

**No. 24-108**

**UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT**

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**IN RE TRANSGENDER AMERICAN VETERANS ASSOCIATION,**

*Petitioner.*

Petition for Writ of Mandamus  
to the Department of Veterans Affairs

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**MOTION OF SCHOLARS WHO STUDY THE TRANSGENDER  
POPULATION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*  
IN SUPPORT OF PETITIONER**

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## CERTIFICATE OF INTEREST

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2. The names of Real Parties in interest represented by the undersigned are:

None.

3. The names of all parent corporations and any publicly held companies that own 10 percent of the party represented are:

None.

4. The names of all law firms and the partners or associates who are expected to appear in this court for *amici* are:

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N/A (amicus).

6. Organizational Victims and Bankruptcy Cases:

None/Not Applicable.

January 29, 2024

/s/ James E. Tysse  
James E. Tysse

**MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF**

Pursuant to Fed. R. App. P. 21 and 29(a)(3), *amici curiae* move for leave to file the attached brief in support of Petitioner.<sup>1</sup>

*Amici* are thirteen scholars of demographics, economics, law, psychology, political science, public health, public policy, and other disciplines. Many *amici* are affiliated with the Williams Institute, an academic research center at UCLA School of Law focused on sexual orientation and gender identity law and public policy. *Amici* have conducted extensive research and authored numerous studies regarding the transgender population in the United States and have expertise in law and policy issues affecting transgender people.

*Amici* have submitted briefs in various courts, including the U.S. Supreme Court. *See, e.g., 303 Creative LLC v. Elenis*, No. 21-476 (2022); *Fulton v. Philadelphia*, No. 19-123 (2021); *Bostock v. Clayton Cnty.*, No. 17-1618 (2020); *Obergefell v. Hodges*, No. 14-556 (2015); *United States v. Windsor*, No. 12-307 (2013). Supreme Court justices have expressly relied on Williams Institute research in several cases. *303 Creative*, 600 U.S. 570, 616 (2023) (Sotomayor, J., dissenting) (citing research on public accommodations discrimination); *Bostock*, 140 S. Ct. 1731, 1752 (2020) (citing scholarship by Williams Institute Faculty Chair, Cary

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<sup>1</sup> Pursuant to Fed. Cir. R. 27(a)(2), *amici* represent that Petitioner has consented to the filing of this motion. Because Respondent has yet to enter an entry of appearance, *amici* have not discussed this motion with counsel for Respondent.

Franklin); *Obergefell*, 576 U.S. 644, 668 (2015) (citing Brief of Gary J. Gates). So have numerous other federal judges. *See, e.g., Tingley v. Ferguson*, 57 F.4th 1072, 1083 (9th Cir. 2023) (Bumatay, J., dissenting); *Hecox v. Little*, 79 F.4th 1009, 1016 n.2 (9th Cir. 2023); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 597, 612 (4th Cir. 2020); *Doe ex. rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3rd Cir. 2018).

*Amici* file this brief to share social science research that is directly relevant to two factors that this Court considers in assessing mandamus petitions based on claims of unreasonable delay. In particular, this research (1) highlights why the Department of Veterans Affairs’s continued exclusion of gender-affirming surgery from health care coverage affects the “human health and welfare” of transgender servicemembers and veterans, and (2) also explains how the true “nature and extent of the interests prejudiced” by the Department’s delay must be assessed against the backdrop of systemic and pervasive discrimination against the transgender population. *Martin v. O’Rourke*, 891 F.3d 1338, 1344-1345 (Fed. Cir. 2018).

As scholars who specialize in issues related to transgender people, *amici* have a substantial interest in this matter and believe that their research and expertise will assist the Court. Accordingly, *amici* respectfully ask the Court to grant this motion for leave to file the attached *amicus curiae* brief.

January 29, 2024

Respectfully submitted,

/s/ James E. Tysse

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## CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) and 32(a) because it contains 462 words, excluding the exempted portions, as provided in Fed. R. App. P. 32(f).

This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared in a proportionally spaced typeface using Word 2010 in 14-point Times New Roman.

January 29, 2024

/s/ James E. Tysse

James E. Tysse



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6. Organizational Victims and Bankruptcy Cases:

None/Not Applicable.

January 29, 2024

/s/ James E. Tysse  
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## INTEREST OF AMICI CURIAE<sup>1</sup>

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*Amici* have submitted briefs in various courts, including the U.S. Supreme Court. *See, e.g., 303 Creative LLC v. Elenis*, No. 21-476 (2022); *Fulton v. Philadelphia*, No. 19-123 (2021); *Bostock v. Clayton Cnty.*, No. 17-1618 (2020); *Obergefell v. Hodges*, No. 14-556 (2015); *United States v. Windsor*, No. 12-307 (2013). Supreme Court justices have expressly relied on Williams Institute research in several cases. *303 Creative*, 600 U.S. 570, 616 (2023) (Sotomayor, J., dissenting) (citing research on public accommodations discrimination); *Bostock*, 140 S. Ct. 1731, 1752 (2020) (citing scholarship by Williams Institute Faculty Chair, Cary

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<sup>1</sup> In accordance with Federal Rule of Appellate Procedure 29(a)(4), *amici* certify that no counsel for either party authored this brief in whole or in part, and that no party or other person other than *amici* or their counsel made a monetary contribution to the brief's preparation or submission.

Franklin); *Obergefell*, 576 U.S. 644, 668 (2015) (citing Brief of Gary J. Gates). So have numerous other federal judges. *See, e.g., Tingley v. Ferguson*, 57 F.4th 1072, 1083 (9th Cir. 2023) (Bumatay, J., dissenting); *Hecox v. Little*, 79 F.4th 1009, 1016 n.2 (9th Cir. 2023); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 597, 612 (4th Cir. 2020); *Doe ex. rel. Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3d Cir. 2018). As scholars who specialize in issues related to transgender people, *amici* have a substantial interest in this matter and believe that their expertise will assist the Court.

## BACKGROUND

In the United States, approximately 1.3 million adults identify as transgender.<sup>2</sup> Defense Department data showed that approximately 14,700 service members identified as transgender in 2016.<sup>3</sup> An estimated 134,300 veterans and retired National Guard or reservists identified as transgender as of 2014.<sup>4</sup> Data indicate that

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<sup>2</sup> Jody L. Herman et al., *How Many Adults Identify as Transgender in the United States?* 1, THE WILLIAMS INST. (2022), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Pop-Update-Jun-2022.pdf>.

<sup>3</sup> Aaron Belin & Diane H. Mazur, *Department of Defense Issues First-Ever Official Count of Active Duty Transgender Service Members*, PALM CTR. (Feb. 13, 2018), <https://palmcenterlegacy.org/wp-content/uploads/2019/06/14700-Transgender-Troops-.pdf>.

<sup>4</sup> Gary J. Gates & Jody L. Herman, *Transgender Military Service in the United States* 1, 4, THE WILLIAMS INST. (2014), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Military-Service-US-May-2014.pdf>.

transgender men and women serve in the military in proportionally higher rates (21.4%) than the general population (10.4%).<sup>5</sup>

The Department of Veterans Affairs (the “VA”) specifically excludes “gender alterations” from health care coverage under 38 C.F.R. § 17.38(c)(4). This regulation prevents veterans from accessing coverage for gender-affirming surgery.<sup>6</sup>

*Amici* agree with Petitioner that the VA’s continued exclusion of gender-affirming surgery from its health plan warrants relief from this Court in the form of a writ of mandamus compelling the VA to formally respond to Petitioner’s May 2016 rulemaking petition. *Amici* submit this brief to provide demographic data, social science research, and related information that highlights the harms and prejudice that flow from the VA’s continued inaction.

### SUMMARY OF ARGUMENT

This Court should grant the Transgender American Veterans Association’s petition for a writ of mandamus compelling the VA to take action on the rulemaking petition immediately. In assessing mandamus petitions based on claims of

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<sup>5</sup> *Id.* at 3; *see also* John R. Blosnich et al., *Prevalence of Gender Identity Disorder and Suicide Risk Among Transgender Veterans Utilizing Veterans Health Administration Care*, 103 AM. J. PUB. HEALTH e27, e28 (2013).

<sup>6</sup> U.S. DEP’T OF VETERANS AFFAIRS, *Patient Care Services: VHA LGBTQ+ Health Program*, <https://www.patientcare.va.gov/lgbt/#:~:text=VA%20currently%20provides%20all%20medically,the%20VA%20medical%20benefits%20package> (last accessed Dec. 12, 2023).

unreasonable delay, this Court looks to several factors. *Amici* file this brief in order to share social science research that directly speaks to two of those factors. First, the Court recognizes that agency inaction is “less tolerable” in cases involving “human health and welfare,” as opposed to mere “economic regulation.” *Martin v. O’Rourke*, 891 F.3d 1338, 1344-1345 (Fed. Cir. 2018). Second, and more generally, the Court also considers “the nature and extent of the interests prejudiced by the delay.” *Id.* Here, both factors weigh strongly in favor of granting a writ of mandamus compelling the VA to respond to Petitioner’s rulemaking petition.

*First*, as federal courts have repeatedly recognized, “[t]here is no doubt that transgender individuals historically have been subjected to discrimination on the basis of their gender identity,” including as it relates to “healthcare access.” *Grimm*, 972 F.3d at 611 (citations omitted); *see Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017) (“There is no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity.”). Such judicial findings have been informed by research on the existence and impact of discrimination against transgender people, including as it relates to health and well-being outcomes. This brief presents findings from that large and growing body of research to illustrate the impact of discrimination on human health and welfare, as well as to highlight the historical

and continuing pattern of discrimination against transgender people in the military specifically.

*Second*, the harm caused by the VA's seven years of inaction on the Transgender American Veterans Association's petition for rulemaking can properly be understood only in the context of the society-wide discrimination transgender individuals face in all facets of life. Accordingly, this brief offers an overview of research on discrimination faced by transgender people in a variety of areas to place the VA's ongoing delay in the context of the critically important interests prejudiced by further inaction.

## **ARGUMENT**

### **I. THE CONTINUING EXCLUSION OF GENDER-AFFIRMING SURGERY FROM THE VA'S HEALTH PLAN DIRECTLY IMPACTS THE HEALTH AND WELFARE OF TRANSGENDER VETERANS**

The VA's continued exclusion of gender-affirming surgery from its health coverage plan directly hinders transgender veterans' ability to access medical care that is critical for their "health and welfare," which strongly favors a writ of mandamus. *Martin*, 891 F.3d at 1344-1345. Relief is all the more warranted when the VA's exclusionary policy—and the VA's delay in rectifying it—is properly assessed as part of a historical and continuing pattern of exclusion and discrimination against transgender servicemembers and veterans specifically.

Access to health care, including gender-affirming care, is critical for the health and welfare of transgender people. Yet research shows that transgender people face significant hurdles to accessing health care. For example, in a large national study of transgender people known as the U.S. Transgender Survey (“USTS”), one third (33%) of respondents who had seen a health care provider in the previous year reported having a negative experience related to their transgender status.<sup>7</sup> Nearly one quarter (23%) of respondents reported that they did not see a doctor when they needed to in the past year due to fear of discrimination.<sup>8</sup> Similarly, a nationally representative survey by the Center for American Progress found that 29% of transgender people reported being refused care entirely in the preceding twelve months because of their gender identity, and that 12% were specifically refused care related to gender transition.<sup>9</sup> Studies show that access to gender-affirming care, including surgery, reduces depression and suicidality among transgender people.<sup>10</sup>

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<sup>7</sup> Sandy E. James et al., *Report of the 2015 U.S. Transgender Survey* 93, NAT’L CTR. FOR TRANSGENDER EQUALITY (2016) [hereinafter “USTS”], <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

<sup>8</sup> *Id.*

<sup>9</sup> Shabab Ahmed Mirza & Caitlin Rooney, *Discrimination Prevents LGBTQ People from Accessing Healthcare*, CTR. FOR AM. PROGRESS (Jan. 18, 2018), <https://www.americanprogress.org/article/discrimination-prevents-lgbtq-people-accessing-health-care/>.

<sup>10</sup> *E.g.*, Richard Bränström & John E. Pachankis, *Reduction in Mental Health Treatment Utilization Among Transgender Individuals After Gender-Affirming Surgeries: A Total Population Study*, 177 AM. J. PSYCHIATRY 727



By denying coverage for gender-affirming surgery, the VA is perpetuating discrimination against transgender people within the health care system and directly impacting their health and welfare.

The VA's delay in offering coverage for gender-affirming surgery, moreover, must be viewed as part of the United States's long history of discrimination against transgender servicemembers and veterans. Such discrimination has lifelong consequences for the health and wellbeing of transgender people.<sup>11</sup> As the minority stress model explains, being subject to stigma and discrimination heightens the chronic stress faced by discriminated individuals, leading to adverse mental health outcomes.<sup>12</sup>

Beginning in the mid-twentieth century, the federal government began a concerted effort to target LGBTQ people in what is known as the "Lavender

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(2019), <https://ajp.psychiatryonline.org/10.1176/appi.ajp.2019.19010080>; Jody L. Herman & Kathryn K. O'Neill, *Suicide Risk and Prevention for Transgender People: Summary of Research Findings*, THE WILLIAMS INST. (Sept. 2001), <https://williamsinstitute.law.ucla.edu/publications/trans-suicide-risk-prevent-summary/>.

<sup>11</sup> See, e.g., Ilan H. Meyer, *Minority Stress and Mental Health in Gay Men*, 36 J. HEALTH & SOC. BEHAV. 38, 38 (1995) [hereinafter "*Minority Stress*"], <https://www.jstor.org/stable/2137286>; cf. Ilan H. Meyer, Sharon Schwartz & David M. Frost, *Social Patterning of Stress and Coping: Does Disadvantaged Social Statuses Confer More Stress and Fewer Coping Resources?*, 67 SOC. SCI. & MED. 368, 371 (2008), <https://pubmed.ncbi.nlm.nih.gov/18433961/> (examining "social stress theory").

<sup>12</sup> Meyer, *Minority Stress*, *supra* note 11, at 38-39.

Scare.”<sup>13</sup> During this time, the government began to purge LGBTQ employees from employment on the grounds that they were thought to pose security risks.<sup>14</sup> In 1953, President Eisenhower formalized this practice through Executive Order 10450, which barred federal government employment for anyone who was determined to have a record of “criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct . . . [or] sexual perversion.”<sup>15</sup> An estimated 5,000 to 10,000 people were fired under suspicions of homosexuality.<sup>16</sup>

As directly relevant to transgender servicemembers and veterans, Executive Order 10450 was used to prohibit transgender people from serving in the armed forces.<sup>17</sup> While this bar on military service by openly transgender people was recently repealed, this result came only after a series of repeated policy reversals that highlight the lack of structural protections for transgender servicemembers and veterans. Specifically, while the military’s “Don’t Ask, Don’t Tell” policy was

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<sup>13</sup> MARK STEIN, ED., *ENCYCLOPEDIA OF LESBIAN, GAY, BISEXUAL AND TRANSGENDER HISTORY IN AMERICA* 342 (2004) [hereinafter “Stein”]; Judith Adkins, “*These People Are Frightened to Death*”, 48 *PROLOGUE MAG.* (Summer 2016) [hereinafter “Adkins”], <https://www.archives.gov/publications/prologue/2016/summer/lavender.html>.

<sup>14</sup> Stein, *supra* note 13, at 342; Adkins, *supra* note 13.

<sup>15</sup> Exec. Order No. 10450, Security Requirements for Government Employment, 18 Fed. Reg. 2,489 (Apr. 27, 1953), revoked by Exec. Order No. 13764, 82 Fed. Reg. 8,115 (Jan. 17, 2017).

<sup>16</sup> Adkins, *supra* note 13.

<sup>17</sup> Alex Redcay, et al., *Changing Social Policy and the Transgender United States Soldier*, 5 *J. HUM. RIGHTS & SOC. WORK* 191, 192 (2020).

repealed in 2011,<sup>18</sup> the military did not lift its ban on service by transgender soldiers until 2016.<sup>19</sup> Even then, the policy change covered only transgender soldiers who were already serving in the military.<sup>20</sup>

Moreover, after a change in presidential administrations, transgender people were yet again targeted for exclusion from the armed forces. In particular, a 2017 Presidential Memorandum directed the Departments of Defense and Homeland Security to adopt the policy “that was in place prior to June 2016,” thus excluding transgender people from openly serving.<sup>21</sup> While a second Presidential Memorandum was issued in March 2018 purportedly revoking the 2017 Memorandum and permitting the Secretaries of Defense and Homeland Security to implement policies addressing service by transgender people,<sup>22</sup> that 2018

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<sup>18</sup> Elisabeth Bumiller, *Obama Ends ‘Don’t Ask, Don’t Tell’ Policy*, N.Y. TIMES (July 22, 2011), <http://www.nytimes.com/2011/07/23/us/23military.html>.

<sup>19</sup> U.S. DEP’T OF DEFENSE, *Transgender Service in the U.S. Military: An Implementation Handbook* 10 (2016), [http://www.defense.gov/Portals/1/features/2016/0616\\_policy/DoDTGHandbook\\_093016.pdf](http://www.defense.gov/Portals/1/features/2016/0616_policy/DoDTGHandbook_093016.pdf).

<sup>20</sup> Sheryl Gay Stolberg, *Loophole in Rules on Transgender Troops Denies 2 Their Commissions*, N.Y. TIMES (May 26, 2017), [https://www.nytimes.com/2017/05/26/us/loophole-in-rules-on-transgender-troops-denies-2-their-commissions.html?\\_r=0](https://www.nytimes.com/2017/05/26/us/loophole-in-rules-on-transgender-troops-denies-2-their-commissions.html?_r=0).

<sup>21</sup> Presidential Memorandum, *Military Service by Transgender Individuals*, 82 Fed. Reg. 41,319 (Aug. 25, 2017), <https://www.govinfo.gov/content/pkg/FR-2017-08-30/pdf/2017-18544.pdf>.

<sup>22</sup> Presidential Memorandum, *Military Service by Transgender Individuals*, 83 Fed. Reg. 13,367 (Mar. 23, 2018), <https://www.federalregister.gov/documents/2018/03/28/2018-06426/military-service-by-transgender-individuals>.

Memorandum adopted a separate policy from the Secretary of Defense that concluded that transgender people should be banned from military service except in very limited circumstances.<sup>23</sup> Thus, the 2018 Memorandum was effectively yet another ban on transgender people serving openly. Preliminary injunctions against the 2017 and the 2018 memoranda were stayed by appellate courts, thereby allowing this exclusionary policy to go into effect. *E.g.*, *Trump v. Karnoski*, 139 S. Ct. 950 (2019); *Karnoski v. Trump*, 926 F.3d 1180 (9th Cir. 2019). Litigation proceeded until a 2021 Executive Order finally allowed transgender people to again enlist and serve openly.<sup>24</sup>

Given this deep history of discrimination and stigma, it is unsurprising that research examining the health and wellbeing of transgender veterans has shown that they are more likely to experience poor mental health outcomes than their cisgender counterparts. For example, one representative study found that transgender veterans were significantly more likely to experience mental distress and depression than cisgender veterans.<sup>25</sup> Another study calculated a suicide rate of 82/100,000 for

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<sup>23</sup> Memorandum for the President from James N. Mattis, Sec’y of Def. (Feb. 22, 2018), <https://media.defense.gov/2018/Mar/23/2001894037/-1/-1/0/MILITARY-SERVICE-BY-TRANSGENDER-INDIVIDUALS.PDF>.

<sup>24</sup> Exec. Order No. 14004, Enabling All Qualified Americans to Serve Their Country in Uniform, 86 Fed. Reg. 7,471 (Jan. 25, 2021).

<sup>25</sup> Janelle Downing, et al., *Transgender and Cisgender US Veterans Have Few Health Differences*, 37 HEALTH AFFAIRS 1160 (2018), <https://www.healthaffairs.org/doi/10.1377/hlthaff.2018.0027>.

transgender veterans—substantially higher than the rate among all veterans (37/100,000) and the general population.<sup>26</sup> Similarly, a study of veterans seeking care from the VA between 1995 and 2013 calculated that nearly 20% of transgender veterans had suicidal ideation or attempts, compared to less than 5% of cisgender veterans.<sup>27</sup> Other studies have found that transgender veterans also suffer from alcohol abuse, panic disorders, PTSD, and serious mental illness at rates significantly higher than cisgender veterans.<sup>28</sup> And research has documented similar disparities for transgender people compared to cisgender people more broadly.<sup>29</sup>

## **II. THE AGENCY’S DELAY SHOULD BE UNDERSTOOD IN LIGHT OF THE ONGOING BROADER PATTERN OF DISCRIMINATION AGAINST TRANSGENDER PEOPLE**

Beyond the immediate context of healthcare access and discrimination in the military, the true “nature and extent” of the harms that flow from the VA’s continued failure to protect transgender veterans must also be assessed against the broader

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<sup>26</sup> John R. Blosnich et al., *Mortality among Veterans with Transgender-Related Diagnoses in the Veterans Health Administration, FY2000-2009*, 1 *LGBT HEALTH* 269, 273 (2014).

<sup>27</sup> George R. Brown & Kenneth T. Jones, *Mental Health and Medical Health Disparities in 5135 Transgender Veterans Receiving Healthcare in the Veterans Health Administration: A Case-Control Study*, 0 *LGBT Health* 1, 6 (2015).

<sup>28</sup> *Id.*

<sup>29</sup> For a summary of this literature, see Public Comment from Williams Institute Scholars to Dep’t of Health & Human Serv. Re: Proposed Rule, 88 Fed. Reg. 44,750 (Sept. 6, 2023) [hereinafter “Public Comment”], <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Comment-HHS-Grants-Sep-2023.pdf>.

backdrop of widespread discrimination faced by transgender people.<sup>30</sup> *See Martin*, 891 F.3d at 1344-1345. As with transgender veterans, this pervasive discrimination is linked to negative health and welfare outcomes for transgender people more broadly, including health disparities, higher rates of poverty, housing instability, and unemployment.<sup>31</sup>

#### **A. Discrimination By Federal, State, And Local Governments**

Much of the historical discrimination against transgender people has been perpetuated by the government itself. As described above, transgender people have historically been barred from employment with the federal government, including in the armed forces. Congress, too, has excluded transgender people from protection under federal laws. For example, in 1988, Congress excluded “transvestites” from the Fair Housing Act.<sup>32</sup> Both the Americans with Disabilities Act and the Rehabilitation Act expressly exclude “transvestism,” “transsexualism,” and “gender identity disorders not resulting from physical impairments” as protected

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<sup>30</sup> For Williams Institute research on discrimination against transgender people, and LGBTQ people more broadly, see <https://williamsinstitute.law.ucla.edu/publications/?issues=discrimination-violence>.

<sup>31</sup> *See, e.g.*, Public Comment, *supra* note 29.

<sup>32</sup> Kevin M. Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507, 527-529 (2016) [hereinafter “*Bare Desire*”].

conditions.<sup>33</sup> Despite efforts to add gender identity as a protected characteristic in federal non-discrimination laws, Congress has refused to do so for decades.

State laws also provide evidence of discrimination against transgender people. States began targeting transgender people through the enactment of anti-cross-dressing laws as early as 1848.<sup>34</sup> In the decades that followed, cities and states passed other laws, including criminal vagrancy laws, that criminalized being transgender and undermined protections for transgender people.<sup>35</sup> These efforts continue today. According to the ACLU, over 500 anti-LGBTQ bills were filed in state legislatures in 2023 alone.<sup>36</sup> Most of them were specifically focused on undermining transgender rights.<sup>37</sup>

## **B. Discrimination In The Legal System**

Transgender people have experienced discrimination and harassment when interacting with the legal system. The 1950s and 60s were marked by police raids

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<sup>33</sup> 42 U.S.C. § 12211(b); 29 U.S.C. § 705(20)(F); *see also* Pub. L. No. 102-569, 106 Stat. 4344 (1992); Barry et al., *Bare Desire*, *supra* note 32, at 529-540.

<sup>34</sup> SUSAN STRYKER, *TRANSGENER HISTORY* 31 (2008) [hereinafter “Stryker”].

<sup>35</sup> Kate Redburn, *Before Equal Protections: The Fall of Cross-Dressing Bans and the Transgender Legal Movement, 1963-86*, 40 *L. & Hist. Rev.* 679, 681 (2022).

<sup>36</sup> ACLU, *Mapping Attacks on LGBTQ Rights in U.S. State Legislatures*, <https://www.aclu.org/legislative-attacks-on-lgbtq-rights> (last updated Jan. 24, 2024).

<sup>37</sup> *Id.*

and targeting of LGBTQ people, as law enforcement relied on nuisance laws to harass and criminalize LGBTQ people.<sup>38</sup> The most famous of these raids took place at the Stonewall Inn in 1969.<sup>39</sup> Research indicates that police raids and overcriminalization of LGBTQ people continues to the present day.<sup>40</sup>

When surveyed, transgender people have also reported recent experiences of mistreatment when interacting with the legal system. Among USTS respondents who had interacted with a courthouse in the prior year, 13% said they experienced discrimination because of being transgender.<sup>41</sup> Of those who interacted with an attorney or legal clinic, 6% said they experienced discrimination because of being transgender.<sup>42</sup> The majority (58%) of respondents who had interacted with police reported experiencing mistreatment during the interaction.<sup>43</sup>

Instances of discrimination and harassment against transgender people within the legal system have also been documented in court cases. Courts have refused to recognize transgender people's marriages, *see, e.g., Kantaras v. Kantaras*, 884 So.

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<sup>38</sup> *Stryker, supra* note 34, at 50-89.

<sup>39</sup> *Id.* at 82-85.

<sup>40</sup> Christy Mallory, et al., *Discrimination and Harassment by Law Enforcement Officers in the LGBT Community*, THE WILLIAMS INST. (2015), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Discrimination-by-Law-Enforcement-Mar-2015.pdf>.

<sup>41</sup> USTS, *supra* note 7, at 214.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 185.



2d 155 (Fla. Dist. Ct. App. 2004); *Littleton v. Prange*, 9 S.W.3d 223 (Tex. Ct. App. 1999); *Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (N.Y. Sup. Ct. 1971); denied their inheritance from deceased spouses, *see, e.g., In re Est. of Gardiner*, 42 P.3d 120 (Kan. 2002); revoked parental rights, *see, e.g., Daly v. Daly*, 715 P.2d 56, 59 (Nev. 1986) (stripping parental rights from transgender woman that court called “a selfish person whose own needs, desires and wishes were paramount and were indulged without regard to their impact on the life and psyche of the daughter”); and used derogatory language in reference to transgender litigants, *see, e.g., Oiler v. Winn-Dixie La., Inc.*, No. 00-3114, 2002 U.S. Dist. LEXIS 17417, at \*28 (E.D. La. Sept. 16, 2002); *Ashlie v. Chester-Upland School District*, No. 78-4037, 1979 U.S. Dist. LEXIS 12516, at \*14 (E.D. Pa. May 9, 1979).

### **C. Discrimination In The Workplace**

Research has documented pervasive employment discrimination against transgender people. For example, a 2021 study by the Williams Institute found that two thirds (66%) of transgender employees had experienced employment discrimination because of their gender identity at some point in their lives.<sup>44</sup> More specifically, about half (49%) of transgender survey respondents said they had not

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<sup>44</sup> Brad Sears, et al., *LGBT People’s Experience of Workplace Discrimination and Harassment 2*, THE WILLIAMS INST. (2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Workplace-Discrimination-Sep-2021.pdf>.

been hired or had been fired because of their gender identity and slightly less than half (46%) said they had experienced verbal, sexual, or physical harassment at work.<sup>45</sup> Along similar lines, 27% of USTS respondents reported having experienced employment discrimination based on their gender identity in the previous year,<sup>46</sup> 15% reported experiencing verbal harassment, physical attack, or sexual assault in the workplace in the past year; and 23% reported other negative actions at work such as being told to present as the wrong gender in order to keep their jobs.<sup>47</sup>

#### **D. Discrimination In Other Essential Services**

Discrimination against transgender people has also been documented in other settings, such as housing and education.<sup>48</sup> Williams Institute research based on data collected through the TransPop Study found that 17% of transgender people had been prevented from moving into or buying a home or apartment by a landlord or realtor at some point in their lives.<sup>49</sup> Another Williams Institute analysis found that 30% of transgender respondents reported having experienced homelessness due to

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<sup>45</sup> *Id.* at 12.

<sup>46</sup> USTS, at 150-151.

<sup>47</sup> *Id.* at 153-154.

<sup>48</sup> *Id.* at 178.

<sup>49</sup> Ilan H. Meyer, et al., *LGBTQ People in the US* 19, THE WILLIAMS INST. (2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Generations-TransPop-Toplines-Jun-2021.pdf>.

their transgender status.<sup>50</sup> Among those who had experienced homelessness within the prior year (13% of respondents), almost 30% were denied access to a shelter due to their gender identity.<sup>51</sup>

Discrimination against transgender people in educational settings is widespread as well. USTS respondents who were open about their transgender status (or who were perceived to be transgender by others) at school reported high rates of verbal harassment (54%), physical attack (24%), and sexual assault (13%) in grades K-12.<sup>52</sup> Williams Institute research has found that transgender people encounter similar challenges in higher education. In response to a 2021 national survey, 32% of transgender adults reported experiencing unfair treatment by teachers, staff, or school administrators in colleges and universities.<sup>53</sup>

### **E. Violence And Victimization**

Transgender people also experience disproportionately high rates of violence. A Williams Institute analysis of National Crime Victimization Survey (NVCS) data found that “[t]ransgender people experienced violence at a rate of 86.2

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<sup>50</sup> Kathryn O’Neill, et al., *Homeless Shelter Access Among Transgender Adults 2*, THE WILLIAMS INST. (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Homeless-Shelter-Nov-2011.pdf>.

<sup>51</sup> *Id.*

<sup>52</sup> USTS, *supra* note 7, at 132-134.

<sup>53</sup> Kerith J. Conron, et al., *Educational Experiences of Transgender People 9*, THE WILLIAMS INST. (2022), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Higher-Ed-Apr-2022.pdf>.

victimizations per 1000 persons compared with 21.7 per 1000 persons among cisgender people.”<sup>54</sup> A separate analysis of NCVS data found that about one in ten LGBT victims of violence described the incident as a hate crime compared to 4% of non-LGBT victims.<sup>55</sup> Transgender respondents to the USTS reported similar rates of violence: 13% of respondents reported they had been physically attacked in the prior year, with 66% of them identifying their gender identity or expression as the motivation for the attack.<sup>56</sup>

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Placed against this backdrop of widespread and systemic discrimination, the “nature and extent” of the interests that transgender veterans have in this case is brought into sharp relief. These veterans have faced immense barriers to accessing the basic rights and dignities accorded their fellow citizens. This Court should not “tolera[te]” any further inaction by the VA in providing transgender veterans the care they need and deserve. *See Martin*, 891 F.3d at 1344-1345; *see also Public Citizen Health Rsch. Grp. v. Auchter*, 702 F.2d 1150, 1157 (D.C. Cir. 1983) (years-

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<sup>54</sup> Andrew R. Flores, et al., *Gender Identity Disparities in Criminal Victimization: National Crime Victimization Survey, 2017–2018*, 111 AM. J. PUB. HEALTH 726 (2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7958056/>.

<sup>55</sup> Andrew R. Flores, et al., *Hate Crimes Against LGBT People: National Crime Victimization Survey, 2017-2019*, 17 PLoS ONE 1 (2022), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0279363>.

<sup>56</sup> USTS, *supra* note 7, at 203.

long delay “from announced intent to regulate to final rule is simply too long given the significant risk of grave danger” to human health).

### CONCLUSION

*Amici* respectfully request that this Court grant Petitioner’s writ of mandamus and compel the VA to respond to the pending rulemaking petition.

January 29, 2024

Respectfully submitted,

*/s/ James E. Tysse*

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because this brief contains 3,892 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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January 29, 2024

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