identity in Community Planning and Development Programs, 81 Fed. Reg. 64763 (Sept. 21, 2016). The final regulations include a requirement of equal access to HUD-assisted or -insured housing "without regard to actual or perceived . . . gender identity," among other protections. 24 C.F.R. § 5.105 (2016).

Finally, HHS also promulgated regulations pursuant to the ACA interpreting the statute's prohibition on sex discrimination to include discrimination on the basis of "gender identity." 42 U.S.C. § 18116(a) (2012); 45 C.F.R. § 92.4 (2016).

Thus, the legal understanding of discrimination on the basis of sex has evolved over time to address the harmful sex stereotyping women experience in the workplace and in public spaces, to protect transgender individuals from equally harmful sex stereotyping, and ultimately to recognize that discrimination based on gender identity or transgender status itself is unlawful sex discrimination.

III. 38 C.F.R. § 17.38(c)(4) Discriminates Against Transgender Veterans on the Basis of Sex.

As the above discussion demonstrates, laws prohibiting sex discrimination protect transgender individuals from discrimination, whether based on their perceived gender nonconformity, their transgender status, or their gender transition itself. For these reasons, 38 C.F.R. § 17.38(c)(4) (2016) ("Regulation"), which limits the healthcare coverage available to transgender veterans, violates both the Equal Protection Clause and Section 1557 of the Affordable Care Act.

A. 38 C.F.R. § 17.38(c)(4) Violates the Equal Protection Clause.

The Regulation and its implementing directives specifically exclude medically necessary sex reassignment surgery for transgender veterans. In so doing, the Regulation singles out transgender veterans for differential treatment, depriving them of the full healthcare coverage to which all veterans are otherwise

entitled. The Regulation prevents the VA from providing sex reassignment surgery to transgender veterans while covering identical or substantially similar surgeries for non-transgender veterans. The only rationale for keeping the Regulation that has been proffered by the VA during these proceedings is the lack of appropriated funding. *See* Joint Appendix 1-47. Such a rationale fails to survive any level of scrutiny, let alone the minimum "exceedingly persuasive justification" required to defend gender-based equal protection claims. *United States v. Virginia*, 518 U.S. at 531. Indeed, whatever the asserted rationale for the bar on medically necessary sex reassignment surgery—whether a penalty for transgender status *per se* or a veteran's gender nonconformity—it is impermissible sex discrimination that violates the Equal Protection Clause.[5]

[5] The Regulation also excludes coverage for "[a]bortions and abortion counseling"—services that are only used by women and transgender men. 38 C.F.R. § 17.38(c)(1). Like the exclusion of coverage for specific services based on transgender status, this exclusion is also impermissible sex discrimination. The Regulation further excludes coverage for in vitro fertilization except in specific instances—a service that can only be used by women and transgender men. 38 C.F.R. §§ 17.38(c)(2), 17.380. Thus, three of the five coverage exclusions enumerated in the Regulation exclude services on the basis of sex. 38 C.F.R. § 17.38(c)(1)-(5). Under Equal Protection analysis, this suggests that any reasons offered for these exclusions are at least partially pretextual, and that impermissible animus on the basis of sex is the actual explanation for the unequal treatment. *See generally Romer v. Evans*, 517 U.S. 620, 635 (1996) (invalidating "a status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests" and noting that it amounts to "a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit"). *Cf. Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2315 (2016) (noting that targeted nature of restrictions indicates

B. 38 C.F.R. § 17.38(c)(4) Also Violates Section 1557 of the Affordable Care Act.

The VA's exclusion of coverage for sex reassignment surgery for transgender veterans constitutes precisely the type of discrimination in health care that is prohibited by Section 1557 of the ACA. Section 1557 prohibits "any program or activity that is administered by an Executive Agency" from discriminating on the basis of sex in health care. 42 U.S.C. § 18116. The VA health system is such a program or activity and therefore is bound to comply with Section 1557. Section 1557's prohibition of sex discrimination in health care programs and activities is firmly grounded in and incorporates the long-standing civil rights principles embodied in statutes such as Title IX and Title VII, as well as the Equal Protection Clause.[6] The consensus under this shared body of law, as described above, is that discrimination against transgender people constitutes impermissible discrimination on the basis of sex, whether arising from a failure to conform to sex stereotypes or transgender status. Thus, the limitation on benefits solely because of transgender status is unlawful discrimination on the basis of sex and violates Section 1557.

The District of Minnesota, the first to consider the question of Section 1557's applicability to discrimination on the basis of gender identity, affirmed

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that asserted governmental purpose is not genuinely being pursued); *id.* at 2320-21 (Ginsburg, J., concurring) (same).

[6] *See* 42 U.S.C. § 18116; 81 Fed. Reg. 31375, 31388 (May 18, 2016).

Section 1557's reach. *Rumble*, 2015 WL 1197415, at *2, 9-18. In *Rumble*, plaintiff Jakob Tiarnan Rumble, a transgender man, sought medical treatment at Fairview Southdale Hospital where, after discovering that his stated gender did not match hospital records, staff denied him appropriate medical care and his doctor conducted an assaultive exam. *Id.* at *15-16. The court found that Section 1557 protects plaintiffs in a healthcare setting who allege discrimination based on gender identity, and provides them with a standalone private right of action. *Id.* at *10.

CONCLUSION

38 C.F.R. § 17.38(c)(4) prohibits coverage of sex reassignment surgery, while providing the same surgeries to non-transgender veterans. Such differential treatment discriminates against transgender veterans based on their sex in violation of both the Equal Protection Clause and Section 1557 of the ACA. For the reasons above, Amici urge this Court to direct the Secretary of Veterans Affairs to reopen rulemaking to amend or repeal 38 C.F.R. § 17.38(c)(4).

Respectfully submitted,

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ADDENDUM

STATEMENTS OF INTEREST FOR ADDITIONAL AMICI CURIAE

A Better Balance is a national legal advocacy organization dedicated to promoting fairness in the workplace and helping employees meet the conflicting demands of work and family. Through its legal clinic, A Better Balance provides direct services to low-income workers on a range of issues, including employment discrimination based on pregnancy and/or caregiver status. A Better Balance is also working to combat LGBTQ discrimination through its national LGBTQ Work-Family project. A Better Balance is committed to ensuring the health, safety, and security of all LGBTQ individuals and families.

California Women's Law Center ("CWLC") is a statewide, nonprofit law and policy center dedicated to advancing the civil rights of women and girls through impact litigation, advocacy, and education. CWLC's issue priorities include gender discrimination, reproductive justice, violence against women, and women's health. CWLC places emphasis on eliminating all forms of gender discrimination in the workplace, including discrimination based on sexual orientation, sexual identity, and sex stereotypes. CWLC is committed to supporting equal rights for transgender folks, and to eradicating invidious discrimination in all forms.

The **Center for Reproductive Rights** is a global advocacy organization that uses the law to advance reproductive freedom as a fundamental right that all

governments are legally obligated to respect, protect, and fulfill. In the U.S., the Center's work focuses on ensuring that all people have access to a full range of high-quality reproductive health care. Since its founding in 1992, the Center has been actively involved in nearly all major litigation in the U.S. concerning reproductive rights, in both state and federal courts, including most recently, serving as lead counsel for the plaintiffs in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), in which the U.S. Supreme Court reaffirmed the constitutional right to access legal abortion. As a rights-based organization, the Center has a vital interest in protecting individuals endeavoring to exercise their fundamental rights free from restrictions based on gender stereotypes.

If/When/How: Lawyering for Reproductive Justice ("If/When/How") is a non-profit organization that trains, networks, and mobilizes law students and legal professionals to work within and beyond the legal system to champion reproductive justice. If/When/How has an interest in ensuring that all people have the ability to decide if, when, and how to create and sustain families with dignity, free from discrimination, coercion, or violence.

Legal Aid at Work ("LAAW") (formerly Legal Aid Society – Employment Law Center) is a non-profit public interest law firm whose mission is to protect, preserve, and advance the employment and education rights of individuals from traditionally under-represented communities. LAAW has represented plaintiffs in

cases of special import to communities of color, women and girls, recent immigrants, individuals with disabilities, the LGBT community, and the working poor. LAAW has litigated a number of cases under Title IX of the Education Amendments of 1972 as well as Title VII of the Civil Rights Act of 1964. LAAW has appeared in discrimination cases on numerous occasions both as counsel for plaintiffs, *see, e.g.*, *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002); *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002); and *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987) (counsel for real party in interest), as well as in an amicus curiae capacity, *see, e.g.*, *United States v. Virginia*, 518 U.S. 515 (1996); *Harris v. Forklift Sys.*, 510 U.S. 17 (1993); *Int'l Union, UAW v. Johnson Controls*, 499 U.S. 187 (1991); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986). LAAW's interest in preserving the protections afforded to employees and students by this country's antidiscrimination laws is longstanding.

Legal Voice, founded in 1978 as the Northwest Women's Law Center, is a Seattle-based non-profit public interest organization dedicated to protecting the rights of women and their families through litigation, legislative advocacy, and the provision of legal information and education. Legal Voice's work includes decades of advocacy in the courts and in the Washington State Legislature to advance the rights of lesbian, gay, bisexual, and transgender people and to ensure the rights of

all people to be from discrimination based on their sex, sexual orientation, and gender identity or expression. Legal Voice has participated as counsel and as amicus curiae in cases throughout the Northwest and the country. Legal Voice has a strong interest in this case because it raises important issues concerning the rights of transgender people to access medically necessary health care and to be free from discrimination in health care.

NARAL Pro-Choice America is a national advocacy organization dedicated since 1969 to supporting and protecting, as a fundamental right and value, a woman's freedom to make personal decisions regarding the full range of reproductive choices, including preventing unintended pregnancy, bearing healthy children, and choosing legal abortion. Through education, organizing, and influencing public policy, NARAL works to guarantee every woman this right.

The **National Council of Jewish Women** ("NCJW") is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Resolutions state that NCJW resolves to work for "quality, comprehensive, confidential, nondiscriminatory mental and physical health care coverage and services that are affordable and accessible for all." Consistent with our Principles and Resolutions, NCJW joins this brief.

The **National Organization for Women Foundation** ("NOW Foundation") is a 501(c)(3) entity affiliated with the National Organization for Women, the largest grassroots feminist activist organization in the United States with chapters in every state and the District of Columbia. NOW Foundation is committed to advancing equal opportunity, among other objectives, and works to assure that women and LGBTQIA persons are treated fairly and equally under the law. As an education and litigation organization, NOW Foundation is also dedicated to eradicating sex-based discrimination.

The **National Women's Political Caucus** was founded in 1971 to recruit, train, and elect women candidates. Today we continue to work on ending sex discrimination and achieving political parity at all levels of government. We stand alongside the Impact Fund, Bay Area Lawyers for Individual Freedom, and the National Women's Law Center when declaring that sex discrimination includes discrimination on the basis of gender and gender identity. We believe in equality for all people.

New Voices for Reproductive Justice is a grassroots human rights organization for women of color, led by and about women of color, operating in Pennsylvania and Ohio. New Voices' mission is to build a social change movement dedicated to the health and well-being of Black women and girls. New Voices defines Reproductive Justice as the human right of all women and people to

control their bodies, sexuality, gender and gender identity, work and reproduction—as well as the ability to form families. For the last thirteen years, New Voices has served over 75,000 women of color through leadership development, community organizing, public policy advocacy, culture change, civic engagement, grassroots activism, and political education. New Voices currently serves on Pittsburgh's Affirmatively Furthering Fair Housing Task Force Gender and Sexual Orientation Subcommittee, a convening of advocates and city officials seeking to identify and redress barriers to affordable housing in Pittsburgh for LGBTQIA+ individuals.

The **Southwest Women's Law Center**, founded in 2005, is a non-profit policy and advocacy law center with its headquarters in the State of New Mexico where we focus on advancing opportunities for women and girls. The Southwest Women's Law Center advocates to eliminate gender discrimination and encourage equal treatment of all individuals. Utilizing federal and state law, regulations, and policies, the Southwest Women's Law Center is dedicated to advocacy that will prevent gender discrimination and provide protections and equal access to healthcare, medical services, housing, and public accommodations. Accordingly, the Law Center is uniquely qualified to comment on, and inform, the Court about the impact of its decision in *Fulcher v. Secretary of Veterans Affairs*.

The **Women's Law Project** ("WLP") is a non-profit women's legal advocacy organization with offices in Philadelphia and Pittsburgh, Pennsylvania. Its mission is to create a more just and equitable society by advancing the rights and status of all women throughout their lives. Since 1974, WLP has engaged in high-impact litigation, public policy advocacy, and education challenging discrimination rooted in gender stereotypes. WLP represented amici curiae in *Prowel v. Wise Business Forms*, 579 F.3d 285 (3d Cir. 2009), to ensure full enforcement of Title VII's protection against sex discrimination in the workplace for a litigant who suffered harassment based on gender stereotyping. WLP was also instrumental in passage of the Allegheny County Human Relations Ordinance, which prohibits discrimination in employment, public accommodations, and housing based on sex, gender identity, and gender expression. From 2012 to 2016, WLP represented Rainbow Alliance, an LGBTQA-student group, in litigation filed under Pittsburgh's Fair Practices Ordinance challenging the University of Pittsburgh's gendered facilities policies. WLP currently serves on the Pennsylvania Department of Health's Transgender Health Workgroup, a convening of Pennsylvania advocates and government officials seeking to improve access to comprehensive health care for transgender and gender nonconforming people.

CERTIFICATE OF SERVICE

I hereby certify that, on this 28th day of June, 2017, I filed the foregoing Brief for Amici Curiae Impact Fund, Bay Area Lawyers for Individual Freedom (BALIF), National Women's Law Center, and 13 Legal and Advocacy Organizations 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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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

Pursuant to Fed. R. App. P. 32(g), the undersigned hereby certifies that this brief complies with the type-volume limitation of Federal Circuit Rules 29(a)(5) and 32(a).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f) and Federal Circuit Rule 32(b), the brief contains 6,570 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 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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