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MEMORANDUM

To: Plan Administrators
From: Transcend Legal
Date: May 17, 2018
Re: Liability for transgender health care exclusions in employer health plans

I. Excluding transgender-related health care is discriminatory.

Transgender health care exclusions run afoul of a variety of nondiscrimination laws. Transgender employees pay the same premiums as other employees yet receive unequal benefits in return. Employees who are transgender or have transgender dependents subsidize the health care of their co-workers while being denied health care for themselves or their families.

Just as it is sex discrimination if a plan excludes all coverage for gynecological care, and it is disability discrimination if a plan excludes all treatments for HIV,¹ it is both sex and disability discrimination when an employer singles out and excludes medical treatment simply because it is for the purpose of treating gender dysphoria.

There is no legitimate, nondiscriminatory basis to single out transgender care for exclusion. Existing plan definitions of medical necessity are sufficient to ensure that only medically necessary services are provided. Transgender care is not experimental, not cosmetic, and is medically appropriate. It is precisely because of that that insurance companies developed explicit exclusions for transgender care—otherwise it is covered under standard surgical, mental health, diagnostic services, or pharmaceutical benefits.²

Transgender care exclusions deprive transgender employees of an individualized assessment and comprehensive clinical evaluation. Medical necessity criteria require that the medical needs of any given individual and the medical judgment of that individual's physician are considered rather than applying a one-size-fits all policy.³ A gender dysphoria exclusion denies transgender employees the ability to

¹ See generally U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, EEOC COMPLIANCE MANUAL (2000), <http://www.eeoc.gov/policy/docs/benefits.html>.

² See *Davidson v. Aetna Life & Cas. Ins. Co.*, 420 N.Y.S.2d 450, 453 (N.Y. Sup. Ct. 1979) (rejecting Aetna's attempt to exclude sex reassignment surgery under a "cosmetic" exclusion and requiring them to cover it).

³ Cf. *Doe v. State of Minn., Dep't of Pub. Welfare*, 257 N.W. 2d 816, 820 (Minn. 1977) ("The medical necessity of each applicant requesting funding of transsexual surgery must be considered individually, on a case-by-case basis.... The determination of medical necessity through a thorough medical evaluation of the individual applicant will ensure that those individuals genuinely requiring sex conversion surgery will be able to obtain it but will deny benefits to persons not demonstrating such medical necessity."); *Pinneke v. Preisser*, 623 F.2d 546, 550 (8th Cir. 1980) ("The decision of whether or not certain treatment or a particular type of surgery is 'medically necessary' rests with the individual recipient's physician and not with clerical personnel or government officials."); *Weaver v. Reagen*, 886 F.2d

have their needs assessed under current standards of medical practice. Such blanket exclusions are discriminatory.

II. Plans that exclude transgender care have fallen behind other employer and government-based health plans.

Employers have increasingly removed transgender exclusions to meet the needs of their transgender employees, remain competitive in hiring,⁴ and comply with non-discrimination laws. Transgender-inclusive coverage allows employers to attract employees and customers who value a commitment to diversity. In the Human Rights Campaign's *Corporate Equality Index 2017*, three-fourths (73%) of the businesses ranked—and half of Fortune 500 businesses—offer transgender-inclusive health care coverage.⁵ Colleges and universities have increasingly removed exclusions from student⁶ and staff⁷ plans.

The federal government prohibits categorical exclusions in its employee health

194, 200 (8th Cir. 1989) (rejecting a blanket exclusion for AZT noting: “The Medicaid statute and regulatory scheme create a presumption in favor of the medical judgment of the attending physician in determining the medical necessity of treatment.”).

⁴ Sandra Cherub, *Nevada to offer transgender health coverage starting July 1*, LAS VEGAS REVIEW-JOURNAL, Jun. 17, 2015, <http://www.reviewjournal.com/news/nevada/nevada-offer-transgender-health-coverage-starting-july-1> (“Jeffery Garofalo, a Las Vegas attorney and [Public Employee Benefits Program] board member, said the policy change is a positive step for Nevada. ‘I am grateful that our plan documents ... are going to be in line with current and modern thinking and respectful of our society,’ Garofalo said. It sends a message, he said, that Nevada ‘is an enlightened and welcoming place.’”).

⁵ Human Rights Campaign Foundation, *CORPORATE EQUALITY INDEX 2017*, 4 (2017), http://assets.hrc.org/files/assets/resources/CEI-2017-Financial.pdf?_ga=2.117326982.1642751118.1495718004-126164941.1495254510.

⁶ Campus Pride, *Colleges and Universities that Cover Transition-Related Medical Expenses Under Student Health Insurance*, <https://www.campuspride.org/tpc/student-health-insurance> (list not comprehensive).

⁷ Campus Pride, *Colleges and Universities that Cover Transition-Related Medical Expenses Under Employee Health Insurance*, <https://www.campuspride.org/tpc/employee-health> (list not comprehensive).

plans.⁸ Medicare covers gender dysphoria treatments.⁹ At least 19 states have explicit coverage in their Medicaid plans for gender dysphoria treatments.¹⁰ Nineteen states and the District of Columbia prohibit the exclusion of transgender-related care in private insurance policies.¹¹ The IRS has recognized treatment for gender dysphoria as medically necessary, tax-deductible care.¹² Courts have issued preliminary injunctions preventing the military from excluding transgender health care under the Equal Protection Clause.¹³ Indeed, the medical necessity of transgender-related care is so well established that blanket exclusions in the prison context have repeatedly been found to be deliberate indifference to a serious medical need in violation of the Eighth Amendment's prohibition on cruel and unusual punishment.¹⁴ Nine of the U.S. Courts of Appeals have concluded or assumed that

⁸ FEHB Program Carrier Letter No. 2015-12, *Covered Benefits for Gender Transition Services* (June 23, 2015), <https://www.opm.gov/healthcare-insurance/healthcare/carriers/2015/2015-12.pdf> (“no carrier participating in the Federal Employees Health Benefits Program may have a general exclusion of services, drugs or supplies related to gender transition or ‘sex transformations.’”).

⁹ Department of Health and Human Services, Departmental Appeals Board, NCD 140.3. Transsexual Surgery, No. A-13-87 (May 30, 2014), <https://www.hhs.gov/sites/default/files/static/dab/decisions/board-decisions/2014/dab2576.pdf> (invalidating National Coverage Determination that categorically excluded gender dysphoria treatments); *Lauderdale v. UnitedHealthcare*, Opinion of the Medicare Appeals Council, M-15-1069 (Jan. 21, 2006), https://www.ezryoung.com/s/MAC-Decision-1-21-16-Lauderdale_Redacted.pdf (requiring coverage for vaginoplasty under Medicare Advantage plan).

¹⁰ See NATIONAL CENTER FOR TRANSGENDER EQUALITY, HEALTHCARE ACTION CENTER (2018), <https://transequality.org/health-care-action-center>.

¹¹ See TRANSCEND LEGAL, STATE HEALTH INSURANCE LAWS & GUIDANCE, <https://transcendlegal.org/state-health-insurance-laws-and-guidance> (listing bulletins, regulations and statutes that prohibit exclusions).

¹² *O'Donnabhain v. C.I.R.*, 134 T.C. 34, 61 (2010) recommendation regarding acq., 2011 WL 5198999 (Nov. 3, 2011), acq., 2011-47 I.R.B. 789 (November 21, 2011).

¹³ *Karnoski v. Trump*, 2:17-cv-01297-MJP, slip op. at 20 (W.D. Wash. Apr. 13, 2018) (order granting in part and denying in part motions for summary judgment) (applying strict scrutiny to transgender people as a protected class where defendants sought to deny transgender-related health care to military service members); *Stone v. Trump*, No. 1:17-cv-02459-MJG, slip op. at 43-44 (D. Md. Nov. 21, 2017) (applying intermediate scrutiny to transgender people as a quasi-suspect class to find that military personnel denied coverage for surgery have an Equal Protection claim); *Karnoski v. Trump*, No. 2:17-cv-1297-MJP, slip op. at 16-17 (W.D. Wash. Dec. 11, 2017) (applying intermediate scrutiny to a policy of denying transgender-related health care to military service members and granting a preliminary injunction).

¹⁴ *E.g., Soneeya v. Spencer*, 851 F.Supp.2d 228, 247 (D. Mass. 2012) (holding that a “blanket ban on certain types of treatment, without consideration of the medical requirements of

severe gender dysphoria constitutes a “serious medical need.”¹⁵ In short, there is no legitimate medical basis to deny coverage for transgender-related care.

Similarly, all major insurance companies currently recognize the medical necessity of treatment for gender dysphoria¹⁶ and administer plans that will cover such care. For example, Aetna’s gender dysphoria medical policy notes, “Aetna considers

individual inmates, is exactly the type of policy that was found to violate Eighth Amendment standards in other cases both in this district and in other circuits.”); *De’lonta v. Johnson*, 708 F.3d 520 (4th Cir. 2013) (declining to dismiss an Eighth Amendment claim where the prison provided psychological counseling and hormones but not surgery); *Norsworthy v. Beard*, 87 F.Supp.3d 1164 (N.D. Cal. April 2, 2015) (granting a preliminary injunction ordering genital reassignment surgery to be provided to an inmate who had been denied care based on a blanket exclusion); *Brooks v. Berg*, 270 F. Supp. 2d 302, 312 (N.D.N.Y. 2003) *vacated in part*, 289 F. Supp. 2d 286 (N.D.N.Y. 2003) (finding a denial of care objectively unreasonable “[i]n light of the numerous cases which hold that prison officials may not deny transsexual inmates all medical attention, especially when this denial is not based on sound medical judgment”).

¹⁵ See *Battista v. Clarke*, 645 F.3d 449, 455 (1st Cir. 2011) (finding that gender dysphoria can be extremely dangerous and upholding injunction requiring hormone therapy for inmate); *Cuoco v. Moritsugu*, 222 F.3d 99, 106 (2d Cir. 2000) (assuming without deciding that gender dysphoria constitutes a serious medical need); *De’lonta*, 708 F.3d 520; *Praylor v. Texas Dept. of Criminal Justice*, 430 F.3d 1208, 1209 (5th Cir. 2005) (assuming without deciding that gender dysphoria does present a serious medical need); *Phillips v. Michigan Dept. of Corrections*, 731 F. Supp. 792, 800 (W.D. Mich. 1990), *decision aff’d*, 932 F.2d 969 (6th Cir. 1991) (upholding lower court finding that gender dysphoria presents a serious medical need and reaffirming injunction entitling inmate to hormone therapy); *Meriwether v. Faulkner*, 821 F.2d 408, 411-13 (7th Cir. 1987) (holding that gender dysphoria presents a serious medical need and noting that sex reassignment surgery has been found to be a medical necessity for treatment of gender dysphoria rather than being a cosmetic surgery); *Fields v. Smith*, 653 F.3d 550, 555 (7th Cir. 2011), cert. denied, 132 S. Ct. 1810 (U.S. 2012) (finding that gender dysphoria presents a serious medical need and that hormone therapy—not counseling—is the only effective treatment); *White v. Farrier*, 849 F.2d 322, 325-27 (8th Cir. 1988) (acknowledging that gender dysphoria is a serious medical condition); *Allard v. Gomez*, 9 Fed. Appx. 793, 794 (9th Cir. 2001) (finding it undisputed that gender dysphoria presents a serious medical need); *Brown v. Zavaras*, 63 F.3d 967, 970 (10th Cir. 1995) (finding that gender dysphoria presents a medical need entitling inmate to treatment); *Kothmann v. Rosario*, 558 Fed. Appx. 907 (11th Cir. 2014) (finding that gender dysphoria presents a serious medical need). See also *Wolfe v. Horn*, 130 F. Supp. 2d 648, 652 (E.D. Pa. 2001) (assuming without deciding that gender dysphoria presents a serious medical need). No U.S. Court of Appeals has held otherwise.

¹⁶ TRANSCEND LEGAL, TRANSGENDER INSURANCE MEDICAL POLICIES, <https://transcendlegal.org/health-insurance-medical-policies> (providing links to 80+ insurance company clinical guidelines on gender reassignment surgery and related treatments).

sex reassignment surgery medically necessary” when its clinical criteria are met.¹⁷ UnitedHealthcare’s policy similarly states that where the stated criteria are met, the procedures “are medically necessary.”¹⁸

Such widespread coverage is unsurprising given that insurance coverage for transgender-related care has been endorsed by all of the leading medical groups, including the American Medical Association, the American Psychiatric Association, the American Psychological Association, the American Academy of Child and Adolescent Psychiatry, the American Academy of Family Physicians, the American Academy of Nursing, the American College of Nurse-Midwives, the American College of Physicians, the American Congress of Obstetricians and Gynecologists, the American Public Health Association, the Endocrine Society, the National Association of Social Workers, the Pediatric Endocrine Society Special Interest Group on Transgender Health, the World Medical Association, and the World Professional Association for Transgender Health.¹⁹

Globally, transgender-inclusive health care has long been standard in national health plans. Countries that publicly fund transgender-related surgeries include

¹⁷ AETNA, CLINICAL POLICY BULLETIN: GENDER REASSIGNMENT SURGERY (2015), http://www.aetna.com/cpb/medical/data/600_699/0615.html.

¹⁸ UNITEDHEALTHCARE, UNITEDHEALTHCARE MEDICAL COVERAGE POLICY NO. 2017T0580A: GENDER DYSPHORIA TREATMENT (JAN. 1, 2017), https://www.unitedhealthcareonline.com/ccmcontent/ProviderII/UHC/en-US/Assets/ProviderStaticFiles/ProviderStaticFilesPdf/Tools%20and%20Resources/Policies%20and%20Protocols/Medical%20Policies/Medical%20Policies/Gender_Dysphoria_Treatment.pdf.

¹⁹ TRANSCEND LEGAL, MEDICAL ORGANIZATIONS SUPPORTING TRANSGENDER HEALTH CARE, <https://transcendlegal.org/medical-organization-statements> (listing 16 medical organizations that have endorsed insurance coverage for transgender health care).

Argentina,²⁰ Brazil,²¹ Canada,²² Cuba,²³ Iran,²⁴ and the following European countries: Austria, Belgium, the Czech Republic, Denmark, Finland, France, Germany, Hungary, Ireland, Italy, Latvia, the Netherlands, Poland, Portugal, Spain, Sweden, and the United Kingdom,²⁵ where a court found a blanket ban to be unlawful.²⁶ The Parliamentary Assembly of the Council of Europe also passed a resolution calling on member states to “make gender reassignment procedures, such as hormone treatment, surgery and psychological support, accessible for transgender people, and ensure that they are reimbursed by public health insurance schemes.”²⁷

The widespread coverage for and endorsement of transgender-related health care calls into question any professed justification for singling out this care for exclusion.

²⁰ Associated Press, *In Argentina, sex change surgery becomes a right*, SFGATE, May 11, 2012, <http://www.sfgate.com/world/article/In-Argentina-sex-change-surgery-becomes-a-right-3550708.php>.

²¹ Associated Press, *Brazil to Provide Free Sex-Change Operations: Court Rules the Surgery is a Constitutional Right for Residents*, NBCNEWS.COM, Aug. 17, 2007, http://www.nbcnews.com/id/20323334/ns/health-health_care/t/brazil-provide-free-sex-change-operations.

²² See Daniel McHardie, *New Brunswick will now cover gender-confirming surgeries*, CBC NEWS, Jun. 3, 2016, <http://www.cbc.ca/news/canada/new-brunswick/gender-confirming-surgeries-1.3614766> (becoming the last province in Canada to remove its exclusion).

²³ Shasta Darlington, *Cuban Enjoys New Benefit of Free Sex-Change Operation*, CNN, June 1, 2011, <http://www.cnn.com/2011/WORLD/americas/06/01/cuba.sex.change>.

²⁴ Vanessa Barford, *Iran’s ‘Diagnosed Transsexuals’*, BBC NEWS, Feb. 28, 2008, <http://news.bbc.co.uk/1/hi/7259057.stm> (noting the government will pay up to half the cost).

²⁵ Stephen Whittle et al., *TRANSGENER EUROSTUDY: LEGAL SURVEY AND FOCUS ON THE TRANSGENER EXPERIENCE OF HEALTH CARE* (2008), <http://www.pfc.org.uk/pdf/eurostudy.pdf>; Daniel Woolls, *Spanish teen undergoes sex change operation*, THE SAN DIEGO UNION-TRIBUNE, Jan. 12, 2010, <http://www.sandiegouniontribune.com/sdut-spanish-teen-undergoes-sex-change-operation-2010jan12-story.html> (noting that three regional systems provide coverage).

²⁶ A. Jain & C. Bradbeer, *Gender Identity Disorder: Treatment and Post-Transition Care in Transsexual Adults*, 18 INT’L J. OF STD & AIDS 147, 149 (2007).

²⁷ Parliamentary Assembly of the Council of Europe, *Discrimination against transgender people in Europe, Resolution 2048* (2015), <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=21736&lang=en>.

III. Cost is not a legitimate basis to exclude transgender care.

There is no legitimate, nondiscriminatory reason to target transgender care—and transgender care only—for cost-saving purposes. All health care costs money, and there are far more expensive medical conditions that could be targeted if cost were truly the concern. But such diagnosis-based exclusions would, like the transgender exclusion, be unlawful discrimination. Cost containment measures must instead be applied equally to all plan members and not single out treatment that is used exclusively by an historically marginalized population.

In reality, removing transgender exclusions is cost-neutral or cost-saving. There is no actuarial basis to price transgender-related surgeries separately from any other type of surgery.²⁸ A survey of employers found that two thirds of employers that provided information on actual costs of employee utilization of gender dysphoria coverage reported zero costs.²⁹ An analysis of the utilization of transgender-related care over 6.5 years in one California health plan found a utilization rate of 0.062 per 1000 covered persons.³⁰ This is because only a small percentage of the population is transgender³¹ and not all transgender individuals undergo all available treatments.

The exclusion of transgender-related health care services likely causes increased health care costs because of the catastrophic costs resulting from untreated gender dysphoria and co-morbidities such as anxiety, alcohol and drug abuse, incidence of

²⁸ The City and County of San Francisco initially raised premiums when it became the first major U.S. employer to remove blanket exclusions for transgender-related care in 2001. But after five years, “beneficial cost data led Kaiser and Blue Shield to no longer separately rate and price the transgender benefit—in other words, to treat the benefit the same as other medical procedures such as gall bladder removal or heart surgery.” City and County of San Francisco and San Francisco Human Rights Commission, *San Francisco City and County Transgender Health Benefit* (Aug. 7, 2007), https://transcendlegal.org/sites/default/files/uploads/SF_transgender_health_benefit.pdf.

²⁹ Jody L. Herman, The Williams Inst., *Costs and benefits of providing transition-related health care coverage in employee health benefits plans: findings from a survey of employers*, 2 (2013), <https://escholarship.org/uc/item/5z38157s>.

³⁰ STATE OF CAL., DEP’T OF INS., ECONOMIC IMPACT ASSESSMENT GENDER NONDISCRIMINATION IN HEALTH INSURANCE, 5 (Apr. 13, 2012), <http://transgenderlawcenter.org/wp-content/uploads/2013/04/Economic-Impact-Assessment-Gender-Nondiscrimination-In-Health-Insurance.pdf>.

³¹ Transgender people comprise about 0.6% of the population. Jan Hoffman, *Estimate of U.S. Transgender Population Doubles to 1.4 Million Adults*, N.Y. TIMES, June 30, 2016, <https://www.nytimes.com/2016/07/01/health/transgender-population.html>; Cal. Economic Impact Assessment, *supra* note 30, 2 (concluding that requiring equal benefits for transgender people “will have an immaterial impact on extra demands for treatments, because of the low prevalence of the impacted population.”).

HIV, depression and suicide attempts.³² As one study concluded, “[w]hile justice, legality, and a desire to avoid discrimination should drive decisions about benefit coverage, this case for the transgender population also appears economically attractive.”³³

IV. Federal nondiscrimination law prohibits transgender exclusions in employee health plans.

A. Americans with Disabilities Act – Disability discrimination

Targeting for exclusion treatments for a specific diagnosis—gender dysphoria—is discrimination under the Americans with Disabilities Act (ADA). The ADA prohibits employers from discriminating on the basis of disability in the provision of health insurance to their employees³⁴ and dependents³⁵ whether or not the benefits are administered by the employer. A court has recognized an employment discrimination claim alleging gender dysphoria discrimination under the ADA,³⁶ and the

³² Cal. Economic Impact Assessment, *supra* note 30, at 9-12.

³³ William V. Padula et al., *Societal Implications of Health Insurance Coverage for Medically Necessary Services in the U.S. Transgender Population: A Cost-Effectiveness Analysis*, 31 J. GEN. INTERNAL MED. (2016), <http://rdcu.be/uZLO>.

³⁴ 42 U.S.C. § 12112(a); 29 C.F.R. § 1630.4(a)(vi) (prohibiting disability discrimination with respect to all terms, conditions, and privileges of employment including “[f]ringe benefits available by virtue of employment, whether or not administered by the covered entity”).

³⁵ 29 C.F.R. § 1630.8 (“It is unlawful for a covered entity to exclude or deny equal jobs or benefits to, or otherwise discriminate against, a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a family, business, social or other relationship or association.”); *See also Polifko v. Office of Personnel Management*, EEOC Request No. 05940611 (Jan. 4, 1995) (Commission held that, based on the association provision of the ADA and the Commission’s “Interim Guidance on Application of ADA to Health Insurance,” Complainant had standing to bring a claim of discrimination on the basis of his relationship with his wife, an individual with a disability, who had been denied specific treatment for breast cancer by an insurance carrier); *Polifko v. Office of Personnel Management* (OPM), EEOC Appeal No. 01960976 (April 3, 1997), *request for reconsideration denied*, EEOC Request No. 05970769 (January 23, 1998) (finding a disability-based exclusion was unlawful).

³⁶ *Blatt v. Cabela’s Retail, Inc.*, No. 5:14-CV-04822, 2017 WL 2178123, at *4 (E.D. Pa. May 18, 2017) (denying a motion to dismiss by finding that “gender dysphoria” was not excluded by § 12211 of the ADA). *See also* Brief of Amici Curiae Bay Area Lawyers for Individual Freedom et al., *Doe v. Arrisi*, No. 3:16-CV-8640-MAS-DEA (D.N.J. Nov. 21, 2017), http://lgbtbar.org/wp-content/uploads/sites/6/2017/11/Doe-v-Arrisi_Amicus-Br-Filed-11.21.17.pdf; Brief of Amici Curiae Bazelon Center for Mental Health Law et al., *Doe v. Mass. Dept. of Correction*, No. 1:17-CV-12255-RGS (D. Mass. Feb. 28, 2018), <https://www.glad.org/wp-content/uploads/2017/11/doe-v-doc-brief-of-amici-curiae.pdf>.

U.S. Department of Justice consistently weighs in in favor of recognizing gender dysphoria as a disability.³⁷ Accordingly, an exclusion for treatment of gender dysphoria, which has no nondiscriminatory basis, would be an unlawful disability-based exclusion.

Such diagnosis-based exclusions are anomalous. Plans do not exclude, for example, all treatments related to diabetes, HIV, or any other specific medical condition because those would be unlawful disability discrimination.³⁸ Psychotherapy alone cannot resolve gender dysphoria.³⁹ Most people diagnosed with gender dysphoria need to undergo medical treatments to alleviate their symptoms. Any “sex change” or “sex transformation” treatment is, by definition, a treatment for transsexualism,⁴⁰ another term for gender dysphoria. In the Medicaid context, courts

³⁷ Second Statement of Interest of the United States at 6, *Blatt v. Cabela’s Retail*, 2017 WL 2178123, at *4 (E.D. Pa. May 18, 2017) (No. 5:14-cv-4822-JFL) (urging the court to adopt a construction “under which Plaintiff’s gender dysphoria would not be excluded from the ADA’s definition of ‘disability.’”); Statement of Interest of the United States, *Doe v. Arisi*, No. 3:16-CV-8640-MAS-DEA (D.N.J. July 17, 2017) (same), <http://www.almcms.com/contrib/content/uploads/sites/292/2017/07/transgender-2.pdf>; Statement of Interest of the United States, *Doe v. Dzurenda*, No. 3:16-cv-1934-RNC (D. Conn. Oct. 27, 2017) (same).

³⁸ EEOC COMPLIANCE MANUAL, *supra* note 1, Disability-Based Distinctions <http://www.eeoc.gov/policy/docs/benefits.html> - III (noting that singling out a particular disability for exclusion of coverage is an unlawful disability-based distinction).

³⁹ See, e.g., *Richards v. U.S. Tennis Ass’n*, 400 N.Y.S. 2d 267, 271 (N.Y. Sup. Ct. 1977) (“Medical Science has not found any organic cause or cure (other than sex reassignment surgery and hormone therapy) for transsexualism, nor has psychotherapy been successful in altering the transsexual’s identification with the other sex or his desire for surgical change.”); *Doe v. State of Minn., Dep’t of Pub. Welfare*, 257 N.W. 2d 816, 819 (Minn. 1977) (“Given the fact that the roots of transsexualism are generally implanted early in life, the consensus of medical literature is that psychoanalysis is not a successful mode of treatment for the adult transsexual.”); *Doe v. McConn*, 489 F. Supp. 76, 77 (S.D. Tex. 1980) (making a factual finding that “[t]reatment of this condition in adults by psychotherapy alone has been futile” and that “[a]dministration of hormones of the opposite sex followed by sex-conversion operations has resulted in better emotional and social adjustment by the transsexual individual in the majority of cases.” Because transsexualism is not a “choice,” “it has been found that attempts to treat the true adult transsexual psychotherapeutically have consistently met with failure.”); *Sommers v. Iowa Civil Rights Comm’n*, 337 N.W.2d 470, 473 (Iowa 1983) (“It is generally agreed that transsexualism is irreversible and can only be treated with surgery to remove some of the transsexual feelings of psychological distress; psychotherapy is ineffective.”); *In re Heilig*, 816 A.2d 68, 78 (Md. 2003) (“Although psychotherapy may help the transsexual deal with the psychological difficulties of transsexualism, courts have recognized that psychotherapy is not a ‘cure’ for transsexualism. Because transsexualism is universally recognized as inherent, rather than chosen, psychotherapy will never succeed in ‘curing’ the patient.”).

⁴⁰ WORLD HEALTH ORGANIZATION, INTERNATIONAL CLASSIFICATION OF

have repeatedly found that such categorical exclusions are arbitrary and unlawful diagnosis-based exclusions.⁴¹ A categorical exclusion of “developmental disabilities” that excluded all autism treatment without actuarial justification stated a claim under the ADA,⁴² and the same would be true for gender dysphoria exclusions.

B. Title VII – Sex discrimination

A blanket transgender-related care exclusion is also unlawful sex discrimination. Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to “discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s ... sex.”⁴³ An employer is liable for discriminatory conduct by a third-party administrator, even where the discriminatory terms and coverage determinations are made by or influenced by a third-party administrator.⁴⁴

DISEASES, TENTH REVISION (ICD-10) (2016), <http://apps.who.int/classifications/icd10/browse/2016/en/-/F64.0> (defining transsexualism as a “desire to live and be accepted as a member of the opposite sex, usually accompanied by a sense of discomfort with, or inappropriateness of, one’s anatomic sex, and a wish to have surgery and hormonal treatment to make one’s body as congruent as possible with one’s preferred sex”).

⁴¹ *Doe v. State of Minn., Dep’t of Pub. Welfare*, 257 N.W. 2d 816, 820 (Minn. 1977) (“The total exclusion of transsexual surgery from eligibility for M.A. benefits is directly related to the type of treatment involved and, therefore, is in direct contravention of the aforesaid regulation.”); *Pinneke v. Preisser*, 623 F.2d 546, 549 (8th Cir. 1980) (finding “a state plan absolutely excluding the only available treatment known at this stage of the art for a particular condition must be considered an arbitrary denial of benefits based solely on the ‘diagnosis, type of illness, or condition.’”); *Rush v. Parham*, 625 F.2d 1150, 1157 (5th Cir. 1980) (“We caution, however, that if defendants simply denied payment for the proposed surgery because it was transsexual surgery, Georgia should now be required to pay for the operation, since a ‘state may not arbitrarily deny or reduce the amount, duration, or scope of a required service . . . solely because of the diagnosis, type of illness, or condition.’”); *Cruz v. Zucker*, 195 F. Supp. 3d 554, 571 (S.D.N.Y. 2016), on reconsideration, 218 F. Supp. 3d 246 (S.D.N.Y. 2016), and appeal withdrawn, (Dec. 30, 2016) (finding that a categorical ban on medically necessary treatments for a specific diagnosis, gender dysphoria, violates the federal Medicaid Act’s Availability Provision).

⁴² *Morgenthal ex rel. Morgenthal v. Am. Tel. & Tel. Co.*, 1999 WL 187055, at *1 (S.D.N.Y. Apr. 6, 1999) (bringing a Title I ADA complaint against the employer). See also *Whitley v. Dr. Pepper Snapple Grp., Inc.* No. 4:16-CV-00362 (E.D. Tex. May. 4, 2017) (denying a motion to dismiss an ADA claim where a self-funded plan excluded applied behavior analysis treatment, a form of therapy for autism spectrum disorder).

⁴³ 42 U.S.C. § 2000e-2(a)(1); *Newport News Shipbldg. & Dry Dock v. EEOC*, 462 U.S. 669, 682 (1983) (“Health insurance and other fringe benefits are ‘compensation, terms, conditions, or privileges of employment.’”).

⁴⁴ *Ariz. Governing Comm. for Tax Deferred Annuity and Deferred Comp. Plans v. Norris*, 463

Excluding treatments that change sex is inherently discrimination because of sex. No reasonable interpretation of “sex” under Title VII could exclude the very physical characteristics that—along with brain sex—comprise and define one’s sex, i.e., hormone levels, genital appearance, reproductive organs, and secondary sex characteristics such as breasts. Under Title VII, an employer could not fire a woman for not having a uterus or require all men to have a certain level of testosterone. Similarly, it would be discriminatory to offer an insurance policy that prohibited coverage for services associated with one sex, such as hysterectomies or prostate exams.

By the same token, a policy of prohibiting coverage for treatments that *change* sex characteristics is facially discrimination “because of sex.”⁴⁵ A hysterectomy, for example, is covered for treating myriad conditions such as endometriosis. Health plans do not contain treatment-based exclusion for hysterectomies, but they are excluded if the purpose is to change sex characteristics. The plan is denying doctor-recommended medical treatment that is recognized as the standard of care for the *only* reason that the treatment happens to change the physical sex of the individual in question.

The employer’s specific discomfort with medical treatment because it deliberately changes sex characteristics from one sex to another surely qualifies as gender impermissibly playing a role in the decision.⁴⁶ As the Sixth Circuit notes, “[g]ender (or sex) is not being treated as ‘irrelevant to employment decisions’ if an employee’s attempt or desire to change his or her sex leads to an adverse employment decision”⁴⁷—in this case, the decision to not provide equal compensation under the health plan. The Court continued, “an employer cannot discriminate on the

US 1073, 1090-91 (1983) (“It would be inconsistent with the broad remedial purposes of Title VII to hold that an employer who adopts a discriminatory fringe-benefit plan can avoid liability on the ground that he could not find a third party willing to treat his employees on a nondiscriminatory basis. An employer who confronts such a situation must either supply the fringe benefit himself, without the assistance of any third party, or not provide it at all.”).

⁴⁵ See *Schroer v. Billington*, 577 F. Supp. 2d 293, 306-08 (D.D.C. 2008) (noting that “the Library’s refusal to hire Schroer after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery was literally discrimination ‘because of ... sex.’”).

⁴⁶ See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244-45 (1989) (noting that “once a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role.”).

⁴⁷ *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 2:14-cv-13710, slip op. at 16 (6th Cir. Mar. 7, 2018).

basis of transgender status without imposing its stereotypical notions of how sexual organs and gender identity ought to align.”⁴⁸

Viewed another way, an employee may have a hysterectomy covered under employee benefits only if the sex of that individual is female. If the individual is currently or is seeking to be recognized as male, then the surgery will be excluded *because of* that employee’s sex. Similarly, prohibiting genital reassignment surgery under the employee benefit plan is inherently sex discrimination. The employer is dictating the very configuration of an employee’s physical sex characteristics—in contradiction to the recommendations of that individual’s physician—for no other reason than that the employer has an unlawful preference as to whether one of its employees has a penis or a vagina.

Separately, viewed under sex stereotyping framework, transgender people do not conform with *the* core sex stereotype, namely that people born with penises are men and people born with vaginas are women. This is a much more basic form of sex stereotyping than has already been widely recognized under *Price Waterhouse* and its progeny.

Common procedures such as hysterectomy, oophorectomy, mastectomy, vaginectomy, orchiectomy, and penectomy all radically change sex characteristics. But those procedures are covered for employees so long as they are not performed for the purpose of changing sex characteristics from one sex to another. That is, they are covered as long as the individual does not challenge the sex stereotype that genitals at birth are the sole and permanent determinant of one’s sex and gender.

Finally, it is well-settled law that transgender discrimination is prohibited under Title VII.⁴⁹ A robust body of case law holds that discriminatory treatment of transgender individuals is sex discrimination.⁵⁰ In 2012, the Equal Employment Opportunity Commission (EEOC) held that “intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination based on sex and such discrimination therefore violates Title VII.”⁵¹

⁴⁸ *R.G. & G.R. Harris Funeral Homes, supra* note 4748 at 17.

⁴⁹ An assertion that the statute prohibits only prohibits discrimination against “men because they are male or women because they are female” is not in accordance with the plain language of the statute. Title VII prohibits discrimination because of “sex” not “the status of being either male or female.”

⁵⁰ See NATIONAL CENTER FOR TRANSGENDER EQUALITY, FEDERAL CASE LAW ON TRANSGENDER PEOPLE AND DISCRIMINATION, <http://www.transequality.org/federal-case-law-on-transgender-people-and-discrimination>.

⁵¹ *Macy v. Dep’t. of Justice*, E.E.O.C. App. No. 0120120821, 2012 WL 1435995, at *12 (Apr. 20, 2012). See also *Tamara Lusardi v. John McHugh, Sec’y, Dep’t of the Army*, No. 0120133395, 2015 WL 1607756, at *9 (E.E.O.C. Apr. 1, 2015) (finding that “denying transgender individuals access to a restroom consistent with gender identity discriminates on the basis of sex in violation of Title VII.”).

As the Sixth Circuit put it, “[b]ecause an employer cannot discriminate against an employee for being transgender without considering that employee’s biological sex, discrimination on the basis of transgender status necessarily entails discrimination on the basis of sex.”⁵² Federal courts, including the First, Third, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits explicitly or implicitly agree that discrimination against transgender people is actionable sex discrimination.⁵³ Additionally, the Second Circuit’s reasoning in *Zarda v. Altitude Express*, recognizing sexual orientation discrimination as sex discrimination under Title VII, would apply equally to recognizing transgender discrimination as sex discrimination.⁵⁴ Furthermore, dozens of district courts—both within and outside of the circuits that have explicitly recognized sex discrimination claims by transgender people—have found that anti-transgender discrimination is unlawful sex discrimination.⁵⁵ In

⁵² *R.G. & G.R. Harris Funeral Homes*, *supra* note 47 at 19.

⁵³ See *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (recognizing claim for sex discrimination under Equal Credit Opportunity Act, analogizing to Title VII); *R.G. & G.R. Harris Funeral Homes*, *supra* note 47 at 14 (holding “that discrimination on the basis of transgender and transitioning status violates Title VII”); *Smith v. City of Salem*, 378 F.3d 566, 574-75 (6th Cir. 2004) (“Price Waterhouse...does not make Title VII protection against sex stereotyping conditional or provide any reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is transsexual.”); *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 341 (7th Cir. 2017) (en banc) (upholding a Title VII sexual orientation discrimination claim and implicitly rejecting *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984)); *Hunter v. United Parcel Serv.*, 697 F.3d 697, 702 (8th Cir. 2012) (evaluating a transgender man’s Title VII claim “based on his non-conformity to gender stereotypes or his being perceived as transgendered”); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (relying on Title VII cases to conclude that violence against a transgender woman was violence because of gender under the Gender Motivated Violence Act); *Chavez v. Credit Nation Auto Sales*, 641 F. App’x 883, 883 (11th Cir. 2016) (“Sex discrimination includes discrimination against a transgender person for gender nonconformity.”) (citing *Glenn v. Brumby*, 663 F.3d 1312, 1316–17 (11th Cir. 2011)). Additionally, the Third Circuit has implicitly assumed without deciding that transgender people may bring sex stereotyping claims. See *Stacy v. LSI Corp.*, 544 F. App’x 93, 97-98 (3d Cir. 2013).

⁵⁴ *Zarda v. Altitude Express, Inc.*, No. 15-3775, slip op. at 28, 41 (2nd Cir. Feb. 26, 2018) (en banc) (finding both that sexual orientation discrimination is a function of sex and that heterosexuality is a core sex stereotype to which gay employees do not conform). In the case of transgender discrimination, whether one is male or female is not merely a function of sex, it *is* sex. Remaining as one’s sex assigned at birth is an even more fundamental sex stereotype than heterosexuality.

⁵⁵ See, e.g., *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 527 (D. Conn. 2016) (“Employment discrimination on the basis of transgender identity is employment discrimination ‘because of sex’ and constitutes a violation of Title VII of the Civil Rights Act.”); *E.E.O.C. v. Rent-a-Center East, Inc.*, 2017 WL 4021130 (C.D. Ill., Sept. 8, 2017) (holding transgender discrimination is actionable under Title VII, relying on 7th Circuit rulings under Title IX

2017, a jury awarded a \$1.1 million verdict to a transgender professor after it found her employer's discrimination based on her transgender status violated Title VII.⁵⁶ The Justice Department, which had filed the lawsuit initially, withdrew from the case just before the trial,⁵⁷ and it was this case that sparked⁵⁸ the Department of Justice's erroneous memo asserting that Title VII does not apply to discrimination against transgender individuals.⁵⁹

Considering this widespread acceptance that transgender-based discrimination is prohibited under the category of sex, it is no longer viable to argue that transgender people are not protected under Title VII. When Saks Fifth Avenue attempted to

(gender identity as sex discrimination) and Title VII (sexual orientation discrimination as sex discrimination) to justify not following an old circuit precedent); *Roberts v. Clark Cnty. Sch. Dist.*, 215 F.Supp.3d 1001, 1014 (D. Nev. 2016) (finding the weight of authority in the 9th Circuit holds discrimination based on transgender status is sex discrimination); *U.S. v. S.E. Okla. State Univ.*, No. 5:15-CV-324, 2015 WL 4606079 at *2 (W.D. Okla. July 10, 2015) (rejecting motion to dismiss premised on *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007) and allowing claim based on harassment, health insurance exclusion, and termination based on gender transition to proceed as sex stereotyping discrimination under Title VII); *Finkle v. Howard Cty., Md.*, 12 F. Supp. 3d 780, 789 (D. Md. 2014) (denying motion to dismiss Title VII claim where plaintiff plausibly alleged that she was rejected both "because of her obvious transgendered status" and also her gender nonconformity); *Hughes v. William Beaumont Hosp.*, No. 13-cv-13806, 2014 WL 5511507 (E.D. Mich. Oct. 31, 2014) (transgender woman subjected to disparate treatment where decision maker testified that people would be uncomfortable with "a man acting as a woman"); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d. 653 (S.D. Tex. 2008) (holding that a transgender woman stated a claim under Title VII where the employer rescinded a job offer because she was transgender); *Tronetti v. TLC HealthNet Lakeshore Hosp.*, No. 03-CV- 0375E(SC), 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003) (finding an actionable claim where employer advised a transgender woman to avoid wearing overtly feminine attire and ultimately fired because she failed to act like a man).

⁵⁶ John Paul Brammer, *Jury awards transgender professor \$1.1 million in discrimination case*, NBCNEWS.COM, Nov. 20, 2017, <https://www.nbcnews.com/feature/nbc-out/jury-awards-transgender-professor-1-1-million-discrimination-case-n822646>.

⁵⁷ Erin Mulvaney, *The U.S. Justice Department Retreated From a Transgender Professor's Case. She Still Won.*, THE NATIONAL LAW JOURNAL, Nov. 21, 2017, <https://www.law.com/nationallawjournal/sites/nationallawjournal/2017/11/21/the-u-s-justice-department-retreated-from-a-transgender-professors-case-she-still-won>.

⁵⁸ See Charlie Savage, *In Shift, Justice Dept. Says Law Doesn't Bar Transgender Discrimination*, N.Y. TIMES, Oct. 5, 2017, <https://www.nytimes.com/2017/10/05/us/politics/transgender-civil-rights-act-justice-department-sessions.html>.

⁵⁹ Memo from Attorney General Jeff Sessions to US Attorneys and Heads of Department Components re: Revised Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964 (Oct. 4, 2017).

argue this in a motion to dismiss, the Human Rights Campaign publicly suspended Saks's ranking on its Corporate Equality Index.⁶⁰ The Attorney General of New York announced that it would investigate Saks.⁶¹ On the day that the Department of Justice chose to weigh in and file a statement of interest,⁶² Saks withdrew its motion to dismiss⁶³ and subsequently settled the case.⁶⁴

The EEOC has obtained \$6.4 million in monetary relief for LGBT claimants bringing sex discrimination claims⁶⁵ and has filed at least ten cases for LGBT charging parties in federal court, in addition to numerous amicus briefs in support of its litigation position.⁶⁶

As one employer defense attorney concluded, "Based on litigation and conciliation activity, the EEOC's stance on benefits for transgender employees appears to be that partial or categorical exclusions for otherwise medically necessary care solely on the basis of sex, including transgender status and gender dysphoria, violates Title VII."⁶⁷

⁶⁰ Nicole Hensley, *Saks Fifth Avenue does not consider transgender employees protected by Title VII: lawsuit*, NEW YORK DAILY NEWS, Jan. 14, 2015, <http://www.nydailynews.com/news/national/saks-retailer-harrassed-transgender-employee-lawsuit-article-1.2077365>.

⁶¹ Hiroko Tabuchi, *Saks Treatment of Transgender Employees Is Investigated*, NY TIMES, Jan. 15, 2015, <http://www.nytimes.com/2015/01/16/business/ex-saks-employees-transgender-harassment-claim-is-investigated.html>.

⁶² Statement of Interest of the United States at 14, *Jamal v. Saks*, No. 4:14-cv-02782 (S.D. Tex. filed Sept. 30, 2014), <http://www.justice.gov/sites/default/files/crt/legacy/2015/02/27/jamalsoi.pdf>.

⁶³ Claire Zillman, *Saks backpedals from controversial stance on transgender discrimination*, FORTUNE, Jan. 26, 2015, <http://fortune.com/2015/01/26/saks-fifth-avenue-transgender-discrimination>.

⁶⁴ *Jamal v. Saks*, No. 4:14-cv-02782 (S.D. Tex. March 4, 2015) (joint stipulation for dismissal with prejudice).

⁶⁵ U.S. Equal Emp't Opportunity Comm'n, *What You Should Know About EEOC and the Enforcement Protections for LGBT Workers*, https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm.

⁶⁶ U.S. Equal Emp't Opportunity Comm'n, *Fact Sheet: Recent EEOC Litigation Regarding Title VII & LGBT-Related Discrimination* (July 8, 2016), https://www.eeoc.gov/eeoc/litigation/selected/lgbt_facts.cfm.

⁶⁷ Nonnie L. Shivers, *A Gender Transition Primer: The Evolution of ADA Protections and Benefits Coverage*, 11th Annual ABA Labor and Employment Law Conference (Nov. 9, 2017),

Following are some cases involving transgender insurance coverage.

- *Dovel v. The Public Library of Cincinnati and Hamilton County*, No. 1:16-cv-955 (S.D. Ohio, filed Sept. 26, 2016). Rachel Dovel, an employee of the Public Library of Cincinnati and Hamilton County was denied coverage for sex reassignment surgery because of her employer's health insurance. The National Center for Lesbian Rights filed suit against the Library under Title VII and the federal Equal Protection Clause of the Fourteenth Amendment and against Anthem under Section 1557 of the Patient Protection and Affordable Care Act. The case settled.⁶⁸
- *Robinson v. Dignity Health*, No. 4:16-cv-03035-YGR (N.D. Cal., filed Jun. 6, 2016). The ACLU filed suit because of a categorical exclusion for transgender care in Josef Robinson's employer-based self-funded health plan. The EEOC had found reasonable cause that the employer discriminated "by excluding 'sex transformation surgery' from all health care coverage in violation of Title VII."⁶⁹ The EEOC submitted an amicus brief.⁷⁰ The case settled for \$25,000⁷¹ and the employer lifted the exclusion from its benefits plans as of 2017.
- *EEOC v. Deluxe Financial*, No. 0:15-cv-02646 (D. Minn. Jan. 20, 2016) (consent decree). The EEOC announced the settlement of a transgender discrimination case for \$115,000.⁷² The consent decree provides that the defendant's national self-funded health benefits plan will not include any

https://www.americanbar.org/content/dam/aba/events/labor_law/2017/11/conference/papers/Duncan-%20Gender%20Transition%20Materials.authcheckdam.pdf.

⁶⁸ Sharon Coolidge, *Library settles transgender lawsuit, now covers transgender surgery*, Cincinnati.com (May 15, 2017), <http://www.cincinnati.com/story/news/politics/2017/05/15/library-settles-transgender-lawsuit-now-covers-transgender-surgery/101512662>.

⁶⁹ Robinson v. Dignity Health, No. 4:16-cv-03035-YGR (N.D. Cal. filed June 6, 2016) (complaint exhibit A), https://transcendlegal.org/sites/default/files/uploads/2016-05-12_Robinson_EEOC_determination.pdf.

⁷⁰ Amicus Brief of the Equal Employment Opportunity Commission in Support of Plaintiff and in Opposition to Defendant's Motion to Dismiss, Robinson v. Dignity Health, No. 4:16-cv-03035-YGR (N.D. Cal., Aug. 8, 2016), https://www.aclu.org/sites/default/files/field_document/043_eecoc_amicus_brief_2016.08.22.pdf.

⁷¹ Bob Egelko, *Dignity Health, transgender employee settle discrimination suit*, SF Gate (April 28, 2017), <http://www.sfgate.com/bayarea/article/Transgender-employee-Dignity-Health-settle-11108011.php>.

⁷² Equal Employment Opportunity Commission, *Deluxe Financial to Settle Sex Discrimination Suit on Behalf of Transgender Employee* (Jan. 21, 2016), <http://eeoc.gov/eeoc/newsroom/release/1-21-16.cfm>.

partial or categorical exclusion for otherwise medically necessary care based on transgender status.

- *Darin B. v. McGettigan*, E.E.O.C. App. No. 0120161068, 2017 WL 1103712 (Mar. 6, 2017) allowed a claim to proceed under Title VII and Section 501 of the Rehabilitation Act where a transgender man was denied nipple reconstruction under his Aetna-administered federal employee health plan.
- *Simonson v. Oswego County*. On June 26, 2017, the EEOC's Buffalo Local Office found reasonable cause because Oswego County denied a retired employee "medical benefit coverage for treatment due to his sex (transgender status/gender identity)." ⁷³ On November 20, 2017, the New York Attorney General announced a settlement in the case, stating that Oswego County's categorical exclusion violated Title VII and the New York State Human Rights Law. ⁷⁴ Lambda Legal filed suit on behalf of Mr. Simonson seeking compensation for past care denied to him. ⁷⁵
- *Robinson v. Sam's East, Inc.* The Tampa Field office of the EEOC found reasonable cause that Walmart discriminated against Jessica Robison "by denying her medical benefit coverage for treatment due to her sex (transgender status/gender identity)" in violation of Title VII. The self-funded plan contained an exclusion for "transgender treatment/sex therapy." ⁷⁶
- *Baker v. Aetna Life Ins. Co. & L-3 Communications Corp.*, No. 3:15-CV-3679-D, 2017 WL 131658, at *5 (N.D. Tex. Jan. 13, 2017). Charlize Baker was denied coverage for breast augmentation under her employer-based short-term disability benefits policy administered by Aetna. Her Title VII

⁷³ *Simonson v. Oswego County* Letter of Determination, EEOC Charge No.: 520-2016-00377 (Jun. 26, 2017), https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/simonson_ny_20170626_eEOC-letter-of-determination.pdf. See also Benjamin Kail, *Facing legal action, Oswego County eyes changes to transgender health coverage*, Oswego County News Now (Aug. 17, 2017), http://www.oswegocountynewsnow.com/news/facing-legal-action-oswego-county-eyes-changes-to-transgender-health/article_4ea2c730-82d3-11e7-a36e-6f0fc6f12da5.html.

⁷⁴ A.G. Schneiderman Announces Settlement With Oswego County To Ensure Health Insurance Coverage for Transgender Employees (Nov. 20, 2017), <https://ag.ny.gov/press-release/ag-schneiderman-announces-settlement-oswego-county-ensure-health-insurance-coverage>.

⁷⁵ Lambda Legal Sues Oswego County, NY for Refusal to Cover Medically Necessary Health Care for Transgender Employee (Nov. 30, 2017), https://www.lambdalegal.org/blog/20171130_lambda-legal-sues-oswego-county-transgender-health-care.

⁷⁶ *Robinson v. Sam's East, Inc.* Letter of Determination, EEOC Charge No. 511-2015-01402 (July 26, 2017), http://www.transgenderlegal.org/media/uploads/doc_725.pdf.

claim against the employer survived a motion to dismiss. The court entertained the claim but went on to find no facial discrimination because the self-funded employer health plan did not categorically exclude breast reconstruction for transgender women.⁷⁷

- *Tovar v. Essentia Health*, 857 F.3d 771, 775 (8th Cir. 2017). Brittany Tovar, the mother of a transgender child brought claims under Title VII after being denied transgender-related care under her employer-provided health insurance plan due to a transgender exclusion. Citing *Hunter v. United Parcel Serv., Inc.*, 697 F.3d 697, 702 (8th Cir. 2012), the Eighth Circuit assumed for purposes of the appeal that Title VII applied but found that Tovar lacked standing because she personally did not experience the sex discrimination—a result not presently adopted in any other circuit.
- *Morton v. Spectrum Health*, No. 1:18-cv-00371 (W.D. Mich. filed Apr. 2, 2018). Bringing Section 1557 and Title VII claims against employer, a health care provider, that has explicit exclusion in its self-funded employee health plan.

C. Title IX – Sex Discrimination

Education programs receiving federal funding are prohibited from discriminating on the basis of sex,⁷⁸ including in compensation and fringe benefits.⁷⁹ Discriminating in the provision of benefits on the basis that the care sought is intended to change sex characteristics is inherently sex discrimination.⁸⁰ As is the case with other federal nondiscrimination statutes described above, courts have generally recognized discrimination based on transgender status to be covered under Title

⁷⁷ *Baker v. Aetna Life Ins. Co.*, No. 3:15-cv-03679-D (N.D. Tex. Jan. 26, 2018).

⁷⁸ 20 U.S.C. § 1681 (2017).

⁷⁹ 34 C.F.R. § 106.54 (2017) (“A recipient shall not make or enforce any policy or practice which, on the basis of sex: (a) Makes distinctions in rates of pay or other compensation.”); 34 C.F.R. § 106.56(b) (2017) (“A recipient shall not: (1) Discriminate on the basis of sex with regard to making fringe benefits available to employees.”).

⁸⁰ *Franciscan Alliance, Inc. v. Burwell*, 227 F.Supp.3d 660, 688 (N.D. Tex. Dec. 31, 2016). (“[T]he text, structure, and purpose reveal that the definition of sex in Title IX’s prohibition of sex discrimination unambiguously prevented discrimination on the basis of the biological differences between males and females.”).

IX's prohibition.⁸¹ Cases to the contrary are readily distinguished.⁸²

D. Executive Order (EO) 11246

Federal contractors are prohibited from discriminating on the basis of gender identity. A transgender exclusion would be prohibited under Executive Order (EO) 11246, as amended by EO 13672.⁸³ Federal contractors are barred from discriminating against any employee because of sex or gender identity, including in "rates of pay or other forms of compensation."⁸⁴ The Department of Labor's Employment Standards Administration's Office of Federal Contract Compliance Programs (OFCCP) enforces EO 11246 and is accepting complaints based on sex and gender identity.⁸⁵ A contractor in violation of EO 11246 may have its contracts canceled, terminated, or suspended in whole or in part, and the contractor may be

⁸¹ See, e.g., *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1046-47 (7th Cir. 2017) (distinguishing *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984) and holding that Title IX prohibits treating transgender students differently from non-transgender students), *petition for cert. filed*, No.17-301 (Aug. 25, 2017); *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 221 (6th Cir. 2016) (denying motion to stay preliminary injunction that prevented school district from excluding transgender girl from the girls' restroom); *A.H. v. Minersville Area Sch. Dist.*, No. 3:17-CV-391, 2017 WL 5632662, *3-7 (M.D. Pa. Nov. 22, 2017) (denying motion to dismiss where a transgender girl was prevented from using the girls' restroom at school); *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850, 856-58 (S.D. Ohio 2016) (holding that excluding transgender student from restrooms consistent with her gender identity likely constituted sex-based discrimination under Title IX and the Equal Protection Clause), *stay pending appeal denied sub nom.*, *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217 (6th Cir. 2016). See also *Doe v. Boyertown Area Sch. Dist.*, No. 17-1249, 2017 WL 3675418, at *52-53 (E.D. Pa. Aug. 25, 2017) (concluding after evidentiary hearing that allowing boys and girls who are transgender to use sex-specific restrooms and locker rooms did not violate privacy), *appeal docketed*, No. 17-3113 (3d Cir. Sept. 28, 2017); *Students & Parents for Privacy v. U.S. Dep't of Educ.*, No. 16-cv-4945, 2016 WL 6134121, at *28-29 (N.D. Ill. Oct. 18, 2016) (report and recommendation) (same), *adopted by* 2017 WL 6629520 (N.D. Ill. Dec. 29, 2017).

⁸² *Johnston v. Univ. of Pittsburgh*, 97 F.Supp.3d 657 (W.D. Pa. Mar. 31, 2015) (relying on outdated precedent to hold that Title IX does not prohibit discrimination based on gender identity or transgender status per se); *Texas v. United States*, 201 F.Supp.3d 810 (N.D. Tex. Aug. 21, 2016) (finding in a preliminary injunction that Title IX permitted bathrooms to be separated by biological sex in light of specific regulations under Title IX).

⁸³ Exec. Order No. 11,246 § 202, 30 Fed. Reg. 12319, 3 CFR, 1964-1965 Comp., p. 339; Exec Order No. 13672, 79 Fed. Reg. 42971 (July 23, 2014).

⁸⁴ 41 C.F.R. § 60-1.4 (2017).

⁸⁵ OFCCP, Directive 2015-01, Handling individual and systemic sexual orientation and gender identity discrimination complaints (April 16, 2015),

debarred, i.e., declared ineligible for future government contracts.⁸⁶ Notably, despite its decision to rescind a number of transgender-related protections,⁸⁷ the current administration has left EO 11246 and EO 13672 in place and has indicated its intent to continue to enforce them.⁸⁸

E. Section 1557 of the Affordable Care Act prohibits insurance companies from administering a plan with a transgender exclusion.

Section 1557 of the Patient Protection and Affordable Care Act (ACA) prohibits sex and disability discrimination in health programs or activities that receive federal financial assistance.⁸⁹ Additionally, covered entities that are principally engaged in providing health services are liable for violations of Section 1557 in their employee health plans.⁹⁰ When an insurance company receives federal financial assistance by virtue of its participation in the Marketplace, for example, this covered entity status carries over even to its role as a third-party administrator.⁹¹

Section 1557 has been in force since the passage of the ACA in March 2010 and

http://www.dol.gov/ofccp/regs/compliance/directives/DIR_2015-01_EO_13672ComplaintAuthority_JROBYN_QA_508c.pdf.

⁸⁶ 41 C.F.R. § 60-1.4(a) (2017).

⁸⁷ See Dear Colleague Letter on Transgender Students, U.S. Dep't of Justice and U.S. Dep't of Educ. (Feb. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>; Exec. Order No. 13,782, 82 Fed. Reg. 15607 (Mar. 30, 2017).

⁸⁸ See Office of the Press Sec., Exec. Office of the President, President Donald J. Trump Will Continue to Enforce Executive Order Protecting the Rights of the LGBTQ Community in the Workplace (Jan. 31, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/31/president-donald-j-trump-will-continue-enforce-executive-order>.

⁸⁹ 42 U.S.C. 18116(a) (2018); 45 C.F.R. § 92.207(a) (“A covered entity shall not, in providing or administering health-related insurance or other health-related coverage, discriminate on the basis of ... sex, age, or disability.”).

⁹⁰ 45 C.F.R. § 92.208(a) (2017) (“A covered entity that provides an employee health benefit program to its employees and/or their dependents shall be liable for violations of this part in that employee health benefit program only when: ... The entity is principally engaged in providing or administering health services, health insurance coverage, or other health coverage”).

⁹¹ 45 C.F.R. § 92.4 (2017); Nondiscrimination in Health Programs and Activities, 81 FR 31375, 31428 (May 18, 2016) (to be codified at 45 C.F.R. pt. 92) (“[A]n issuer participating in the Marketplace, and thereby receiving Federal financial assistance ... would be covered by the regulation for all of its health plans, as well as when it acts as a third-party administrator for an employer-sponsored group health plan.”).

has a private right of action.⁹² Under the Department of Health and Human Services' Office of Civil Rights' 2016 implementing regulations, discriminatory denials of coverage—including categorical exclusions—for treatments related to gender transition are expressly prohibited.⁹³

The Office of Civil Rights is presently enjoined under *Franciscan Alliance v. Azar* from enforcing limited portions of its regulations. That injunction is not applicable here because it is expressly limited to the “prohibition against discrimination on the basis of gender identity or termination of pregnancy.”⁹⁴

Prohibitions against discrimination on the basis of sex and disability remain in force. The regulation stating that a covered entity shall not “[h]ave or implement a categorical coverage exclusion or limitation for all health services related to gender transition” does not reference “gender identity” and is not a prohibition against discrimination on the basis of “gender identity.”⁹⁵ To the extent that the protections flow from the statutory protections against discrimination on the basis of sex and disability, it remains enforceable.

Franciscan Alliance itself concurs that “the text, structure, and purpose reveal that the definition of sex in Title IX’s prohibition of sex discrimination unambiguously prevented discrimination on the basis of the biological differences between males and females.”⁹⁶ It is discrimination on the basis of biological differences between males and females that is precisely at issue in the case of gender dysphoria exclusions.

Finally the statute and regulations separately prohibit claim denials and “benefit designs that discriminate on the basis of ... disability,”⁹⁷ and those protections are independent of protections under the category of sex.

⁹² See, e.g., *Rumble v. Fairview Health Servs.*, No. 14-cv-2037, 2015 WL 1197415 (D. Minn. Mar. 16, 2015); *Southeastern Pa. Transp. Auth. v. Gilead*, 102 F. Supp. 3d 688 (E.D. Pa. 2015); *Callum v. CVS Health Corp.*, No. 4:14-cv-3481-RBH, 2015 WL 5782077 (D.S.C. Sept. 29, 2015).

⁹³ See 42 U.S.C. § 18116; 45 C.F.R. § 92.207(b) (2017) (providing that a covered entity shall not “[h]ave or implement a categorical coverage exclusion or limitation for all health services related to gender transition”).

⁹⁴ *Franciscan Alliance, Inc. v. Burwell*, 227 F.Supp.3d 660, 695 (N.D. Tex. Dec. 31, 2016) (“Only the Rule’s command this Court finds is contrary to law and exceeds statutory authority—the prohibition of discrimination on the basis of “gender identity” and “termination of pregnancy”—is hereby enjoined.”).

⁹⁵ Other sections of the regulations specifically reference “gender identity” including § 92.4 § 92.206

⁹⁶ *Id.* at 33-34.

⁹⁷ 45 C.F.R. § 92.207 (2017).

Most importantly, the regulations still represent a reasonable interpretation of the statute that a court can readily adopt independently. Courts continue to find that the ACA itself—independent of any regulation—protects transgender individuals.⁹⁸

V. The Federal Equal Protection Clause prohibits transgender exclusions.

Finally, the disparate treatment of transgender employees raises issues under the federal Equal Protection Clause. Because only transgender people need treatments that change sex characteristics for the purpose of treating gender dysphoria, the exclusion unlawfully targets transgender people, who receive unequal benefits.

As described above, there is no rational basis to single out and exclude transgender care over any other type of medically necessary care. Nor is lack of medical necessity the basis for the exclusion—health plans already contain a separate exclusion for any non-medically necessary treatment. The inevitable inference is that the exclusion solely exists due to animus toward transgender people and the medical treatment they need. Animus-based classifications are not legitimate bases for government classification and do not withstand rational basis review.⁹⁹ Courts have issued preliminary injunctions preventing the military from excluding transgender health care under the Equal Protection Clause.¹⁰⁰ A Minnesota court found a categorical exclusion under Medicaid to be a violation of Minnesota’s equal protection clause.¹⁰¹

⁹⁸ *Prescott v. Rady Children’s Hospital-San Diego*, Case No. 16-cv-02408, slip op. at 8 (S.D. Cal. Sept. 27, 2017) (“Because Title VII, and by extension Title IX, recognize that discrimination on the basis of transgender identity is discrimination on the basis of sex, the Court interprets the ACA to afford the same protections.”).

⁹⁹ *Romer v. Evans*, 517 U.S. 620, 634-35 (1996); *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (“a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”).

¹⁰⁰ *Stone v. Trump*, No. 1:17-cv-02459-MJG, slip op. at 43-44 (D. Md. Nov. 21, 2017) (applying intermediate scrutiny to transgender people as a quasi-suspect class to find that military personnel denied coverage for surgery have an Equal Protection claim); *Karnoski v. Trump*, No. 2:17-cv-1297-MJP, slip op. at 16-17 (W.D. Wash. Dec. 11, 2017) (applying intermediate scrutiny to a policy of denying transgender-related health care to military service members and granting a preliminary injunction); *Karnoski v. Trump*, 2:17-cv-01297-MJP, slip op. at 20 (W.D. Wash. Apr. 13, 2018) (order granting in part and denying in part motions for summary judgment) (applying strict scrutiny to transgender people as a protected class where defendants sought to deny transgender-related health care to military service members).

¹⁰¹ *OutFront Minnesota v. Johnson Piper*, No. 62-CV-15-7501 (Nov. 14, 2016) (finding a categorical exclusion for sex reassignment surgery violates equal protection and the right to

Furthermore, a transgender exclusion is subject to intermediate scrutiny both because transgender people are a quasi-suspect class and the exclusion is a sex-based classification. Transgender people have been regarded as a quasi-suspect class because (1) they “have immutable and distinguishing characteristics that make them a discernable class;” (2) “[a]s a class, transgender individuals have suffered, and continue to suffer, severe persecution and discrimination;” (3) there is no “evidence suggesting that being transgender in any way limits one’s ability to contribute to society;” and (4) “transgender people as a group represent a very small subset of society lacking the sort of political power other groups might harness to protect themselves from discrimination.”¹⁰² Transgender discrimination has also been widely regarded as an unconstitutional sex-based classification triggering intermediate scrutiny.¹⁰³

Under intermediate scrutiny, the government must demonstrate an “exceedingly

privacy under the Minnesota Constitution).

¹⁰² *Doe v. Trump*, No. 1:17-cv-01597-CKK, slip op. at 60-61 (D.D.C. Oct. 30, 2017) (order granting preliminary injunction). See also *F.V. v. Barron*, No. 1:17-CV-00170-CWD, slip op. at 25 (D. Idaho Mar. 5, 2018) (applying intermediate scrutiny because “transgender people bear all of the characteristics of a quasi-suspect class”); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017) (holding that “all of the indicia for the application of the heightened intermediate scrutiny standard are present” for transgender individuals); *Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep’t of Educ.*, 208 F. Supp. 3d 850, 872–74 (S.D. Ohio 2016) (finding that “transgender status is a quasi-suspect class under the Equal Protection Clause”); *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”); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015) (applying intermediate scrutiny where an transgender inmate was denied access to surgery to treat gender dysphoria).

¹⁰³ *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (recognizing discrimination against transgender people as sex discrimination and applying intermediate scrutiny); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017) (holding that heightened scrutiny used for sex-based classifications applied to school policy requiring transgender student to use bathroom of sex listed on his birth certificate because it “treat[ed] transgender students . . . who fail to conform to the sex-based stereotypes associated with their assigned sex at birth, differently. . . . These students are disciplined under the School District’s bathroom policy if they choose to use a bathroom that conforms to their gender identity”); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 577 (6th Cir. 2004) (holding that the facts alleged by transsexual plaintiff to support claims of gender discrimination on the basis of sex stereotyping “easily constitute a claim of sex discrimination grounded in the Equal Protection Clause of the Constitution”); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017) (applying intermediate scrutiny to find that excluding transgender students from restrooms consistent with their gender identity likely constitutes sex-based discrimination in violation of the Equal Protection Clause).

persuasive justification” for its actions.¹⁰⁴ “The burden of justification is demanding and it rests entirely on” the government.¹⁰⁵ The government “must show ‘at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.’”¹⁰⁶ “The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation.”¹⁰⁷ “And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females,”¹⁰⁸ such as that it is inappropriate to change sex characteristics from one sex to the other. Because there is no important government interest in ensuring that employees do not physically change their sex characteristics to treat a medical condition, the transgender exclusion will be struck down under intermediate scrutiny.

VI. Conclusion

Excluding transgender health care from an employer insurance plan is unlawful discrimination under federal law. It is in the best interests of employers, employees, and insurers that these exclusions be removed.

¹⁰⁴ *United States v. Virginia*, 518 U.S. 515, 531 (1996).

¹⁰⁵ *Id.* at 533.

¹⁰⁶ *Id.* (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (internal quotations omitted)).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*