Lambda Legal
making the case for equality

September 7, 2018

Director, Office of Regulation Policy and Management
Department of Veterans Affairs
810 Vermont Ave NW Room 1063B
Washington, DC 20420

Re: Comments in response to "Notice of Petition for Rulemaking and request for comments—Exclusion of Gender Alterations from the Medical Benefits Package."

To Whom It May Concern:

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") and the Transgender Law Center ("TLC") appreciate the opportunity to comment on the petition to assist the Department of Veterans Affairs ("the agency" or "VA") in determining whether to amend the medical benefits package to eliminate 38 C.F.R. §17.38(c)(4) (the "Regulation"), which excludes "gender alterations" from the VA's medical benefits package. Lambda Legal is the oldest and largest national legal organization dedicated to achieving full recognition of the civil rights of lesbian, gay, bisexual, and transgender ("LGBT") people and everyone living with HIV, through impact litigation, policy advocacy, and public education. TLC is the largest national trans-led organization advocating self-determination for all people and for changes to law, policy, and attitudes so that all people can live safely, authentically, and free from discrimination regardless of their gender identity or expression.

Lambda Legal and TLC submit these comments on behalf of Dee Fulcher and Giuliano Silva, who both served with distinction as members of the U.S. Armed Forces. As veterans, they participate in the VA medical benefits package; as transgender veterans, they are deprived by the Regulation of care that their VA health care practitioners have determined is medically necessary as part of their gender transition. Lambda Legal and TLC also submit these comments on behalf of the Transgender American Veterans Association, which advocates for transgender veterans across the country.

Dee Fulcher: Ms. Fulcher is a veteran of the Marine Corps. She received a diagnosis of gender dysphoria from her physician and mental health social worker at the VA, and her clinicians have since recommended that she receive sex reassignment surgery, including a penectomy, vaginoplasty, facial feminization, breast augmentation, and electrolysis, as part of her gender transition. However, because of the Regulation, Ms. Fulcher cannot receive this prescribed treatment through the VA.

Giuliano Silva: Mr. Silva is a veteran of the U.S. Army. He has also received a diagnosis of gender dysphoria from his VA physicians but could not receive necessary sex reassignment surgery as treatment under the Regulation.

The Transgender American Veterans Association: Ms. Fulcher and Mr. Silva are members of the Transgender American Veterans Association ("TAVA"), a non-profit organization that advocates for transgender veterans within the VA health care system. TAVA works with veterans, active duty servicemembers, Congress, and LGBT organizations to influence VA and military policy, regulations, and procedures regarding the provision of health care to veterans with gender dysphoria. TAVA

members "experience extreme and sometimes life-threatening hardships because they cannot obtain coverage for these health care services that their doctors deem to be medically necessary."

These veterans, like tens of thousands of other transgender veterans, are categorically denied medically necessary surgical care because of the Regulation. In various forums, the VA has recognized and acknowledged for over a decade that gender dysphoria is a serious medical condition requiring treatment. In addition, the VA has acknowledged that surgical care is widely accepted as medically necessary to treat gender dysphoria and that the cost is *de minimus*. According to recent estimates, there are more than 130,000 transgender veterans of the United States Military, the United States Reserves, and the National Guard.[1] We urge the VA to move forward with formal rulemaking to eliminate the blanket exclusion so that these transgender veterans can obtain the health care coverage they need and deserve.

I. Summary of Comments

The agency's request for comments states that it seeks input to assist with its evaluation of a Petition for Rulemaking submitted on May 9, 2016. Lambda Legal and TLC originally submitted that Petition for Rulemaking, and this comment begins below by describing the relevant agency history relating to that Petition. The comment then addresses three specific questions raised by the agency's request for comments, and it explains why a February 22, 2018 Department of Defense document issued in connection with a reversal of the military's open service policy for transgender people—cited by the request for comments—is not entitled to any weight. Because other comments have addressed those topics at length, we provide a summary overview of that information, and then focus on why the exclusion in 38 C.F.R. §17.38(c)(4) is contrary to law, both because it is arbitrary and capricious, and because it discriminates on the basis of sex and transgender status in violation of the equal protection component of the Fifth Amendment's Due Process Clause and Section 1557 of the Affordable Care Act, 42 U.S.C. §18116.

II. Prior Agency Proceedings

In the spring of 2016, the VA drafted a Notice of Proposed Rulemaking ("NPRM") proposing to amend or repeal the Regulation by removing the exclusion of "gender alterations" from the medical benefits package.[2] The draft NPRM was not published, but the VA announced in the Fall 2016 Unified Agenda of Federal Regulatory and Deregulatory Action that it was considering issuance a possible NPRM to repeal the Regulation. As the draft NPRM explained, that exclusion had been enacted in 1999 on the theory that sex reassignment surgery was "not considered medically needed" for transgender veterans. Even if that rationale had been tenable seventeen years earlier, the VA explained, it was no longer consistent with the statute and regulation under which the agency provided the medical benefits package, given intervening medical developments: "Increased understanding of both gender dysphoria and surgical techniques in this area have improved significantly, and surgical procedures are now widely accepted in the medical community as medically necessary treatment for gender dysphoria. Additionally, recent medical research shows that the failure to provide transition surgeries to certain

[1] Gary J. Gates, Jody L. Herman, *Transgender Military Service in the United States*, THE WILLIAMS INSTITUTE (May 2014), *available at* https://williamsinstitute.law.ucla.edu/research/military-related/us-transgender-military-service.
[2] *See* proposed NPRM, RIN 2900-AP69, attached as Exhibit A.

patients suffering from gender dysphoria can have severe medical consequences." "In light of these medical advances and the evolving standard of care," the draft NPRM explained, the VA "propose[d]" to "revise its medical benefits package regulation to remove this exclusion." With the exclusion removed, "the treating VA healthcare provider [could] determine, in the exercise of his or her clinical judgment, that such services are medically necessary in a particular clinical case and so offer them to the patient."[3]

In conjunction with the draft NPRM, the VA conducted an economic impact analysis of the proposed removal of the exclusion. It concluded that projected costs for 2018-2020 would be approximately $18 million, depending on patient interest in and awareness of the procedures—a negligible fraction of the VA's overall healthcare budget. Given that the VA already provided certain aspects of transition-related care, the analysis observed that "[f]ortunately, the addition of medically necessary transition-related procedures is viewed as an event-based expense per unique veteran, rather than ongoing medical expense to the system."[4] That is, the VA would incur no incremental fixed costs, but only the expense associated with each procedure sought and provided. The analysis also observed that those minor costs might be offset by efficiencies introduced by the VA's provision of sex reassignment surgery through its own network of providers. For example, the VA explained that "[m]any Veterans" had undergone sex reassignment surgery abroad, with little or no planned post-surgical care. That arrangement not only imposed significant hardship on the affected veterans—requiring them, for example, to "sit[] on the surgical site for an extended airline trip" and consequently requiring visits to VHA emergency rooms—but also imposed significant cost on the VA: Because the VA provides post-surgical care regardless of where the surgery takes place, it addresses—and bears the financial consequence of—"post-operative complications related to international travel from surgical centers and poor surgical care." By removing the exclusion, the analysis explained, "these types of complications can be reduced and continuity of care will be enhanced." The agency further explained that "transition-related surgery has been proven effective at mitigating serious health conditions including suicidality, substance abuse and dysphoria that, left untreated, impose treatment costs on the [VA]." The chief financial officer of the Veterans Health Administration concurred in the financial analysis.[5]

During the summer and fall of 2016, Members of Congress sent letters to the VA requesting information about the status of the proposed rulemaking. On November 10, 2016, the VA sent an identical letter to each of the 47 Members of Congress who had written to the agency about the draft NPRM.[6] Signed by respondent David J. Shulkin, M.D.—then the Under Secretary of Veterans Affairs for Health—the letter acknowledged both that the VA "currently provides many services for transgender Veterans to include hormone therapy, mental health care, preoperative evaluation, and long-term care following sex reassignment surgery," and that "[i]ncreased understanding of both gender dysphoria and surgical techniques in this area has improved significantly and is now widely accepted as medically necessary treatment." The letter nonetheless disclosed that the VA was withdrawing the NPRM from the Fall 2016 Unified Agenda. Then-Under Secretary Shulkin explained that the "VA has been [exploring] and will continue to explore a regulatory change that would allow VA to perform gender alteration surgery and a

[3] *Id*.
[4] *See* VA Economic Impact Analysis for the proposed NPRM, attached as Exhibit B.
[5] *Id.* at 7.
[6] *See* Letters from David Shulkin to Members of Congress, attached as Exhibit C.

change in the medical benefits package," but only "when appropriated funding is available." Any future rulemaking on the subject was "not imminent."[7]

After Lambda Legal and TLC sought review from the U.S. Court of Appeals for the Federal Circuit, the agency announced on July 8, 2018, that it would seek comments "as part of its ongoing consideration of the petition."

III. Surgery is Effective, Reduces Rates Of Suicide, and Will Not Affect Access To Care at The VA

This section first addresses the three questions posed by the agency's request for comments, and then addresses the February 22, 2018 Department of Defense document cited in the request for comments.

A. "What evidence is available about the safety and effectiveness of 'gender alterations' for the treatment of Gender Dysphoria and how reliable is that evidence?"

The Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People ("Standards of Care"), promulgated by the World Professional Association for Transgender Health, set forth the protocol accepted by medical professionals for the individualized diagnosis and treatment of gender dysphoria.[8] The Standards of Care have been developed based on hundreds of peer-reviewed studies spanning decades of research. That rigorous base of research also is described in comments submitted to this agency by the nation's leading medical and behavioral health organizations, which confirm the overwhelming consensus about the safety and effectiveness of transition-related treatment in accordance with the Standards of Care. Because this robust scientific research is reviewed in detail in other comments, we will not repeat it here, and instead refer the agency to comments submitted by a collection of the nation's preeminent medical and mental health organizations, including:

- The American Academy of Nursing, the American Medical Association, the American Medical Student Association, American Medical Women's Association, the American Nurses Association, the Association of LGBTQ Psychiatrists, the Association of Nurses in AIDS Care, GLMA: Health Professionals Advancing LGBT Equality, the HIV Medicine Association, the LGBT Caucus of Public Health Professionals of the American Public Health Association, the Lesbian, Bisexual, Gay and Transgender Physician Assistant Caucus of the American Academy of PAs, Inc., the National Association of Social Workers, and the World Professional Association for Transgender Health;[9]
- The American Medical Association, in its own comment, submitted in addition to the one cited immediately above;[10]
- A collection of more than 100 medical and mental health providers;[11] and

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[7] *Id*.
[8] World Professional Association for Transgender Health Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People 7th Version (Sept. 25, 2011), *available at* https://www.wpath.org/media/cms/Documents/Web%20Transfer/SOC/Standards%20of%20Care%20V7%20-%202011%20WPATH.pdf.
[9] *See See* VACO Tracking No. 1k2-95ak-rmtt.
[10] *See* VA-2018-VACO-0001-4630.

- The American Psychological Association.[12]

The comments reflect the organizations' longstanding positions on these issues, rooted in the extensive, rigorous base of research developed over decades in support of access to medically necessary care for transgender people. Major medical professional associations including the American Medical Association,[13] the American Psychiatric Association,[14] the American Psychological Association,[15] the American College of Obstetricians and Gynecologists, the Endocrine Society,[16] and the World Professional Association for Transgender Health[17] have affirmed through organizational statements, and clinical guidelines, the appropriateness and medical necessity of medical and surgical therapy and have supported insurance coverage for treatment of appropriate patients diagnosed with gender dysphoria.

B. "Given the challenge of the high rates of Veteran suicide, what does the evidence, including peer-reviewed evidence, suggest about the impact of gender alterations on the rates of suicide and suicidal ideation among those suffering from gender dysphoria?"

Experts agree that the mental health disparities faced by the transgender community, including rates of suicidal ideation, do not reflect inherent pathology, but rather are associated with high levels of discrimination and stigma. As the American Psychiatric Association has stated, "[b]eing transgender or gender variant implies no impairment in judgment, stability, reliability, or general social or vocational capabilities; however, these individuals often experience discrimination due to a lack of civil rights protections for their gender identity or expression."[18] Instead, studies of transgender veterans, as well as of transgender people overall, demonstrate that suicidal ideation and other mental health disparities are associated with denials of care and higher levels of discrimination, including discriminatory policies and rejection in the military contexts.

For example, a 2017 analysis of 6,308 transgender veterans found that suicide risk was strongly associated with experiences of violence, housing instability, and financial hardship.[19] Other studies reported similar findings among transgender veterans.[20] Studies of transgender people more generally

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[11] *See* VACO Tracking No. 1k2-95aq-gv73.
[12] *See* VA-2018-VACO-0001-4197.
[13] American Medical Association. (2008). Removing financial barriers to care for transgender patients H-185.950.
[14] Drescher, J., Haller, E., & Lesbian, G., *Position statement on access to care for transgender and gender variant individuals*. (2012) Washington, DC: American Psychiatric Association.
[15] American Psychological Association. (2008). Transgender, gender identity, & gender expression non-discrimination. American Psychological Association.
[16] Wylie C. Hembree, et al., "Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline." *The Journal of Clinical Endocrinology & Metabolism*, Volume 102, Issue 11, pages 3869–3903 (Sept. 13, 2017).
[17] Gail, K. *Position Statement on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the USA*. World Professional Association for Transgender Health (WPATH), (Dec. 21, 2016).
[18] American Psychiatric Association (2012).
[19] Blosnich, J. R., Marsiglio, M. C., Dichter, M. E., Gao, S., et al. (2017). Impact of social determinants of health on medical conditions among transgender veterans. *American Journal of Preventive Medicine*, *52*(4), 491-498
[20] Lehavot, K., Simpson, T. L., & Shipherd, J. C. (2016). Factors associated with suicidality among a national sample of transgender veterans. *Suicide and Life-Threatening Behavior*, *46*(5), 507-524 (finding elevated suicide ideation and attempt rates among transgender veterans and finding that higher suicide attempt and ideation rates were associated with experiences

have found that the health disparities they experience are driven by discrimination, rejection, and barriers to care and that those health disparities decrease substantially when transgender people are supported, including by having access to the health care they need without discrimination.[21] These findings were echoed by former military Surgeon Generals in their assessment of the Department of Defense's February 22, 2018 plan for implementing the ban on military service by transgender people. The Surgeon Generals' report noted that "[e]xtensive research has confirmed that both stigma and the denial of medically necessary care can lead to suicidality" and that military policies such as the ban on transgender service members have in fact "contributed to stigma and deprivation of health care" and exacerbated the problem of suicidality—just as a discriminatory exclusion of health care for transgender veterans would continue to do.[22]

C. "Given that any addition to the medical benefits package will have an associated cost and burden on existing specialists, especially urological and vascular surgeons and other highly trained specialists who are already in shorty supply nationwide, what is the potential impact of adding 'gender alterations' on Veterans' access to care, particularly for Veterans facing life-threatening medical conditions waiting to see surgical specialists?"

This question creates a false distinction between transgender veterans seeking surgical care and those seeking care for "life-threatening" medical conditions. The question ignores utilization rates and the relatively small population of transgender people, but more importantly, it transparently assumes that severe gender dysphoria is not a "life-threatening" condition, without citing any medical authority for that proposition. All veterans deserve health care coverage for medically necessary conditions. The VA does not pit the health care needs of other groups of veterans against each other, and transgender veterans should not be singled out simply because they are a disfavored minority group. We urge the VA

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of discrimination within and outside of the military); Tucker, R. P., Testa, R. J., Reger, M. A., Simpson, T. L., Shipherd, J. C., & Lehavot, K. (2018). Current and military-specific gender minority stress factors and their relationship with suicide ideation in transgender veterans. *Suicide and Life-Threatening Behavior*, doi: 10.1111/sltb.12432 (finding that suicidal ideation among transgender veterans is associated with higher levels of discrimination and rejection, including in military contexts).

[21] See e.g. Bockting, W. O., Coleman, E., Deutsch, M. B., Guillamon, A., Meyer, W., et al. (2016). Adult development and quality of life of transgender and gender nonconforming people. *Current Opinion in Endocrinology & Diabetes and Obesity, 23*(2), 188-197 (literature review finding that research points to a strong association between stigma and suicidality and depression among transgender people); Bockting, W. O., Miner, M. H., Swinburne Romine, R. E., Hamilton, A., & Coleman, E. (2013). Stigma, mental health, and resilience in an online sample of the US transgender population. *American Journal of Public Health, 103*(5), 943-951; Clements-Nolle, K., Marx, R., & Katz, M. (2006). Attempted suicide among transgender persons: the influence of gender-based discrimination and victimization. *Journal of Homosexuality, 51*(3), 53-69; House, A. A., Van Horn, E., Coppeans, C., & Stepleman, L. M. (2011). Interpersonal trauma and discriminatory events as predictors of suicidal and nonsuicidal self-injury in gay, lesbian, bisexual, and transgender persons. *Traumatology, 17*(2), 75-85; James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. (2016). *The report of the 2015 U.S. Transgender Survey*. Washington, DC: National Center for Transgender Equality (experiences of violence, discrimination, rejection, and inadequate access to care were associated with higher levels of psychological distress and suicide in a national sample of 27,715 adults); Moody, C. & Smith, N. (2013). Suicide protective factors among trans adults. *Archives of Sexual Behavior, 42*(4), 739-752; Perez-Brumer, A., Hatzenbuehler, M. L., Olbenburg, C. E, & Bockting, W. (2015). Individual- and structural-level risk factors risk factors for suicide attempts among transgender adults, *Behavioral Medicine, 41*(3), 164-171 (study of 1,229 transgender individuals finding an association between social stigma and lifetime suicide attempts).

[22] Arthur, D. C., Pollock, G., Steinman, A. M., Frank, N., Mazur, D. H., & Belkin, A. (2018). *DoD's Rationale for Reinstating Transgender Ban is Contradicted by Evidence*. Palm Center: San Francisco, California.

to pursue this inquiry led by science and medicine, and refer the agency to the comments submitted by Professor Emeritus at the Naval Postgraduate School in Monterey, California, Mark J. Eitelberg, and the Palm Center for further analysis of this issue.[23]

If the VA chooses not to eliminate the exclusion because of the purported costs associated with covering sex reassignment surgery or if it claims, as it has previously,[24] that it requires appropriated funding from Congress first, those justifications fail because they have no basis in fact.

First, the agency has recognized the medical needs of transgender veterans and has provided transition-related care for years without any requirement of specific appropriations from Congress. This is consistent with the economic impact analysis previously performed by the agency, which found that transition-related surgery would be "viewed as an event-based expense per unique veteran, rather than ongoing medical expense to the system."[25] Specific appropriated funds are not necessary to cover such incremental event-based expenses.

Second, as discussed below, the VA already provides procedures substantially similar to those constituting sex reassignment surgery, so long as the medical need is not related to a veteran's gender transition. The VA thus will not need to develop new technologies or acquire new equipment to meet the needs of transgender veterans.

Third, the VA's prior financial analysis of the proposed rule—drafted by agency staff and concurred in by the CFO of the Veterans Health Administration—concluded that projected costs for 2018 through 2020 would be approximately $18 million.[26] That figure represents a negligible figure at less than 0.01% of the VA's $186.5 annual budget for 2018. Moreover, as the financial analysis makes clear, that figure would likely be offset substantially by eliminating costs associated with (1) serious health consequences from untreated gender dysphoria and (2) post-operative care needed by veterans who receive sex reassignment surgery from non-VA (and often low-quality) providers.[27] Confirming this point, research and analysis demonstrates that the upfront costs of sex reassignment surgery would be far outweighed by these savings.[28] The VA has failed to provide any reasonable explanation of why the minimal costs involved in providing sex reassignment surgery require denial of the care, particularly in view of the corresponding efficiencies and offsets. Additionally, the Supreme Court has long made clear that cost cannot justify discrimination; in the Court's words, the government cannot "protect the public fisc by drawing an invidious distinction between classes of its citizens." *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 263 (1974); *see also Graham v. Richardson*, 403 U.S. 365, 374-375 (1971).

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[23] *See* VA-2018-VACO-0001-4538.
[24] *See* Letters from David Shulkin to Members of Congress (Exhibit C).
[25] *See* VA Economic Impact Analysis for the proposed NPRM at 3 (Exhibit B).
[26] *Id*. at 16.
[27] *Id*. at 14.
[28] *See* Padula, WV, *Societal Implications of Health Insurance Coverage for Medically Necessary Services in the U.S. Transgender Population: A Cost-Effectiveness Analysis,* J Gen Intern Med. (2016), *available at* https://www.ncbi.nlm.nih.gov/pubmed/26481647; "Economic Impact Assessment of Gender Nondiscrimination in Health Insurance," Reg. File No. REG-2011-00023 (Apr. 13, 2012), *available at* http://transgenderlawcenter.org/wp-content/uploads2013/04/Economic-Impact-Assessment-Gender-Nondiscrimination-In-Health-Insurance.pdf.

D. The VA Should Not Rely on The February 22, 2018 Department of Defense Document Because it is Contrary to Medical Consensus

The request for comment on the petition for rulemaking cites a February 22, 2018 Department of Defense document (the "Feb. 22 Document") that raised questions about the efficacy of treatment for transition-related care, and quality of research supporting that treatment. The Feb. 22 Document, however, was immediately repudiated by leading medical organizations as mischaracterizing the relevant research and ignoring the medical consensus on these issues:[29]

- For example, the American Medical Association ("AMA") explained that the Feb. 22 Document "mischaracterized and rejected the wide body of peer-reviewed research on the effectiveness of transgender medical care," which demonstrates that "medical care for gender dysphoria is effective."[30]

- The American Psychological Association issued a statement expressing "alarm[]" at "the administration's misuse of psychological science to stigmatize transgender Americans," and explaining that "[s]ubstantial psychological research shows that gender dysphoria is a treatable condition."[31]

- A definitive report debunking the Feb. 22 Document was issued by Former Surgeon General of the U.S. Navy Vice Admiral Donald C. Arthur, Former Acting Surgeon General of the U.S. Army Major General Gale Pollock, and Former Director of Health and Safety of the U.S. Coast Guard Rear Admiral Alan M. Steinman.[32] We will not repeat the content of that comprehensive response to the Feb. 22 Document here, but refer the agency to pages 1-13, and 44-47 for a specific response to the Feb. 22 Document's mischaracterizations of the medical literature. We further refer the agency to comments submitted by the former Surgeons General authors of that report in response to the agency's request for comments. *See* VA-2018-VACO-0001-4538, Attachment 1.

For all of the reasons above, the agency should give the Feb. 22 Document no weight, and instead should rely on the clear medical consensus about the efficacy of surgical treatment for gender dysphoria, reached over decades of rigorous peer-reviewed research.

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[29] Further demonstrating serious credibility problems with the Feb. 22 Document, all four service chiefs contradicted other claims in that report, for example about deployability and unit cohesion, in sworn congressional testimony. *See* Tara Copp, "All 4 service chiefs on record: No harm to units from transgender service," Military Times (April 24, 2018), *available at* https://bit.ly/2Ka8IIe.

[30] *See* VA-2018-VACO-0001-4538, Attachment 2, Letter from James Madara on behalf of the physician and medical student members of the American Medical Association to Secretary of Defense, James Mattis (Apr. 3, 2018), *available at* https://www.politico.com/f/?id=00000162-927c-d2e5-ade3-d37e69760000.

[31] *See* VA-2018-VACO-0001-4538, Attachment 2, American Psychological Association (2018). APA Statement Regarding Transgender Individuals Serving in Military.

[32] *See* VA-2018-VACO-0001-4538, Attachment 1, Palm Center, "DoD's Rationale for Reinstating the Transgender Ban Is Contradicted by Evidence" (May 4, 2018), *available at* https://www.palmcenter.org/wp-content/uploads/2018/04/Transgender-troops-are-medically-fit-pdf.pdf.

IV. The Regulation Should Be Repealed Because It Is Contrary To Federal Law And The Constitution

A. The Regulation Is Inconsistent With The Aims of The Medical Benefits Package and With The VA's Overall Treatment of Gender Dysphoria

The Regulation is contrary to the statutory directive to provide "needed" care to veterans. As the VA acknowledges, 38 U.S.C. §1710 "requires VA to 'furnish hospital care and medical services which the Secretary determines to be needed' for eligible veterans."[33] The agency has implemented that statutory directive by providing an operative definition of the statutory term "needed"—namely "medically needed," which the agency in turn defines to mean "care that … appropriate healthcare professionals [determine] to be needed to promote, preserve, or restore the health of the individual and to be in accord with generally accepted standards of medical practice."[34]

The exclusion of sex reassignment surgery was introduced in 1999 based on the view that the surgery was "not considered medically needed." As the VA recognized in the draft NPRM, that rationale has now been thoroughly debunked: "[M]ultiple medical professional organizations, including the American Psychological Association, the American Psychiatric Association, the American Academy of Family Physicians, the American Congress of Obstetricians and Gynecologists, and the World Professional Association for Transgender Health have all issued statements affirming that transition surgery is medically necessary care for some patients." Yet the VA's categorical exclusion of sex reassignment surgery remains in place, even as "other provisions of this regulation have been modified over the years."[35]

Furthermore, the draft NPRM recognized that sex reassignment surgery is consistent with a wall of medical authority on the point. "Indeed, every psychiatric reference text that has been established as authoritative in this case endorses sex reassignment surgery as a treatment for [gender dysphoria] in appropriate circumstances," and "[n]o psychiatric reference text has been brought to the Court's attention that fails to list, or rejects … sex reassignment surgery as the accepted treatment regimen for [gender dysphoria]."[36] In recognition of that medical consensus, multiple federal agencies have either provided sex reassignment surgery for covered transgender people or direct participating providers or insurance carriers to do so in appropriate cases. A growing number of state agencies take the same approach, as do an increasing number of private businesses and insurance carriers.

The Regulation and its implementing directives are also arbitrary and capricious because they result in a regimen for transition-related care that is incoherent and contrary to the VA's professed goal of promoting, preserving, and restoring veterans' health. As explained, the VA recognizes that gender dysphoria is a serious medical condition that requires treatment—including, in some cases, sex reassignment surgery. The VA accordingly provides transgender veterans with treatments such as "hormonal therapy, mental health care, preoperative evaluation, and medically necessary post-operative

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[33] *See* proposed NPRM, RIN 2900-AP69 at 2-3 (Exhibit A).
[34] 63 Fed. Reg. 37,299, 37,300 (July 10, 1998); *see also* 63 Fed. Reg. at 37,300 ("The Secretary has authority to provide healthcare as determined to be medically needed." (citing 38 U.S.C. §1710).
[35] *See* proposed NPRM, RIN 2900-AP69 at 2 (Exhibit A).
[36] *O'Donnabhain*, 134 T.C. at 65-66.

and long-term care following gender confirming/affirming surgery."[37] Indeed, reflecting its commitment to provide medically needed care to transgender veterans, the VA has opened clinics in Cleveland and Tucson that specialize in providing medical care to transgender veterans.[38] In addition, the VA Boston Healthcare System has formed the Interdisciplinary Transgender Treatment Team, which provides medical care tailored to the needs of transgender veterans.[39] As the VA also has acknowledged, the agency actually provides "the majority" of the care needed for transgender veterans, and without any specific appropriation from Congress.[40]

The VA harbors no medical objection to the procedures that constitute sex reassignment surgery. Indeed, it already provides surgeries similar to those that constitute sex reassignment surgery—when done for reasons other than to treat gender dysphoria.[41] For example, the VA offers veterans "[r]econstructive (plastic) surgery required as a result of disease or trauma," which under VHA Directive 1091 (Feb. 21, 2014) includes "those surgical procedures performed for the revision of external bodily structures which deviate from normal either from congenital or acquired causes."[42] Under 38 C.F.R. §17.38(a)(1)(x) and VHA Directive 1091, the VA offers breast reconstruction to cisgender (i.e., non-transgender) women following a mastectomy, as well as penile and testicular implants to cisgender males whose penises or testes have been damaged. Hysterectomy and mastectomy are offered to cisgender females for, among other reasons, reduction of cancer risk.[43] The VA also offers cisgender males orchiectomies, scrotectomies, and penectomies for various medical reasons.[44] Yet it denies those same procedures to transgender veterans when needed for purposes of gender transition.

The refusal to provide transgender veterans with sex reassignment surgery—irrespective of the medical need for it in a particular case, and notwithstanding that it provides substantively identical procedures to other veterans for various reasons is arbitrary and deprives transgender veterans of medically necessary health care coverage. Moreover, the Regulation arbitrarily strips VA clinicians of the ability to determine whether sex reassignment surgery is medically necessary on an individualized basis. This

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[37] *See* VHA Directive 1341 (May 23, 2018), attached as Exhibit D.
[38] *See* Brian Albrecht, *VA Transgender Clinic Opens in Cleveland*, THE PLAIN DEALER (Nov. 12, 2005), *available at* https://www.cleveland.com/metro/index.ssf/2015/11/vas_first_transgender_clinic_o.html; Carol Ann Alaimo, *Tucson VA Launches Clinic for Transgender Veterans*, TUCSON.COM (Dec. 13, 2015), *available at* https://tucson.com/news/tucson-va-launches-clinic-for-transgender-veterans/article_69a93024-f314-50e0-8c49-e3e476df0c5b.html.
[39] *See* VA Boston Healthcare System, Interdisciplinary Transgender Treatment Team (ITTT), https://www.boston.va.gov/services/Lesbian_Gay_Bisexual_and_Transgender_Veterans.asp.
[40] *See* VA Economic Impact Analysis for the proposed NPRM at 3 (Exhibit B).
[41] *Id.*
[42] *See* VHA Directive 1091 at 1 (Feb. 21, 2014), attached as Exhibit E.
[43] *See* Gardella *et al.*, *Prevalence of Hysterectomy and Associated Factors in Women Veterans Affairs Patients*, 50(3) J. Reprod. Med. 166, 166-72 (Mar. 2005) (estimating the prevalence of hysterectomies provided by the VA Puget Sound Health Care System); Hynes *et al*., *Breast Cancer Surgery Trends and Outcomes: Results from a National Department of Veterans Affairs Study*, 198(5) J. of the Am. College of Surgeons 707-16 (Mar. 2004) (examining trends in breast cancer surgery performed at VA hospitals).
[44] *See Norvell v. Peake*, 22 Vet. App. 194, 195 (2008) (noting that the patient underwent a bilateral orchiectomy at Lexington, Kentucky, VA Medical Center), *aff'd sub nom. Norvell v. Shinseki*, 333 F. App'x 571 (Fed. Cir. 2009); Corman *et al.*, *Fournier's Gangrene in a Modern Surgical Setting: Improved Survival with Aggressive Management*, BJU International, 84: 85-88 (July 1999) (noting that all patients covered in the survey had received scrotectomies for Fournier's Gangrene and that some of the patients had been treated at West Los Angeles Veterans Administration Hospital); Board of Veterans Appeals, Docket No. 05-31 519 (Oct. 25, 2007) (noting that the patient had undergone a total penectomy at a VA hospital due to cancer).

categorical bar contravenes not only the standard of care and scientific consensus in this area, but also a line of cases finding categorical bans improper because they preclude an "individualized medical evaluation" of the need for sex reassignment surgery, contrary to "prudent professional standards" and the Standards of Care.[45]

B. Treatment of Sex Reassignment Surgery By Courts, Agencies, Insurers, and Employers

The categorical exclusion of surgical care is not only internally incoherent but also is divorced from an ever-growing consensus among federal and state agencies, insurance carriers, and private businesses regarding coverage for sex reassignment surgery.

Federal and state agencies have taken a dim view of categorical exclusions for coverage of health services related to gender transition, such as the Regulation. For example, the Office of Personnel Management, recognizing "the evolving professional consensus that treatment may be medically necessary to address … gender dysphoria," stated in a letter to health insurance carriers participating in the Federal Employees Health Benefits Program that no carrier "may have a general exclusion of services, drugs or supplies related to gender transition."[46] An increasing number of states, including California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington, as well as the District of Columbia, have adopted similar statutes, rules, and directives.[47] Other federal agencies have taken a similar tack. For example, in 2014, the Department of Health and Human Services Departmental Appeals Board overturned a thirty-year-old policy denying Medicare coverage for sex reassignment surgery.[48] The Board deemed the exclusion unreasonable in light of significant and unchallenged contemporary empirical evidence supporting the safety, effectiveness, and necessity of that treatment for certain individuals with severe gender dysphoria.

Federal courts also have recognized both the seriousness of gender dysphoria and the medical need for sex reassignment surgery.[49] The Federal Tax Court, for example, held that expenses associated with the surgery were medically necessary and therefore deductible for federal tax purposes.[50] Courts have also

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[45] *Fields v. Smith*, 712 F. Supp. 2d 830, 858-62 (E.D. Wis. 2010), aff'd, 653 F.3d 550 (7th Cir. 2011) (internal quotation marks omitted); see also *De'lonta*, 708 F.3d at 523, 526 ("[J]ust because Appellees have provided De'lonta with some treatment consistent with the [gender dysphoria] Standards of Care, it does not follow that they have necessarily provided her with constitutionally adequate treatment.").

[46] U.S. Office of Personnel Management FEHB Program Carrier Letter (June 13, 2014), available at https://www.opm.gov/healthcare-insurance/healthcare/carriers/2014/2014-17.pdf.

[47] Katie Keith, CHIRblog, *15 States and DC Now Prohibit Transgender Insurance Exclusions*, GEORGETOWN UNIVERSITY HEALTH POLICY INSTITUTE CENTER ON HEALTH INSURANCE REFORMS (Mar. 30, 2016), *available at* http://chirblog.org/15-states-and-dc-now-prohibit-transgender-insurance-exclusions/.

[48] Department of Health and Human Services Departmental Appeals Board Appellate Division Decision No. 2576 (May 30, 2014), *available at* https://www.hhs.gov/sites/default/files/static/dab/decisions/board-decisions/2014/dab2576.pdf.

[49] *See Whitaker v. Kenosha Unified Sch. Dist. No. 1*, 858 F.3d 1034, 1040 (7th Cir. 2017); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 277 n.12 (W.D. Pa. 2017); *Board of Educ. of Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850, 855 (S.D. Ohio 2016).

[50] *O'Donnabhain v. Commissioner*, 134 T.C. 34, 65-70 (2010).

struck down categorical bans on sex reassignment surgery, deeming them deliberately indifferent to a prisoner's medical needs in violation of the Eighth Amendment.[51]

Finally, private businesses and insurance carriers increasingly cover sex reassignment surgery as part of the complement of benefits provided to employees. According to one 2016 study, nearly a third of large employers nationwide include the surgery as part of their employee health benefits packages.[52] The nation's largest insurers likewise cover surgery.

C. The Regulation Discriminates on The Basis of Sex and Transgender Status

The Regulation and its implementing directives discriminate against transgender veterans on the basis of sex and transgender status, in violation of both the equal protection component of the Fifth Amendment's Due Process Clause and Section 1557 of the Affordable Care Act, 42 U.S.C. §18116. The Regulation and its implementing directives deny transgender veterans medically necessary care that is available to non-transgender veterans to meet their medical needs. Under the Regulation, for example, a transgender woman may not receive vaginoplasty through the medical benefits package if it is intended as part of a veteran's gender transition.[53] By contrast, the VA would provide a cisgender woman that same procedure to treat an array of medical needs, including for "genital reconstruction due to blast injuries."[54] That differential treatment is plainly discriminatory.[55]

Discrimination based on a person's transgender status is itself discrimination based on sex. The decision to treat a woman who is transgender differently from a woman who is cisgender is necessarily taken on the basis of whether the woman's gender matches her sex assigned at birth, and is thus based on sex.[56]

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[51] *See, e.g., De'lonta v. Johnson*, 708 F.3d 520, 523, 526 (4th Cir. 2013); *Fields v. Smith*, 712 F. Supp. 2d 830, 863-864 (E.D. Wis. 2010), aff'd, 653 F.3d 550 (7th Cir. 2011).

[52] Mercer National Survey of Employer-Sponsored Health Plans (Nov. 19, 2015) *available at* https://www.mercer.com/newsroom/national-survey-of-employer-sponsored-health-plans-2015.html (Gender reassignment surgery is covered by 11% of all large employers (up from 8% in 2014) and by 29% of employers with 20,000 or more employees (up from 25%).

[53] *See* VHA Directive 1341 at 3 (Exhibit D).

[54] *See* VA Economic Impact Analysis for the proposed NPRM at 4 (Exhibit B).

[55] *See, e.g., Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1120 (N.D. Cal. 2015) (California regulation is "facially discriminatory because it explicitly distinguishes between treatment for transsexual women that is designated as presumptively 'not medically necessary' … and the same treatments for non-transgender women …, which are explicitly exempted from this bar"); *Denegal v. Farrell*, No. 1:15-cv-01251, 2016 WL 3648956, at *7 (E.D. Cal. July 8, 2016) (plaintiff stated equal protection claim based on allegation that prison "discriminate[d] against transgender women by denying surgery (vaginoplasty) that is available to cisgender women"); *Cruz v. Zucker*, 195 F. Supp. 3d 554, 581 (S.D.N.Y. 2016) (holding that a state's blanket ban on sex reassignment procedures constituted a "categorical exclusion on treatments of gender dysphoria" and discriminated on the basis of "sex"), modified in part on reconsideration, 218 F. Supp. 3d 216 (S.D.N.Y. 2016). Excluding from coverage procedures necessary for "gender alteration"—which by definition only transgender veterans would use—targets transgender people for differential treatment. *Cf. International Union v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991) (company's "use of the words 'capable of bearing children' … as the criterion for exclusion … must be regarded, for Title VII purposes, in the same light as explicit sex discrimination").

[56] *See Macy v. Holder*, No. 0120120821, 2012 WL 1435995, at *7 (EEOC Apr. 20, 2012) ("When an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment 'related to the sex of the victim.'" (citing *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000))). Thus, as both agencies and courts have recognized, "discrimination based on transgender status" is "cognizable" as a form of "sex discrimination."

Moreover, "discrimination against a transgender individual on the basis of an intended, ongoing, or completed gender transition is literally discrimination because of [that person's] sex."[57] As the EEOC has explained, analogizing religious conversion to gender transition: Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only "converts." That would be a clear case of discrimination "because of religion." No court would take seriously the notion that "converts" are not covered by the [antidiscrimination] statute. Discrimination "because of religion" easily encompasses discrimination because of a change of religion.[58] By the same rationale, discrimination against a person because of his or her transition from male to female or female to male is definitionally discrimination "because of sex." Here, the VA provides certain procedures to veterans to treat an array of medical needs—except for needs associated with gender transition. Discriminatory treatment based on gender transition—as on the face of the Regulation's exclusion for "gender alterations"—is direct evidence of sex discrimination.[59]

Finally, under a distinct but related theory, the First, Sixth, Seventh, Ninth, and Eleventh Circuits have recognized that discrimination against transgender individuals is impermissible sex stereotyping under the Equal Protection Clause of the Constitution and federal civil rights statutes.[60] As these courts have explained, discrimination on the basis of sex encompasses disparate treatment based on an individual's nonconformity with assumptions about how men and women should look and behave.[61] Because transgender individuals' "outward behavior and inward identity do not meet social definitions" associated with their sex assigned at birth,[62] there is inherently "a congruence between discriminating against transgender … individuals and discrimination on the basis of gender-based behavioral norms,"[63] As a result, any discrimination against transgender people because they are transgender—*i.e.*, against "individuals who, by definition, do not conform to gender stereotypes—is … discrimination on the basis of sex."[64]

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[57] *Macy*, 2012 WL 1435995, at *14 n.10 (internal quotation marks omitted).
[58] *Id*. at *11 (citing *Schroer v. Billington*, 577 F. Supp. 2d 293, 306 (D.D.C. 2008)).
[59] *See Glenn v. Brumby*, 663 F.3d 1312, 1320-1321 (11th Cir. 2011) ("Brumby['s] admitt[ing] that his decision to fire Glenn was based on 'the sheer fact of the transition' … provides ample direct evidence to support the district court's conclusion" that sex discrimination occurred; "If this were a Title VII case, the analysis would end here."); *Schroer*, 577 F. Supp. 2d at 306 ("[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.'"); *Macy*, 2012 WL 1435995, at *5 (discrimination claim based on "gender transition/change of sex" was "simply [a] different way[] of stating the same claim of discrimination 'based on … sex,' a claim cognizable under Title VII"); see also *Chavez v. Credit Nation Auto Sales*, LLC, 641 F. App'x 883, 890-892 (11th Cir. 2016) (employer's concerns about employee's "gender transition" sufficient to demonstrate pretext for discrimination on the basis of sex).
[60] *See Whitaker v. Kenosha Unified Sch. Dist. No. 1*, 858 F.3d 1034 (7th Cir. 2017); *Glenn*, 663 F.3d at 1316-1320; *Smith v. City of Salem*, 378 F.3d 566, 572-575 (6th Cir. 2004); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215-216 (1st Cir. 2000); *Schwenk*, 204 F.3d at 1200-1203.
[61] *See, e.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-252 (1989).
[62] *Schwenk*, 204 F.3d at 1201.
[63] *Glenn*, 663 F.3d at 1316.
[64] *Finkle v. Howard County, Maryland*, 12 F. Supp. 3d 780, 788 (D. Md. 2014); see also *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267 (W.D. Pa. 2017) ("[D]iscrimination based on transgender status in these circumstances is essentially the epitome of discrimination based on gender nonconformity, making differentiation based on transgender status akin to discrimination based on sex for these purposes."); accord *Fabian v. Hospital of Central Connecticut*, 172 F. Supp. 3d 509, 526-527 (D. Conn. 2016) ("Discrimination on the basis of the 'peculiarities' that 'typically' manifest as maleness and femaleness … would surely include discrimination on the basis of gender stereotypes, and just as surely discrimination on the

The Supreme Court has recognized that certain classifications are inherently invidious, such as those that single out certain groups through a suspect classification.[65] Because transgender people have been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process,"[66] several courts have concluded that transgender status is a suspect classification, and accordingly subjected statutes and regulations that discriminate on the basis of that status to heightened scrutiny.[67] Those courts' conclusion is correct. The Supreme Court consistently has applied heightened scrutiny where the group subject to the classification at issue has suffered a history of discrimination and the classification has no bearing on a person's ability to perform in society.[68] Even today, transgender people face staggering rates of harassment, discrimination, or other mistreatment at school and at work, as well as in access to employment, housing, and healthcare.[69] The Court has also sometimes considered whether the group is a minority or relatively politically powerless, and whether the characteristic is defining or "immutable."[70] While not all considerations need point toward heightened scrutiny, here all demonstrate that laws that discriminate based on transgender status should be subjected to heightened review.[71]

Transgender people have "immutable [and] distinguishing characteristics that define them as a discrete group, or as the Second Circuit put it … 'the characteristic of the class calls down discrimination when it is manifest.'"[72] A person's transgender status is "inherent in who they are as people,"[73] and "so fundamental" to their identity that they "should not be required to abandon" it.[74] As the service of

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basis of gender identity."); *Rumble v. Fairview Health Servs.*, No. 14-cv-2037, 2015 WL 1197415, at *2 (D. Minn. Mar. 16, 2015) ("Because the term 'transgender' describes people whose gender expression differs from their assigned sex at birth, discrimination based on an individual's transgender status constitutes discrimination based on gender stereotyping.").

[65] *Massachusetts Board of Retirees v. Murgia*, 427 U.S. 307, 312-313 (1976).

[66] *Id.*

[67] *See, e.g.*, *Karnoski v. Trump*, No. C17-1297-MJP, 2018 WL 1784464, at *11 (W.D. Wash. Apr. 13, 2018); *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1145 (D. Idaho 2018); *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704, 718 (D. Md. 2018); *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 208 (D.D.C. 2017); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017); *Board of Educ. of Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850, 873-874 (S.D. Ohio 2016); *Norsworthy*, 87 F. Supp. 3d at 1119; *Adkins v. City of N.Y.*, 143 F. Supp. 3d 134, 138-140 (S.D.N.Y. 2015).

[68] *See, e.g.*, *Murgia*, 427 U.S. at 313 (heightened scrutiny is warranted where a classified group has "experienced a 'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities").

[69] *See Whitaker*, 2017 WL 2331751, at *12; Adkins, 143 F. Supp. 3d at 139-140.

[70] See, e.g., *Lyng v. Castillo*, 477 U.S. 635, 638 (1986); see also *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407, 425-429 (Conn. 2008) (analyzing federal equal protection law to conclude that history of discrimination and ability to contribute to society are the two central considerations, and collecting authorities).

[71] *See e.g.*, "There is no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity." *Whitaker*, 2017 WL 2331751, at *12; *see also Adkins*, 143 F. Supp. 3d at 139-140; Indeed, "[t]he hostility and discrimination that transgender individuals face in our society today is well-documented," *Brocksmith v. United States*, 99 A.3d 690, 698 n.8 (D.C. 2014)," and "this history of persecution and discrimination is not yet history," *Adkins*, 143 F. Supp. 3d at 139.

[72] *Highland*, 208 F. Supp. 3d at 874 (quoting *Windsor*, 699 F.3d at 183); see also *Adkins*, 143 F. Supp. 3d at 139-140 ("mismatch" between sex assigned at birth and gender identity "calls down discrimination").

[73] *Evancho*, 237 F.Supp.3d at 288.

[74] *Hernandez-Montiel* v. INS, 225 F.3d 1084, 1093 (9th Cir. 2000), overruled on other grounds, *Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005).

thousands of transgender soldiers in our Nation's defense makes clear, an individual's transgender status has no relation to that person's ability to contribute to society.[75]

Finally, "as a tiny minority of the population, whose members are stigmatized for their gender non-conformity in a variety of settings, transgender people are a politically powerless minority group."[76] Transgender people's lack of "strength to politically protect themselves from wrongful discrimination" is self-evident.[77]

D. The Regulation Cannot Survive Any Level of Review

Although the Regulation and its implementing directives could not satisfy even rational basis review, the fact that they discriminate on the basis of sex and transgender status means they are subject to strict or at least heightened scrutiny.[78] Accordingly, they require a compelling or "exceedingly persuasive justification"—and must be narrowly or "substantially related to the achievement of those objectives."[79] The burden to satisfy heightened scrutiny "is demanding and … rests entirely on the [government],"[80] and the justifications on which the VA relies "must be genuine, not hypothesized or invented post hoc in response to litigation."[81] Further, as the Supreme Court recently explained, a classification subject to heightened scrutiny "must serve an important governmental interest today, for 'new insights and societal understandings can reveal unjustified inequality … that once passed unnoticed and unchallenged.'"[82]

Neither the proposed nor the final Regulation offered any credible justification for the exclusion of sex reassignment surgery.[83] Nor did implementing directives.[84] As discussed, however, the VA has previously explained in the draft NPRM that the exclusion was based on the VA's 1999 view that "such services were not considered medically needed."[85] Given the authoritative medical consensus to the contrary, and VA's own acknowledgement that its prior views are outmoded, it obviously cannot satisfy even rational basis review, let alone strict or heightened scrutiny.

E. The Regulation Violates The Affordable Care Act

For the same reasons just discussed, the Regulation and directives are also "not in accordance with law" because they violate the statutory prohibition on health care discrimination contained in the Affordable Care Act ("ACA"), 42 U.S.C. §18001 et seq. Under Section 1557 of the ACA, no individual may be "excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any

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[75] *See Highland*, 208 F. Supp. 3d at 874.
[76] *Highland*, 208 F. Supp. 3d at 873-874.
[77] *Windsor*, 699 F.3d at 184; *Adkins*, 143 F. Supp. 3d at 140 ("Particularly in comparison to gay people at the time of *Windsor*, transgender people lack the political strength to protect themselves.").
[78] *See Craig v. Boren*, 429 U.S. 190, 197 (1976) (sex); *Adkins*, 143 F. Supp. 3d at 140 (transgender status).
[79] *Berkley v. United States*, 287 F.3d 1076, 1082 n.1 (Fed. Cir. 2002) (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)).
[80] *Virginia*, 518 U.S. at 531.
[81] *Id*.
[82] *Sessions v. Morales-Santana*, No. 15-1191, 2017 WL 2507339, at *2 (U.S. June 12, 2017) (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015)).
[83] *See* 63 Fed. Reg. 37,299 (July 10, 1998) (proposed rule); 64 Fed. Reg. 54,207 (Oct. 6, 1999) (final regulation).
[84] *See* VHA Directive 1341 (Exhibit D).
[85] *See* proposed NPRM, RIN 2900-AP69 at 2 (Exhibit A).

health program or activity, any part of which is receiving Federal financial assistance … or under any program or activity that is administered by an Executive Agency" on grounds prohibited by various federal antidiscrimination statutes, including Title IX of the Education Amendments of 1972.[86] Title IX, in turn, prohibits discrimination in certain programs "on the basis of sex."[87] As explained, that prohibition protects transgender people from discrimination.[88] And, again for the reasons discussed above, the VA's exclusion constitutes discrimination against transgender veterans.[89] Where agency action is inconsistent with a statute, it must be set aside as "not in accordance with law."[90] The VA's denial of the rulemaking petition should therefore be set aside as inconsistent with Section 1557.

We appreciate this opportunity to comment on this important matter.

Most respectfully,

LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.

TRANSGENDER LAW CENTER

[86] 42 U.S.C. §18116.
[87] 20 U.S.C. §1681(a).
[88] *See Rumble,* 2015 WL 1197415, at *7, *10 (transgender status is covered by "sex" under section 1557); *Flack v. Wis. Dep't of Health Servs., No. 18-CV-309-WMC*, 2018 WL 3574875 (W.D. Wis. July 25, 2018) at *15 (transgender plaintiffs made a persuasive showing that a categorical health care exclusion was a form of discrimination on the basis of sex in violation of the ACA).
[89] *See Cruz*, 195 F. Supp. 3d at 581 ("categorical exclusion on treatments of gender dysphoria" violates section 1557).
[90] *See, e.g.*, *New York v. Nuclear Regulatory Commission*, 681 F.3d 471, 476, 481-482 (D.C. Cir. 2012) (setting aside agency action under Nuclear Waste Policy Act for failure to comply with National Environmental Policy Act).