

No. 17-1460

IN THE

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

**DEE FULCHER, GIULIANO SILVA, and TRANSGENDER AMERICAN
VETERANS ASSOCIATION,**

Petitioners,

v.

SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition for Review from the United States Department of Veterans Affairs
Pursuant to 38 U.S.C. § 502

**BRIEF OF SCHOLARS WHO STUDY THE TRANSGENDER
POPULATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS**

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TABLE OF CONTENTS

	Page
INTEREST OF AMICI CURIAE.....	1
BACKGROUND	2
SUMMARY OF ARGUMENT	6
ARGUMENT	8
LAWS THAT DISCRIMINATE AGAINST TRANSGENDER PEOPLE TRIGGER HEIGHTENED JUDICIAL SCRUTINY.	8
A. Transgender People Have Experienced A Long History Of Discrimination.	11
1. <i>Discrimination by federal, state, and local governments.</i>	12
2. <i>Discrimination in the judicial system and by law enforcement.</i>	16
3. <i>Discrimination in the workplace.</i>	20
4. <i>Discrimination in housing, education, public accommodations, and health care.</i>	23
5. <i>Discrimination against transgender people is linked to adverse health and well-being consequences.</i>	25
B. Being Transgender Bears No Relationship To A Person’s Ability To Contribute To Society.	28
C. The Remaining Factors Further Demonstrate That Transgender Status Is A Suspect Classification Deserving of Heightened Scrutiny.	29
CONCLUSION.....	32
CERTIFICATE OF COMPLIANCE.....	33
APPENDIX: AMICI CURIAE SCHOLARS.....	34

CERTIFICATE OF SERVICE36

TABLE OF AUTHORITIES

Page(s)

CASES

Adkins v. City of N.Y.,
143 F. Supp. 3d 134 (S.D.N.Y. 2015)..... passim

Ashlie v. Chester Upland School District,
No. 78-4037, U.S. Dist. LEXIS 12516
(E.D. Pa. May 9, 1979)17

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(S.D. Ohio Sept. 26, 2016).....11

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INTEREST OF AMICI CURIAE¹

Amici curiae are 15 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 dedicated to the study of 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, as well as law and policy affecting transgender people. The appended list of scholars identifies each of the individual *amici*.

Many *amici* have testified as expert witnesses in federal district courts, and have submitted *amicus curiae* briefs on related issues in the various courts of appeals and the U.S. Supreme Court. *See, e.g., Obergefell v. Hodges*, No. 14-556 (U.S. 2015); *United States v. Windsor*, No. 12-307 (U.S. 2013). In *Obergefell*, the Supreme Court expressly relied on Williams Institute research, 135 S. Ct. 2584, 2600 (2015) (citing Brief of Gary J. Gates as *Amicus Curiae*). So have numerous other federal courts. *See, e.g., Baskin v. Bogan*, 766 F.3d 648, 663, 668 (7th Cir. 2014); *Campaign for S. Equality v. Bryant*, 64 F. Supp. 3d 906, 943 n.42 (S.D.

¹ In accordance with Federal Rule of Appellate Procedure 29(c)(5), *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. All parties consent to the filing of this brief. Fed. R. App. P. 29(a).

Miss. 2014), *aff'd*, 791 F.3d 625 (5th Cir. 2015); *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 763-64 (E.D. Mich.), *rev'd*, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom.*, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

As scholars who specialize in issues related to transgender people, *amici* have a substantial interest in this matter. In this brief, *amici* present recent social science data and scholarly research regarding the transgender population. Specifically, *amici* present statistical, demographic, and historical evidence to establish that transgender status should be considered a suspect classification for purposes of Fifth Amendment equal-protection analysis. *Amici* believe that their expertise and the research presented herein will aid the Court in evaluating whether the Department of Veterans Affairs' policy of denying medically indicated sex-reassignment surgery deprives transgender veterans of equal protection.

BACKGROUND

The term “transgender” generally “describes individuals whose current gender identity is not fully congruent with their assigned sex at birth.”² “Gender identity refers to a person’s internal sense of gender (e.g., being a man, a woman, or genderqueer) and potential affiliation with a gender community (e.g., women,

² Gender Identity in U.S. Surveillance Group, The Williams Institute, *Best Practices for Asking Questions to Identify Transgender and Other Gender Minority Respondents on Population-Based Surveys*, at ix (2014), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/geniuss-report-sep-2014.pdf>.

trans women, genderqueer).”³ According to *amici*’s recent analyses of data collected by the Centers for Disease Control and Prevention (CDC), 0.6% of the U.S. adult population, or approximately 1.4 million adults, identifies as transgender.⁴ Roughly 150,000 teens (ages 13 to 17) also identify as transgender, and younger adults (aged 18-24) are more likely to identify as transgender than older people.⁵

The past decade has seen a marked increase in the visibility of transgender people in the media and in society in general.⁶ Improved measures for collecting data about transgender and other gender minorities have provided new and more detailed insights into the transgender population.⁷ Although only a small subset of the U.S. population, the transgender population reflects society at large in many respects. Transgender people are residents of every state; are racially and ethnically diverse; are citizens and immigrants; are straight, lesbian, gay, and

³ *Id.* at ix.

⁴ Flores et al., The Williams Institute, *How Many Adults Identify as Transgender in the United States?* (2016), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf>; Herman et al., Williams Inst., *Age of Individuals Who Identify as Transgender in the United States* 4 (2017) <http://williamsinstitute.law.ucla.edu/wp-content/uploads/TransAgeReport.pdf>.

⁵ *Id.*

⁶ See, e.g., James et al., Nat’l Ctr. for Transgender Equality, *Report of the 2015 U.S. Transgender Survey 18-19* (2016), <http://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf> [hereinafter “USTS”]; *Best Practices*, at ix.

⁷ *Best Practices* i, xiv-xv; USTS 19.

bisexual; have obtained varied levels of education; and practice numerous religions (or no religion at all).⁸ Many transgender people also are parents.⁹

Despite historically having been prohibited from serving openly, transgender people also serve (or have served) in the military.¹⁰ A 2014 study estimated that 134,300 veterans and retired National Guard or reservists identify as transgender, as do 15,500 active duty soldiers or those in the National Guard and Reserve forces.¹¹ In fact, the same study estimated that transgender men and women serve in the U.S. military in proportionally higher rates (21.4%) than the general

⁸ USTS, at 53-59; Flores et al., The Williams Institute, *Race and Ethnicity of Adults Who Identify as Transgender in the U.S.* (2016), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Race-and-Ethnicity-of-Transgender-Identified-Adults-in-the-US.pdf>; Herman, “LGB within the T: sexual orientation in the National Transgender Discrimination Survey,” *Trans Studies: Beyond Hetero/Homo Normativities* (2016).

⁹ Stotzer et al., The Williams Institute, *Transgender Parenting: A Review of Existing Research* (2014), <http://williamsinstitute.law.ucla.edu/research/parenting/transgender-parenting-oct-2014>.

¹⁰ Gates & Herman, The Williams Institute, *Transgender Military Service in the United States* (2014), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Transgender-Military-Service-May-2014.pdf> [hereinafter “*Transgender Military*”]; *Transgender People Will Be Allowed to Serve Openly in Military*, N.Y. Times (June 30, 2016), https://www.nytimes.com/2016/07/01/us/transgender-military.html?_r=0; see also USTS, at 167 (18% of respondents reported serving or having served in the military).

¹¹ *Transgender Military* at 1, 4.

population (10.4%).¹² Transgender people assigned male at birth serve at a rate of 32% compared to 19.7% of adult males, while transgender people assigned female at birth serve at a rate of 5.5% compared to 1.4% of adult women.¹³

Research shows that “[t]ransgender people face systematic oppression and devaluation as a result of social stigma attached to their gender nonconformity.”¹⁴ As discussed in detail below, two large national surveys (the 2011 National Transgender Discrimination Survey (NTDS) and the 2015 U.S. Transgender Survey (USTS)), along with other social science data and research, provide extensive data on the pervasiveness of discrimination and its effects on transgender people’s economic condition, education, health, and welfare.¹⁵

¹² *Id.* at 3; see also Blosnich et al., *Prevalence of Gender Identity Disorder and Suicide Risk Among Transgender Veterans Utilizing Veterans Health Administration Care*, *American Journal of Public Health* 103(10) e27-e32 (2013) [hereinafter “*Prevalence*”] (study reflecting that the prevalence of Gender Identity Disorder in the Veterans Health Administration is substantially higher (22.9/100 000 persons) than estimates of GID in the general US population (4.3/100 000 persons)).

¹³ *Transgender Military* at 4.

¹⁴ Bockting et al., *Stigma, Mental Health, and Resilience in an Online Sample of the US Transgender Population*, 103 *Am. J. of Pub. Health* 943, 943 (2013) [hereinafter “*Stigma*”].

¹⁵ Bockting et al., *Stigma*, at 943; see generally Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* (2011), http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf [hereinafter “NTDS”]; USTS.

SUMMARY OF ARGUMENT

The Constitution guarantees all people equal protection of the laws. Because the law must treat similarly situated people alike, laws that divide people along “suspect” (or “quasi-suspect”) lines are deserving of heightened judicial scrutiny. To determine whether a law targeting a group triggers heightened scrutiny, the Supreme Court has considered various factors. The first two are the most important: whether the group (1) has experienced a history of discrimination and (2) faces discrimination based on stereotyped characteristics not truly indicative of the abilities of the group’s members to contribute to society. In some cases, the Court has additionally considered whether the group (3) lacks the capacity adequately to protect itself within the political process and (4) shares definite characteristics that distinguish it as a discrete minority group.

Amici agree with Petitioners that the Department of Veterans Affairs policy against providing sex-reassignment surgery in its medical benefits package discriminates on the basis of sex *and* on the basis of transgender status. This brief addresses the second basis (transgender status). This brief provides relevant demographic data, social science research, and legal authority to assist this Court in determining whether laws targeting transgender people, independent of discriminating on the basis of sex, create suspect classifications under the factors the Supreme Court has historically considered. As scholars who specialize in

studying the transgender population, *amici* are uniquely suited to offer such data and research to this Court.

In *amici*'s view, each of the relevant factors demonstrates that laws and government policies that discriminate against transgender people or classify on the basis of transgender status trigger heightened scrutiny.

First, overwhelming evidence shows that transgender people have long been the victims of public and private discrimination. For decades, federal, state, and local government policies have discriminated against transgender people, including in the U.S. military. Transgender people also have been mistreated by the justice system—as civil litigants and criminal defendants, as prisoners, and as victims of crimes that transgender people suffer at disproportionately high rates. Studies show that discrimination also permeates many other aspects of transgender peoples' lives, including at work, in school, in housing and public accommodations, and when receiving healthcare. And this discrimination has costs: Transgender people suffer high rates of poverty, unemployment, criminal victimization, and a range of physical and mental health conditions.

Second, courts and scholars agree that being transgender bears no relation to a person's ability to contribute to society.

Third, the transgender population—a small minority group in our society—lacks political power to protect itself within the political process. Legislatures

continue to enact discriminatory laws and a majority of states refuse to extend anti-discrimination protections to transgender people—all of which is exacerbated by the lack of any openly transgender officials elected to state or federal office.

Fourth, the approximately 1.4 million transgender adults in the United States who identify as transgender (or 0.6% of the adult population) share definite characteristics that distinguish them as an identifiable, discrete minority group.

Because all four considerations support the same conclusion, this Court should recognize that laws and policies that discriminate against transgender people, such as the Department of Veterans Affairs refusal to provide medically indicated sex-reassignment surgery, trigger heightened scrutiny.

ARGUMENT

LAWS THAT DISCRIMINATE AGAINST TRANSGENDER PEOPLE TRIGGER HEIGHTENED JUDICIAL SCRUTINY.

The constitutional guarantee of equal protection “commands that no State shall ‘deny to any person within its jurisdiction the equal protection of the laws,’ which is essentially a direction that all persons similarly situated should be treated alike.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (quoting *Plyler v. Doe*, 457 U.S. 202, 216 (1982)).¹⁶ The Constitution forbids laws

¹⁶ Although *Cleburne* analyzed the Equal Protection Clause of the Fourteenth Amendment, federal courts apply the same standard to Fifth Amendment equal protection claims. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975).

that are “arbitrary or irrational” as well as those that reflect “a bare . . . desire to harm a politically unpopular group.” *Id.* at 446-47 (citation omitted). Although courts presume the validity of classifications that are “rationally related to a legitimate state interest,” that “general rule gives way . . . when a statute classifies” groups that have historically been subject to discrimination or “impinge[s] on personal rights protected by the Constitution.” *Id.* at 440. Thus, laws that discriminate based on a “suspect” classification (such as race) or a “quasi-suspect” classification (such as gender) receive heightened judicial scrutiny. *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987).

Although the Supreme Court has been reluctant to recognize new suspect classifications, it has “identified sex-based classifications as quasi-suspect,” and, in recent cases, “has meaningfully altered the way it views both sex and sexual orientation through the equal protection lens.” *Bostic v. Schaefer*, 760 F.3d 352, 374-75 (4th Cir. 2014). And though neither the Supreme Court nor this Court has determined the appropriate level of scrutiny for laws that discriminate against transgender people, multiple district courts have recently recognized that such laws should receive heightened scrutiny. *Evancho v. Pine-Richland Sch. Dist.*, No. 2:16-01537, 2017 U.S. Dist. LEXIS 26767, at *31-34 (W.D. Pa. Feb. 27, 2017) (applying heightened scrutiny in holding transgender students likely to succeed on their equal protection claims and granting preliminary injunction); *Board of Educ.*

of *Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850, 873 (S.D. Ohio 2016) (same); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 140 (S.D.N.Y. 2015) (concluding that “transgender people are a quasi-suspect class” and court “must apply intermediate scrutiny to defendants’ treatment of plaintiff” in § 1983 action).

The Supreme Court has historically looked to two primary considerations to determine whether certain classifications are suspect: (1) whether the group has experienced a history of discrimination, *City of Cleburne*, 473 U.S. at 440-41, and (2) whether the discrimination is based on “stereotyped characteristics not truly indicative” of the group’s abilities, *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (per curiam). The Supreme Court has also occasionally looked to (3) whether members of the classified group have “obvious, immutable, or distinguishing characteristics that define them as a discrete group,” *Lyng v. Castillo*, 477 U.S. 635, 638 (1986), and (4) whether the group lacks the capacity adequately to protect itself within the political process, *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987). Those latter two factors, however, are not necessary to establish a suspect class. See *Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012) (“Immutability and lack of political power are not strictly necessary factors to identify a suspect class.”), *aff’d*, 133 S. Ct. 2675 (2013); see also *City of Cleburne*, 473 U.S. at 472 n.24 (Marshall, J., concurring in part and dissenting in part) (“The

‘political powerlessness’ of a group may be relevant . . . , but that factor is neither necessary, as the gender cases demonstrate, nor sufficient, as the example of minors illustrates.”); *Nyquist v. Mauclet*, 432 U.S. 1, 9 n.11 (1977) (alienage triggers strict scrutiny even though not immutable).

No single factor is dispositive, *Murgia*, 427 U.S. at 321, and the presence of any one of these factors is a signal that the classification is “more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective,” *Plyler*, 457 U.S. at 216 n.14. Here, because all relevant factors are satisfied, this Court should apply heightened scrutiny.

A. Transgender People Have Experienced A Long History Of Discrimination.

It is well documented that transgender people have long faced persistent and pervasive discrimination in the United States. As one court remarked this year, “there is not much doubt that transgender people have historically been subject to discrimination including in education, employment, housing, and access to healthcare.” *Highland*, 208 F. Supp. 3d at 874; *see, e.g., Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, No. 16-3522, 2017 U.S. App. LEXIS 9362, at *34-35 (7th Cir. May 30, 2017) (“There is no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity.”); *Adkins*, 143 F. Supp. 3d at 139 (that “transgender people have suffered a history of persecution and discrimination . . . is not much in

debate”) (internal quotation marks omitted); *Brocksmith v. United States*, 99 A.3d 690, 698 n.8 (D.C. 2014) (“The hostility and discrimination that transgender individuals face in our society today is well-documented.”). Historical discrimination against transgender people can readily be seen in state and federal law, the justice system, employment, housing, and other vital areas of life. Moreover, that discrimination is linked to deleterious consequences for the health and well-being of transgender people.

1. *Discrimination by federal, state, and local governments.*

Transgender individuals have historically faced discrimination under federal, state, and local laws and policies, including in the U.S. military. At the federal level, this Court need look no further than the prohibition on military service by transgender soldiers. While the military’s “Don’t Ask, Don’t Tell” policy (which effectively prohibited military service by openly gay and lesbian people) was repealed in 2011,¹⁷ the military did not lift its ban on service by transgender soldiers until 2016.¹⁸ Even then, the policy change only covered transgender

¹⁷ *A history of ‘don’t ask, don’t tell’*, Washington Post (Nov. 30, 2010), <http://www.washingtonpost.com/wp-srv/special/politics/dont-ask-dont-tell-timeline/>; *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>.

¹⁸ U.S. Department of Defense, *Transgender Service in the U.S. Military: An Implementation Handbook*, at 10 (2016), http://www.defense.gov/Portals/1/features/2016/0616_policy/DoDTGHandbook_093016.pdf?ver=2016-09-30-160933-837.

soldiers who were already serving in the military.¹⁹ Openly transgender recruits were expected to become eligible to join the military starting in July 2017,²⁰ but that policy change may be delayed.²¹

Beyond the military, other federal laws and policies have discriminated against transgender people. In 1988, Congress excluded “transvestites” from the Fair Housing Act.²² Both the Americans with Disabilities Act and the Rehabilitation Act expressly exempt “transvestism,” “transsexualism,” and “gender identity disorders not resulting from physical impairments” from the conditions protected by the laws.²³

State laws also provide ample evidence of discrimination against transgender people. Last year, North Carolina and Mississippi each adopted legislation

¹⁹ *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.

²⁰ *Navy, Marines to Accept Transgender Recruits by July 2017*, Military.com (Aug. 8, 2016), <http://www.military.com/daily-news/2016/08/08/navy-marines-to-accept-transgender-recruits-by-july-2017.html>

²¹ *AP sources: Military to seek delay on transgender enlistees*, Washington Post (June 24, 2017), https://www.washingtonpost.com/world/national-security/ap-sources-military-to-seek-delay-on-transgender-enlistees/2017/06/24/393c6584-58aa-11e7-840b-512026319da7_story.html?utm_term=.dfed5bd518aa.

²² Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause* (“*Bare Desire*”), 57 B.C.L. Rev. 507, 527-29 (2016), <http://lawdigitalcommons.bc.edu/bclr/vol57/iss2/4>.

²³ 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*, at 529-40.

expressly targeting transgender people.²⁴ In 2015, Houston voters repealed “by a wide margin” a measure that banned discrimination on the basis of gender identity and sexual orientation (among other bases, such as race and national origin).²⁵ Arkansas also enacted a law that prohibits local governments from passing anti-discrimination laws, shortly before a locality enacted a local ordinance prohibiting discrimination on the basis of sexual orientation and gender identity.²⁶ Texas is currently contemplating a similar law, which the Texas Governor seeks to enact during a special summer session.²⁷ Only a minority of states actually have laws expressly prohibiting discrimination on the basis of gender identity.²⁸ And of the

²⁴ Public Facilities Privacy & Security Act, 2016 N.C. Sess. Laws 2016-3 (H.B. 2) (“HB2,” forbidding transgender people from using single-sex facilities matching gender listed on birth certificate); Protecting Freedom of Conscience From Government Discrimination Act, 2016 Miss. Laws ch. 334 (H.B. 1523), § 2(c) (permitting discrimination on belief that “[m]ale (man) or female (woman) refer to an individual’s immutable biological sex as objectively determined by anatomy and genetics at time of birth”).

²⁵ *Houston Equal Rights Ordinance fails by wide margin*, Houston Chronicle (Nov. 4, 2015), <http://www.chron.com/politics/election/local/article/HERO-results-6608562.php>

²⁶ The Intrastate Commerce Improvement Act, Act 137 of 2015, codified at Ark. Code Ann. § 14-1-401 to -403 (Supp. 2015); *Protect Fayetteville v. City of Fayetteville*, 2017 Ark. 49, 510 S.W.3d 258, 260 (2017) (striking down Fayetteville ordinance).

²⁷ *Texas Governor Revives Stalled Transgender Bathroom Bill*, N.Y. Times (June 6, 2017), <https://www.nytimes.com/2017/06/06/us/texas-bathroom-bill.html>.

²⁸ As of June 2017, 20 states and D.C. prohibit gender identity discrimination in employment and housing, and 19 states and D.C. prohibit such discrimination in public accommodations. Thus, 30 states do not prohibit gender identity discrimination in employment and housing, and 31 states do not prohibit

45 states that have passed hate crimes legislation, only 17 (and the District of Columbia) extend those protections to transgender victims.²⁹

Indeed, laws discriminating against transgender people run deep in our nation’s history. For example, many cities enacted laws criminalizing cross-dressing beginning in the nineteenth century,³⁰ leading to arrests and prosecutions. *People v. Archibald*, 296 N.Y.S.2d 834, 836 (App. Div. 1968) (affirming conviction of a transgender defendant under a law forbidding “a disguise ‘in a manner calculated to conceal his being identified’”); *Doe v. McConn*, 489 F. Supp. 76, 79 (S.D. Tex. 1980) (holding Houston ordinance unconstitutional as applied to transsexuals that criminalized “dress[ing] with the designed intent to disguise his or her true sex as that of the opposite sex”). While most of these anti-cross-dressing laws were held unconstitutional or repealed, *see, e.g., City of Columbus v.*

gender identity discrimination in public accommodations. See Movement Advancement Project, Non-Discrimination Laws, http://www.lgbtmap.org/equality-maps/non_discrimination_laws (toggle between employment, housing, and public accommodations tabs).

²⁹ Movement Advancement Project, Hate Crime Laws, http://www.lgbtmap.org/equality-maps/hate_crime_laws; *see also* Carpenter et al., *Transgender Status, Gender Identity, and Economic Outcomes in the United States* 4 (forthcoming 2017) [hereinafter “*Transgender Status*”].

³⁰ Ballard, *Sex Change: Changing the Face of Transgender Policy in the United States*, 18 *Cardozo J.L. & Gender* 775 (2012); *see also* Capers, *Cross Dressing and the Criminal*, 20 *Yale J.L. & Human.* 1, 8-9 (2008).

Rogers, 324 N.E.2d 563, 565 (Ohio 1975),³¹ others were not.³² Regardless, the mere presence of these laws on the books had the effect of demeaning transgender people and sweeping them into the criminal justice system.

Beyond such facially discriminatory laws, many laws disparately impact transgender people. For example, laws requiring voters to have a certain form of identification risks disenfranchising many transgender individuals, who face administrative obstacles to obtaining identification that reflects their correct gender identity. According to one recent study, the strictest of these laws (requiring government-issued photo identification) threatened to disenfranchise more than 34,000 transgender people in eight states during the November 2016 election.³³

2. *Discrimination in the judicial system and by law enforcement.*

Transgender people have also suffered discrimination throughout the judicial system. In the NTDS, 24% reported being denied equal treatment by a government agency or official, and 13% reported such treatment by a judge or court official.³⁴

³¹ Eskridge, *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961-1981*, 25 Hofstra L. Rev. 817, 861-62 (1997).

³² *Id.* at 862 & n.197.

³³ Herman, The Williams Institute, *Potential Impact of Voter Identification Laws on Transgender Voters in the 2016 General Election* (2016), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/2016-Voter-ID.pdf>.

³⁴ NTDS, at 133.

In family law proceedings, transgender litigants have been mistreated and repeatedly deprived of fundamental rights. Courts have refused to recognize transgender people's marriages, *see, e.g., Kantaras v. Kantaras*, 884 So.2d 155 (Fla. App. 2004); *Littleton v. Prange*, 9 S.W.3d 223 (Tex. 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 Estate of Gardiner*, 42 P.3d 120 (Kan. 2002); and 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”).

One federal court justified discriminating against a transgender woman by stating she was “impersonating” a woman and “pretend[ing]” in order to “disguise himself.” *Oiler v. Winn-Dixie Louisiana, Inc.*, No. 00-3114, 2002 U.S. Dist. LEXIS 17417, at *28 (E.D. La. Sept. 16, 2002). Another court likened a transgender litigant to a man trying to change himself “into a donkey.” *Ashlie v. Chester-Upland School District*, No. 78-4037, 1979 U.S. Dist. LEXIS 12516, at *14 (E.D. Pa. May 9, 1979). And another found no cognizable discrimination even though an employer fired a transgender woman after asking “where she was in the sex change process” and “whether she still had male genitalia.” *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1218-19 (10th Cir. 2007).

As this last decision illustrates, courts have historically held transgender people outside the protection of sex discrimination laws. *See also Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1087 (7th Cir. 1984) (concluding that discrimination against transgender people is not prohibited by Title VII); *Sommers v. Budget Marketing, Inc.*, 667 F. 2d 748, 750 (8th Cir. 1982) (same). Some courts continue to adhere to the view that federal law does not protect against discrimination on the basis of transgender status or gender transition, *see, e.g., E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d 837, 841 (E.D. Mich. 2016), although an increasing number of courts have revisited or rejected such views, *see Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001, 1014 (D. Nev. 2016) (reviewing and following authority finding “that gender-identity discrimination is actionable under Title VII”); *cf. Whitaker*, 2017 U.S. App. LEXIS 9362, at *23-32 (finding school district’s bathroom policy discriminated on the basis of sex in violation of Title IX).

Courts have also humiliated transgender litigants who petitioned to change their names. What is meant to be a routine administrative process has at times become a platform for judges to express hostility and bias. In one case, a court likened transgender people to “gargoyles,” and then characterized a transgender person’s name-change petition as “being asked to lend the dignity of the court and the sanctity of the law to [a] freakish rechristening” that would “pervert the judicial

process.” *In re Petition of Richardson to Change Name*, 23 Pa. D. & C.3d 199, 201 (1982); *see also In re Harvey*, No. CV-2011-1075, slip op. at 1, 5, 6 (Dist. Ct. Okla. Sept. 2, 2011) (rejecting transgender woman’s name change as “fraudulent” because she would still have male DNA). Other courts have questioned transgender litigants’ commitment to living as a particular gender, *In re Harris*, 707 A.2d 225, 228 (Pa. Super. Ct. 1997); permitted name change only by transgender people who have had sex-reassignment surgery, *In re Anonymous*, 293 N.Y.S.2d 834, 838 (N.Y. Civ. Ct. 1968); and expressed concern that changing one’s name to correspond with his or her gender identity would constitute fraud, *In re Eck*, 584 A.2d 859, 860-61 (N.J. Super. Ct. App. Div. 1991).

Transgender prisoners have historically suffered discrimination as well. They have been incarcerated in facilities inconsistent with their gender identities, *see, e.g., Kosilek v. Maloney*, 221 F. Supp. 2d 156, 160 (D. Mass. 2002), and have been denied appropriate treatment (such as access to hormone therapy) or even gender-appropriate clothing and grooming items. For example, in *Long v. Nix*, 86 F.3d 761 (8th Cir. 1996), the Eighth Circuit rejected a prisoner’s request to wear women’s clothing as “demand[ing] the privilege of cross dressing” and characterized the prisoner as “[h]aving no apparent interest in overcoming his

gender-identity disorder.” *Id.* at 766. Incarcerated transgender people also face high levels of sexual abuse in prison from prison staff and other inmates.³⁵

Finally, transgender people report high levels of harassment and abuse by law enforcement officers. In the NTDS, 20% of the transgender respondents reported unequal treatment by a police officer, 29% reported being harassed or disrespected, 6% reported being physically assaulted, and nearly half reported being uncomfortable seeking police assistance.³⁶ Of USTS respondents who interacted with law enforcement in the prior year, 58% reported negative treatment, 20% reported verbal harassment or disrespect, and 4% reported being physically attacked.³⁷

3. *Discrimination in the workplace.*

Overwhelming evidence documents pervasive and persistent discrimination against transgender workers. In the NTDS, fully 78% of transgender respondents reported experiencing mistreatment at work because of their gender identity.³⁸

³⁵ Beck, Bureau of Justice Statistics, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011-12—Supplemental Tables: Prevalence of Sexual Victimization Among Transgender Adult Inmates* (2014), http://www.bjs.gov/content/pub/pdf/svpjri1112_st.pdf.

³⁶ NTDS, at 6; *see also* Mallory et al., The Williams Institute, *Harassment by Law Enforcement Officers in the LGBT Community* (2015), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Discrimination-and-Harassment-in-Law-Enforcement-March-2015.pdf>.

³⁷ USTS, at 186.

³⁸ NTDS, at 56.

Half reported being harassed at work.³⁹ Nearly half (47%) reported that they suffered an adverse employment action at some time in their lives due to their gender identity—either not getting a job for which they applied (44%), being denied a promotion (23%), or losing their job (26%).⁴⁰

In the more recent USTS, more than one-quarter (27%) of transgender respondents who held or applied for a job reported that their gender identity or expression had led to them not being hired, being denied a promotion, or being fired during the previous year.⁴¹ Fifteen percent reported experiencing verbal harassment, physical attack, or sexual assault in the workplace in the past year, while 23% reported negative actions at work such as being told to present as the wrong gender in order to keep their jobs, being removed from direct contact with clients, or having private information shared.⁴² More than half the respondents with a job (53%) reported that they were forced to hide their gender identity in the past year.⁴³

The discrimination that transgender people face in employment is connected to high rates of unemployment or underemployment among transgender people: 15% of USTS respondents reported being unemployed, three times the national

³⁹ *Id.*

⁴⁰ *Id.* at 53-54.

⁴¹ USTS, at 150-51.

⁴² *Id.* at 153-54.

⁴³ *Id.* at 154.

average.⁴⁴ Transgender people of color had even higher unemployment rates: 20% of black respondents and 21% of Latino and multiracial respondents were unemployed.⁴⁵

Related to these work experiences, many transgender people are living in poverty. The poverty rate for USTS respondents (29%) was double the poverty rate for U.S. adults overall (14%).⁴⁶ Nearly one-quarter (22%) of USTS respondents reported annual earnings of under \$10,000—significantly higher than the 15% of the general population with such low incomes.⁴⁷ Even those transgender individuals with higher incomes reported lower household incomes than the general population: 62% had incomes under \$50,000 per year (compared to 38% of the general population),⁴⁸ while only 15% reported earning more than \$100,000 (compared to 31% of the general population).⁴⁹ These figures are consistent with a forthcoming study by several *amici* finding “clear evidence that self-identified transgender individuals have significantly lower employment rates

⁴⁴ *Id.* at 140.

⁴⁵ *Id.*

⁴⁶ *Id.* at 144.

⁴⁷ *Id.* at 142.

⁴⁸ *Id.* at 143-44.

⁴⁹ *Id.* at 144.

and household incomes and significantly higher poverty rates than non-transgender individuals.”⁵⁰

4. *Discrimination in housing, education, public accommodations, and health care.*

Discrimination against transgender people extends to other important aspects of life. Studies reflect widespread discrimination against transgender people in housing, education, and public accommodations.⁵¹ Thirty percent of transgender respondents to the USTS reported homelessness (12% within the prior year),⁵² 19% of NTDS respondents reported being denied a home or apartment, and 11% reported being evicted because of their gender identity, in their lifetimes.⁵³

Discrimination against transgender people in education settings is widespread as well. In the USTS, respondents who were open about their transgender status at school (or those 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-12.⁵⁴ Seventeen percent of those respondents left school because of the mistreatment.⁵⁵ Twenty-four percent of respondents reported

⁵⁰ Carpenter et al., *Transgender Status*, at 18 (on file with counsel).

⁵¹ USTS, at 178; NTDS, at 106-113.

⁵² USTS at 178.

⁵³ NTDS, at 106-113.

⁵⁴ USTS, at 132-34.

⁵⁵ *Id.* at 135.

verbal, physical, or sexual harassment at post-secondary institutions.⁵⁶ Harassment was so severe that nearly one in six respondents (16%) left school.⁵⁷

In addition, 44% of transgender NTDS respondents reported having been denied equal treatment or service at least once at a place of public accommodation (e.g., retail stores, hotels and restaurants, doctors' offices, hospitals, etc.).⁵⁸ In the USTS, 14% of respondents reported similar experiences in the past year.⁵⁹ More than half of NTDS respondents reported being verbally harassed and 8% reported being physically attacked or assaulted in a place of public accommodation.⁶⁰

Finally, transgender people face significant hurdles to accessing health care: 19% of NTDS respondents reported that they were denied care, 28% reported being verbally harassed in a doctor's office, emergency room, or other medical setting, and 50% met health care providers who were ignorant of basic aspects of transgender health and had to be educated about the patient's special health care needs.⁶¹

⁵⁶ *Id.* at 136.

⁵⁷ *Id.*

⁵⁸ NTDS, at 124-35.

⁵⁹ USTS, at 213-14.

⁶⁰ NTDS, at 126-28.

⁶¹ *Id.* at 72-76.

5. *Discrimination against transgender people is linked to adverse health and well-being consequences.*

Transgender people face high levels of physical violence, criminal victimization, and adverse health consequences correlated with the discrimination they suffer. One explanation is that prejudice and stigma against transgender people leads to various stressors referred to as “minority stress,”⁶² which causes a variety of negative effects on well-being and which ultimately becomes reflected in disparities in health outcomes and other well-being indicators.⁶³

With regard to violence and criminal victimization, the National Council of Anti-Violence Programs reported 13 hate-motivated murders of transgender women in 2013 alone.⁶⁴ In 2009, Congress recognized that over 400 people were murdered due to anti-transgender bias in the preceding decade, including 21 in 2008 alone.⁶⁵ Transgender individuals also suffer “a high prevalence of sexual

⁶² See, e.g., Hendricks & Testa, *A conceptual framework for clinical work with transgender and gender nonconforming clients: An adaptation of the minority stress model*, *Professional Psychology Research and Practice* 43(5), 460 (2012); Bockting et al., *Adult development and quality of life of transgender and gender nonconforming people*, *Current Opinion in Endocrinology, Diabetes, and Obesity*, 23(2), 188-97 (2016).

⁶³ See Bockting et al., *Stigma*, at 943-51.

⁶⁴ Nat’l Coalition of Anti-Violence Programs, *Lesbian, Gay, Bisexual, Transgender, Queer and HIV-Affected Hate Violence in 2013*, at 8, 22–23 (2014), http://avp.org/storage/documents/2013_ncavp_hvreport_final.pdf.

⁶⁵ H.R. Rep. No. 111-86, at 11 (2009).

assault and rape starting at a young age.”⁶⁶ Forty-seven percent of USTS respondents reported having been sexually assaulted at some point in their lifetime—10% within the prior year.⁶⁷ Moreover, transgender victims of sexual assault rarely report the crimes. In one study, 83% of victims of sexual assaults had not reported any of the incidents to the police.⁶⁸ Mistrust of police (as noted above, *see supra*, at 20) likely contributed to the lack of reporting.⁶⁹

Turning to health and well-being more generally, 35% of NTDS respondents who suffered harassment or discrimination reported using drugs or alcohol to cope.⁷⁰ One in three reported a negative experience with healthcare providers within the prior year,⁷¹ with such experiences often leading transgender people to postpone medical care.⁷² Transgender people are also recognized as the most at-risk population for HIV/AIDS.⁷³

⁶⁶ Stotzer, *Aggression and Violent Behavior* 14, at 170–72 (2009) [hereinafter “*Aggression*”].

⁶⁷ USTS at 205-06; see also Stotzer, *Aggression*, at 170-72 (citing Clements-Nolle et al., *Attempted suicide among transgender persons: The influence of gender-based discrimination and victimization*, *Journal of Homosexuality*, 51(3), 53-69 (2006)).

⁶⁸ Stotzer, *Aggression*, at 173.

⁶⁹ *Id.* at 176.

⁷⁰ NTDS, at 44.

⁷¹ USTS at 97.

⁷² NTDS, at 76; USTS, at 96, 98.

⁷³ CDC Issue Brief, *HIV and Transgender Communities* (2016), <https://www.cdc.gov/hiv/pdf/policies/cdc-hiv-transgender-brief.pdf>.

An alarming 40% of transgender people have reported a suicide attempt—a rate vastly higher than the national average of only 4.6%.⁷⁴ Moreover, 82% of USTS respondents reported having seriously considered suicide at some point in their lives, including 48% in the prior year alone.⁷⁵ The high prevalence of suicide attempts is associated with discrimination: NTDS respondents who had lost a job due to discrimination, were unemployed, suffered abuse (particularly physical abuse) in school, or performed sex work had a higher prevalence of suicide attempts.⁷⁶

Unsurprisingly, members of the military and veterans are not immune from these effects. In an online survey of transgender veterans, participants reported “a variety of life challenges, including high rates of a history of homelessness (34%), employment and housing discrimination (34% and 12%, respectively), and military enacted stigma [*i.e.*, investigation or punishment of transgender status by the military] due to gender identity (29%).”⁷⁷ Studies have reflected that transgender

⁷⁴ USTS, at 114.

⁷⁵ *Id.* at 112-14.

⁷⁶ NTDS, at 45, 65; Hass et al., The Williams Institute, *Suicide Attempts among Transgender and Gender Non-Conforming Adults* 11 (2014), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/AFSP-Williams-Suicide-Report-Final.pdf>.

⁷⁷ Lehovet, et al, *Factors Associated with Suicidality Among a National Sample of Transgender Vets*, *Suicide and Life-Threatening Behavior* 46(5) 507, 509-10, 518-19 (2016) [hereinafter “*Suicidality*”]. “Enacted stigma” consists of “[e]xternal factors such as experiences of discrimination and rejection.” *Id.* at 508.

veterans experience high rates of suicide.⁷⁸ One study of transgender veterans calculated a suicide rate of 82/100,000—substantially higher than the rate among veterans (37/100,000) and the general population.⁷⁹ Another study of veterans seeking care from the Veterans Health Administration between 1995 and 2013 calculated that nearly 20% of transgender veterans had suicidal ideation or attempts, compared to less than 5% of non-transgender veterans.⁸⁰ Transgender veterans also suffer from alcohol abuse, depression, panic disorders, PTSD, and serious mental illness at rates significantly higher than non-transgender veterans.⁸¹

B. Being Transgender Bears No Relationship To A Person’s Ability To Contribute To Society.

The second significant factor in the Court’s heightened scrutiny analysis is whether the group in question is distinctively different from other groups in a way that “frequently bears [a] relation to ability to perform or contribute to society.” *City of Cleburne*, 473 U.S. at 440-41 (quoting *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality op.)). Unlike non-suspect classes like intelligence or

⁷⁸ Blosnich et al., *Mortality among veterans with transgender related diagnoses in the Veterans Health Administration, FY2000-2009*, 1 *LGBT Health* 269, 269-276 (2014) [hereinafter “*Mortality*”]; Blosnich, *Prevalence*, at e27–e32; Lehovet, *Suicidality*, at 508.

⁷⁹ Blosnich, *Mortality*, at 273.

⁸⁰ Brown and Jones, *Mental Health and Medical Health Disparities in 5135 Transgender Veterans Receiving Healthcare in the Veterans Health Administration: A Case-Control Study*, *LGBT Health* 6 (2015) [hereinafter “*Mental Health*”].

⁸¹ *Id.*

physical disability, *see id.*, courts have held that transgender status “bears no relation to ability to contribute to society,” *Adkins*, 143 F. Supp. 3d at 139; *see also Evancho*, 2017 U.S. Dist. LEXIS 26767, at *32; *Highland*, 208 F. Supp. 3d at 874. Like the court in *Adkins*, *amici* are “not aware of any data or argument suggesting that a transgender person, simply by virtue of transgender status, is any less productive than any other member of society.” *Adkins*, 143 F. Supp. 3d at 139.

C. The Remaining Factors Further Demonstrate That Transgender Status Is A Suspect Classification Deserving of Heightened Scrutiny.

The remaining two factors—the lack of political power and status as a discrete minority group—also support the conclusion that transgender status is a suspect classification.

Lack of political power. As a small minority that comprises just 0.6% of the total adult population, there can be little debate that transgender people lack political power to fully protect themselves in the political process against a hostile majority. *Highland*, 208 F. Supp. 3d at 874 (finding transgender community politically powerless “as a tiny minority of the population, whose members are stigmatized for their gender non-conformity in a variety of settings”); *see also Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 989-90 (S.D. Ohio 2013) (citing “small population size” as factor establishing powerlessness of LGBT community),

rev'd, DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *rev'd, Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

One significant indication that the transgender community lacks political power is the lack of openly transgender elected or appointed political officials. *Adkins* recognized the absence of openly transgender members of the United States Congress or federal judiciary. 143 F. Supp. 3d at 140. *Amici* are aware of only three current openly transgender elected officials, all at local levels.⁸² An openly transgender person has never been sworn in as a legislator at the state or federal level.⁸³ *Amici* are aware of three transgender candidates who ran for state legislative office in 2016, but one lost in a primary, one in the general election, and the other withdrew out of fear for her personal safety.⁸⁴ Three transgender

⁸² *The U.S. elected fewer openly LGBT legislators this cycle than last*, Washington Post (Nov. 11, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/11/11/the-u-s-elected-fewer-openly-lgbt-legislators-this-cycle-than-last-again/?utm_term=.156997917705 [hereinafter “*LGBT legislators*”]; see also Casey & Reynolds, *Standing Out: Transgender and Gender Variant Candidates and Elected Officials Around the World*, App. 2 (2015), https://lgbtqrightsrep.files.wordpress.com/2015/10/lgbt_report_trans_v4.pdf.

⁸³ *LGBT legislators*; Cleis Abeni, *Our 18 Greatest Allies for Trans Equality in Office*, The Advocate (Feb. 25, 2016), <http://www.advocate.com/transgender/2016/2/25/our-18-greatest-allies-trans-equality-office>; Carol Robinson, *It's Final: Laughton Resigns State Rep Seat*, Nashua Patch (Nov. 20, 2012), <http://patch.com/new-hampshire/nashua/it-s-final-laughton-to-resign>.

⁸⁴ *Primary Election Results*, Honolulu Star-Advertiser (Aug. 14, 2016), <http://www.staradvertiser.com/2016/08/14/hawaii-news/primary-election-results/>

candidates ran for the U.S. Congress in 2016, but all lost.⁸⁵ Given the many thousands of federal, state, and local officeholders, these statistics demonstrate how few openly transgender individuals have been elected.

Status as a discrete minority group. As noted, approximately 0.6% of the U.S. adult population, or approximately 1.4 million adults, identifies as transgender. Courts and scholars agree that the transgender population is a “discrete” minority group that self-identifies according to a distinguishing characteristic: a lack of congruence between their gender identity and their assigned sex at birth. *Lyng*, 477 U.S. at 638; *see Adkins*, 143 F. Supp. 3d at 139 (“transgender status is a sufficiently discernible characteristic to define a discrete minority class”); *see also Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) (gender identity is “so fundamental” to identity that individuals “should not be required to abandon” it), *overruled on other grounds, Thomas v. Gonzalez*, 409 F.3d 1777 (9th Cir. 2005). Indeed, as already discussed (*see supra*, Section A), the group’s distinguishing characteristic “calls down discrimination when it is manifest.” *Adkins*, 143 F. Supp. 3d at 139-40 (finding this factor relevant because transgender people “face backlash in everyday life when their status is

(results for Senate District 13); *LGBT legislators; Transgender Candidate Danni Askini Drops Out of State House Race*, Seattle Met (May 23, 2016), <http://www.seattlemet.com/articles/2016/5/13/transgender-candidate-danni-askini-drops-out-of-state-house-race>.

⁸⁵ *LGBT legislators*.

discovered”) (citing *Windsor*, 699 F.3d at 183). This factor, too, thus weighs in favor of finding that transgender status is a suspect classification.

CONCLUSION

In accordance with the foregoing, *amici* respectfully request that this Court apply heightened scrutiny to the Department of Veterans Affairs policy of refusing to provide medically indicated gender reassignment surgery in its benefits package.

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Respectfully submitted,

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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 6,851 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief 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 this brief has been prepared in a proportionally spaced typeface using Word 2010 in 14-point Times New Roman.

June 28, 2017

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