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*PETITION FOR INTERIM FINAL RULE / LEGAL INTERPRETATION REGARDING THE
INADEQUATE MEDICAL CARE PROVIDED TO TRANSGENDER VETERANS*

Dear Ms. Mitrano:

I was horrified last year when my domestic partner told me that her orchiectomy was denied by the Veterans Health Administration on the basis of sex. While I am quite familiar with private insurers barring coverage for genital surgeries in defiance of the Affordable Care Act's nondiscrimination provision (codified at 42 U.S.C. § 18116), and even the Federal government's prior actions to bar such coverage to Federal employees in defiance of constitutional and statutory law, I was unprepared for the Biden/Harris Administration to continue to take this stance and expose the United States to enormous civil liability for violations of clearly established Federal law. My partner asked that I give the Administration time to resolve the issue, and it has been two years since President Biden took office. Thus, I have waited.

Progress has nominally been made, insofar as my partner was coerced into receiving entirely unrelated procedures, specifically laser hair removal on her scrotum, that she was told will allow her to receive an orchiectomy when her clinicians are satisfied with the lack of hair on her scrotum. My partner didn't much care about this hair and, if she had free choice, would in no way have undergone this painful application of lasers to one of her most sensitive body parts. When I first contacted the Department regarding this matter, my concerns were ignored. After my partner underwent laser hair removal, only then did the Department reveal that it had no intention of providing her with the orchiectomy that was promised, and confirm that men seeking orchiectomies are not routinely subject to painful laser hair removal. The Department's action in using the false promise of an orchiectomy to coerce my partner into undergoing an unwanted, unnecessary, and needless procedure served only to cause her pain; despite the Department's claims, she is no closer to being permitted to have an orchiectomy. The Department views a transgender woman in need of an orchiectomy to be seeking "gender confirming/affirming surgery," which the Department categorically excludes from otherwise available procedures, such as orchiectomies.

To defend this current state of affairs, the Department of Veterans Affairs puts forward "VHA Directive 1341: Providing Health Care for Transgender and Intersex Veterans," under color of authority of 38 U.S.C. 7301(b), which establishes "[t]he primary function of the Administration is to provide a complete

medical and hospital service for the medical care and treatment of veterans.” Despite this primary function, the Veterans Health Administration nonetheless “does not provide gender confirming/affirming surgeries because VA regulation excludes them from the medical benefits package.”¹

It appears that the Department of Veterans Affairs does not realize that it is bound by the Constitution and its authorizing statute, insofar as it claims to have the authority to discriminate on the basis of sex by force of its regulations, in open defiance of both. This interpretation ignores the Supreme Court’s clear and simple words in *Bostock v. Clayton County*, 590 U.S. ____, 140 S. Ct. 1731 (2020), in which Justice Gorsuch, for the majority, writes, “At bottom, these cases involve no more than the straight-forward application of legal terms with plain and settled meanings. . . . In Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee’s sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law.” This “necessary consequence” firmly establishes a bright-line rule that discrimination related to gender transition is discrimination on the basis of sex. In elaborating why the special pleading aimed at allowing anti-transgender discrimination to continue under Title VII is unavailing, Justice Gorsuch writes:

“[T]he employers must scramble to justify deploying a stricter causation test for use only in cases involving discrimination based on sexual orientation or transgender status. Such a rule would create a curious discontinuity in our case law, to put it mildly. Employer hires based on sexual stereotypes? Simple test. Employer sets pension contributions based on sex? Simple test. Employer fires men who do not behave in a sufficiently masculine way around the office? Simple test. But when that same employer discriminates against women who are attracted to women, or persons identified at birth as women who later identify as men, we suddenly roll out a new and more rigorous standard? Why are *these* reasons for taking sex into account different from all the rest?”²

Thus, I am left with several questions of legal interpretation for the Office of General Counsel of the VA. By this letter, I request a formal and binding interpretation from the Office of General Counsel, in accordance with the Administrative Procedure Act.³

- 1) What is the current VA regulation on trans-affirming surgeries, given that VHA Directive 1341 continues to state that “does not provide gender confirming/affirming surgeries because VA regulation excludes them from the medical benefits package”⁴? It would seem to me that excluding surgeries because they are gender-confirming/affirming is *de jure*, textual, and intentional discrimination on the basis of sex.

¹ https://www.va.gov/vhapublications/ViewPublication.asp?pub_ID=6431; the document was also conveyed from the Veteran's Health Administration LGBT Veteran Care Coordinator to my domestic partner as justification for his decision to deny access to necessary medical care on the grounds that it is "gender confirming/affirming surgery."

² *Bostock v. Clayton County*, 590 U.S. ____ (2020) at 23, available at https://www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf (emphasis in original).

³ While 38 CFR §5.20 does establish procedures for the withdrawal or modification of a guidance document, the text of VHA Directive 1341 is quite clear that "VA regulations" are the source of this unconstitutional behavior, and so, observing the lack of specifics as to how to petition the Department for interpretation or rulemaking in accordance with 5 U.S.C. § 553(e), seek to do so in this document.

⁴ https://www.va.gov/vhapublications/ViewPublication.asp?pub_ID=6431

- 2) Assuming the VA is not abandoning the "gender confirming/affirming" test as the obviously unconstitutional barrier to care that it is, how does classifying a surgery as "gender confirming/affirming" operate without being discrimination on the basis of sex? I have a dear friend who was prevented from seeing a doctor for her orchiectomy until she had collected the various permissions from others that are required for trans people to exercise autonomy over our bodies, only to learn that she had testicular cancer all the while. While this dear friend is thankfully not a veteran of the hostility of the US government and therefore was able to have her testes removed immediately, her situation does raise a question in my mind: what is the legal basis for the Department of Veterans Affairs creating a subgroup of surgeries, "gender confirming/affirming" surgeries, that are not eligible for treatment because they are related to sex? A person who wants their testes removed because of cancer may have them removed; a person who wants their testes removed because of gender dysphoria may not. The difference seems to be entirely on the sex of the person suffering – the person who needs their testes removed because of cancer is overwhelmingly statistically likely to be male, whereas the person who needs their testes removed for gender dysphoria is very unlikely to be male. It would seem that the application of the Department's "gender confirming/affirming surgeries" construct only serves to discriminate against veterans on the basis of sex.
- 3) What constitutes a "gender confirming/affirming" procedure? My domestic partner seeks an orchiectomy to end her reliance on spironolactone to suppress her testosterone, which is only related to gender by the VA's guidance document and the VA's flagrantly false belief that genitals define gender. I do not believe a man who has had an orchiectomy to treat testicular cancer is less of a man, just as I do not believe that a woman with testicles is less of a woman. The Department, on the other hand, would seem to not only believe this, but is actively making decisions and distributing guidance documents that state that the VA has found both constitutional and Congressional authority to create a concept of procedures that are "gender confirming/affirming" and therefore not accessible to veterans. I do not recall the governance of an individual's sex amongst Congress's enumerated powers, and rather thought that such decisions belonged to individuals expressing their own bodily autonomy. It would be a truly bizzare result if people have more rights over the disposition of land they own than bodies they inhabit, given that people undoubtedly have property interests in their bodies that are more fundamental than their rights over what real estate they may own, but perhaps the Biden/Harris Administration truly does care more about the rights of property than the rights of people.
- 4) What is the legal basis for requiring a patient to undergo laser hair removal to their scrotum in order to receive an orchiectomy, and what is the legal basis for imposing different surgical requirements upon a trans woman seeking an orchiectomy than a cis man seeking an orchiectomy? While the Department has subsequently admitted that it has ceased so doing in favor of denying orchiectomies to women altogether, I wish to hear the legal justification for coercing my domestic partner into undergoing the painful procedure.
- 5) What is the legal basis for the VA's decision, every day, to continue to fail to publish so much as a proposal to end the classification of surgeries as "gender confirming/affirming" and therefore not available to transgender veterans? Given that there is a clearly identified constitutional right to not be discriminated against on the basis of sex, and that the Supreme Court in *Bostock* spoke

quite clearly in saying that discrimination against transgender individuals on the basis of their transition is discrimination on the basis of sex, what legal reasoning supports the Department of Veterans Affairs in its decision to not simply strike the offending text of its regulations by interim final rule in order for its officers and agents to faithfully discharge their sworn duties to support and defend the Constitution?

To ask Justice Gorsuch's question of the Department of Veterans Affairs: what possible permissible interest is served by summarily denying surgical care to people the Department has determined are seeking "gender confirmation/affirmation"? Why is this reason for taking sex into account, to decide whether or not a surgery is "gender confirming/affirming" so as to decide whether or not it will be offered, different from any other form of discrimination on the basis of sex? As every first-year law student knows, Federal discrimination on the basis of sex must survive intermediate scrutiny; what "important government interest" is being advanced here, and how exactly is a prohibition on surgical care related to gender dysphoria "substantially related to that interest?" Recalling the Veterans Health Administration authorizing statute, 38 U.S.C. § 7301(b), it is impossible to square the primary function of providing "a complete medical and hospital service for the medical care and treatment of veterans" with a policy that specifically excludes surgical care related to gender from coverage. Not only does this specific exclusionary policy work against the explicit text of the authorizing statute, but also does so in a way that is constitutionally suspect, without even a façade of important interests supporting the sex discrimination that is substantially related to the prohibition on surgeries the Department arbitrarily and capriciously designates as unavailable based entirely on sex.

The Biden/Harris Administration asserts that transgender rights are human rights, and that same ideal was echoed into the 2020 Democratic Party platform. Over a year ago, the Biden/Harris Administration published an interpretation from the Department of Education responding to *Bostock*, which, by operation of the Affordable Care Act, governs the healthcare rights of most Americans. Why, then, has the Department of Veterans Affairs been ignoring the fact that anti-trans health discrimination is unconstitutional sex discrimination as it casually discriminates against transgender veterans as a matter of rote policy? Why does the Biden/Harris Administration believe it is legal for the Department of Veteran's Affairs to discriminate against trans people in to provision of medical services in a way that private entities may not? In the 2020 final rule published by the Department of Health and Human Services, the United States writes, "Namely, a covered entity may not deny or limit health services that are ordinarily or exclusively available to individuals of one sex, to a transgender individual based on the fact that the individual's sex assigned at birth, gender identity, or gender otherwise recorded is different from the one to which such health services are ordinarily or exclusively available."⁵ It seems as though the Biden/Harris Administration believes that transgender veterans have less of a right to be protected from sex discrimination than the public at large.

It is my sincere hope that this is simply a circumstance where the Secretary was unaware of this issue, perhaps because of the prior Administration's open hostility to transgender service members, or the illegal behavior of the prior Administration in impeding the transition to the Biden/Harris Administration. If this is simply a matter of insufficient attention paid to a portion of the Federal bureaucracy operating outside the bounds of their constitutional oaths, the Secretary need simply issue an interim final rule to cease this unlawful conduct immediately.

⁵ Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37160 (June 19, 2020) at 37189, available at <https://www.govinfo.gov/content/pkg/FR-2020-06-19/pdf/2020-11758.pdf>.

Further dithering about the false necessity of continued public comment is not only a violation of clearly established constitutional law, but also a violation of the trust the American people placed in the Biden/Harris Administration and the Democratic Party to defend civil rights. The Biden/Harris Administration promised the American people that transgender rights are human rights, but seems loathe to act on those words when it comes to caring for veterans.

I look forward to your prompt response to this petition and swift resolution of this issue.

Sincerely,

Emily T. Prince St. Cameron, Esq.

CC: The Honorable Denis Richard McDonough, Secretary of Veterans Affairs
The Honorable Shontel Brown, Congresswoman of the 11th District of Ohio
The Honorable Sherrod Brown, Senator for Ohio