Table of Contents

I. Introduction: Excluding transgender-related health care is discriminatory .... 2

II. Plans that exclude transgender care have fallen behind other health plans. . 5

III. Cost is not a legitimate basis to exclude transgender care ...................... 12

IV. Federal nondiscrimination law prohibits transgender exclusions in employee health plans ................................................................. 14
   A. Americans with Disabilities Act – Disability Discrimination .......... 14
   B. Section 504 of the Rehabilitation Act – Disability Discrimination .. 17
   C. Title VII – Sex Discrimination ..................................................... 18
   D. Title IX – Sex Discrimination .................................................... 25
   E. Liability of Third-Party Administrators ........................................ 26
   F. Duty of Fair Representation ....................................................... 28
   G. Executive Order (EO) 11246 – Federal Contractors ................. 28
   H. Section 1557 of the Affordable Care Act .................................... 29

V. ERISA prohibits clinical policies that do not reflect current standards of care. ............................................................................. 32

VI. The Federal Equal Protection Clause prohibits transgender exclusions .... 33
   A. Sex-Based Classification – Heightened Scrutiny ......................... 33
   B. Transgender-Based Classification - Heightened Scrutiny ............... 36
   C. Animus-Based Exclusion - Rational Basis ................................. 37

VII. Settlements and pending cases involving transgender exclusions in employer health plans ................................................................. 37
   A. Pending Matters ........................................................................ 37
   B. Resolved Cases .......................................................................... 39
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 19641 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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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


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 Psychosomatic 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. 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, 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.

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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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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, and comply with nondiscrimination laws. 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.”

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. Colleges and universities have also increasingly removed exclusions from student and staff health plans.

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

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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.


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. At least 24 states plus the District of Columbia cover gender dysphoria treatments in their Medicaid plans, and courts have repeatedly struck down blanket exclusions under Medicaid. Twenty-three states plus the District of Columbia have laws, regulations, or

(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.’”).


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-00600-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,

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).


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’onta v. Johnson, 708 F.3d 520 (4th Cir. 2013) (finding that denial of sex reassignment surgery states an Eighth 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. Farrrier, 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.\textsuperscript{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\textsuperscript{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.\textsuperscript{28} UnitedHealthcare’s policy similarly states that where the stated criteria are

\footnotesize{will.”);}\textit{Edmo}, 935 F.3d at 797 (ordering gender-confirmation surgery as its denial was an Eighth Amendment violation and rejecting analysis in \textit{Gibson v. Collier}, 920 F.3d 212, 215 (5th Cir. 2019)); \textit{De’lonta v. Johnson}, 708 F.3d 520 (4th Cir. 2013) (declining to dismiss an Eighth Amendment claim where the prison provided psychological counseling and hormones but not surgery); \textit{Fields}, 653 F.3d at 556 (striking down a Wisconsin statute that barred comprehensive transgender healthcare to prisoners as an Eighth 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); \textit{Hicklin v. Precyntae}, 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, 2013) (agreeing to provide incarcerated trans woman with surgery and pay attorney’s fees); \textit{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); \textit{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.”); \textit{Brooks v. Berg}, 270 F. Supp. 2d 302, 312 (N.D.N.Y 2003) \textit{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”). \textit{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).


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

\textsuperscript{28} Aetna, \textit{Clinical Policy Bulletin: Gender Reassignment Surgery},
met, the procedures are “medically necessary and covered as a proven benefit.”

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).

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


29 UnitedHealthcare, Medical Coverage Policy: Gender Dysphoria Treatment,

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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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


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 transgender52 and not all transgender individuals undergo all available treatments.

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


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).


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.\textsuperscript{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.”\textsuperscript{54}

\textbf{IV. Federal nondiscrimination law prohibits transgender exclusions in employee health plans.}

\textbf{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),\textsuperscript{55} public services (Title II),\textsuperscript{56} and public accommodations (Title III).\textsuperscript{57} While the ADA contains a provision that purports to exclude coverage for “gender identity disorders not resulting from physical impairments”\textsuperscript{58} that exclusion appears to be patently unconstitutional to the extent it applies to gender dysphoria, and indeed

\textsuperscript{53} Cal. Economic Impact Assessment, \textit{supra} note 45, at 9-12.


\textsuperscript{55} \textit{Lange}, 499 F. Supp. 3d at 1270 (rejecting a motion to dismiss that argued gender dysphoria is not a disability under the ADA); \textit{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 \textit{Doe v. Northrop Grumman Sys. Corp.}, 418 F. Supp. 3d 921, 930 (N.D. Ala. 2019) and \textit{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.

\textsuperscript{56} \textit{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); \textit{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); \textit{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.”).


\textsuperscript{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.\(^\text{59}\) The ADA prohibits employers from discriminating on the basis of disability in the provision of health insurance to their employees\(^\text{60}\) and dependents\(^\text{61}\) whether or not the benefits are administered by the employer. Insurance companies may also be held liable under Title I\(^\text{62}\) and Title


\(^{60}\) 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 “acts[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\textsuperscript{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.\textsuperscript{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.\textsuperscript{65}

Covering only psychological treatment of gender dysphoria would not correct the requirement that the covered entity be an employer of the qualified individual.


\textsuperscript{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).

\textsuperscript{65} \textit{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”); \textit{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); \textit{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); \textit{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); \textit{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); \textit{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.”\(^{68}\)

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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
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. Under Title VII, “discrimination based on . . . transgender status necessarily entails discrimination based on sex.” Justice Gorsuch explained that the “statute’s message . . . is equally simple and momentous: An individual’s . . . transgender status is not relevant to employment decisions.” Thus, where an employer intentionally treats transgender employees worse than cisgender ones, the employer has committed unlawful sex discrimination.

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).

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. 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. A jury issued a $780,500 verdict for the plaintiffs, including reimbursement for facial gender reassignment surgery.

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. 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 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.

Supra notes 1-2.


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. Levassuer, 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


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.

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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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.


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

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, 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. 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.” 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. 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. 151 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 Insns 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.”)


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
Liability for transgender health care exclusions

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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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).


\section*{D. Title IX – Sex Discrimination}

insurance exclusion context.\textsuperscript{105} Cases to the contrary are readily distinguished.\textsuperscript{106} Education programs receiving federal funding are prohibited from discriminating on the basis of sex,\textsuperscript{107} including in employment,\textsuperscript{108} compensation,\textsuperscript{109} and fringe benefits.\textsuperscript{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.\textsuperscript{111}

\textbf{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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\textsuperscript{105} \textit{Kadel}, 446 F. Supp. 3d at 14.
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\textsuperscript{106} \textit{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 \textit{Evancho v. Pine–Richland Sch. Dist.}, 237 F. Supp. 3d 267, 287 (W.D. Pa. 2017) (“\textit{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, \textit{Johnston}’s prognostication of that reality was profoundly accurate.” (citation omitted)); \textit{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).
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\textsuperscript{107} 20 U.S.C. § 1681.
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\textsuperscript{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.”).
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\textsuperscript{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.”).
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\textsuperscript{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”).
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\textsuperscript{111} See, e.g., \textit{Kadel}, 446 F. Supp. 3d at 14-15 (reviewing Title VII caselaw pre-\textit{Bostock} and holding a transgender health exclusion violates Title IX).
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influenced by a third-party administrator. 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.” 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. 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. 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.” The agencies were found liable. Other courts have adopted the agency theory a wide variety of factual situations consistent with the law of agency.

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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).


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


116 *Id.*


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. 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.” The DFR governs union conduct in the negotiation and administration 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. More specifically, discrimination against a worker for being transgender states a claim of breach of the DFR. 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. Federal contractors are prohibited from discriminating against employees on the basis of transgender status.

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


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).


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”).


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. OFCCP specifically notes that “trans-exclusive health benefits offerings may constitute unlawful discrimination.” 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.”

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.

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, 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.

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. Courts have and continue to find that § 1557 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).


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).

Liability for transgender health care exclusions

itself—independent of any regulation—protects transgender individuals from
discrimination in health care in general, and that transgender insurance
exclusions in particular trigger sex discrimination protections under § 1557.
These cases have all settled. Trump-era regulations have not changed this
result. 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, including specifically in the insurance exclusion

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.


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.”)

context.  

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. The Trump administration repealed those regulations, but five lawsuits challenged the repeal. 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.

\[\text{sub nom., }\text{Dodds v. U.S. Dep’t of Educ., }845\ F.3d 217\ (6\text{th Cir. 2016}).\text{ See also }\text{Parents for Privacy v. Barr, }949\ F.3d 1210\ (9\text{th Cir. 2020}), \text{cert. denied, }141\ \text{S. Ct. 894 (2020)}; \text{Doe by & through Doe v. Boyertown Area Sch. Dist., }897\ F.3d 518, 533\ (3\text{d Cir. 2018})\text{ (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. }\text{Doe v. Boyertown Area Sch. Dist., }139\ \text{S. Ct. 2636 (2019)}; \text{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 }\text{Bostock. Johnston v. Univ. of Pittsburgh, 97 F. Supp. 3d 657 (W.D. Pa. Mar. 31, 2015)}\text{ (relying on outdated precedent to hold that Title IX does not prohibit discrimination based on gender identity or transgender status per se); }\text{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.


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. 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. Under the ACA, a group health plan includes an employee welfare benefit plan. A qualified health plan under the ACA must provide essential health benefits, including ambulatory patient services, hospitalization, mental health services, prescription drugs, and laboratory services. The court will analyze if the plan provides “meaningful access to the benefit.” 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. 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

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).


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:


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., 888 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

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


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.

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

158 Id.

159 Id.


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. 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. 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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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—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.

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. The court found that claims were stated under Section 1557 notwithstanding the Trump-era regulations.

- **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.”).


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


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). 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). 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.

**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.

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2020) (order on motion to dismiss),


• **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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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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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


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


brief. The case settled for $25,000, 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. 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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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).