Transgender Legal Defense & Education Fund

DRAFT MEMORANDUM

To: Plan Administrators
From: Transgender Legal Defense & Education Fund
Date: July 23, 2021
Re: Liability for transgender health care exclusions in employer health plans

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Transgender Legal Defense & Education Fund
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I. Introduction: Excluding transgender-related health care is discriminatory.

Courts have consistently found that transgender exclusions in health plans violate numerous federal laws such as Title VII of the Civil Rights Act of 1964[1] or analogous sex discrimination provisions under Section 1557 of the Affordable Care Act.[2] In *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020) the U.S.

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[1] *Lange v. Houston Cty., Georgia*, 499 F. Supp. 3d 1258 (M.D. Ga. 2020), *reconsideration denied*, No. 5:19-CV-392 (MTT), 2020 WL 7634054 (M.D. Ga. Dec. 22, 2020) (denying motion to dismiss Americans with Disabilities Act, federal Equal Protection and—citing *Bostock*—Title VII claims challenging an employee health plan with "sex change surgery" exclusion); *Fletcher v. Alaska*, 443 F. Supp. 3d 1024, 1030 (D. Alaska Mar. 6, 2020) (granting summary judgment under Title VII to the plaintiff where Alaska state employee health plan excluded surgeries "related to changing sex or sexual characteristics" because "[p]lainly, defendant treated plaintiff differently in terms of health coverage because of her sex, irrespective of whether 'sex' includes gender identity."); Stipulated Final Judgment and Order, Fletcher v. Alaska, ECF 69, (D. Alaska June 15, 2020) (ordering $70,000 in compensation); *Toomey v. Arizona*, No. 4:19-cv-00035-RM-LAB, 2019 WL 7172144, at *6 (D. Ariz. Dec. 23, 2019) (denying motion to dismiss because a "narrow exclusion of coverage for 'gender reassignment surgery' is directly connected to the incongruence between Plaintiff's natal sex and his gender identity. Discrimination based on the incongruence between natal sex and gender identity—which transgender individuals, by definition, experience and display—implicates the gender stereotyping prohibited by Title VII."); *Boyden v. Conlin*, 341 F. Supp. 3d 979, 997 (W.D. Wis. 2018) (a jury awarded $780,500 in damages after the court granted summary judgment against the Wisconsin state employee health plan because "[w]hether because of differential treatment based on natal sex, or because of a form of sex stereotyping where an individual is required effectively to maintain his or her natal sex characteristics, the Exclusion on its face treats transgender individuals differently on the basis of sex, thus triggering the protections of Title VII and the ACA's anti-discrimination provision."). *See also Baker v. Aetna Life Ins. Co. & L-3 Communications Corp.*, 228 F. Supp. 3d 764, 771 (N.D. Tex. 2017) (allowing Title VII claim to proceed, but ultimately finding no facial discrimination on the basis that the plan did not categorically exclude breast reconstruction for transgender women. *Baker v. Aetna Life Ins. Co.*, No. 3:15-cv-03679-D (N.D. Tex. Jan. 26, 2018)). *Cf. Maloney v. Yellowstone County*, Montana Dep't. of Labor and Industry Office of Admin. Hearings Nos. 1570-2019 and 1572-2019 (Aug. 14, 2020) (finding an exclusion unlawful under the Montana Human Rights Act, which is modeled after Title VII); Declaratory Ruling on Petition Regarding Health Insurers' Categorization of Certain Gender-Confirming Procedures as Cosmetic, Connecticut Commission on Human Rights and Opportunities, 26-27 (2020) (finding that offering or administering a plan with an exclusion is gender identity and sex discrimination); *Darin B. v. McGettigan*, E.E.O.C. App. No. 0120161068, 2017 WL 1103712 (Mar. 6, 2017) (establishing that a claim may proceed under Title VII where a transgender man was denied transgender-related surgery under his federal employee health plan).

[2] *Kadel v. Folwell*, 446 F. Supp. 3d 1, 14 (M.D.N.C. Mar. 11, 2020) (rejecting a motion to dismiss against the North Carolina state employee health plan under § 1557 and Title IX under a *Price Waterhouse* sex-stereotyping theory and also because the exclusion discriminates "based on employee's physical sex characteristics."); *Flack v. Wisconsin Dep't of Health Servs.*, 395 F.

Supreme Court addressed the question of whether transgender people are protected under Title VII's sex-based nondiscrimination protections. The Court erased any doubt: under its holding that discrimination on the basis of transgender status is inherently unlawful sex discrimination, a categorial exclusion for transgender-related surgeries plainly violates Title VII.[3] The Biden administration has issued an executive order directing agencies to enforce *Bostock*, noting that it is the policy of the administration "to prevent and combat discrimination on the basis of gender identity … and to fully enforce Title VII and other laws that prohibit discrimination on the basis of gender identity…."[4]

As detailed herein, for over 40 years, courts have routinely found transgender-related health care to be medically necessary with no legitimate medical or actuarial basis to exclude such coverage. The first transgender-related surgery was performed in the U.S. over 100 years ago,[5] and for over 60 years medical experts have understood that gender-transition surgeries are appropriate medical treatment.[6] Insurers only began to adopt explicit exclusions for transgender-related

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Supp. 3d 1001, 1015 (W.D. Wis. 2019) (finding a transgender exclusion in Medicaid discriminates on the basis of sex under § 1557 as detailed in *Flack*, 328 F. Supp. 3d at 951); *Boyden v. Conlin*, 341 F. Supp. 3d 979, 997 (W.D. Wisc. 2018) (applying § 1557 to Wisconsin state employee health plan); *Tovar v. Essentia Health*, 342 F. Supp. 3d 947, 954 (D. Minn. 2018) (holding that employer and third-party administrator may be held liable under § 1557 for administering a self-funded plan containing an exclusion for "gender reassignment" treatment); *Cruz v. Zucker,* 116 F. Supp. 3d 334, 348 (S.D.N.Y. 2015) (entertaining a § 1557 sex discrimination claim for transgender people under Medicaid).

[3] Nick J. Welle (Foley & Lardner LLP), *Recent Supreme Court Decision Might Require Changes to Your Benefit Plans – LGBT Coverage Issues* (July 15, 2020); Jacob Mattinson, et al. (McDermott Will & Emery), *LGBTQ Title VII Ruling May Impact Your Employee Benefit Plan*, The National Law Review (June 22, 2020); Stephen Miller (Society for Human Resource Management), *3 Checklists for Avoiding LGBTQ Discrimination in Your Benefits Programs* (June 30, 2020). Sources compiled at https://transhealthproject.org/tools/legal-analysis.

[4] Exec. Order No. 13988, Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, 86 FR 7023 (2021). *See also* Exec. Order No. 13985, Advancing Racial Equity and Support for Underserved Communities, 86 FR 7009 (2021) (directing "a comprehensive approach to advancing equity for all," including transgender individuals, who are designated as an underserved community).

[5] Joanne J. Meyerowitz, How Sex Changed 17-18 (2009) (noting examples of surgeries in 1902 and 1917).

[6] *See, e.g.*, Christian Hamburger et al., *Transvestism: Hormonal, Psychiatric, and Surgical Treatment*, 152 JAMA 391, 392-93 (1953) (noting that feelings of being transgender, referred to then as "transvestism," generally arise in early childhood and attempts to change a transgender person's gender identity are futile); Harry Benjamin, *Transsexualism and Transvestism as Psycho-Somatic and Somato-Psychic Syndromes*, 8 Am. J. Psychotherapy 219, 228 (1954) ("[P]sychotherapy for the purpose of curing the condition is a waste of time. … Nevertheless the condition requires psychiatric help, reinforced by hormone treatment and, in some cases, by surgery. In this way a reasonably contented existence may be worked out for these patients.");

care after courts found that coverage for this care falls under standard surgical, mental health, and pharmaceutical benefits.[7] Moreover, existing plan definitions of "medically necessary" suffice to ensure that only medically necessary transgender-related services are provided.

In the employment context, transgender employees work the same hours and pay the same premiums as other employees yet earn unequal benefits in return. Employees who are transgender thus contribute to and subsidize the health care of their cisgender co-workers, while having to go without their own doctor-recommended care. Likewise, transgender individuals purchasing insurance on the individual market pay the same premiums as other consumers. Yet, when transgender care is excluded, they do not receive equal coverage and are left to pay out of pocket for care that is subject to an exclusion. Similarly, employees and individuals with transgender spouses or dependents are left to bear the full out-of-pocket cost of healthcare their loved ones need, or watch them go without this necessary treatment.

Accordingly, singling out transgender health care for exclusion is discrimination. Just as it would be sex discrimination if a plan were to exclude all coverage for gynecological care, and it would be disability discrimination if a plan were to exclude all treatments for HIV,[8] it is both sex and disability discrimination when a health plan carves out and excludes medically necessary care simply because it alters sex characteristics for the purpose of treating gender dysphoria. Thus, even before *Bostock*, the nation's major law firms consistently advised their clients to remove such exclusions from their health plans.[9]

Harry Benjamin, *Clinical Aspects of Transsexualism in the Male and Female*, 18 Am. J. Psychotherapy 458, 458 (1964) (characterizing variations in sex experienced by transgender people as "an intrinsic part of nature" and noting "[s]ince … the mind cannot be adjusted to the body, the opposite seems to me not only permissible, but indicated, in carefully selected cases.").

[7] *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 transgender-related surgery under a "cosmetic" exclusion and requiring them to pay the claim).

[8] *See generally* U.S. Equal Employment Opportunity Commission, EEOC Compliance Manual (2000), https://www.eeoc.gov/policy/docs/benefits.html#II.%20Discrimination%20Based%20on%20Sex,%20Race,%20Color,%20National%20Origin,%20or%20Religion%2087; https://www.eeoc.gov/policy/docs/benefits.html#II.%20Equal%20Benefits%20(ADA).

[9] *E.g.*, Todd Solomon, Jacob Mattinson and Erin Steele (McDermott Will & Emery), *Transgender Health Benefits: Best Practices & Legal Considerations*, 56 Benefits Magazine 22, 24 (2019) ("The legal consequences of excluding gender transition-related health coverage are evolving, but it is clear that many plan sponsors and health insurers that exclude transition-related medical care do so at the risk of violating antidiscrimination laws."); Denise M. Visconti, Finn Pressly, and Anne Sanchez LaWer (Littler), *HHS Proposed Regulations Remove Protections*

Even when a plan covers some transgender care, it is nonetheless discrimination where the plan or claims administrator categorically excludes specific services such as facial gender reassignment surgery or surgery for people who are under the age of eighteen. When an administrator designates a procedure as not medically necessary for all individuals with gender dysphoria and foregoes consideration of medical necessity on an individualized basis, an administrator similarly discriminates on the basis of sex and disability.[10]

II. Plans that exclude transgender care have fallen behind other health plans.

Employers have increasingly removed transgender exclusions from health plans to meet the needs of their transgender employees, remain competitive in hiring,[11] win

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from the Affordable Care Act for Transgender Patients (2019) ("[E]mployers should continue to evaluate whether their employer-sponsored benefits plans and programs contain blanket, categorical exclusions from coverage for health services or care related to transgender- or transition-related procedures. If these plans and programs contain such exclusions, employers should consult with their benefits group, Plan Administrator and counsel to determine how best to ensure compliance with Section 1557 and Title VII."); Nathaniel M. Glasser & Cassandra Labbees (Epstein Becker & Green), *Group Health Plans Cannot Categorically Exclude Coverage for Gender Dysphoria, Say Two More Federal Courts* (2018) ("Plans cannot categorically exclude coverage for procedures to treat gender dysphoria. ... [E]mployers are advised to review their plans to ensure that services to treat gender dysphoria and related conditions are made available to their covered employees."); Lars C. Golumbic, *Who May Sue You and Why: How to Reduce Your ERISA Risks, and the Role of Fiduciary Liability Insurance*, A Chubb Special Report 18 (2017) ("To minimize the risk of Section 1557 claims, it will be incumbent on employers and health care providers to work closely with experienced counsel when crafting policies and coverage options to prevent discriminatory distinctions on the basis of protected classes."). Sources compiled at https://transhealthproject.org/tools/legal-analysis.

[10] *See* Declaratory Ruling on Petition Regarding Health Insurers' Categorization of Certain Gender-Confirming Procedures as Cosmetic, Connecticut Commission on Human Rights and Opportunities, 10-12 (2020 *available at* https://www.glad.org/cases/challenging-insurance-exclusions-for-gender-affirming-medical-care; National Center for Lesbian Rights, *Parties Settle Landmark Lawsuit by Transgender Employee Who Was Unlawfully Denied Medically Necessary Care* (Mar. 3, 2020), http://www.nclrights.org/press-room/press-release/parties-settle-landmark-lawsuit-by-transgender-employee-who-was-unlawfully-denied-medically-necessary-care (settling the employer-based claims for $345,000 in damages where the third-party administrator maintained an exclusion for facial gender-transition surgeries in its clinical criteria and the third-party administrator settled for $60,000 in damages).

[11] 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.'").

customers,[12] and comply with nondiscrimination laws.[13] Transgender-inclusive benefits are an important signal on which customers and applicants rely to assess a company's commitment to diversity. As Julie Stich of the International Foundation of Employee Benefit Plans notes, "employers that lag behind are already paying the price in recruiting and retention. . . . When searching for meaningful employment, individuals look for employers with cultures that resonate. . . . Employers are seeking top talent, and offering [a trans-]inclusive benefits package sets them apart from their competition."[14]

In the Human Rights Campaign's *Corporate Equality Index 2021*, approximately 9 out of 10 (91%) of the businesses ranked—and over two-thirds (71%) of Fortune 500 businesses—offer transgender-inclusive health care coverage.[15] Colleges and universities have also increasingly removed exclusions from student[16] and staff[17] health plans.

The federal government prohibits categorical transgender exclusions in its employee health plans.[18] The Veterans Administration will begin covering

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[12] Avery Anapol, *Starbucks Expands Health Benefits for Transgender Employees*, The Hill, Jun. 26, 2018, https://thehill.com/blogs/blog-briefing-room/394221-starbucks-expands-health-benefits-for-transgender-employees.

[13] Alan Hovorka, *Portage County Adds Transgender Benefits to Its Health Care Plan*, Stevens Point Journal, Mar. 5, 2020, https://www.stevenspointjournal.com/story/news/2020/03/05/portage-county-adds-transgender-benefits-its-health-care-plan/4927948002 ("Portage County Human Resources Committee Chair James Gifford said the county wanted to err on the side of caution and not open itself up to a potential lawsuit. Gifford said he didn't want to violate anyone's civil rights because of rulings like Conley's. 'Look, we don't want to take the risk on some huge settlement,' he said. 'I didn't think we had any option. We don't certainly want to get involved with a federal discrimination suit.'"); Portage County Human Resources, Memorandum re: Health Plan Amendment – Transgender Benefits Coverage (2020), https://www.co.portage.wi.us/Home/Components/MeetingsManager/MeetingItem/ShowDocument/?documentID=609.

[14] Lydia Dishman, *Finally, employers are expanding trans-inclusive benefits*, Fast Company, June 28, 2018, https://www.fastcompany.com/40590804/finally-employers-are-expanding-trans-inclusive-benefits.

[15] Human Rights Campaign Foundation, Corporate Equality Index 2021, 7, 18 (2021), https://www.hrc.org/campaigns/corporate-equality-index.

[16] 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).

[17] 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).

[18] FEHB Program Carrier Letter No. 2015-12, *Covered Benefits for Gender Transition Services*

surgeries, and TRICARE covers them for aMedicare has covered gender dysphoria treatments since an exclusion was removed in 2014.[19] At least 24 states plus the District of Columbia cover gender dysphoria treatments in their Medicaid plans,[20] and courts have repeatedly struck down blanket exclusions under Medicaid.[21] Twenty-three states plus the District of Columbia have laws, regulations, or

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(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.'").

[19] 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); In the Case of Claim for UnitedHealthcare/AARP Medicare Complete, M-15-1069, 2016 WL 1470038 (H.H.S. Jan. 21, 2016) (requiring coverage for vaginoplasty under Medicare Advantage plan).

[20] *See* TLDEF, *Medicaid Regulations and Guidance*, https://transhealthproject.org/resources/medicaid-regulations-and-guidance.

[21] *E.g.*, *Flack v. Wisconsin Dep't of Health Servs.*, 395 F. Supp. 3d 1001 (W.D. Wis. 2019) (striking down Wisconsin Medicaid exclusion under § 1557 of the Affordable Care Act, Availability and Comparability Provisions of the Medicaid Act, and Equal Protection); *Good v. Iowa Dep't of Human Servs.*, No. CVCV055470 (Iowa Dist. Ct. Jun. 6, 2018) (striking down Iowa's categorical Medicaid ban as discrimination under the Iowa Civil Rights Act and the Iowa Equal Protection Clause, as violative of privacy rights, and as unreasonable, arbitrary and capricious), *aff'd Good v. Iowa Dep't of Human Servs.*, 924 N.W.2d 853 (Iowa 2019) (holding that the exclusion is discrimination under the Iowa Civil Rights Act); *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); *M.K. v. Div. Med. Assistance & Health Servs.*, 92 NJAR2d (DMA) 38, 1992 WL 280789 at *9 (N.J. Admin. 1992) (ordering coverage of genital reassignment surgery under NJ Medicaid and rejecting arguments that it was experimental and/or cosmetic); *Pinneke v. Preisser*, 623 F.2d 546, 550 (8th Cir. 1980) (striking down Iowa's Medicaid transgender exclusion, which "reflect[ed] inadequate solicitude for the applicant's diagnosed condition, the treatment prescribed by the applicant's physicians, and the accumulated knowledge of the medical community."); *Rush v. Parham*, 625 F.2d 1150, 1157 n.12 (5th Cir. 1980) (observing that a categorical denial of healthcare simply "because it was transsexual surgery" would violate Medicaid laws); *J. D. v. Lackner*, 80 Cal. App. 3d 90, 95 (Cal. Ct. App. 1978) (requiring coverage for transgender surgery under California's Medicaid program); *G.B. v. Lackner*, 80 Cal. App. 3d 64, 71 (Cal. Ct. App. 1978) (same); *Doe v. State of Minn., Dep't of Pub. Welfare*, 257 N.W. 2d 816, 820 (Minn. 1977) (deeming transgender exclusion to be arbitrary and capricious). *But see Smith v. Rasmussen*, 249 F.3d 755, 760 (8th Cir. 2001) (declining to overturn a Medicaid surgery ban where hormones were covered). *See also* Stipulated Settlement Agreement and Order, Being v. Crum, No. 3:19-cv-00060-HRH (D. Alaska Jan. 25, 2021) (agreeing to remove exclusion for transgender surgery in Alaska Medicaid plan following the filing of a class action complaint with Equal Protection, § 1557, and Medicaid availability and comparability claims).

bulletins that clarify that the exclusion of transgender-related care is prohibited under state and federal laws governing insurance.[22] The IRS has recognized treatment for gender dysphoria as medically necessary, tax-deductible care.[23] Ten of the U.S. Courts of Appeals have concluded or assumed that severe gender dysphoria constitutes a "serious medical need."[24] Indeed, the medical necessity of transgender-related care is so well established that blanket exclusions in the prison context have repeatedly been found to violate the Eighth Amendment's prohibition on cruel and unusual punishment.[25] And in the context of child custody cases,

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[22] *See* TLDEF, *State Health Insurance Laws & Guidance*, https://transhealthproject.org/resources/state-health-insurance-laws-and-guidance (listing bulletins, regulations and statutes that prohibit exclusions).

[23] *O'Donnabhain v. Comm'r*, 134 T.C. 34, 65 (2010), acq., 2011-47 I.R.B. 789 (Nov. 21, 2011); recommendation regarding acq., Subject: *O'Donnabhain v. Comm'r*, IRS AOD-2011-03 (Nov. 3, 2011).

[24] *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 v. Johnson*, 708 F.3d 520 (4th Cir. 2013) (finding that denial of sex reassignment surgery states an Eight Amendment claim); *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); *Edmo v. Corizon, Inc.*, 935 F.3d 757, 785 (9th Cir. 2019) ("The State does not dispute that Edmo's gender dysphoria is a sufficiently serious medical need to trigger the State's obligations under the Eighth Amendment. Nor could it."), *en banc rev. denied*, 949 F.3d 489 (9th Cir. 2019), *cert. denied sub nom. Idaho Dep't of Corr. v. Edmo*, 141 S. Ct. 610 (2020); *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.

[25] *E.g.*, *Campbell v. Kallas*, No. 16-CV-261-JDP, 2020 WL 7230235, at *8 (W.D. Wis. Dec. 8, 2020) (finding deliberate indifference to a serious medical need where a state prison categorically denied a transgender woman genital surgery to treat her gender dysphoria); *Keohane v. Fla. Dep't of Corr. Sec'y*, 952 F.3d 1257, 1293 (11th Cir. 2020) (commenting that a now-rescinded freeze-frame policy of categorically denying treatments for gender dysphoria would be unconstitutional because "responding to an inmate's acknowledged medical need with what amounts to a shoulder-shrugging refusal even to consider whether a particular course of treatment is appropriate is the very definition of 'deliberate indifference'—anti-medicine, if you

parents have been denied custody where they refuse to provide doctor-recommended transgender-related medical treatment.[26] In short, there is no legitimate medical basis to deny coverage for transgender-related care.

Similarly, all major insurance companies recognize the medical necessity of treatment for gender dysphoria[27] and administer plans that will cover such care. For example, Aetna's gender dysphoria medical policy notes, "Aetna considers gender reassignment surgery medically necessary" when its clinical criteria are met.[28] UnitedHealthcare's policy similarly states that where the stated criteria are

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will."); *Edmo*, 935 F.3d at 797 (ordering gender-confirmation surgery as its denial was an Eighth Amendment violation and rejecting analysis in *Gibson v. Collier*, 920 F.3d 212, 215 (5th Cir. 2019)); *De'lonta v. Johnson*, 708 F.3d 520 (4th Cir. 2013) (declining to dismiss an Eight Amendment claim where the prison provided psychological counseling and hormones but not surgery); *Fields*, 653 F.3d at 556 (striking down a Wisconsin statute that barred comprehensive transgender healthcare to prisoners as an Eight Amendment violation, observing that there was no evidence that there are adequate alternative treatments for gender dysphoria that "reduces dysphoria and can prevent the severe emotional and physical harms associated with it."); Findings and Recommendations Regarding Dismissal of Certain Claims and Defendants, Gonzales v. Cal. Dep't. of Corr. and Rehab. No. 1:19-cv-01467 (E.D. Cal. Apr. 13, 2020) (finding Equal Protection and Eighth Amendment claims where staff were not permitted to recommend surgery); *Hicklin v. Precynthe*, No. 4:16-CV-01357-NCC, 2018 WL 806764, at *13 (E.D. Mo. Feb. 9, 2018) (striking down a blanket policy of denying hormone treatment to any prisoner who was not receiving hormone treatment prior to entering prison as a violation of the Eight Amendment); Joint Notice of Settlement Agreement, Quine v. Beard, No. 14-cv-02726-JST (N.D. Cal. Aug. 7, 2015) (agreeing to provide incarcerated trans woman with surgery and pay attorney's fees); *Norsworthy v. Beard*, 87 F. Supp. 3d 1164 (N.D. Cal. 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 and ultimately settling, including nearly $500,000 in attorney's fees); *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 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."); *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"). *But see Gibson v. Collier*, 920 F.3d 212, 221 (5th Cir. 2019) (declining to find a denial of gender reassignment surgery as an Eighth Amendment violation where the record contained only the WPATH *Standards of Care*).

[26] *In re: JNS*, No. F17-334 X, (Hamilton Cty. Ohio Juvenile Ct. Feb. 16, 2018), https://www.prizmnews.com/wp-content/uploads/371667957-Ruling-from-Judge-Sylvia-Sieve-Hendon-on-transgender-boy.pdf (granting custody to a transgender teenager's grandparents where the parents refused to allow him to access hormone therapy).

[27] TLDEF, Health Insurance Medical Policies, https://transhealthproject.org/resources/health-insurance-medical-policies (providing links to 150+ insurance company clinical guidelines on gender reassignment surgery and related treatments).

[28] Aetna, *Clinical Policy Bulletin: Gender Reassignment Surgery*,

met, the procedures are "medically necessary and covered as a proven benefit."[29]

Such widespread coverage is unsurprising given that transgender-related care has been endorsed by all of the leading medical groups, including the following:

1. American Medical Association
2. American Psychiatric Association
3. American Psychological Association
4. American Academy of Child and Adolescent Psychiatry
5. American Academy of Dermatology
6. American Academy of Family Physicians
7. American Academy of Nursing
8. American Academy of Pediatrics
9. American Academy of Physician Assistants
10. American College Health Association
11. American College of Nurse-Midwives
12. American College of Obstetricians and Gynecologists
13. American College of Physicians
14. American Counseling Association
15. American Heart Association
16. American Medical Student Association
17. American Nurses Association
18. American Osteopathic Association
19. American Public Health Association
20. American Society of Plastic Surgeons
21. Endocrine Society
22. GLMA: Health Professionals Advancing LGBTQ Equality
23. National Association of Nurse Practitioners in Women's Health
24. National Association of Social Workers
25. National Commission on Correctional Health Care
26. Pediatric Endocrine Society
27. Society for Adolescent Health and Medicine
28. World Medical Association
29. World Professional Association for Transgender Health (WPATH).[30]

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

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http://www.aetna.com/cpb/medical/data/600_699/0615.html.

[29] UnitedHealthcare, *Medical Coverage Policy: Gender Dysphoria Treatment*, https://www.uhcprovider.com/content/provider/en/viewer.html?file=%2Fcontent%2Fdam%2Fprovider%2Fdocs%2Fpublic%2Fpolicies%2Fcomm-medical-drug%2Fgender-dysphoria-treatment.pdf.

[30] TLDEF, Medical Organization Statements, https://transhealthproject.org/resources/medical-organization-statements (listing 29 medical organizations that have endorsed transgender health care).

Argentina,[31] Brazil,[32] Canada,[33] Cuba,[34] India,[35] Iran,[36] Japan,[37] and virtually all European countries and the United Kingdom,[38] where a court found a blanket ban to be unlawful.[39] 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

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[31] 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.

[32] 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.

[33] All Canadian provinces cover gender dysphoria surgeries. *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 one of the last province in Canada to remove its exclusion); Gail Harding, *P.E.I. to cover gender reconstructive surgeries*, CBC NEWS, May 9, 2018, http://www.cbc.ca/news/canada/prince-edward-island/pei-health-gender-constructive-surgeries-1.4655251.

[34] 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/index.html.

[35] Neelam Pandey, *Free Gender Reassignment Surgeries Soon at Gov't Hospitals Under New Transgender Rights Rules*, June 8, 2020, https://theprint.in/india/governance/free-gender-reassignment-surgeries-soon-at-govt-hospitals-under-new-transgender-rights-rules/437561.

[36] 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).

[37] *Japan's social security net for transgender people improving but obstacles loom for seniors*, JAPAN TIMES, June 14, 2018, https://www.japantimes.co.jp/news/2018/06/14/national/social-issues/japans-social-security-net-transgender-people-improving-obstacles-loom-seniors.

[38] Stephen Whittle et al., TRANSGENDER EUROSTUDY: LEGAL SURVEY AND FOCUS ON THE TRANSGENDER 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); Press Release by the Office of the Deputy Prime Minister and the Ministry for Health: *Malta Recognises the Fundamental Importance of Universal Access To Health Care*, May 22, 2018, https://www.gov.mt/en/Government/DOI/Press%20Releases/Pages/2018/May/22/pr181140.aspx.

[39] 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).

schemes."[40] A commitment to transgender health care equality is also found under international human rights principles.[41]

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

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

There is no legitimate reason to target transgender care—and transgender care only—for cost-saving purposes. All health care costs money, and there are far more widespread, expensive, and preventable medical conditions that could be targeted if cost were truly the concern.[42] Cost containment measures must instead be applied equally to all plan members and not single out treatment that is used exclusively by a historically marginalized population.

In reality, removing a transgender exclusion is cost-neutral or cost-saving. There is no actuarial basis to price transgender-related surgeries separately from any other type of surgery.[43] A survey found that two thirds of employers that provided information on actual costs of employee utilization of gender dysphoria coverage

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[40] 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.

[41] The Yogyakarta Principles are an authoritative statement under international human rights law of the rights of persons of diverse sexual orientations and gender identities. They provide that "[e]veryone has the right to the highest attainable standard of physical and mental health, without discrimination on the basis of … gender identity." The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, 22 (2006), http://yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf. Further, states shall "[e]nsure that gender affirming healthcare is provided by the public health system or, if not so provided, that the costs are covered or reimbursable under private and public health insurance schemes." *Id.* at 20.

[42] The North Carolina state employee health plan has identified the top high-cost treatments as "diabetes, cancers, cardiology, orthopedics, and rheumatology." The other "biggest cost drivers" are inflation and utilization of specialty drugs. Dee Jones and Beth Horner, *The North Carolina State Health Plan for Teachers and State Employees: Strategies in Creating Financial Stability While Improving Member Health*, 79 N. Carolina Med. J. 56, 57, 59 (2018).

[43] 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://transhealthproject.org/documents/19/SF_transgender_health_benefit.pdf.

reported zero costs.[44] 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.[45] Estimates from other state health plans show equally low costs with North Carolina estimating 0.011% to 0.027% of premium,[46] in Alaska, 0.03% to 0.05%,[47] and in Wisconsin the costs at most were "immaterial at 0.1% to 0.2% of the total cost."[48] Cost estimates under Wisconsin Medicaid were "actuarially immaterial as they are equal to approximately 0.008% to 0.03%" of Wisconsin's share of its Medicaid budget.[49] An analysis in the military context concluded that the financial cost was "too low to matter"[50] or, as military leadership noted, "'budget dust,' hardly even a rounding error."[51] This is because only a small percentage of the population is transgender[52] and not all transgender individuals undergo all available treatments.

In contrast, the exclusion of transgender-related health care services likely causes

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[44] 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.

[45] 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.

[46] Segal Consulting memorandum to Mona Moon re: Transgender Cost Estimate, Nov. 29, 2016, https://files.nc.gov/ncshp/documents/board-of-trustees/3aii-3-The-Segal-Company-Transgender-Cost-Estimate-Memorandum.pdf.

[47] Plaintiffs' Motion for Partial Summary Judgment, Fletcher v. Alaska, No. 1:18-cv-00007-HRH (D. Alaska July 1, 2019), ECF No. 28.

[48] *Boyden v. Conlin*, 341 F. Supp. 3d 979, 1000 (W.D. Wis. 2018).

[49] *Flack*, 395 F. Supp. 3d at 1008. *See also Good v. Iowa Dep't of Human Servs.*, Nos. CVCV054956, CVCV055470, slip op. at 27, 29 (Iowa Dist. Ct. Jun. 6, 2018) (rejecting cost argument under Equal Protection analysis).

[50] Aaron Belkin, Caring for Our Transgender Troops—The Negligible Cost of Transition-Related Care, 373 NEW ENGLAND J. OF MED. 1089, 1092 (2015).

[51] Decl. of Raymond Edwin Mabus, Jr. [fmr. U.S. Secretary of the Navy] in Support of Plaintiff's Motion for Preliminary Injunction at ¶ 41, *Doe v. Trump*, No. 17-cv-1597-CKK (D.D.C. Aug. 31, 2017), ECF No. 13-9, http://files.eqcf.org/wp-content/uploads/2017/09/13-Ps-App-PI.pdf.

[52] 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 45, 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.").

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 HIV, depression, and suicide attempts.[53] 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."[54]

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

A. Americans with Disabilities Act – Disability Discrimination

Excluding treatments for gender dysphoria is discrimination under the Americans with Disabilities Act (ADA). Courts have found people with gender dysphoria to be protected under the ADA in the context of both employment (Title I),[55] public services (Title II),[56] and public accommodations (Title III).[57] While the ADA contains a provision that purports to exclude coverage for "gender identity disorders not resulting from physical impairments"[58] that exclusion appears to be patently unconstitutional to the extent it applies to gender dysphoria, and indeed

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[53] Cal. Economic Impact Assessment, *supra* note 45, at 9-12.

[54] 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.

[55] *Lange*, 499 F. Supp. 3d at 1270 (rejecting a motion to dismiss that argued gender dysphoria is not a disability under the ADA); *Blatt v. Cabela's Retail, Inc.*, No. 5:14-CV-04822-JFL, 2017 WL 2178123, at *4 (E.D. Pa. May 18, 2017) (gender dysphoria resulting in substantial limits on major life activities is encompassed within the protections of the ADA, and does not fall within the exemption under 42 U.S.C. § 12211(b) regarding the now-deprecated diagnosis of "gender identity disorder"). Claims were dismissed in *Doe v. Northrop Grumman Sys. Corp.*, 418 F. Supp. 3d 921, 930 (N.D. Ala. 2019) and *Parker v. Strawser Constr., Inc.*, 307 F. Supp. 3d 744, 755 (S.D. Ohio 2018) because plaintiffs failed to allege gender dysphoria results from a physical impairment.

[56] *Tay v. Dennison*, No. 19-CV-00501-NJR, 2020 WL 2100761, at *3 (S.D. Ill. May 1, 2020) (allowing incarcerated transgender woman's ADA failure to accommodate claim to proceed); *Doe v. Mass. Dep't of Correction,* No. 1:17-cv-12255-RGS, 2018 WL 2994403, at *6-8 (D. Mass. June 14, 2018) (drawing a distinction between gender identity disorder and gender dysphoria and suggesting that there may be a physical etiology underlying gender dysphoria sufficient to take it out of "not resulting from physical impairments" category); *Edmo v. Idaho Dep't of Correction,* No. 1:17-CV-00151-BLW, 2018 WL 2745898, at *8 (D. Idaho June 7, 2018) (declining to dismiss Title II claim because whether plaintiff's "diagnosis falls under a specific exclusion of the ADA presents a genuine dispute of material fact in this case.").

[57] *Doe v. Hosp. of Univ. of Pennsylvania*, No. CV 19-2881-KSM, 2021 WL 2661501, at *10 (E.D. Pa. June 29, 2021) (allowing a gender dysphoria claim to proceed under Title I and Title III).

[58] 42 U.S.C. § 12211(b).

U.S. Department of Justice has historically declined to defend the constitutionality of a gender dysphoria exclusion in the ADA.[59] The ADA prohibits employers from discriminating on the basis of disability in the provision of health insurance to their employees[60] and dependents[61] whether or not the benefits are administered by the employer. Insurance companies may also be held liable under Title I[62] and Title

[59] Statement of Interest of the United States, Doe v. Dzurenda, No. 3:16-cv-1934-RNC (D. Conn. Oct. 27, 2017) (urging the court to adopt a construction "under which Plaintiff's gender dysphoria would not be excluded from the ADA's definition of 'disability,'" notwithstanding the ADA's exclusion of coverage for the now-deprecated diagnosis of "gender identity disorder."); Statement of Interest of the United States, Doe v. Arrisi, No. 3:16-CV-8640-MAS-DEA (D.N.J. July 17, 2017) (same); 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) (same). Additionally, the Justice Department has declined to defend the constitutionality of the ADA's "gender identity disorder" exclusion. Notice by the United States of Decision not to Intervene to Defend the Constitutionality of a Federal Statute, Doe v. Mass. Dept. of Correction, 2018 WL 1156227 (D. Mass. May 30, 2018) (No. 1:17-CV-12255-RGS). *See also* Kevin M. Barry and Jennifer L. Levi, *The Future of Disability Rights Protections for Transgender People*, 35 TOURO L. REV. 25, 49 (2019) ("[N]o defendant has attempted to defend the constitutionality of the ADA's transgender exclusion either.").

[60] 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").

[61] 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) (holding 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).

[62] The EEOC and numerous courts have concluded that insurance companies may be considered "agents" of employers and therefore "covered entities" for purposes of the ADA. *Compare* EEOC Compliance Manual, No. 915.003, 2-III(B)(2)(b)(2000), https://www.eeoc.gov/policy/docs/threshold.html (citing *Carparts*) (stating that "an insurance company that provides discriminatory benefits to the employees of a law firm may be liable under the EEO statutes as the law firm's agent"), *with e.g., Carparts Distribution Center, Inc. v. Automotive Wholesaler's Ass'n of New England, Inc.*, 37 F.3d 12, 17 (1st Cir. 1994) (holding that insurance company could be considered a covered entity for purposes of ADA if, inter alia, it "act[s] on behalf of the entity in the matter of providing and administering employee health benefits"); *accord. Spirt v. Teachers Ins. & Annuity Ass'n*, 691 F.2d 1054, 1063 (2d Cir. 1982), *vacated and remanded sub nom. Long Island Univ. v. Spirt*, 463 U.S. 1223 (1983), *reinstated on remand*, 735 F.2d 23 (2d Cir.), *cert. denied*, 469 U.S. 881 (1984) (Title VII); *Graf v. K-Mart Corp.*, No. 88-1254, 1989 WL 407247, at *2-4 (W.D. Pa. Aug. 28, 1989) (Title VII); *United States v. State of Illinois*, 3 A.D. Cases 1157, 1994 WL 562180, at *2 (N.D. Ill. 1994) ("There is no express

III[63] for administering discriminatory plans. Accordingly, an exclusion for treatment of gender dysphoria, which has no nondiscriminatory basis, would be an unlawful disability-based exclusion. The same would hold true for the exclusion of specific categories of treatment, such as facial gender reassignment surgery, when the treatment is covered for other diagnoses, but not for gender dysphoria.

Such diagnosis-based exclusions are anomalous because singling out a particular disability for exclusion of coverage is an unlawful disability-based distinction.[64] Thus plans do not exclude, for example, all treatments related to diabetes, HIV, or any other specific medical condition. Courts have ruled that other categorical exclusions—such as excluding certain cancer treatments or all autism treatments—also violate the ADA absent a non-discriminatory actuarial justification.[65]

Covering only psychological treatment of gender dysphoria would not correct the

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requirement that the covered entity be an employer of the qualified individual."). These authorities make clear that, when an insurer provides discriminatory benefits policies or model policies that affect the compensation, terms, conditions or privileges of employment, the insurer or third-party administrator can be held liable under the ADA for its own discriminatory policies carried out within the agency relationship that it has with the employer.

[63] *E.g.*, *Fletcher v. Tufts University*, 367 F. Supp. 2d 99, 115 (D. Mass. 2005) (denying motion to dismiss and holding that employee of Tufts University could sue the Metropolitan Life Insurance Company for its discriminatory employer-sponsored disability benefits plan under Title III of the ADA); *Boots v. Nw. Mut. Life. Ins. Co.,* 77 F. Supp. 2d 211, 214-16 (D.N.H. 1999) (denying motion to dismiss and holding that employee could sue Northwestern Mutual Life Insurance Company for its discriminatory employer-sponsored disability benefits plan under Title III of the ADA).

[64] EEOC Compliance Manual, *supra* note 8, Disability-Based Distinctions https://www.eeoc.gov/policy/docs/benefits.html#II.%20Equal%20Benefits%20(ADA) (noting that singling out a particular disability for exclusion of coverage is an unlawful disability-based distinction).

[65] *Henderson v. Bodine Aluminum, Inc.*, 70 F.3d 958, 960–61 (8th Cir. 1995) (granting preliminary injunction to provide coverage for a certain cancer treatment because "denial of that treatment arguably violates the ADA" where "the plan provides the treatment for other conditions directly comparable to the one at issue"); *Carparts*, 37 F.3d at 14, 16 (holding that caps on AIDS-related care in employer-provided health plan could constitute Title I and Title III discrimination); *Fletcher*, 367 F. Supp. 2d at 104 (holding that plaintiff stated Title I and Title III ADA claims where employer adopted and maintained a health plan that provided inferior benefits to people with mental health conditions); *Whitley v. Dr Pepper Snapple Grp., Inc.*, No. 4:17-CV-0047 (E.D. Tex. May. 4, 2017) (denying a motion to dismiss a Title I ADA claim where a self-funded plan excluded applied behavior analysis, a form of autism treatment); *de Louis v. Metro. Atlanta Rapid Transit Auth.*, 1:04-CV-2816-CC, 2005 WL 8154830, at *10 (N.D. Ga. Aug. 4, 2005) (holding that a public employee stated a claim under Title II for "alleged[] discriminati[on] against him in the provision of disability benefits" on the basis of his mental illness); *Morgenthal ex rel. Morgenthal v. Am. Tel. & Tel. Co.*, 1999 WL 187055, at *1 (S.D.N.Y. Apr. 6, 1999) (denying motion to dismiss in Title I ADA complaint against employer where plan excluded all treatments for "developmental disabilities" including autism treatments).

discrimination because psychotherapy alone cannot resolve gender dysphoria.[66] Most people diagnosed with gender dysphoria need to undergo medical treatments to alleviate their symptoms, and hormone therapy alone is typically insufficient. In the Medicaid context, courts have repeatedly found that categorical exclusions of transgender-related medical care are arbitrary and unlawful diagnosis-based exclusions,[67] and the same would be true under the ADA.

B. Section 504 of the Rehabilitation Act – Disability Discrimination

Similarly, for entities receiving federal funding, Section 504 of the Rehabilitation Act of 1973 also prohibits disability discrimination and, by extension, diagnosis-based exclusions. Section 504 provides that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[68] Gender

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[66] *See, e.g.*, *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."); *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."); *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."); *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 . . . 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.").

[67] *Cruz*, 195 F. Supp. 3d at 571 (rejecting categorical transgender care ban under NY Medicaid); *Pinneke*, 623 F.2d at 549 (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*, 625 F.2d at 1157 ("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.'"); *Doe v. State of Minn., Doe v. State of Minn.*, 257 N.W. 2d at 820 ("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 aforestated regulation.").

[68] 29 U.S.C. § 794(a). Under Section 504, a "program or activity receiving Federal financial assistance" includes "a department, agency, special purpose district, or other instrumentality of a State or of a local government," "a college, university, or other postsecondary institution, or a public system of higher education," or "an entire corporation, partnership, or other private

dysphoria is a disability under Section 504,[69] and the analysis is the same as under the ADA.[70]

C. Title VII – Sex Discrimination

A transgender-related exclusion is also unlawful sex discrimination under Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employee benefits.[71] Under Title VII, "discrimination based on . . . transgender status necessarily entails discrimination based on sex."[72] Justice Gorsuch explained that the "statute's message . . . is equally simple and momentous: An individual's . . . transgender status is not relevant to employment decisions."[73] Thus, where an employer intentionally treats transgender employees worse than cisgender ones,[74] the employer has committed unlawful sex discrimination.[75]

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organization," which receives federal funds or "[a]ny other thing of value by way of grant, loan, contract or cooperative agreement."29 U.S.C. § 794(b)(1).

[69] *Doe v. Hosp. of Univ. of Pennsylvania*, 2021 WL 2661501, at *10 (allowing a gender dysphoria claim to proceed under Section 504); *Shorter v. Barr,* No. 4:19-cv-108-WS/CAS, 2020 WL 1942785, at *10 (N.D. Fla. Mar. 13, 2020), *report and recommendation adopted*, No. 4:19-cv-108-WS/CAS, 2020 WL 1942300 (N.D. Fla. Apr. 22, 2020) (denying "Defendant Barr's motion to dismiss the Rehabilitation Act claim on the basis of the Act's exclusion of 'gender identity disorder not resulting from physical impairments.'"); *Iglesias v. True*, 403 F. Supp. 3d 680, 687 (S.D. Ill. 2019) (allowing a pro se incarcerated transgender woman's Rehabilitation Act claim to proceed). *Cf. Darin B. v. McGettigan*, E.E.O.C. App. No. 0120161068, 2017 WL 1103712 (Mar. 6, 2017) (establishing that a claim may proceed under Section 501 of the Rehabilitation Act where a transgender man was denied nipple reconstruction under his federal employee health plan). The definitions of disability under the ADA and Rehabilitation Act are identical. Compare 42 U.S.C. § 12102 (defining "disability"), with 29 U.S.C. §§ 705(9)(B), (20)(B) (cross-referencing ADA definition of "disability"); see also Americans with Disabilities Act Amendments Act of 2008 § 7 (conforming Section 504's definition of "disability" to definition of disability "in section 3 of the Americans with Disabilities Act of 1990").

[70] Section 504 and ADA cases are interchangeable. *E.g.*, *T.W. ex rel. Wilson v. Sch. Bd. of Seminole Cty., Fla.*, 610 F.3d 588, 604 (11th Cir. 2010).

[71] 42 U.S.C. § 2000e-2(a)(1) (making 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"); *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.'").

[72] *Bostock v. Clayton County Georgia*, 140 S. Ct. 1731, 1746 (2020).

[73] *Id.* at *7.

[74] Cisgender people are non-transgender people. They "identify as being the same sex they were determined to have at birth." *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 521 (3d Cir. 2018), *cert. denied sub nom. Doe v. Boyertown Area Sch. Dist.*, 139 S. Ct. 2636 (2019).

[75] *Id.* ("Just as sex is necessarily a but-for *cause* when an employer discriminates against . . . transgender employees, an employer who discriminates on these grounds inescapably *intends* to

An exclusion for gender-transition health care targets transgender people because it excludes coverage for medically-necessary healthcare for no reason other than a transgender person needs it. Only transgender people need gender-transition care. A treatment that may radically change sex characteristics, such as a mastectomy, is not subject to the exclusion unless it is undertaken for the very purpose of changing sex characteristics—that is, unless it is undertaken by a transgender person. The exclusion on its own terms is the "but-for cause" of an adverse employment action on the basis of sex. The exclusion applies only where an employee seeks gender transition and it denies coverage for healthcare that would otherwise be covered as medically necessary.

Federal courts have consistently found that transgender exclusions in employee health plans violate Title VII or analogous sex discrimination provisions in Title IX or Section 1557 of the Affordable Care Act.[76] For example, in *Boyden v. Conlin*, a court found that the exclusion of trans health care in the Wisconsin state employee health plan violated Title VII, § 1557 and Equal Protection. Just prior to the ruling, noting that the "legal landscape" had changed, the Wisconsin Group Insurance Board voted to voluntarily remove the exclusion.[77] A jury issued a $780,500 verdict for the plaintiffs, including reimbursement for facial gender reassignment surgery.[78]

Transgender exclusions also constitute sex discrimination for another reason. "Sex" is defined at a minimum to include the physical characteristics that comprise one's sex, i.e., brain characteristics, hormone levels, genital appearance, reproductive organs, and secondary sex characteristics such as breasts and facial features.[79] Under Title VII, an employer cannot fire a woman for not having a uterus or require all men to have a certain level of testosterone. Similarly, it would

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rely on sex in its decisionmaking."); *see also Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) ("[D]iscrimination against a transgender individual because of her gender-nonconformity is sex discrimination."). Although decided under the Equal Protection Clause, *Glenn* relied on Title VII precedents, most notably *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), on which *Bostock* also draws. *See Glenn*, 663 F.3d at 1312; *see also Bostock*, 140 S. Ct. at 1740.

[76] *Supra* notes 1-2.

[77] Emmarie Huetteman, *In a reversal, Wisconsin to cover state workers seeking transgender treatment*, Kaiser Health News (Aug 29, 2018), https://www.mprnews.org/story/2018/08/30/npr-in-reversal-wisconsin-to-cover-state-workers-seeking-transgender-treatment.

[78] Zack Ford, *Transgender Women Celebrate Monumental Court Win*, ThinkProgress Oct. 30, 2018, https://archive.thinkprogress.org/wisconsin-transgender-women-health-care-court-victory-e5ca758264b4.

[79] *See, e.g.*, Julie A. Greenberg & Marybeth Herald, *You Can't Take it With You: Constitutional Consequences of Interstate Gender Identity Rulings*, 80 Wash. L. Rev. 819, 825-26 (2005) (discussing eight factors that contribute to a person's sex, including gender identity); Dru M. Levasseur, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science is Key to Transgender Rights*, 39 Vt. L. Rev. 943, 951, 951 n.36 (2015).

be discriminatory to offer an insurance policy that prohibited coverage for sex-linked services, such as hysterectomies or prostate exams.

Viewed under a sex stereotyping framework, transgender people do not conform with *the* core sex stereotype, namely that people born with typically male sex organs are men and people born with typically female sex organs are women. The Sixth Circuit notes, "an employer cannot discriminate on the basis of transgender status without imposing its stereotypical notions of how sexual organs and gender identity ought to align."[80] This is a much more basic form of sex stereotyping than has already been widely recognized under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) and its progeny. Common procedures such as hysterectomy, oophorectomy, mastectomy, vaginectomy, orchiectomy, and penectomy all change genital or reproductive 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.[81]

By the same token, a policy prohibiting coverage for treatments that *change* sex characteristics is discrimination "because of sex."[82] A hysterectomy, for example, is covered for treating myriad conditions such as endometriosis. But if medically necessary hysterectomies are excluded only when the purpose of the surgery is to change sex characteristics, this is a sex-based exclusion.[83]

By excluding coverage for transgender-related surgical care, an employer is in effect 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 regarding its employees' anatomy, such as whether an employee has typically-female breasts, a penis, or a vagina.[84] The employer's specific discomfort with

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[80] *Equal Employment Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 576 (6th Cir. 2018), *cert. granted in part sub nom. R.G. & G.R. Harris Funeral Homes, Inc. v. E.E.O.C.*, 139 S. Ct. 1599 (2019), and *aff'd sub nom. Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731 (2020).

[81] *See Kadel*, 446 F. Supp. 3d at 14 (M.D.N.C. Mar. 11, 2020) ("[B]y denying coverage for gender-confirming treatment, the Exclusion tethers Plaintiffs to sex stereotypes which, as a matter of medical necessity, they seek to reject.").

[82] *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.'").

[83] 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.

[84] *See* Recent Case, *Macy v. Holder*, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012), 126 HARV. L.

medical treatment because it deliberately changes sex characteristics from one sex to another is impermissible sex discrimination—in the same way that adverse employment action against an employee changing from one religion to another is impermissible religious discrimination.[85] 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"[86]—in this case, the decision to not provide equal compensation under the health plan.

Health plans have made a variety of unsuccessful arguments as to why transgender exclusions are allegedly not sex discrimination, including the following:

- The exclusion does not limit coverage based on sex because it applies equally to both men and women.[87]
- The plan does not discriminate against transgender people because they can be on the plan and receive coverage for non-transgender related care.[88]
- A surgery-only exclusion does not target gender dysphoria treatments because other gender dysphoria treatments such as hormones or mental

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REV. 1731 (2013) https://harvardlawreview.org/wp-content/uploads/pdfs/vol126_macy_v_holder.pdf (describing how "transgender discrimination is based on sex because it is rooted in aversion to or assumptions about biological sex characteristics").

[85] *Harris Funeral Homes,* 884 F.3d at 575; *Schroer*, 577 F. Supp. 2d at 306. *See also 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.").

[86] *Harris Funeral Homes*, 884 F.3d at 576.

[87] *E.g.*, Defendants State of Arizona, Davidson, and Shannon's Motion to Dismiss Complaint, Toomey v. Arizona, 4:19-cv-00035-RM-LAB (D. Ariz. Mar. 28, 2019) [hereinafter Toomey MTD] ("The exclusion is facially neutral, applicable to all employees, regardless of sex."); State of Alaska's Combined Memorandum in Support of Cross-Motion for Summary Judgment and Opposition to Plaintiff's Motion for Partial Summary Judgment at 13, 17, Fletcher v. Alaska, No. 1:18-cv-00007-HRH, (D. Alaska Aug. 16, 2019) [hereinafter Fletcher MSJ] ("[T]he exclusion applies to all employees regardless of their sex. Clearly, therefore, Plaintiff's case does not fall under the gender stereotyping standard announced in *Price Waterhouse*.").

[88] Defendant's Opposition to Plaintiffs' Motion for Modification of the Preliminary Injunction, Flack v. Wisconsin, No. 3:18-cv-00309-wmc (W.D. Wisc. Nov. 16, 2018) [hereinafter Flack Opposition] at 29 ("[T]he Exclusion does not draw any facial classifications based on transgender status. It 'does not deny [transgender individuals] access to [Medicaid coverage] or exclude them from the particular package of Medicaid services [Wisconsin] has chosen to provide.'").

health care may be provided under the plan.[89]

- The exclusion cannot be rooted in sex discrimination because the plan contains many other exclusions, i.e., not all medically necessary care is covered under the plan.[90]

- It is not a sex-based classification because the exclusion does not target transgender people, it targets a procedure; gender-transition surgeries are simply not provided to anyone.[91]

- The exclusion is just a specific example clarifying a broader, facially-neutral exclusion, such as a cosmetic exclusion.[92]

Courts have rejected all of these arguments.[93] The only court that has denied a Title VII claim did so by erroneously citing outdated pre-*Price Waterhouse* Eighth

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[89] *E.g.*, Toomey MTD *supra* note 87, at 24 ("[T]he Health Plan does provide coverage for other forms of treatment for individuals with gender dysphoria. For example, coverage is provided for mental health counseling and hormone therapy medically necessary for gender dysphoria."); Fletcher MSJ *supra* note 87, at 13 (citing coverage for hormone therapy and counseling as evidence of nondiscrimination).

[90] *E.g.*, Toomey MTD *supra* note 87, at 24 ("Thus, not all services and procedures deemed medically necessary by a clinician are covered under the Health Plan; certain medically necessary procedures may be excluded from coverage.").

[91] Memorandum in Support of Motion to Dismiss by Treasurer Dale Folwell, Executive Administrator Dee Jones, and the North Carolina State Health Plan for Teachers and State Employees at 11-12, Kadel v. Folwell, No. 1:19-cv-272-LCB-LPA (M.D.N.C. July 8, 2019) ("Nowhere do Plaintiffs allege the Health Plan classifies on the basis of gender or transgender status, because the Plan does not. The challenged benefits exclusions do not mention transgender individuals; no person—regardless of gender or gender identity—receives assistance with "gender transformation" or "sex changes or modifications."); Flack Opposition, *supra* note 88, at 23 (The exclusion "does not even draw lines between different types of *people*—it excludes coverage for particular *procedures* (transsexual surgeries and related hormone therapy), only given to persons with a particular condition (gender dysphoria)." (emphasis added)).

[92] State Defendants' Brief in Support of Motion for Summary Judgment at 20, Boyden v. Conlin, 341 F. Supp. 3d 979 (W.D. Wis. June 1, 2018) (No. 3:17-cv-00264-WMC) ("Since the Exclusion simply specifies procedures that are generally excluded for all Group Health Plan members—cosmetic procedures meant to alleviate psychological distress—Plaintiffs are not subjected to discrimination on the basis of sex or transgender status."); *Id.* at 16 ("They cannot [establish discrimination] because the Uniform Benefits neutrally exclude all coverage for cosmetic procedures meant to treat psychological conditions. The Exclusion merely states that surgical services associated with gender dysphoria are subject to the same generally-applicable cosmetic exclusion.").

[93] *See* cases cited *supra* notes 1-2.

Circuit precedent,[94] and has now been plainly overruled by *Bostock*.

In fact, the Supreme Court did no more than confirm what had been the prevailing understanding of federal law for decades.[95] 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."[96] Federal courts, including the First, Sixth, Seventh, Eighth, Ninth, Eleventh and D.C. Circuits explicitly or implicitly agreed pre-*Bostock* that discrimination against transgender people is actionable sex discrimination.[97] The Third and Tenth

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[94] *Krei v. Nebraska*, 4:19-cv-03068-BCB-SMB (D. Neb Mar. 16, 2020) (dismissing Title VII claim regarding Nebraska state employee health plan where plaintiff didn't make sex stereotyping arguments and the court narrowly viewed the issue as one of "transgender" discrimination, which it rejected under *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748 (8th Cir. 1982)). However, even the Eighth Circuit has assumed that transgender people can bring sex discrimination claims. *Tovar v. Essentia Health*, 857 F.3d 771, 775 (8th Cir. 2017); *Hunter v. United Parcel Serv., Inc.*, 697 F.3d 697, 704 (8th Cir. 2012); *see also Lewis v. Heartland Inns of Am., LLC*, 591 F.3d 1033, 1039 (8th Cir. 2010) (endorsing sex stereotyping claims under *Price Waterhouse* and approvingly citing *Smith v. City of Salem, Ohio*, 378 F.3d 566 (6th Cir. 2004): "As the Sixth Circuit concluded in *Smith*, an adverse employment decision based on 'gender non-conforming behavior and appearance' is impermissible under *Price Waterhouse*.").

[95] *See* cases cited *infra* notes 96-99; *see also* 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.

[96] *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.").

[97] *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 , 884 F.3d 560, 575-76 (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

Circuits have assumed that a sex stereotyping claim is available to transgender plaintiffs.[98] Furthermore, dozens of district courts—both within and outside of the circuits that have explicitly recognized sex discrimination claims by transgender people—have long found that anti-transgender discrimination is unlawful sex discrimination.[99]

In 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.[100] The court had previously declined to dismiss a hostile work environment

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1312, 1316–17 (11th Cir. 2011)); *Schroer v. Billington*, 577 F. Supp. 2d 293, 306-08 (D.D.C. 2008).

[98] *See Stacy v. LSI Corp.*, 544 F. App'x 93, 97-98 (3d Cir. 2013); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224 (10th Cir. 2007). 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. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 115 (2d Cir. 2018), *cert. granted sub nom. Altitude Exp., Inc. v. Zarda*, No. 17-1623, 2019 WL 1756678 (U.S. Apr. 22, 2019) (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); *see also Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 200-01 (2d Cir. 2017) (per curiam) (holding that a plaintiff had stated a plausible Title VII claim based on a gender stereotyping theory).

[99] *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 (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 her because she failed to act like a man).

[100] 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-

claim based in part on the university's health plan, which contained a transgender exclusion.[101] Since 2013 the EEOC has obtained $35.2 million in settlements and awards on behalf of LGBT claimants bringing sex discrimination claims, and it has filed numerous cases for LGBT charging parties in federal court.[102] As employer-defense counsel have concluded, "[b]ased 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."[103]

D. Title IX – Sex Discrimination

As is the case with other federal nondiscrimination statutes described above, courts consistently recognize discrimination based on transgender status to be covered under Title IX's prohibition on sex discrimination,[104] including specifically in the

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transgender-professor-1-1-million-discrimination-case-n822646.

[101] *United States v. Se. Oklahoma State Univ.*, No. 5:15-cv-00324, 2015 WL 4606079 (W.D. Okla. July 10, 2015).

[102] *See* U.S. Equal Emp't Opportunity Comm'n, *LGBT-Based Sex Discrimination Charges*, https://www.eeoc.gov/eeoc/statistics/enforcement/lgbt_sex_based.cfm. *See also* U.S. Equal Emp't Opportunity Comm'n, *Sexual Orientation and Gender Identity (SOGI) Discrimination*, https://www.eeoc.gov/sexual-orientation-and-gender-identity-sogi-discrimination; U.S. Equal Emp't Opportunity Comm'n, *Fact Sheet: Notable EEOC Litigation Regarding Title VII & Discrimination Based on Sexual Orientation and Gender Identity*, https://www.eeoc.gov/fact-sheet-notable-eeoc-litigation-regarding-title-vii-discrimination-based-sexual-orientation-and.

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

[104] *See, e.g., Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 619 (4th Cir. 2020), *as amended* (Aug. 28, 2020), *cert. denied*, No. 20-1163, 2021 WL 2637992 (U.S. June 28, 2021) (denying a transgender student the use of a restroom corresponding with his gender violated Title IX); *Whitaker by 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), *cert. dismissed sub nom. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ. v. Whitaker ex rel. Whitaker*, 138 S. Ct. 1260, 200 L. Ed. 2d 415 (2018); *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); *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704 (D. Md. 2018); *A.H. v. Minersville Area Sch. Dist.*, 290 F. Supp. 3d 321 (M.D. Pa. Nov. 22, 2017); *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), *stay pending appeal denied sub nom.*, *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217 (6th Cir. 2016). *See also Parents for Privacy v. Barr*, 949 F.3d 1210 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 894 (2020); *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 533 (3d Cir. 2018) (concluding after evidentiary hearing that allowing boys and girls who are transgender to use sex-specific restrooms and locker rooms did not violate privacy), *cert. denied sub nom. Doe v. Boyertown Area Sch. Dist.*, 139 S. Ct. 2636

insurance exclusion context.[105] Cases to the contrary are readily distinguished.[106] Education programs receiving federal funding are prohibited from discriminating on the basis of sex,[107] including in employment,[108] compensation,[109] and fringe benefits.[110] Just as it is under Title VII, discriminating in the provision of benefits on the basis that the care sought is intended to change sex characteristics is inherently sex discrimination under Title IX.[111]

E. Liability of Third-Party Administrators

An employer is liable for discriminatory conduct by a third-party administrator, even if the discriminatory terms and coverage determinations were made by or

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(2019); *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).

[105] *Kadel*, 446 F. Supp. 3d at 14.

[106] *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; the same district court later chose not to follow that decision, *see Evancho v. Pine–Richland Sch. Dist.*, 237 F. Supp. 3d 267, 287 (W.D. Pa. 2017) ("*Johnston* also acutely recognized that cases involving transgender status implicate a fast-changing and rapidly-evolving set of issues that must be considered in their own factual contexts. To be sure, *Johnston's* prognostication of that reality was profoundly accurate." (citation omitted)); *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).

[107] 20 U.S.C. § 1681.

[108] 34 C.F.R. § 106.51(a)(1) ("No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment … under any education program or activity operated by a recipient which receives Federal financial assistance.").

[109] 34 C.F.R. § 106.54 ("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.").

[110] 34 C.F.R. § 106.56(b) ("A recipient shall not: (1) Discriminate on the basis of sex with regard to making fringe benefits available to employees."); 34 C.F.R. § 106.51(a)(3) ("A recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination prohibited by this subpart, including relationships with … organizations providing or administering fringe benefits to employees of the recipient."); 34 C.F.R. § 106.51(b)(7) (applying employment discrimination protections to "[f]ringe benefits available by virtue of employment, whether or not administered by the recipient").

[111] *See, e.g., Kadel*, 446 F. Supp. 3d at 14-15 (reviewing Title VII caselaw pre-*Bostock* and holding a transgender health exclusion violates Title IX).

influenced by a third-party administrator.[112] Likewise, third-party administrators are also liable as agents under Title VII and the ADA, as the statutes include an employer's "agent" within the definition of "employer."[113] In *Lange*, a county administered a health plan for a sheriff's office and sought dismissal on the basis that the county did not have an employment relationship with the plaintiff, as the sheriff was a separate entity from the county under Georgia law. The court rejected that argument as insufficient, finding that the plaintiff "plausibly alleged that the County was acting as an agent of the Sheriff's Office," where the sheriff's office voluntarily delegated control over the health plan to the county.[114] In *Boyden*, the court found that in the context of a state employee health plan, the agencies that were responsible for administering the benefits and determining which benefits, although not the direct employer, were likewise "agents" under Title VII.[115] The court applied the rule that "to be an agent under Title VII, one must be empowered with respect to employment practices, like the right to hire and fire, supervise work, set schedules, pay salary, withhold taxes, *or provide benefits*."[116] The agencies were found liable.[117] Other courts have adopted the agency theory a wide variety of factual situations consistent with the law of agency.[118]

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[112] *Ariz. Governing Comm. for Tax Deferred Annuity and Deferred Comp. Plans v. Norris*, 463 U.S. 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."); *Los Angeles Dep't of Water and Power v. Manhart*, 435 U. S. 702, 717, n.33 (1978) (employer cannot avoid its responsibilities under Title VII "by delegating discriminatory programs" to third parties).

[113] 42 U.S.C. § 2000e-(b) (Title VII); 42 U.S.C. § 12111(5)(A) (ADA).

[114] *Lange*, 499 F. Supp. 3d at 1273.

[115] *Boyden v. Conlin*, No. 17-CV-264-WMC, 2017 WL 5592688, at *3 (W.D. Wis. Nov. 20, 2017); *accord Boyden v. Conlin*, No. 17-CV-264-WMC, 2018 WL 2191733, at *1 (W.D. Wis. May 11, 2018).

[116] *Id*.

[117] *Boyden v. Conlin*, 341 F. Supp. 3d 979, 998 (W.D. Wis. 2018).

[118] *See, e.g., Manhart*, 435 U. S. 702, 717, n.33 (finding agency liability over city agency's administrative board as the agency's agent as well as the agency itself as the plaintiffs' direct employer); *Jacobs v. Maricopa Cty.*, *Ariz.,* 1994 WL 175424, at *3 (9th Cir. May 9, 1994) (reversing dismissal of Title VII claims against Maricopa County as agent of Maricopa County judiciary where plaintiff alleged County exercised control over court personnel through involvement with Judicial Merit System); *Tovar v. Essentia Health*, 857 F.3d 771, 778 (8th Cir. 2017) (rejecting third-party administrator's argument in § 1557 claim that because the employer retained "all powers and discretion necessary to administer the Plan"—including the power to change its terms—that Tovar's alleged injuries were not fairly traceable to or redressable by the third-party administrator); *Tovar v. Essentia Health*, 342 F. Supp. 3d 947, 954 (D. Minn. 2018)

F. Duty of Fair Representation

Unions have a duty to fairly represent all employees in the bargaining unit.[119] This duty of fair representation (DFR) obligates a union to serve the interests of all members "without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct."[120] The DFR governs union conduct in the negotiation[121] and administration[122] of collective bargaining agreements. Demonstrating "that the union's actions or omissions during the grievance process were arbitrary, discriminatory, or in bad faith" proves a breach of the DFR.[123] More specifically, discrimination against a worker for being transgender states a claim of breach of the DFR.[124] Unions therefore have an obligation to ensure that welfare plans provide non-discriminatory benefits to transgender workers, and the presence of a discriminatory exclusion constitutes a breach of the DFR.

G. Executive Order (EO) 11246 – Federal Contractors

For federal contractors, a transgender exclusion is prohibited under Executive Order (EO) 11246, as amended by EO 13672.[125] Federal contractors are prohibited from discriminating against employees on the basis of transgender status.[126] The

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(same).

[119] This arises separately from federal common law and § 8(b)(1)(A) of the National Labor Relations Act.

[120] *Vaca v. Sipes*, 386 U.S. 171, 177 (1967).

[121] *See Ford Motor Co. v. Huffman*, 345 U.S. 330, 337–38 (1953); see also *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 78–80 (1991).

[122] *See Vaca*, 386 U.S. at 177–78 (statutory duty of fair representation in administering collective bargaining agreement); *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957) (same).

[123] *Garrison v. Cassens Transp. Co.*, 334 F.3d 528, 539 (6th Cir. 2003).

[124] *Fowlkes v. Ironworkers Local 40*, 790 F.3d 378, 388-89 (2d Cir. 2015) (recognizing DFR claim of transgender ironworker who "alleg[ed] that the union refused to refer him for work for which he was qualified because of his transgender status").

[125] 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).

[126] 41 C.F.R. § 60-20.2(a) ("It is unlawful for a contractor to discriminate against any employee or applicant for employment because of sex. The term sex includes … gender identity; transgender status; and sex stereotyping."); 41 C.F.R. § 60-20.7(b)) (listing "[a]dverse treatment of employees or applicants because of their actual or perceived gender identity or transgender status" as an example unlawful discrimination based on sex-based stereotypes); 41 C.F.R. § 60-20.2(14) (contractors may not treat employees adversely "because they have received, are receiving or are planning to receive transition-related medical services designed to facilitate the adoption of a sex or gender other than the individual's designated sex at birth."); contractors may not discriminate on the basis of sex or gender identity in "rates of pay or other

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.[127] OFCCP specifically notes that "trans-exclusive health benefits offerings may constitute unlawful discrimination."[128] OFCCP states, "an explicit, categorical exclusion of coverage for all care related to gender dysphoria or gender transition is facially discriminatory because such an exclusion singles out services and treatments for individuals on the basis of their gender identity or transgender status, which violates EO 11246's prohibitions on both sex and gender identity discrimination."[129]

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 debarred, i.e., declared ineligible for future government contracts.[130]

H. Section 1557 of the Affordable Care Act

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,[131] which includes, for example, the Retiree Drug Subsidy Program. Additionally, covered entities that are principally engaged in providing healthcare are liable for violations of § 1557 in their employee health plans.[132]

1. Sex discrimination under § 1557

Section 1557 has been in force since the passage of the ACA in March 2010 and includes a private right of action.[133] Courts have and continue to find that § 1557

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forms of compensation," 41 C.F.R. § 60-1.4, or in fringe benefits on the basis of sex, 41 C.F.R. § 60-20.6(a).

[127] OFCCP, Directive 2015-01, Handling individual and systemic sexual orientation and gender identity discrimination complaints (April 16, 2015), https://www.dol.gov/agencies/ofccp/directives/2015-01.

[128] OFCCP, Discrimination on the Basis of Sex, 81 Fed. Reg. 39107-39169 at 39135-39137 (June 15, 2016).

[129] OFCCP, Frequently Asked Questions Sexual Orientation and Gender Identity, https://www.dol.gov/ofccp/LGBT/LGBT_FAQs.html#Q29.

[130] 41 C.F.R. § 60-1.4(a).

[131] 42 U.S.C. 18116(a); 45 C.F.R. § 92.2.

[132] 45 C.F.R. § 92.3(b).

[133] *See*, *e.g.*, *Doe v. BlueCross BlueShield of Tennessee, Inc.*, 926 F.3d 235, 239 (6th Cir. 2019); *Boyden v. Conlin*, 341 F. Supp. 3d 979, 998 (W.D. Wisc. Sept. 18, 2018); *Weinreb v. Xerox Bus. Servs., LLC Health & Welfare Plan*, 323 F. Supp. 3d 501, 521 (S.D.N.Y. 2018); *Flack v. Wis. Dep't of Health Servs.*, 328 F. Supp. 3d 931 (W.D. Wis. Jul. 25, 2018); *Edmo v. Idaho Dept. of*

itself—independent of any regulation—protects transgender individuals from discrimination in health care in general,[134] and that transgender insurance exclusions in particular trigger sex discrimination protections under § 1557.[135] These cases have all settled.[136] Trump-era regulations have not changed this result.[137] To the extent that a court may look to Title IX to interpret § 1557, courts consistently recognize discrimination based on transgender status to be sex discrimination under Title IX,[138] including specifically in the insurance exclusion

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Correction, No. 1:17-cv-00151, 2018 WL 2745898, at *8-*9 (D. Idaho June 7, 2018); *Audia v. Briar Place, Ltd.*, No. 17-cv-6618, 2018 WL 1920082, at *3 (N.D. Ill. Apr. 24, 2018); *Briscoe v. Health Care Serv. Corp.*, 281 F. Supp. 3d 725, 737 (N.D. Ill. 2017); *Esparza v. Univ. Med. Ctr. Mgmt. Corp.*, No. CV 17-4803, 2017 WL 4791185, at *5 (E.D. La. Oct. 24, 2017); *Callum v. CVS Health Corp.*, 137 F. Supp. 3d 817 (D.S.C. Sept. 29, 2015); *Southeastern Pa. Transp. Auth. v. Gilead*, 102 F. Supp. 3d 688 (E.D. Pa. 2015); *Rumble v. Fairview Health Servs.*, No. 14-cv-2037, 2015 WL 1197415 at *7 n.3 (D. Minn. Mar. 16, 2015).

[134] *Rumble*, 2015 WL 1197415, at *2; *Prescott v. Rady Children's Hospital-San Diego*, 265 F. Supp. 3d 1090, 1099 (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.").

[135] *See* cases cited *supra* note 2.

[136] *Flack* settled for $2.2 million. Relman Dane & Colfax, Transgender Medicaid Beneficiaries Secure Victory in Landmark Class Action Health Care Rights Lawsuit Against State of Wisconsin (Dec. 10, 2019), https://www.relmanlaw.com/news-213; Nat'l Center for Lesbian Rights, Case: *Prescott v. RCHSD*, http://www.nclrights.org/cases-and-policy/cases-and-advocacy/case-prescott-v-rchsd; *Tovar v. Essentia Health*, No. 0:16-cv-00100-DWF-LIB (D. Minn. July 25, 2019), ECF No. 123 (order for dismissal with prejudice); *Rumble v. Fairview Health Services*, No. 0:14-cv-02037-SRN-FLN (D. Minn. Jun. 28, 2017), ECF No. 257 (stipulation for dismissal with prejudice). *See also* Stipulated Settlement Agreement and Order, Being v. Crum, No. 3:19-cv-00060-HRH (D. Alaska Jan. 25, 2021) (paying $255,000 in damages and attorneys' fees in Alaska Medicaid settlement).

[137] *Pritchard v. Blue Cross Blue Shield of Illinois*, No. 3:20-CV-06145-RJB, 2021 WL 1758896, at *4 (W.D. Wash. May 4, 2021) (finding that a transgender exclusion can give rise to a claim because a "claim of discrimination in violation of Section 1557 does not depend on an HHS rule.")

[138] *See, e.g., Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 619 (4th Cir. 2020), *as amended* (Aug. 28, 2020), *cert. denied*, No. 20-1163, 2021 WL 2637992 (U.S. June 28, 2021) (denying a transgender student the use of a restroom corresponding with his gender violated Title IX); *Whitaker by 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), *cert. dismissed sub nom. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ. v. Whitaker ex rel. Whitaker*, 138 S. Ct. 1260, 200 L. Ed. 2d 415 (2018); *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); *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704 (D. Md. 2018); *A.H. v. Minersville Area Sch. Dist.*, 290 F. Supp. 3d 321 (M.D. Pa. Nov. 22, 2017); *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), *stay pending appeal denied*

context.[139]

Additionally, under the Department of Health and Human Services Office of Civil Rights (OCR) 2016 implementing regulations, discriminatory denials of coverage—including categorical exclusions—for treatments related to gender transition were explicitly prohibited.[140] The Trump administration repealed those regulations, but five lawsuits challenged the repeal.[141] The repeal of the 2016 definition of discrimination on the basis of sex, including sex stereotyping, has been stayed and HHS is enjoined from enforcing the repeal.[142]

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sub nom., *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217 (6th Cir. 2016). *See also Parents for Privacy v. Barr*, 949 F.3d 1210 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 894 (2020); *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 533 (3d Cir. 2018) (concluding after evidentiary hearing that allowing boys and girls who are transgender to use sex-specific restrooms and locker rooms did not violate privacy), *cert. denied sub nom. Doe v. Boyertown Area Sch. Dist.*, 139 S. Ct. 2636 (2019); *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). Cases to the contrary are readily distinguished, especially in light of *Bostock*. *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).

[139] *Kadel*, 446 F. Supp. 3d at 14.

[140] *See* 42 U.S.C. § 18116; 45 C.F.R. § 92.207(b) (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"). While OCR is presently enjoined under *Franciscan Alliance v. Azar* from enforcing limited portions of its regulations and it is reviewing the regulations, Dep't of Health and Human Services, Nondiscrimination in Health and Health Education Programs or Activities, 84 Fed. Reg. 27846-27895 (June 14, 2019), that injunction is not applicable here. It only applies to government enforcement and is expressly limited to the "prohibition against discrimination on the basis of gender identity." *Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp. 3d 660, 695 (N.D. Tex. 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."). Prohibitions against discrimination on the basis of sex and disability are still enforceable by OCR and courts.

[141] *New York v. U.S. Dep't of Health and Human Serv.*, No. 1:20-cv-05583-AKH-JLC (S.D.N.Y. filed July 20, 2020); *Washington v. U.S. Dep't of Health and Human Serv.*, No. 2:20-cv-01105-JLR (W.D. Wash. filed July 16, 2020); *Boston Alliance v. U.S. Dep't of Health and Human Serv.*, No. 1:20-cv-11297-PBS (D. Mass. filed July 9, 2020); *Walker v. Azar*, No. 1:20-cv-02834-FB-SMG (E.D.N.Y. filed June 26, 2020); *Whitman-Walker Clinic v. U.S. Dep't of Health and Human Serv.*, No. 20-cv-01630-JEB (D.D.C. filed June 22, 2020).

[142] *Walker v. Azar*, 480 F. Supp. 3d 417, 430 (E.D.N.Y. 2020); *Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Human Servs.*, 485 F. Supp. 3d 1, 64 (D.D.C. 2020).

2. Disability discrimination under § 1557

Finally, § 1557 wholly separately prohibits claim denials and benefit designs that discriminate on the basis of disability. Those protections are independent of sex-based protections and, as outlined in the ADA section above, prohibit categorical gender dysphoria exclusions. To state a disability claim under § 1557, one must allege facts adequate to state a claim under Section 504 of the Rehabilitation Act.[143] A court will then look to the underlying statute—the ACA—to determine the "benefit" that someone cannot be excluded from based on their disability.[144] Under the ACA, a group health plan includes an employee welfare benefit plan.[145] A qualified health plan under the ACA must provide essential health benefits,[146] including ambulatory patient services, hospitalization, mental health services, prescription drugs, and laboratory services.[147] The court will analyze if the plan provides "meaningful access to the benefit."[148] In this case, the ACA-defined essential health benefit that is being denied. In *Doe v. CVS*, an allegation that the structure and implementation of a facially-neutral specialty pharmacy program discriminated against plaintiffs on the basis of HIV/AIDS by preventing them "from obtaining the same quality of pharmaceutical care that non-HIV/AIDS patients may obtain in filling non-specialty prescriptions, thereby denying them meaningful access to their prescription drug benefit" was sufficient to state an ACA disability discrimination claim.[149] In the case of a transgender exclusion, the exclusion itself is diagnosis-based and thus the disability discrimination is even more clear.

V. ERISA prohibits clinical policies that do not reflect current standards of care.

For employer-based plans, using a claims administrator that has an overly-restrictive clinical policy that does not accord with generally-accepted standards of care is unlawful under the Employee Retirement Income Security Act ("ERISA"). In a class-action case against United Behavioral Health ("UBH"), the court found that UBH's process for developing its clinical guidelines "breached its fiduciary duty by violating its duty of loyalty, its duty of due care, and its duty to comply with

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[143] *Doe v. CVS Pharmacy, Inc.*, 982 F.3d 1204, 1209 (9th Cir. 2020); *Doe v. BlueCross BlueShield of Tennessee, Inc.*, 926 F.3d 235, 239 (6th Cir. 2019).

[144] *Doe v. CVS*, 982 F.3d at 1210 (quoting 29 U.S.C. § 794).

[145] 42 U.S.C.A. § 300gg-91(a)(1).

[146] 42 U.S.C.A. § 18021(1)(B).

[147] 42 U.S.C.A. § 18022(b)(1).

[148] *Doe v. CVS*, 982 F.3d at 12010.

[149] *Id.*

plan terms by adopting Guidelines that are unreasonable and do not reflect generally accepted standards of care."[150] Furthermore, applying its restrictive policy to deny claims was also unlawful, making UBH liable with respect to the denial of benefits claims.[151] A clinical policy that categorically excludes, for example, facial gender reassignment surgery or surgery for people under eighteen is out of line with generally-accepted standards of care. When a claims administrator applies such a clinical policy to deny care that otherwise would meet the plan's definition of medical necessity, the plan risks liability for breach of fiduciary duty and denial of benefit claims.[152]

VI. The Federal Equal Protection Clause prohibits transgender exclusions.

Finally, for government employers, the disparate treatment of transgender employees violates the federal Equal Protection Clause.

A. Sex-Based Classification – Heightened Scrutiny

Transgender discrimination has been widely regarded as an unconstitutional sex-based classification triggering heightened scrutiny.[153] As one court explained:

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[150] *Wit v. United Behavioral Health*, No. 14-CV-02346-JCS, 2019 WL 1033730, at *53 (N.D. Cal. Mar. 5, 2019).

[151] *Id.* at *55.

[152] *See* TLDEF, Medical Necessity Literature Reviews, https://transhealthproject.org/tools/medical-necessity-literature-reviews.

[153] *Kadel*, 446 F. Supp. 3d at 18 (applying heightened scrutiny to transgender exclusion in North Carolina state employee health plan); *Toomey*, 2019 WL 7172144, at *8 ("Plaintiff has alleged sufficient facts that, if true, could justify a heightened level of scrutiny" in Arizona employee health plan); *Flack*, 395 F. Supp. 3d at 1020 (applying heightened scrutiny to transgender Medicaid exclusion); *Boyden*, 341 F. Supp. 3d at 1000 (W.D. Wis. 2018) (applying heightened scrutiny to transgender exclusion in Wisconsin state employee health plan). *See also Adams by & through Kasper v. Sch. Bd. of St. Johns Cty.*, No. 18-13592, 2021 WL 2944396, at *4 (11th Cir. July 14, 2021) (applying intermediate scrutiny because a transgender school bathroom policy was sex discrimination); *Morris v. Pompeo*, No. 219CV00569GMNDJA, 2020 WL 6875208, at *7 (D. Nev. Nov. 23, 2020) (applying heightened scrutiny where the U.S. passport gender-correction policy discriminates on the basis of transgender status); *Grimm*, 972 F.3d at 609 (applying intermediate scrutiny to a transgender school bathroom policy because (a) it facially referenced sex, (b) it relied on sex stereotypes, and (c) transgender people are a quasi-suspect class); *Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1046–47 (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."), *cert. dismissed sub nom. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ. v. Whitaker ex rel. Whitaker*, 138 S. Ct. 1260, 200 L. Ed. 2d 415 (2018); *Glenn v. Brumby*, 663 F.3d 1312, 1320 (11th Cir. 2011) (holding that discriminating against a transgender woman based on gender non-conformity constitutes sex-based

> On its face, the Exclusion bars coverage for 'treatment in conjunction with proposed *gender* transformation' and '*sex* changes or modifications.' The characteristics of sex and gender are directly implicated; it is impossible to refer to the Exclusion without referring to them. State Defendants attempt to frame the Exclusion as one focused on "medical diagnoses, not ... gender." However, the diagnosis at issue—gender dysphoria—only results from a discrepancy between assigned *sex* and *gender* identity. *Cf. McWright v. Alexander*, 982 F.2d 222, 228 (7th Cir. 1992) ("[A]n employer cannot be permitted to use a technically neutral classification as a proxy to evade the prohibition of intentional discrimination," such as "gray hair as a proxy for age."). In short, the Exclusion facially discriminates on the basis of gender, and heightened scrutiny applies.[154]

Under heightened scrutiny, the government must demonstrate an "exceedingly persuasive justification" for its actions.[155] "The burden of justification is demanding and it rests entirely on" the government.[156] The government "must

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discrimination and applying heightened scrutiny); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 577 (6th Cir. 2004) (holding that the facts alleged by transgender plaintiff to support claims of gender discrimination on the basis of sex stereotyping "easily constitute a claim of sex discrimination" under Equal Protection); *Doe v. Mass. Dep't of Correction*, 2018 WL 2994403, at *9 ("[W]here a State creates a classification based on transgender status, the classification is tantamount to discrimination based on sex and is therefore subject to heightened judicial scrutiny."); *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704, 718-19 (D. Md. 2018) (reviewing *Glenn* and *Whitaker* and determining that heightened scrutiny applied in transgender school bathroom case); *A.H. v. Minersville Area Sch. Dist.*, 290 F. Supp. 3d 321, 331 (M.D. Pa. 2017) (holding intermediate scrutiny applied in transgender school bathroom case); *Stone v. Trump*, 280 F. Supp. 3d 747, 755 (D. Md. 2017) (applying intermediate scrutiny to decision to exclude transgender individuals from the military), *appeal dismissed*, No. 17-2398, 2018 WL 2717050 (4th Cir. Feb. 2, 2018) (staying preliminary injunction); *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 210 (D.D.C. 2017) (subjecting military bans on transgender individuals to heightened scrutiny because they "punish individuals for failing to adhere to gender stereotypes"), *vacated sub nom. Doe 2 v. Shanahan*, 755 F. App'x 19 (D.C. Cir. 2019) (vacating following change in federal policy); *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 affirmed sex likely constitutes sex-based discrimination); *Norsworthy*, 87 F. Supp. 3d at 1119 (applying intermediate scrutiny to discrimination on the basis of transgender status in prison context in part under sex-stereotyping theory); *Morris v. Pompeo*, No. 19-00569, 2020 WL 6875208, at *7 (D. Nev. Nov. 23, 2020) (applying heightened scrutiny to a discriminatory State Department policy requiring transgender individuals to provide verification of gender-affirming care when applying for a passport).

[154] *Kadel*, 446 F. Supp. 3d at 18 (internal citations omitted; emphasis in original).

[155] *United States v. Virginia*, 518 U.S. 515, 531 (1996).

[156] *Id.* at 533.

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.'"[157] "The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation."[158] "And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females,"[159] such as that it is inappropriate to change sex characteristics from one sex to the other.

Cost saving is also an insufficient interest under heightened scrutiny to discriminate in the award of benefits.[160] Justifying cost savings through discrimination is merely "a concise expression of an intention to discriminate."[161] Once it has offered health coverage, an employer cannot selectively deny it for discriminatory reasons such as failure to conform to gender stereotypes.[162]

Because there is no important government interest in ensuring that employees do not physically alter their sex characteristics in order to treat a medical condition, a transgender exclusion will be struck down under heightened scrutiny.

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

[158] *Id.*

[159] *Id.*

[160] *Flack*, 395 F. Supp. 3d at 1021 (rejecting cost-savings justification for transgender Medicaid exclusion); *Boyden*, 341 F. Supp. 3d at 1000 (W.D. Wis. 2018) (finding no evidence that cost efficacy was basis for the transgender exclusion in Wisconsin state employee health plan); *Kadel*, 446 F. Supp. 3d (noting that "when heightened scrutiny applies, 'a State may not protect the public fisc by drawing an invidious distinction between classes of its citizens.' *Mem. Hosp. v. Maricopa Cty.*, 415 U.S. 250, 263, 94 S. Ct. 1076, 39 L. Ed. 2d 306 (1974)"); *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969), *overruled in part on other grounds by Edelman v. Jordan*, 415 U.S. 651 (1974) (same); *accord Plyler v. Doe*, 457 U.S. 202, 229 (1982); *Graham v. Richardson*, 403 U.S. 365, 374-75 (1971). *See also Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 14 (1st Cir. 2012) (holding costs savings an insufficient interest to deny same-sex married couples benefits, including insurance, even under a searching form of rational basis review); *Collins v. Brewer*, 727 F. Supp. 2d 797, 811 (D. Ariz. 2010), *aff'd sub nom. Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011) (cost concerns could not justify denying insurance coverage to same-sex couples under rational basis review).

[161] *Plyler*, 457 U.S. at 227.

[162] *See Hishon v. King & Spalding*, 467 U.S. 69, 75 (1984) ("A benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free under the employment contract simply not to provide the benefit at all."). *Cf. Maher v. Roe*, 432 U.S. 464, 469–70 (1977) ("The Constitution imposes no obligation on the States to pay . . . medical . . . expenses. But when a State decides to . . . provid[e] medical care, the manner in which it dispenses benefits is subject to constitutional limitations.").

B. Transgender-Based Classification - Heightened Scrutiny

A transgender exclusion is also subject to heightened scrutiny because transgender people are a quasi-suspect class.[163] This applies to transgender people as a class regardless of whether the action in question constitutes statutory discrimination on the basis of sex or disability.

The need for transgender-related medical care is inextricably linked to the status of being transgender.[164] The exclusion is based on transgender status because only transgender people use these services—by definition anyone who would access "sex transformation surgery" or "gender reassignment services" is transgender. Because only transgender people need treatments that change sex characteristics for the purpose of treating gender dysphoria, the exclusion unlawfully targets

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[163] *See*, *e.g.*, *Ray v. McCloud*, No. 2:18-CV-272, slip op. at 20 (S.D. Ohio Dec. 16, 2020) (holding "transgender individuals are a quasi-suspect class entitled to heightened scrutiny" where transgender individuals were barred from correcting the sex on their birth certificates); *Grimm*, 972 F.3d at 609 (applying intermediate scrutiny to a transgender school bathroom policy because transgender people are a quasi-suspect class); *Karnoski v. Trump,* 926 F.3d 1180, 1201 (9th Cir. 2019) (applying "something more than rational basis but less than strict scrutiny" to the class of transgender persons); *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 208–09 (D.D.C. 2017), *vacated sub nom. Doe 2 v. Shanahan*, 755 F. App'x 19 (D.C. Cir. 2019) (vacating following change in federal policy); *Stone v. Trump*, 280 F. Supp. 3d 747, 768 (D. Md. 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), *appeal dismissed*, No. 17-2398, 2018 WL 2717050 (4th Cir. Feb. 2, 2018) (staying preliminary injunction); *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1145 (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"); *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).

[164] *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 271 (1993) ("Some activities may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed. A tax on wearing yarmulkes is a tax on Jews."); *Telescope Media Group v. Lucero*, 936 F.3d 740, 770 (8th Cir. 2019) ("it is well established that some protected characteristics are so intertwined with particular conduct that discrimination against the conduct becomes discrimination against the protected class"). *See also, e.g.*, *DaVita, Inc. v. Marietta Meml. Hosp. Employee Health Benefit Plan*, 978 F.3d 326, 349 (6th Cir. 2020) (where there is a 'near-perfect overlap between [end-stage renal disease] patients and dialysis patients,' . . . a jury could reasonably conclude that discrimination against the latter constitutes [disability] discrimination against the former."); *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1271-73 (9th Cir. 1998) (pre-employment testing for sickle-cell trait created Title VII cause of action for discrimination based on race).

transgender people, who receive unequal benefits. For the same reasons as above, this exclusion will not survive heightened scrutiny.

C. Animus-Based Exclusion - Rational Basis

There is not even a rational basis to single out and exclude transgender care over any other type of medically necessary care. Lack of medical necessity is not a basis for the exclusion[165]—health plans already contain a separate exclusion for any non-medically necessary treatment. And, as detailed above, significant cost savings cannot be demonstrated. 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.[166]

VII. Settlements and pending cases involving transgender exclusions in employer health plans.

A. Pending Matters

- *Pritchard v. Blue Cross Blue Shield of Illinois*, No. 3:20-cv-06145-RJB (W.D. Wash. filed Nov. 23, 2020). Lambda Legal represents a transgender teen and his parents in challenging under § 1557 BCBS of Illinois' administration of a self-funded plan with a categorical exclusion.[167] The court found that claims were stated under Section 1557 notwithstanding the Trump-era regulations.[168]

- *Holt v. City of Springfield* (Ill. Dep't. of Human Rights and EEOC, filed Nov. 18, 2020). The ACLU of Illinois represents a former Springfield

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[165] *Flack*, 395 F. Supp. 3d at 1021 ("[T]he medical consensus is that gender-confirming treatment, including surgery, is accepted, safe, and effective in the treatment of gender dysphoria, meaning that the denial of Medicaid benefits for needed medical treatment completely fails to protect the public health.").

[166] *Toomey*, 2019 WL 7172144, at *9 ("Limiting health care costs is a legitimate state interest, but that interest cannot be furthered by arbitrary classifications or by harming a politically unpopular or vulnerable group."); *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."). Cf. *OutFront Minnesota v. Johnson Piper,* No. 62-CV-15-7501 (Minn. Dist. Ct. Nov. 14, 2016) (finding a categorical exclusion for sex reassignment surgery violates equal protection and the right to privacy under the Minnesota Constitution), https://www.aclu.org/legal-document/outfront-minnesota-v-johnson-piper-order.

[167] https://www.lambdalegal.org/in-court/cases/cp-v-bcbsil.

[168] *Pritchard v. Blue Cross Blue Shield of Illinois*, No. 3:20-CV-06145-RJB, 2021 WL 1758896, at *4 (W.D. Wash. May 4, 2021) ("A claim of discrimination in violation of Section 1557 does not depend on an HHS rule.")

employee in challenging under the Illinois Human Rights Act and federal law an exclusion in the City's self-funded employee health plan.[169]

- *Fain v. Crouch*, No. 3:20-cv-00740 (S.D. W.Va. filed Nov. 12, 2020) Lambda Legal represents individuals in a class action that jointly challenges exclusions in West Virginia's state employee and Medicaid plans. There are § 1557, federal Equal Protection, and Medicaid availability and comparability claims. The case is proceeding after the court denied a motion to dismiss by defendant.[170]

- *Scruggs v. Unified Police Department Greater Salt Lake*, No. 2:20-cv-00259 (D. Utah filed April 17, 2020). Plaintiff Scruggs brings claims against his former employer and the third-party administrator, Public Employees Health Program, due to an exclusion in a self-funded plan. There are Title VII, ADA (Title I), and Equal Protection claims.

- *Claire v. Florida Dep't of Mgmt. Serv.*, No. 4:20-cv-00020 (N.D. Florida filed Jan. 13, 2020). The ACLU, Southern Legal Counsel, and Legal Services of Greater Miami filed on behalf of Florida state employees who have been denied care under an exclusion in their self-funded plans.[171] There are Title VII and Equal Protection claims.

- *Pangborn v. Care Alternatives of Mass.*, No. 3:20-cv-30005-MGM (D. Mass. filed Jan. 10, 2020).[172] GLAD filed on behalf of an employee who was denied surgery due to an explicit exclusion in a self-funded plan. There are Title VII, ADA, Rehabilitation Act, § 1557, and equivalent state-law claims. *Pangborn* had been stayed pending the Supreme Court's decision in *Bostock*. Post-*Bostock*, the employer promptly removed the exclusion from its plan,[173] and the court denied a motion to dismiss.[174] Finding that it could

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[169] ACLU of Illinois, Springfield Woman Files Charge Challenging City's Anti-Transgender Employee Insurance Plan (Nov. 24, 2020), https://www.aclu-il.org/en/news/springfield-woman-files-charge-challenging-citys-anti-transgender-employee-insurance-plan.

[170] *Fain v. Crouch*, No. 2:19-cv-00569 (S.D. W. Va. May 19, 2021) (order on motion to dismiss), https://www.courtlistener.com/docket/18620247/57/fain-v-crouch.

[171] https://www.aclufl.org/en/press-releases/advocacy-groups-sue-florida-government-agencies-university-florida-over.

[172] http://www.glad.org/cases/pangborn-v-ascend.

[173] Defendant Care Alternatives of Massachusetts, LLC's Answer To Plaintiff Alexander Pangborn's Complaint at 1, Pangborn v. Care Alternatives of Massachusetts, LLC, No. 3:20-cv-30005 (D. Mass. July 15, 2020) (removing the exclusion effective July 10, 2020), https://www.courtlistener.com/docket/16702124/pangborn-v-care-alternatives-of-massachusetts-llc/#entry-16.

[174] *Pangborn v. Care Alternatives of Massachusetts, LLC,* No. 3:20-cv-30005 (D. Mass. Dec. 16,

be an "employer," the court declined to dismiss the corporate entity that owns the health plan but is not the employer identified on the paychecks or otherwise acting as an employer in a day-to-day relationship with the employee. The court also declined to dismiss claims based on receipt of federal financial assistance where the parent company may have received the funds indirectly through a separate corporate entity.

- *Lange v. Houston County, Georgia*, No. 5:19-cv-00392-MTT (M.D. Ga. filed Oct. 2, 2019).[175] TLDEF filed this case on behalf of a Houston County sheriff's deputy who was denied coverage for surgery due to an explicit exclusion in a self-funded plan. There are Title VII, ADA, Rehabilitation Act, and state and federal Equal Protection claims.

- *Kadel v. Folwell*, No. 1:19-cv-00272-LCB-LPA (M.D.N.C. filed March 11, 2019).[176] In this TLDEF/Lambda Legal case, state employees who are transgender or have transgender dependents are challenging an explicit exclusion under Title IX, § 1557, and Equal Protection with Title VII claims tolled by stipulation.

- *Toomey v. Arizona*, No. 4:19-cv-00035-LCK (D. Ariz. filed Jan. 23, 2019). The ACLU is bringing a class-action case with Title VII and Equal Protection claims on behalf of Russel Toomey, a University of Arizona professor who was denied surgery under the state employee health plan's blanket exclusion.[177]

B. Resolved Cases

- *Duex v. Las Vegas Resort Holdings, LLC d/b/a Sahara Las Vegas*, No. 2:20-cv-02073 (D. Nev. filed Nov. 12, 2020). Private counsel brought Title VII and Nevada employment discrimination claims on behalf of a transgender woman who was denied coverage under her self-funded employer plan. The case settled pursuant to an Early Neutral Evaluation Conference.[178]

2020) (order on motion to dismiss), https://www.courtlistener.com/docket/16702124/pangborn-v-care-alternatives-of-massachusetts-llc/#entry-27.

[175] http://transgenderlegal.org/headline_show.php?id=985.

[176] https://www.lambdalegal.org/in-court/cases/kadel-v-folwell.

[177] ACLU Files Lawsuit against the State of Arizona, Arizona Board of Regents for Denying Gender-Confirming Care to Transgender Employees, Jan. 24, 2018, https://www.acluaz.org/en/press-releases/aclu-files-lawsuit-against-state-arizona-arizona-board-regents-denying-gender.

[178] https://www.courtlistener.com/docket/18625423/duex-v-las-vegas-resort-holdings-llc.

- *In re Anderson* (Colo. Civil Rts. Div. 2020) Lambda Legal filed charges of discrimination on behalf of Niamh Anderson against the Town of Limon, the Colorado Employer Benefit Trust (CEBT) and health plan administrators alleging violations of the Colorado Anti-Discrimination Act, which prohibits discrimination on the basis of transgender status in employment. CEBT paid all of Anderson's claim and removed the categorical transgender healthcare exclusion from the plan, which covers 33,000 members and over 350 participating groups.[179]

- *Ketcham v. Regence BlueCross BlueShield of Oregon*, No. 19CV31838 (Or. Cir. Ct. filed July 18, 2019). On behalf of a county employee, the National Center for Lesbian Rights brought state constitutional, employment, insurance, and public accommodation nondiscrimination claims against her employer, self-funded plan, and third-party administrator to challenge the denial of facial gender reassignment surgery. The employer and self-funded plan settled for $345,000 in damages plus $70,000 in attorneys' fees where a clinical policy excluded coverage for facial reassignment surgery. The third-party administrator paid an additional $60,000 in damages.[180]

- *Moore v. InnoSource*, (Colo. Civil Rts. Div. filed Feb. 11, 2019). The ACLU filed an employment discrimination complaint on behalf of Dashir Moore regarding an exclusion in a self-funded plan. The matter was settled, including removal of the exclusion.[181]

- *Musgrove v. Board of Regents of the Univ. of Georgia*, No. 3:18-cv-00080-CDL (M.D. Ga. filed Jun. 28, 2018). This case was brought on behalf a University of Georgia employee who was denied coverage for surgery due to an explicit exclusion in a self-funded plan. There were Title VII, ADA, Rehabilitation Act, Title IX, and Equal Protection claims. The matter

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[179] Lambda Legal, Anti-Transgender Exclusion Removed from Colorado Group Health Plan, June 10, 2020, https://www.lambdalegal.org/blog/20200610_victory-anti-trans-exclusion-colorao.

[180] National Center for Lesbian Rights, *Parties Settle Landmark Lawsuit by Transgender Employee Who Was Unlawfully Denied Medically Necessary Care* (Mar. 3, 2020), http://www.nclrights.org/press-room/press-release/parties-settle-landmark-lawsuit-by-transgender-employee-who-was-unlawfully-denied-medically-necessary-care; *Ketcham v. Regence BlueCross BlueShield of Oregon*, No. 19CV31838 (Or. Cir. Ct. filed July 18, 2019); Email from NCLR to TLDEF (Sept. 2, 2020).

[181] ACLU: Colorado Company Denied Health Care Coverage to Transgender Man, Feb. 11, 2019, https://www.aclu.org/news/aclu-colorado-company-denied-health-care-coverage-transgender-man; ACLU Settles Case: Colorado Company Can No Longer Discriminate Against Transgender Individuals, Sept. 25, 2019, https://www.aclu.org/press-releases/aclu-settles-case-colorado-company-can-no-longer-discriminate-against-transgender.

settled for $100,000 and removal of the exclusion.[182]

- *Fletcher v. Alaska*, No. 1:18-cv-00007-HRH (D. Alaska filed Jun. 5, 2018). In this Lambda Legal case, Ms. Fletcher, a State of Alaska legislative librarian, brought a Title VII challenge to a blanket exclusion in the state employee health plan.[183] The court issued summary judgment in favor of the plaintiff, and the State agreed to damages of $70,000 plus attorneys' fees.[184]

- *Morton v. Spectrum Health*, No. 1:18-cv-00371 (W.D. Mich. filed Apr. 2, 2018). Ms. Morton brought § 1557 and Title VII claims against her employer, a health care provider, that had an explicit exclusion in its self-funded employee health plan. The matter was resolved.[185]

- *Elyn Fritz-Waters vs. Iowa State Univ.*, No. 02851 LACV050531 (Iowa Dist. Ct. filed Jan. 2, 2018). An Iowa State University employee won a settlement of $28,000.[186] The Iowa Board of Regents removed the exclusion from its self-funded plan after the suit was filed.

- *Simonson v. Oswego County*, No. 5:17-cv-01309-MAD-DEP (N.D.N.Y. filed Nov. 30, 2017). The EEOC found reasonable cause that Oswego County discriminated against a retired employee under Title VII due to his "sex (transgender status/gender identity)" by denying him medical benefit coverage pursuant to a blanket gender dysphoria treatment exclusion.[187]

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[182] Eric Stirgus, *UGA employee says settlement is step forward for transgender rights*, Atlanta Journal-Constitution, Oct. 1, 2019, https://www.ajc.com/news/local-education/uga-employee-says-settlement-step-forward-for-transgender-rights/Rfq95Ylk4XmWrt2Idn5iNN.

[183] https://www.lambdalegal.org/in-court/cases/fletcher-v-alaska.

[184] Stipulated Final Judgment and Order, Fletcher v. State of Alaska, ECF 69, (D. Alaska June 15, 2020), https://www.courtlistener.com/docket/7047744/fletcher-v-state/#entry-69.

[185] Stipulation of Dismissal, Morton v. Spectrum Health, No. 1:18-cv-00371 (W.D. Mich. Oct. 5, 2018), ECF No. 12.

[186] Jason Clayworth, *Transgender woman's health discrimination claim against Iowa State University settled for $28,000*, Des Moines Register, May 7, 2019, https://www.desmoinesregister.com/story/news/2019/05/07/iowa-state-university-may-settle-transgender-health-discrimination-claim/1129169001.

[187] 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.

The NY Attorney General announced a settlement in the case, stating that Oswego County's categorical exclusion violated Title VII and the NY State Human Rights Law.[188] Lambda Legal filed suit on behalf of Mr. Simonson seeking compensation for past care denied to him.[189] The case settled for $35,000.[190]

- *Bruce v. South Dakota*, No. 5:17-cv-05080-JLV (D.S.D. filed Oct. 13, 2017). In this ACLU case, Mr. Bruce brought Title VII and Equal Protection claims challenging a blanket exclusion in the South Dakota state employee health plan. He had been unable to access treatment, and the case was voluntarily dismissed following Mr. Bruce's death by suicide.[191]

- *Enstad v. PeaceHealth*, No. 2:17-cv-01496-RSM (W.D. Wash. filed Oct. 6, 2017). The ACLU filed a lawsuit against PeaceHealth, a Catholic healthcare organization, on behalf of an employee and her teenage son for denying coverage for trans-related surgery under its self-funded employee health benefits plan. She brought § 1557 and Washington Law Against Discrimination claims. The plan removed the exclusion prior to filing the complaint and the case settled.[192]

- *Vroegh v. Iowa Dep't of Corr.* (filed Iowa 2017). The ACLU filed a complaint with the Iowa Civil Rights Commission, which found probable cause that the DOC had discriminated against the plaintiff for having a transgender exclusion in its self-funded employee health plan. Vroegh brought Iowa Civil Rights Act and state equal protection claims. A jury

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[188] 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.

[189] 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.

[190] Lambda Legal, *Victory! Lambda Legal Obtains Settlement for Oswego County Transgender Employee Denied Coverage for Transition-Related Care* (Aug. 21, 2018), https://www.lambdalegal.org/news/ny_20180821_victory-settlement-for-oswego-county-transgender-employee. Settlement agreement on file with TLDEF.

[191] Jonathan Ellis, *Lawsuit challenging state transgender policy dismissed after plaintiff dies*, Argus Leader, Jan 15, 2019, https://www.argusleader.com/story/news/2019/01/15/lawsuit-challenging-s-d-transgender-policy-dismissed-after-plaintiff-dies-terri-bruce/2584567002.

[192] Allan Brettman, *PeaceHealth, ACLU settle transgender lawsuit*, The Columbian, Dec. 21, 2018, https://www.columbian.com/news/2018/dec/21/peacehealth-aclu-settle-transgender-lawsuit.

awarded him $120,000 in damages.[193]

- *Boyden v. Conlin* (filed April 7, 2017). The ACLU filed on behalf of Wisconsin state employees who were denied care under an exclusion in their self-funded plans. The court found the employer and third-party administrator liable under Title VII, § 1557, and Equal Protection. Just prior to the ruling, noting that the "legal landscape" had changed, the Wisconsin Group Insurance Board voted to voluntarily remove the exclusion. A jury issued a $780,500 verdict for the plaintiffs, including reimbursement for facial gender reassignment surgery.[194]

- *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 surgery. The National Center for Lesbian Rights filed suit against the Library under Title VII and the federal Equal Protection Clause and against Anthem under § 1557. The case settled.[195]

- *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."[196] The EEOC submitted an amicus

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[193] Courtney Crowder, *Transgender nurse barred from using men's restroom wins discrimination suit against the state*, DES MOINES REGISTER, Feb. 13, 2019 https://www.desmoinesregister.com/story/news/local/columnists/courtney-crowder/2019/02/13/transgender-prison-nurse-sues-iowa-alleged-discrimination-aclu-state-civil-rights-corrections/2863854002.

[194] Stenographic Transcript of Second Day of Jury Trial Held Before U.S. District Judge William M. Conley at 144-145, Boyden v. Wisconsin, No. 17-CV-264-WMC (D. Wisc. Jun. 7, 2019), ECF No. 261, http://files.eqcf.org/cases/317-cv-00264-261 (awarding $780,500 in damages to two plaintiffs, including for reimbursement of facial gender reassignment surgery).

[195] 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.

[196] Robinson v. Dignity Health, No. 4:16-cv-03035-YGR (N.D. Cal. filed June 6, 2016) (complaint exhibit A), https://transhealthproject.org/documents/20/2016-05-12_Robinson_EEOC_determination.pdf.

brief.[197] The case settled for $25,000,[198] 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). The EEOC announced the settlement of a transgender discrimination case for $115,000.[199] The consent decree provides that the defendant's national self-funded health benefits plan will not include any partial or categorical exclusion for otherwise medically necessary care based on transgender status.

VIII. Conclusion

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

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[197] 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_eeoc_amicus_brief_2016.08.22.pdf.

[198] 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.

[199] 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; EEOC and Britney Austin v. Deluxe Fin. Servs., Inc., No. 0:15-cv-02646, ECF No. 37 ¶ 30 (D. Minn. entered Jan. 20, 2016) (requiring Deluxe to maintain health plan without "partial or categorical exclusions for otherwise medically necessary care solely on the basis of sex (including transgender status) and gender dysphoria"); *see also EEOC v. Product Fabricators, Inc.*, 666 F.3d 1170, 1172-73 (8th Cir. 2012) (recognizing that a district court will not enter consent decree without implicitly finding it has jurisdiction over the injuries redressed therein).