IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA WESTERN DIVISION

TERRI BRUCE, *Plaintiff,* v. STATE OF SOUTH DAKOTA and LAURIE GILL, in her official capacity as Commissioner of the South Dakota Bureau of Human Resources, *Defendants.*	)	Case No. 17-5080

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The State of South Dakota provides healthcare coverage to State employees—including Plaintiff Mr. Bruce—through the South Dakota State Employee Health Plan ("SDSEHP" or the "Plan"). Under the Plan, beneficiaries are "entitled to Medically Necessary services and supplies, if provided by or under the direction of a Physician."[1] But the Plan singles out transgender employees for unequal treatment by categorically excluding coverage for all "[s]ervices or drugs related to gender transformations" for gender dysphoria.[2] As a result of the exclusion, the Plan denies all coverage for transition-related care for gender dysphoria even when that care would qualify as "Medically Necessary" under the Plan's generally applicable procedures.

Mr. Bruce has been prescribed hormone therapy and chest-reconstruction surgery as medical treatment for gender dysphoria. The American Medical Association, the American Psychological Association, the American Psychiatric Association, the Endocrine Society, and other major medical organization have all issued policy statements and guidelines declaring that these forms of treatments for gender dysphoria can be medically necessary for transgender individuals.[3] But the "gender transformation" exclusion deprives Mr. Bruce—and other transgender employees—of the opportunity to prove that their transition-related care for gender dysphoria is medically necessary under the same standards and procedures that apply to other medical conditions. Mr. Bruce

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[1] SDSEHP at 46 (Block Decl. Ex. 1)

[2] *Id.* at 56.

[3] Brown Expert Rep. & Decl. ¶ 29 (Block Decl. Ex. 5); Block Decl. Exs. 24-27.

seeks declaratory and injunctive relief requiring Defendants to remove the Plan's categorical exclusion of coverage for "services or drugs related to gender transformations" and evaluate whether Mr. Bruce's chest-reconstruction surgery and hormone therapy to treat his gender dysphoria are "Medically Necessary" in accordance with the Plan's generally applicable standards and procedures.

Under Supreme Court and Eighth Circuit precedent, the "gender transformation" exclusion violates Title VII of the Civil Rights Act of 1964 because it discriminates on the basis of sex, including a person's gender nonconformity and failure to adhere to sex stereotypes. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality); *Lewis v. Heartland Inns of Am.*, 591 F.3d 1033, 1040 (8th Cir. 2010). The "gender transformation" exclusion also violates the Equal Protection Clause under heightened scrutiny, or under any standard of scrutiny. The government may not reduce costs by arbitrarily discriminating between similarly situated groups. And if the Plan's generally applicable standards are sufficient to protect the health and safety of beneficiaries with respect to other medical conditions, there is no rational reason why those generally applicable standards are not sufficient to protect the health and safety of patients receiving transition-related care.

In a case with strikingly similar facts, the U.S. District Court for the Western District of Wisconsin recently held that a similar exclusion in Wisconsin's State-employee health plan discriminated against transgender employees on the basis of sex in violation of Title VII and the Fourteenth Amendment. *See Boyden v. Conlin*, 17-cv-264-wmc, 2018 WL 4473347 (W.D. Wis. Sept. 18, 2018). That decision is consistent with the

decisions of many other district courts—including two district courts within the Eighth Circuit—evaluating similar exclusions in the context of private health insurance, Medicaid programs, and prison health care policies. *See Tovar v. Essentia Health*., No. CV 16-100 (DWF/LIB), 2018 WL 4516949, at *3 (D. Minn. Sept. 20, 2018) (plaintiff stated valid claim that exclusion in insurance plan violated Section 1557 of the Affordable Care Act); *Flack v. Wis. Dep't of Health Servs.*, No. 18-CV-309-WMC, 2018 WL 3574875, at *12-*16 (W.D. Wis. July 25, 2018) (plaintiffs granted preliminary injunction on claims that exclusion in Wisconsin Medicaid statute violated Section 1557 of the Affordable Care Act and the Equal Protection Clause); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1118–21 (N.D. Cal. 2015) (plaintiff stated valid claim that exclusion in prison healthcare policy violated Equal Protection Clause); *see also Fields v. Smith*, 653 F.3d 550, 559 (7th Cir. 2011) (holding that Wisconsin statute prohibiting "even the consideration of hormones or surgery" as transition-related care for prisoners was facially invalid under Eighth Amendment); *Hicklin v. Precynthe*, No. 4:16-CV-01357-NCC, 2018 WL 806764, at *11 (E.D. Mo. Feb. 9, 2018) ("The denial of hormone therapy based on a blanket rule, rather than an individualized medical determination, constitutes deliberate indifference in violation of the Eighth Amendment.").

Moreover, because "[t]he inability to compete on equal footing is an injury in fact," *McDaniel v. Precythe*, 897 F.3d 946, 950 (8th Cir. 2018), Mr. Bruce is entitled to summary judgment as a matter of law. Although Defendants attempt to create a disputed question of fact with respect to whether transition-related care is medically necessary, Mr. Bruce merely seeks an equal opportunity to prove that his care is medically necessary

under the same standards and procedures that apply to other medical conditions. The undisputed facts show that the "gender transformation" exclusion denies him that equal opportunity, in violation of Title VII and the Fourteenth Amendment.

STATEMENT OF FACTS

Transgender Individuals and Gender Dysphoria

Plaintiff Terri Bruce is a man who is transgender, which means that he has a male gender identity but the sex assigned to him at birth was female. Mr. Bruce has obtained a South Dakota State court order declaring that his legal gender is male, and he has a passport and birth certificate reflecting a male gender marker.[4]

Typically, people who are designated female at birth based on their external anatomy identify as girls or women, and people who are designated male at birth identify as boys or men. For transgender individuals, however, the sense of one's self—one's gender identity—differs from the sex assigned to them at birth.[5] Transgender men are men who were assigned "female" at birth, but have a male gender identity. Transgender women are women who were assigned "male" at birth, but have a female gender identity. Experts agree that gender identity has a biological component, meaning that each person's gender identity (transgender and non-transgender individuals alike) is the result of biological factors, and not just social, cultural, and behavioral ones.[6]

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[4] Bruce Decl. ¶¶ 6-7.

[5] Brown Expert Rep. & Decl. ¶ 17 (Block Decl. Ex. 5); Hruz Expert Decl. ¶ 21 (Block Decl. Ex. 10).

[6] Brown Expert Rep. & Decl. ¶ 18; Hruz Expert Decl. ¶ 35.

Being transgender is not a mental disorder.[7] Men and women who are transgender have no impairment in judgment, stability, reliability, or general social or vocational capabilities solely because of their transgender status.[8] But transgender men and women may require treatment for "gender dysphoria," the diagnostic term for the clinically significant emotional distress experienced as a result of the incongruence of one's gender with their assigned sex and the physiological developments associated with that sex. [9] Gender dysphoria is a serious medical condition codified in the Diagnostic and Statistical Manual of Mental Disorders (DSM-V) and International Classification of Diseases (ICD-10).[10] The criteria for diagnosing gender dysphoria are set forth in the DSM-V (302.85). The clinically significant emotional distress experienced as a result of the incongruence of one's gender with their assigned sex and the physiological developments associated with that sex is the hallmark symptom associated with gender dysphoria.[11]

The parties have both offered expert testimony regarding the medical necessity of transition-related care for gender dysphoria. Plaintiffs have submitted expert testimony

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[7] Brown Expert Rep. & Decl. ¶ 21.

[8] *Id.*; *accord* Am. Pyschiatric Ass'n, Position Statement on Discrimination Against Transgender and Gender Diverse Individuals (July 2018), at https://www.psychiatry.org/File%20Library/About-APA/Organization-Documents-Policies/Policies/Position-2018-Discrimination-Against-Transgender-and-Gender-Diverse-Individuals.pdf.

[9] Brown Expert Rep. & Decl. ¶ 22; Hruz Expert Decl. ¶ 22.

[10] Brown Expert Rep. & Decl. ¶ 22; Hruz Expert Decl. ¶ 22.

[11] Brown Expert Rep. & Decl. ¶ 24.

from Dr. George Brown[12] and Dr. Loren Schechter,[13] who are widely recognized as experts in the field with decades of experience treating transgender patients and publishing peer-reviewed research.[14]

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[12] *See generally* Brown Expert Rep. & Decl.; Brown Supp. Rep. & Declaration (Block Decl. Ex. 6); Brown Reply Rep. & Decl. (Block Decl. Ex. 7); Brown CV (Block Decl. Ex. 8). Dr. Brown is a Professor of Psychiatry and the Associate Chairman for Veterans Affairs in the Department of Psychiatry at the East Tennessee State University, Quillen College of Medicine. Brown Expert Rep. & Decl. ¶ 4. For three decades, Dr. Brown's research and clinical practice has included extensive study of health care for transgender individuals. *Id.* ¶ 9. He has authored or coauthored 43 papers in peer-reviewed journals and 21 book chapters on topics related to gender dysphoria and health care for transgender individuals, including the chapter concerning gender dysphoria in Treatments of Psychiatric Disorders (3d ed. 2001), a definitive medical text published by the American Psychiatric Association. *Id*. Over the last 35 years, Dr. Brown has evaluated, treated, and/or conducted research personally with 600-1,000 individuals with gender dysphoria and other issues related to gender identity and, as part of research, conducted chart reviews of over 5,100 patients with gender dysphoria. *Id.* ¶ 8.

[13] *See generally* Schechter Rebuttal Rep. & Decl. (Block Decl. Ex. 9). Dr. Schechter is the Medical Director of the Center for Gender Confirmation Surgery at Weiss Memorial Hospital. *Id.* ¶ 12. He is the site director for a fellowship in reconstructive urology and gender surgery at Weiss Memorial Hospital in Chicago and founded the surgical fellowship in gender surgery at Weiss Memorial Hospital in Chicago. *Id.* Dr. Schechter has been performing gender confirming surgeries for over 18 years and has performed over 500 gender confirming surgeries during his medical career. *Id.* ¶ 8. Dr. Schechter has written a number of peer-reviewed journal articles and chapters in professional textbooks about gender confirmation surgeries. *Id.* ¶ 10. He is also a guest reviewer for the *Journal of Plastic and Reconstructive Surgery*, the *Journal of Reconstructive Microsurgery*, and the *Journal of Sexual Medicine*. Each of these publications is a peer-reviewed medical journal. *Id.* ¶ 11.

[14] *See Keohane v. Jones*, No. 4:16CV511-MW/CAS, 2018 WL 4006798, at *3 (N.D. Fla. Aug. 22, 2018) (relying on expert testimony of Dr. Brown); *Fields v. Smith*, 712 F. Supp. 2d 830, 839 (E.D. Wis. 2010), *supplemented* (July 9, 2010), *aff'd*, 653 F.3d 550 (7th Cir. 2011) (same); *Flack v. Wis. Dep't of Health Servs.*, No. 18-CV-309-WMC, 2018 WL 3574875, at *12 (W.D. Wis. July 25, 2018) (relying on expert testimony from Dr. Schechter).

For their part, Defendants have offered putative expert testimony from Dr. Paul Hruz, a pediatric endocrinologist, and Dr. David Sutphin, a plastic surgeon.[15] Neither of Defendants' designated expert witnesses has treated a patient for gender dysphoria; neither one has conducted research studies on treatment of gender dysphoria; and neither one has published on gender dysphoria in a peer-reviewed journal.[16]

Plaintiff doubts that either Dr. Sutphin or Dr. Hruz would qualify as expert witnesses on the topic of gender dysphoria or transition-related care under Federal Rule of Evidence 702. But even if Defendants' witnesses were accepted as experts and even if all inferences are drawn in Defendants' favor, the Plaintiff is entitled to summary judgment because the following facts are undisputed:

The World Professional Association for Transgender Health ("WPATH") has published Standards of Care for treating gender dysphoria.[17] Under the WPATH

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[15] Hruz Expert Decl. (Block Decl. Ex. 10); Sutphin Expert Decl. (Block Decl. Ex. 11).

[16] Hruz Dep. at 14, 26, 43-44, 49-50 (Block Decl. Ex. 12); Sutphin Dep. at 25, 27-28 (Block Decl. Ex. 13). Dr. Hruz has written two articles related to gender dysphoria in religiously affiliated publications that are not peer-reviewed. The first article was published in *The New Atlantis*, which is a quarterly publication from a socially conservative advocacy group "dedicated to applying the Judeo-Christian moral tradition to critical issues of public policy." Hruz Dep. at 43-44, 49. The second article was published in *Catholic Bioethics Quarterly*. *Id.* a 43-44. Dr. Hruz wrote the article as a final paper for the correspondence course he took with the National Catholic Bioethics Center. *Id.* at 67. In the article Dr. Hruz wrote: "The readily-accepted view that reproductive capacity can be disassociated from what it means to be male and female, which has grown from the seeds of 'biological mutiny,' that began with the acceptance of contraception as a solution to difficult social circumstances must be held to close scrutiny in assessing the morality of cross-sex steroid use." *Id.* at 93-94.

[17] Brown Expert Rep. & Decl. ¶ 30.

standards, medically necessary treatment for gender dysphoria may require medical steps to affirm one's gender identity and transition from living as one gender to another. [18] This treatment, often referred to as transition-related care, may include hormone therapy, surgery (sometimes called "sex reassignment surgery" or "gender confirmation surgery"), and other medical services that align individuals' bodies with their gender identities. [19] Under each patient's treatment plan, the goal is to enable the individual to live all aspects of one's life consistent with his or her gender identity, thereby eliminating the distress associated with the incongruence. [20] Under the WPATH standards, the exact medical treatment varies based on the individualized needs of the person.[21]

In the past, public and private insurance companies excluded coverage for transition-related care based on the assumption that such treatments were cosmetic or experimental. Today, however, the American Medical Association, the American Psychological Association, the American Psychiatric Association, the Endocrine Society, and other major medical organizations have issued policy statements and guidelines supporting health-care coverage for transition-related care as medically necessary under contemporary standards of care.[22] No major medical organization has taken the position

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[18] Brown Expert Rep. & Decl. ¶ 31.

[19] *Id.*

[20] *Id.* ¶ 32.

[21] *Id.*

[22] *Id.* ¶ 29; Block Decl. Exs. 24-27.

that transition related-care is *not* medically necessary or advocated in favor of a categorical ban on insurance coverage for transition-related procedures.[23]

Transition-related care is now routinely covered by private and public insurance programs. The coverage guidelines for Aetna, Anthem, Blue Cross Blue Shield of North Dakota, Cigna, and United Healthcare all provide coverage for gender confirmation surgery as medically necessary treatment for gender dysphoria.[24] Medicare began covering transition-related surgery in 2014 after an independent medical board in the U.S. Department of Health & Human Services rescinded an old Medicare policy that had excluded surgery from Medicare coverage.[25] The decision explained that the Medicare surgery exclusion was based on a medical review conducted in 1981 and failed to take into account subsequent developments in surgical techniques and medical research. The Board stated: "We have no difficulty concluding that the new evidence, which includes medical studies published in the more than 32 years since issuance of the 1981 report underlying the" surgery exclusion "demonstrates that transsexual surgery is safe and effective and not experimental."[26] The decision also noted that even without long-term

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[23] The American College of Pediatricians, which Defendants cite in their answer to interrogatories, *see* Def. 1st Supp. Response to Interrogatory 1, at 5-6 (Block Decl. Ex. 4), is a small advocacy organization founded in 2002 to oppose allowing same-sex couples to adopt children. *See* Brown Supp. Report & Decl. ¶ 31. It should not be confused with the mainstream American Academy of Pediatrics (with over 65,000 members founded over 85 years ago), which supports transition-related care. *Id.*

[24] Block Decl. Exs. 17 – 21.

[25] Brown Expert Rep. & Decl. ¶ 40; HHS DAB Decision (Block Decl. Ex. 23).

[26] HHS DAB Decision at 8.

randomized studies, there was "a consensus among researchers and mainstream medical organizations that transsexual surgery is an effective, safe and medically necessary treatment for [gender dysphoria]."[27] In 2016, the Center for Medicare & Medicaid Services ("CMS") reaffirmed that transition-related surgery "may be a reasonable and necessary service for certain beneficiaries with gender dysphoria" and that "coverage is available for gender reassignment surgery when determined reasonable and necessary . . . on a case-by-case basis."[28]

Mr. Bruce's South Dakota State Employee Health Plan

For nearly ten years, Mr. Bruce has worked at the South Dakota State Historical Society Archaeological Research Center.[29] Mr. Bruce has been receiving hormone therapy prescribed by his physician as part of his treatment for gender dysphoria since 2011.[30] His physicians have also prescribed chest-reconstruction surgery in accordance with the WPATH Standards of Care.[31]

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[27] *Id.* at 20.

[28] Brown Supp. Report & Decl. ¶ 8; CMS Decision Memo at 51-52, 54 (Block Decl. Ex. 24). Although CMS determined that there were not enough long-term controlled studies involving the Medicare population to set national coverage standards, CMS did not authorize providers to categorically exclude coverage without determining medical necessity on an individualized case-by-case base.

[29] Def.'s Answer to Am. Compl. ¶ 4 (ECF No. 26).

[30] Bruce Decl. ¶ 7.

[31] *Id.* ¶ 10.

The State of South Dakota provides healthcare coverage to State employees—including Mr. Bruce—through the South Dakota State Employee Health Plan.[32] Defendant Laurie Gill is Commissioner of the South Dakota Bureau of Human Resources, which is the State agency responsible for designing and administering the Plan, including the administration and payment of claims. [33] Under the Plan, beneficiaries are generally "entitled to Medically Necessary services and supplies, if provided by or under the direction of a Physician."[34] The Plan defines "Medically Necessary" as "Health care services or supplies needed to prevent, diagnose or treat an illness, injury, condition, disease or its symptoms and that meet accepted standards of medicine."[35]

The South Dakota Bureau of Human Resources contracts with a company called Health Management Partners ("HMP") to determine whether treatments meet the Plan's definition of "medically necessary."[36] To make that determination, HMP uses an evidence-based guideline software called the Milliman Care Guidelines.[37] The undisputed evidence shows that HMP has *never* denied authorization for a procedure approved by the Milliman Care Guidelines based on lack of medical necessity.[38] In 2018, the Milliman Care Guidelines issued a guideline authorizing coverage for transition-

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[32] Def.'s Answer to Am. Compl. ¶ 2.

[33] Am. Compl. ¶ 17 (ECF No. 24); Def.'s Answer to Am. Compl. ¶ 13.

[34] Def.'s Answer to Am. Compl. ¶ 2; SDSEHP at 46.

[35] Def.'s Answer to Am. Compl. ¶ 2; SDSEHP at 11.

[36] Gill Dep. at 45 (Block Decl. Ex 14).

[37] Def.'s 1st Supp. Response to 2d Set of Interrogatories at 1 (Block Decl. Ex 4).

[38] Luther Dep. at 12-13, 42-43 (Block Decl. Ex 16)

related care for gender dysphoria, including chest-reconstruction surgery, when prescribed in accordance with the WPATH Standards of Care.[39]

In the event that HMP determines that a treatment is not medically necessary, the Plan also gives beneficiaries the right to request an independent review in accordance with regulations from the South Dakota Department of Labor and Regulation, Division of Insurance.[40] Under those regulations, if a beneficiary requests an external review from an adverse benefit determination, an independent review organization selects an independent clinical reviewer to hear the appeal.[41] That independent reviewer must "[b]e an expert in the treatment of the covered person's medical condition that is the subject of the external review" and "[b]e knowledgeable about the recommended health care service or treatment through recent or current actual clinical experience treating patients with the same or similar medical condition of the covered person." *See* ARSD § 20:06:53:58. Defendants do not play any role in selecting the independent clinical reviewer or presenting evidence, and if the independent clinical reviewer rules in favor of the beneficiary, that decision is binding on Defendants and cannot be further appealed.[42]

Despite the Plan's broad coverage generally provided for "medically necessary" care and the recommendation of the Milliman Care Guidelines, the Plan categorically

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[39] Block Decl. Exs 31-32.

[40] Steckel Dep. at 19 (Block Decl. Ex 15).

[41] *Id.* at 23.

[42] Steckel Dep. at 23-24.

excludes coverage for all "[s]ervices or drugs related to gender transformations."[43] As a result of the exclusion, the Plan denies all coverage for transition-related care even when that care would qualify as "medically necessary" under the Plan's generally applicable procedures.[44] Beneficiaries thus have no opportunity to establish that their transition-related care is medically necessary before HMP or an independent reviewer. [45]

The "gender transformation" exclusion dates back to the early 1990s.[46] Defendants do not know the original justification for excluding transition-related care from the Plan, and they have never evaluated whether the exclusion is medically appropriate.[47] When asked how the exclusion serves the State's interest in providing safe and effective care, Commissioner Gill testified: "We have a list of exclusions. They are there, they have been there for a long time, and they exist, and we have not . . . in my memory removed an exclusion up and to this point. It is what it is."[48]

In May 2016, Mr. Bruce's physician asked the Plan to preauthorize coverage for chest-reconstruction surgery to treat Mr. Bruce's gender dysphoria, but the Plan denied coverage based on the "gender transformation" exclusion without ever assessing whether

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[43] Def.'s Answer to Am. Compl. ¶ 3; SDSEHP at 56.

[44] Def.'s Answer to Am. Compl. ¶ 3.

[45] Steckel Dep. at 25-26. Mr. Bruce requested an external review of the Plan's refusal to authorize his chest-reconstruction surgery, but the external reviewer upheld the denial based on the "gender transformation" exclusion without making any determination as to whether the surgery was medically necessary. *Id.* at 17.

[46] Gill Dep. at 9.

[47] *Id.* at 9-10.

[48] *Id.* at 49-50.

the procedure would have qualified as medically necessary.[49] Mr. Bruce then filed a Title VII charge of discrimination with the Equal Employment Opportunity Commission ("EEOC").[50]

After Mr. Bruce filed his EEOC charge, Defendants considered whether to retain or eliminate the exclusion.[51] In 2017, they made a decision to retain the "gender transformation" exclusion based *solely* on the goal of reducing costs.[52] Before deciding to retain the exclusion, Defendants never evaluated the medical literature regarding treatment for gender dysphoria or made any effort to determine whether the exclusion was consistent with contemporary standards of care.[53] Defendants also never evaluated whether covering transition-related care would be disproportionately costly as compared with comparable medical conditions.[54] Commissioner Gill testified that she could not think of *any* dollar amount she would be willing to spend from a cost perspective to cover treatment for gender dysphoria.[55]

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[49] Def.'s Answer to Am. Compl. ¶ 5; Steckel Dep. at 25-26.

[50] Am. Compl. ¶ 20; Def.'s Answer to Am. Compl. ¶ 15.

[51] Gill Dep. at 10.

[52] Defs.' Response to First Set of Interrogatories at 8 (Block Decl. Ex. 2); Gill Dep. at 17.

[53] Defs.' 1st Supp. Response to 2d Set of Interrogatories at 1 (Block Decl. Ex. 5); Gill Dep. at 18.

[54] Gill Dep. at 17 (admitting that 3-page document was the "sole basis" for decision).

[55] *Id.* at 25.

After the EEOC found reasonable cause to believe that discrimination had occurred and issued a right-to-sue letter,[56] Mr. Bruce filed this lawsuit seeking an opportunity to establish that his hormone therapy and surgery meets the Plan's definition of medical necessity in accordance with the Plan's generally applicable provisions. During litigation, Defendants asserted for the first time that the "gender transformation" exclusion advances a governmental interest in protecting patients from harmful and ineffective procedures.[57] But that *post hoc* litigation position is based on research conducted by Defendants' attorneys—not based on any medical judgment by Defendants themselves.[58] The undisputed evidence shows that Defendants' decision to maintain the gender transformation was based solely on controlling costs and not based on any concerns about the safety and efficacy of transition-related care. According to Commissioner Gill, "at that point our discussions were strictly financially based, and we didn't take any other information into consideration."[59]

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[56] Am Compl. ¶ 21; Def.'s Answer to Am. Compl. ¶ 15.

[57] Defs.' 1st Supp. Response to 1st Set of Interrogatories No.1, at 6-7.

[58] Gill Dep. at 43-44, 47. In support of their *post hoc* argument that transition-related care is not safe or effective, Defendants rely on many articles published by conservative advocacy organizations with religious objections to transition-related care such as the *The New Atlantis*, the Family Research Council, and the American College of Pediatricians. Defs.' 1st Supp. Answer to 1st Set of Interrogatories No.1, at 1-6. Defendants concede that they have never relied on those sources when determining care for *other* conditions is medically necessary under Plan. Defs.' 1st Supp. Answer to 2d Set of Interrogatories at 2.

[59] Gill Dep. at 18.

Mr. Bruce seeks a declaratory judgment and injunctive relief requiring Defendants to evaluate whether his treatments for gender dysphoria are "medically necessary" under the Plan's generally applicable standards and procedures.

ARGUMENT

I. Summary Judgment Standard

"[A] movant is entitled to summary judgment if the movant can 'show[] that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Keaton v. United States*, No. CV 16-5023-JLV, 2018 WL 4082510, at *2 (D.S.D. Aug. 27, 2018) (quoting Fed. R. Civ. P. 56(a)). "Only disputes over facts that might affect the outcome of the case under the governing substantive law will properly preclude summary judgment." *Id.* "Accordingly, 'the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.'" *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986)).

II. The "Gender Transformation" Exclusion Denies Transgender Employees an Equal Opportunity to Prove Their Care for Gender Dysphoria Is "Medically Necessary."

The "gender transformation" exclusion is facially invalid because it deprives transgender employees—including Mr. Bruce—of the opportunity to prove their transition-related care for gender dysphoria care is medically necessary under the same standards and procedures that apply to other medical conditions. Mr. Bruce seeks declaratory relief and an injunction prohibiting Defendants from categorically excluding

coverage for "services and drugs related to gender transformations" and requiring Defendants to evaluate whether Mr. Bruce's chest-reconstruction surgery and hormone medications qualify as "medically necessary" under the Plan. *Cf. Fields v. Smith*, 653 F.3d 550, 559 (7th Cir. 2011) (holding that Wisconsin statute prohibiting "even the consideration of hormones or surgery" as transition-related care for prisoners was facially invalid under Eighth Amendment); *Hicklin v. Precynthe*, No. 4:16-CV-01357-NCC, 2018 WL 806764, at *11 (E.D. Mo. Feb. 9, 2018) ("The denial of hormone therapy based on a blanket rule, rather than an individualized medical determination, constitutes deliberate indifference in violation of the Eighth Amendment.").

A. The Undisputed Evidence Establishes that Transition-Related Care for Gender Dysphoria Can Qualify as "Medically Necessary" Within the Definition of the Plan.

The undisputed evidence establishes that transition-related care can satisfy the Plan's definition of "medically necessary" when prescribed on an individualized basis in accordance with the WPATH Standards of Care. Under the Plan, "medically necessary" care is defined as: "Health care services or supplies needed to prevent, diagnose or treat an illness, injury, condition, disease or its symptoms and that meet accepted standards of medicine."[60] As previously noted, Defendants have failed to identify *any* mainstream medical organization that disputes the medical necessity of transition-related care or supports categorically denying coverage for transition-related procedures.

[60] SDSEHP at 11.

Defendants' designated expert witnesses disagree with all of these organizations and argue that transition-related care should not be accepted as medically necessary without long-term randomized clinical trials. The evidence at trial would show that Defendants are wrong.[61] But for purposes of this motion for summary judgment, Defendants' arguments are also irrelevant. Under the Plan, the question is whether a treatment is currently accepted as part of the standard of care, not whether the treatment *should* be accepted. As a purely objective matter, a medical treatment that is endorsed as medically necessary by the American Medical Association, the American Psychiatric Association, the American Psychological Association, the National Endocrine Society and every other major medical organization that has addressed the issue is—by definition—a treatment that "meet[s] accepted standards of medicine."

Even the Milliman Care Guidelines—which Defendants rely upon to determine whether treatments are medically necessary for other conditions—authorize coverage for transition-related care for gender dysphoria, including chest-reconstruction surgery, when prescribed in accordance with the WPATH Standards of Care.[62] According to Defendants' own 30(b)(6) witness, the Milliman Care Guidelines are a "trustworthy

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[61] As Plaintiff's expert witness explained: "The level of evidence supporting accepted clinical guidance for gender dysphoria is the same type of evidence relied upon by the medical community to treat countless other medical conditions." Brown Rebuttal Report & Decl. ¶ 14. "Studies demonstrating that patients' conditions improved after treatment can be very informative, whether or not there are matched control groups." *Id.* (citation omitted). "Moreover, there is abundant clinical experience going back 50 years establishing the effectiveness of hormone therapy and surgeries as treatment for gender dysphoria in adults following accepted standards of care." *Id.*

[62] Block Decl. Exs. 21-32.

source" and their recommendations "are consistent with accepted medical practice."[63] Indeed, as noted above, the undisputed evidence shows that HMP has *never* denied authorization for a procedure approved by the Milliman Care Guidelines for lack of medical necessity.[64] The only occasions in which HMP departed from the Milliman Care Guidelines' recommendations regarding medical necessity were instances in which HMP *expanded* coverage by authorizing procedures as medically necessary even though the procedure was not yet approved by the Milliman Care Guidelines.[65]

Defendants, however, now attempt to hold Mr. Bruce and other beneficiaries seeking transition-related care to a different definition of "medically necessary" and a different standard of proof. Defendants' designated experts argue that more long-term randomized studies should be conducted before transition-related care is accepted as medically necessary, but they improperly equate the term "medically necessary" with "definitively proven." For example, Dr. Hruz concedes that physicians do not have to wait for long-term randomized studies before providing treatment, but (under his personal definition of "medically necessary") asserts that "we don't claim medical necessity for interventions that have not been proven definitively."[66]

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[63] Luther Dep. at 12.

[64] *Id.* at 12-13, 42-43.

[65] *Id.* at 42-43

[66] Hruz Dep. 197; *see also id.* at 175 ("My opinion is that it's inappropriate to present it as a definitive answer[.]"); *id.* at 227 ("[Clinical guidelines are] a starting point. They're not a definitive answer"); *id.* at 287 ("You don't discount low-quality studies, but you don't use them as the benchmark as far as making that determination that we've

Similarly, Dr. Sutphin acknowledges that randomized controlled trials cannot be done for many surgical procedures, but asserts that (in his personal opinion) transition-related care—unlike other procedures—should be supported by an "exceptional quality of data."[67] If the Plan required randomized controlled studies for every medical treatment, then not even tonsillectomies and appendectomies would qualify as medical necessary.[68] There is no feasible way to provide a placebo for many surgeries, including surgery for gender dysphoria, and ethical rules prohibit researchers from withholding treatment as part of a randomized trial.[69] Dr. Sutphin nevertheless demands that surgery for gender dysphoria—unlike surgery for other medical conditions—be justified by "an unprecedented level of support."[70]

That is not the standard of "medically necessary" under the Plan. Indeed, both Dr. Hruz and Dr. Sutphin testified that they have no expertise with respect to the definition of "medically necessary" in the Plan or the insurance industry more generally.[71] Far from requiring "definitive proof," Defendants' 30(b)(6) witness admitted that under the Milliman Care Guidelines, "even if the evidence of benefit is of less than a moderate

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solved the problem."); Hruz Expert Decl. ¶ 32 ("Limitations of the existing medical literature prevent definitive conclusions regarding long-term safety and efficacy.").

[67] Sutphin Expert Decl. ¶¶ 43, 46.

[68] Brown Supp. Report & Decl. ¶¶ 11-12.

[69] Brown Supp. Report & Decl. ¶ 10; Brown Rebuttal Report & Decl. ¶¶ 13, 19.

[70] Sutphin Dep. at 144.

[71] Hruz Dep. at 287-88 ("[T]here are some things that remain a mystery to me as far as why insurance companies will or will not approve of various therapies."); Sutphin Dep. at 26-27 ("I have no concept of what insurance companies do, don't do, or why they do what they do. I continue to be amazed.").

certainty and consists mainly of consensus, opinion of experts, case studies, and common standard care, it could still qualify as medically necessary under the South Dakota State Employee Health Plan."[72] For example, Defendants follow the Milliman Care Guidelines for gynecomastia, which authorize chest surgery to reduce breast tissue for non-transgender men even though the evidence of net benefit is "of less than a moderate certainty and consists mainly of consensus, opinion of experts, case studies, and common standard care."[73]

By demanding that transition-related care—but not care for other medical conditions—be supported by "definitive proof" and "an unprecedented level of support," Defendants attempt to hold transition-related care to a different and unequal standard.

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[72] Luther Dep. at 20.

[73] *Id.*; Block Decl. Ex. 29. Under the Milliman Care Guidelines, medical treatments can be authorized as medically necessary base *solely* on "Level 2" evidence and "Grade B" recommendations. Block Decl. Ex. 29; Luther Dep. at 19. "Level 2" evidence consisted of "[c]ohort studies with statistical adjustment for potential cofounders," "[c]ohort studies without adjustment," "[c]ase series with historical or literature controls," "[u]ncontrolled case series," "[p]ublished [g]uidelines, [p]olicies and [p]rocedures," and "[s]tatements in published articles or textbooks" Lech Decl. Exhibit 29 at 2-3. Grade B recommendations indicate that "[e]vidence demonstrates a net benefit but of less than moderate certainty and may consist of a consensus opinion of experts, case studies, and common standard care." *Id.* at 3.

By contrast, "Level 1" evidence generally consists of "[m]eta-analyses," "[r]andomized controlled trials with meta-analysis," "[r]andomized controlled trials," and "[s]ystematic reviews." *Id.* at 2. Grade A recommendations indicate that "[e]vidence demonstrates at least moderate certainty of at least moderate net benefit." *Id.* at 3. By demanding randomized controlled studies, Defendants' experts are insisting that transition-related care—unlike other medical treatments and common standards of care—be supported by "Level 1" evidence and "Grade A" recommendations.

B. The Undisputed Evidence Establishes That the "Gender Transformation" Exclusion Deprives Mr. Bruce of the Plan's Generally Applicable Standards and Procedures for Proving Medical Necessity.

Even if Defendants' evidence were sufficient to create a disputed question of fact with respect to whether transition-related care meets the Plan's definition of "medically necessary," Mr. Bruce would still be entitled to summary judgment because "[t]he inability to compete on equal footing is an injury in fact," *McDaniel v. Precythe*, 897 F.3d 946, 950 (8th Cir. 2018). The Supreme Court and the Eighth Circuit have made clear that "'[w]hen the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing.'" *Id.* (quoting *Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993)). Mr. Bruce merely seeks an opportunity to prove that his care is medically necessary under the same standards and procedures that apply to other medical conditions. To prevail on summary judgment, Bruce does not have to prove that transition-related care would ultimately qualify as medically necessary if the "gender transformation" exclusion were removed.

By short-circuiting the Plan's generally applicable procedures for determining medical necessity and trying to litigate the issue in this Court, Defendants are singling out transition-related care for a different and unequal set of standards and procedures. Most importantly, under the Plan, if a treatment is denied based on lack of medical necessity, beneficiaries have a right to request an independent review in accordance with

regulations from the South Dakota Department of Labor and Regulation, Division of Insurance.[74] Under those regulations, if a beneficiary requests an external review from an adverse benefit determination, an independent review organization selects an independent clinical reviewer to hear the appeal.[75] That independent reviewer must "[b]e an expert in the treatment of the covered person's medical condition that is the subject of the external review" and "[b]e knowledgeable about the recommended health care service or treatment through recent or current actual clinical experience treating patients with the same or similar medical condition of the covered person." *See* ARSD § 20:06:53:58. Defendants would not play any role in selecting the independent clinical reviewer, and if the independent clinical review rules in favor of the beneficiary, that decision would be binding on Defendants and could not be further appealed.[76]

Instead of providing Mr. Bruce and other transgender beneficiaries with the opportunity to have their healthcare evaluated by a neutral expert in the field, Defendants attempt to litigate the question in this court with two hand-picked putative experts who would not come close to satisfying the prerequisites for serving as an independent clinical reviewer. As noted above, neither of Defendants' designated experts has treated a patient for gender dysphoria; neither one has experience conducting research on the treatment of gender dysphoria; and neither one has published on the topic of gender dysphoria or transition-related care in a peer-reviewed scientific publication. Their testimony is no

[74] Steckel Dep. at 19.

[75] *Id.* at 23-24.

[76] *Id.* at 22.

substitute for the opportunity to have the issue of medical necessity evaluated by a neutral expert in the field.

III. The "Gender Transformation" Exclusion Violates Title VII.

The "gender transformation" exclusion violates Title VII, which prohibits employers from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). It is well-settled that Title VII prohibits employers from providing health insurance and other fringe benefits that facially discriminate on the basis of sex. *See Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1082 (1983); *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983); *City of L.A., Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978). "A benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion." *Hishon v. King & Spalding*, 467 U.S. 69, 75 (1984).

The "gender transformation" exclusion discriminates against transgender employees in violation of Title VII because it "is inherently based upon a sex-classification." *Whitaker v. Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017). Under the exclusion, the Plan grants or denies coverage for medically necessary surgery or hormone therapy based on a person's sex assigned at birth. *See Boyden v. Conlin*, 17-cv-264-wmc, 2018 WL 4473347, at *12 (W.D. Wis. Sept. 18, 2018); *Flack v. Wis. Dep't of Health Servs.*, No. 18-CV-309-WMC, 2018 WL 3574875, at *12 (W.D. Wis. July 25, 2018). The Plan covers medically necessary testosterone,

chest-reconstruction surgery, and phalloplasty only if the employee had a male sex assigned at birth. And the Plan covers medically necessarily estrogen, breast augmentation, and vaginoplasty only if the employee was assigned a female sex as birth. "As such, this is a 'straightforward case of sex discrimination.'" *Boyden*, 2018 WL 4473347, at *12 (quoting *Flack*, 2018 WL 3574875, at *12)).

The "gender transformation" exclusion also violates Title VII because it discriminates based on a person's gender nonconformity and failure to adhere to sex stereotypes. As the Supreme Court recognized in *Price Waterhouse v. Hopkins*, "assuming or insisting that [individual men and women] match[] the stereotype associated with their group" is discrimination because of sex. 490 U.S. 228, 251 (1989) (plurality). The plaintiff in *Price Waterhouse*, Ann Hopkins, was a female senior manager who was advised that if she wanted to become a partner in the firm she should be less "macho," take "a course in charm school," "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* at 235. The Supreme Court held that discriminating against Ms. Hopkins on these grounds constituted discrimination on the basis of sex under Title VII.[77] "After *Price Waterhouse*, an employer who discriminates against women because, for instance,

[77] All members of the Supreme Court agreed that the discrimination against Ann Hopkins—if proven—would violate Title VII, but they divided over which party should bear the burden of proving that discriminatory motives caused the adverse employment action. *See Price Waterhouse*, 490 U.S. at 251 (plurality) (shifting burden to defendant in mixed-motive case); *id.* at 259 (White, J., concurring) (same); *id.* at 273 (O'Connor, J., concurring) (same); *id.* at 295 (Kennedy, J., dissenting) (requiring plaintiff to show but-for causation).

they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination *would not occur but for the victim's sex*." *Lewis v. Heartland Inns of Am.*, 591 F.3d 1033, 1040 (8th Cir. 2010) (internal quotation marks and citations omitted; alterations incorporated).

Applying *Price Waterhouse*, the First, Sixth, Seventh, Ninth, and Eleventh Circuits—and at least three district courts within this Circuit—have all recognized that discrimination against transgender individuals is discrimination on the basis of sex. *See EEOC v. R.G. &. G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 577 (6th Cir. 2018), *pet. for cert. filed* No. 18-107 (June 24, 2018); *Whitaker*, 858 F.3d at 1051; *Glenn v. Brumby*, 663 F.3d 1312, 1316-19 (11th Cir. 2011); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1201-03 (9th Cir. 2000); *Tovar v. Essentia Health.*, No. CV 16-100 (DWF/LIB), 2018 WL 4516949, at *3 (D. Minn. Sept. 20, 2018); *Rumble v. Fairview Health Serv.*, Civ. No. 14–2037, 2015 WL 1197415, at *15–16 (D. Minn. March 16, 2015); *Dawson v. H&H Elec., Inc.*, No. 4:14CV00583 SWW, 2015 WL 5437101, at *1 (E.D. Ark. Sept. 15, 2015). Although the Eighth Circuit has not explicitly decided the question, it has cited to the Sixth Circuit's decision in *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004), as "instructive." *See Lewis*, 591 F.3d at 1036 (citing approvingly to *Smith*'s conclusion that discrimination against a transgender firefighter violated Title VII).[78]

[78] Before *Price Waterhouse* was decided, the Eighth Circuit held in *Sommers v. Budget Mktg.*, 667 F.2d 748 (8th Cir. 1982), that discrimination on the basis of sex did not include discrimination based on transgender status. But, as other circuits have

As these courts have explained, "discrimination against a plaintiff who is a transsexual—and therefore fails to act and/or identify with his or her [birth-assigned] gender—is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman." *Smith*, 378 F.3d at 575. Indeed "a person is defined as transgender precisely because" that person "transgresses gender stereotypes." *Glenn*, 663 F.3d at 1316; *accord Harris Funeral Homes*, 884 F.3d at 577; *Whitaker*, 858 F.3d at 1048. "The defining characteristic of a transgender individual is that their inward identity, behavior, and possibly their physical characteristics, do not conform to stereotypes of how an individual of their assigned sex should feel, act and look." *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 210 (D.D.C. 2017). "[D]iscriminating on the basis that an individual was going to, had, or was in the process of changing their sex—or the most pronounced physical characteristics of their sex—is *still* discrimination based on sex." *Flack*, 2018 WL 3574875, at *13.

Here, the "gender transformation" exclusion facially discriminates based on sex stereotypes and gender nonconformity because a person's "transitioning status constitutes

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recognized in distinguishing pre-*Price Waterhouse* precedent, those decisions "cannot and do[] not foreclose . . . transgender [individuals] from bringing sex-discrimination claims based upon a theory of sex-stereotyping." *Whitaker*, 858 F.3d at 1047 (distinguishing Seventh Circuit's pre-*Price Waterhouse* decision in *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir.1984)); *Schwenk*, 204 F.3d at 1201-02 (distinguishing Ninth Circuit's pre-*Price Waterhouse* decision in *Holloway v. Arthur Andersen*, 566 F.2d 659 (9th Cir.1977)). Following *Price Waterhouse*, the Eighth Circuit has twice "assume[d] for purposes of [an] appeal that the prohibition on sex based discrimination under Title VII . . . encompasses protection for transgender individuals" without explicitly resolving the legal question. *See Tovar v. Essentia Health*, 857 F.3d 771, 775 (8th Cir. 2017).

an inherently gender non-conforming trait." *Harris Funeral Homes*, 884 F.3d at 577; *accord Glenn*, 663 F.3d at 1314 (firing employee because of her "intended gender transition" is sex discrimination); *Dawson*, 2015 WL 5437101, at *3 (same). Indeed, the "gender transformation" exclusion targets transition-related care precisely *because* the healthcare is being provided for a gender non-conforming purpose. For example, Defendants will cover chest-reconstruction surgery for non-transgender men with gynecomastia who experience psychological distress from excess breast tissue and require surgery to better align their chest with the sex assigned to them at birth.[79] But—as a result of the "gender transformation" exclusion—Defendants categorically refuse to cover Mr. Bruce's chest-reconstruction surgery to alleviate clinically significant distress by aligning his chest with his gender identity.

By categorically excluding coverage for transition related care, Defendants are impermissibly "insisting that [employees' anatomy] match[] the stereotype associated with their" sex assigned at birth. *Price Waterhouse*, 490 U.S. at 251. As another district court explained in striking down a similar exclusion in the health plan for Wisconsin employees:

> [T]he Exclusion implicates sex stereotyping by limiting the availability of medical transitioning, if not rendering it economically infeasible, thus requiring transgender individuals to maintain the physical characteristics of their natal sex. In other words, the Exclusion entrenches the belief that transgender individuals must preserve the genitalia and other physical attributes of their natal sex over not just personal preference, but specific medical and psychological recommendations to the contrary.

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[79] Luther Dep. at 20; Block Decl. Ex. 29.

Boyden, 2018 WL 4473347, at *13; *cf. Kastl v. Maricopa Cty. Cmty. Coll. Dist.*, No. 02-1531, 2004 WL 2008954, at *2 (D. Ariz. June 3, 2004) ("[N]either a woman with male genitalia nor a man with stereotypically female anatomy, such as breasts, may be deprived of a benefit or privilege of employment by reason of that nonconforming trait.").

For all these reasons, an employer-provided insurance policy that denies coverage for medical treatments based on whether those treatments relate to "gender transformation" facially discriminates on the basis of "sex" in violation of Title VII.

IV. The "Gender Transformation" Exclusion Violates the Equal Protection Clause.

A. The "Gender Transformation" Exclusion Triggers Heightened Scrutiny.

Under the Equal Protection Clause, discrimination based on gender is subject to heighted scrutiny. *United States v. Virginia*, 518 U.S. 515 (1996). For all the same reasons that the "gender transformation" exclusion discriminates on the basis of sex under Title VII, the exclusion also facially discriminates on the basis of gender under the Equal Protection Clause. *See Glenn*, 663 F.3d at 1316-19.

Under that demanding standard, Defendants must show "at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690 (2017) (brackets omitted). "The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation." *Virginia*, 518 U.S. at 533. Moreover, the policy must

"substantially serve an important governmental interest *today*, for in interpreting the equal protection guarantee, [the Supreme Court has] recognized that 'new insights and societal understandings can reveal unjustified inequality that once passed unnoticed and unchallenged.'" *Morales-Santana*, 137 S. Ct. at 1690 (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015)) (alterations incorporated) (emphasis in *Morales-Santana*).

The "gender transformation" exclusion is also subject to heightened scrutiny because—as many courts have already recognized—discrimination based on transgender status is at least a quasi-suspect classification in its own right. *M.A.B. v. Bd. of Educ. of Talbot Cnty.*, 286 F. Supp. 3d 704, 720-21 (D. Md. 2018); *accord Karnoski v. Trump*, No. C17-1297-MJP, 2018 WL 1784464, at *11 (W.D. Wash. Apr. 13, 2018), *appeal filed* No. 18-35347 (9th Cir. Apr. 30, 2018); *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1145 (D. Idaho 2018); *Doe 1*, 275 F. Supp. 3d 208-09; *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015). As these courts have explained, transgender status meets all four of the traditional criteria for identifying suspect or quasi-suspect classifications. First, "transgender people have historically been subject to discrimination or differentiation." *M.A.B.*, 286 F. Supp. 3d at 720-21. Second, "transgender status bears no relation to an ability to contribute to society." *Id.* Third, "transgender individuals exhibit immutable or distinguishing characteristics that define them as a discrete group." *Id.* And, fourth, transgender people "as a class, are a minority or politically powerless." *Id.*

As discussed below, none of Defendants justifications for the "gender transformation" exclusion can survive heightened scrutiny—or even rational basis

review. "When those who appear similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference, to ensure that all persons subject to legislation or regulation are indeed being treated alike, under like circumstances and conditions." *Engquist v. Oregon Dep't of Agr.*, 553 U.S. 591, 602 (2008) (internal quotation marks omitted). Because Defendants have failed to offer any rational reason for not evaluating Mr. Bruce's transition-related care pursuant to the Plan's generally applicable standards and procedures that apply to the health care of similarly situated employees, the "gender transformation" exclusion cannot survive any standard of review.

B. The "Gender Transformation" Exclusion Cannot Be Justified Based on Defendants' Asserted Interest in Reducing Cost.

Defendants decided to maintain the "gender transformation" in order to reduce costs, but Defendants have not provided a rational reason for treating costs associated with transition-related care differently from costs associated with other treatments. Defendants never evaluated whether covering transition-related care would be disproportionately costly as compared with comparable medical conditions. They simply "looked at the financial implications of removing the exclusion and made the decision that [removing the exclusion] would be moving in the direction that would be increasing costs to the plan versus reducing costs to the plan."[80]

The Equal Protection Clause requires more. Although "a state has a valid interest in preserving the fiscal integrity of its programs" and "may legitimately attempt to limit

[80] Gill Dep. at 25

its expenditures . . . a State may not accomplish such a purpose by invidious distinctions between classes of its citizens." *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969), *overruled in part on other grounds by Edelman v. Jordan*, 415 U.S. 651 (1974). The Supreme Court has made clear that concerns about costs and administrative convenience are insufficient to "justify gender-based discrimination in the distribution of employment-related benefits" under heightened scrutiny. *Califano v. Goldfarb*, 430 U.S. 199, 217 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 647 (1975). And even under rational-basis review, the government may not reduce costs by arbitrarily discriminating between two similarly situated groups. *See Plyler v. Doe*, 457 U.S. 202, 229 (1982); *Diaz v. Brewer*, 656 F.3d 1008, 1014 (9th Cir. 2011) (finding costs concerns cannot justify denying insurance coverage to same-sex couples under rational basis review).

Because Defendants have failed to provide any explanation for treating the costs associated with transition-related care differently from the costs associated with other medically necessary treatments, Defendants' goal of reducing costs cannot justify "gender transformation" exclusion under any standard of scrutiny.

C. The "Gender Transformation" Exclusion Cannot Be Justified Based on Defendants' Asserted Interest in Health and Safety.

The "gender transformation" exclusion also cannot be justified based on Defendants' asserted interest in health and safety. As an initial matter, because Defendants' arguments regarding safety and efficacy were "hypothesized or invented *post hoc* in response to litigation," *Virginia*, 518 U.S. at 533, they cannot provide a justification for the "gender transformation" exclusion under heightened scrutiny. *See*

Boyden, 2018 WL 4473347, at *17 (refusing to consider a similar *post hoc* justification). The undisputed evidence shows that Defendants' decision to maintain the "gender transformation" exclusion was based solely on controlling costs and not based on any concerns about the safety and efficacy of transition-related care. Before Mr. Bruce filed this lawsuit, Defendants never took any steps to evaluate the medical literature or standards of care for treating gender dysphoria. According to Commissioner Gill, "at that point our discussions were strictly financially based, and we didn't take any other information into consideration."[81]

Even if this Court were to consider Defendants' *post hoc* assertions, however, they would not satisfy either heightened scrutiny or rational-basis review. If the Plan's generally applicable standards are sufficient to protect the safety and health of beneficiaries with respect to other medical conditions, there is no rational reason why the generally applicable standards of medically necessity are not sufficient to protect the health and safety of patients receiving transition-related care. *Cf. City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) ("[T]he expressed worry about fire hazards, the serenity of the neighborhood, and the avoidance of danger to other residents fail rationally to justify singling out a home [for people with disabilities] for the special use permit, yet imposing no such restrictions on the many other uses freely permitted in the neighborhood.").

[81] Gill Dep. at 18

In determining whether the "gender transformation" exclusion actually serves Defendants' interest in protecting health and safety, "the proper focus of the constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *City of L.A., Calif. v. Patel*, 135 S. Ct. 2443, 2451 (2015). The Plan's general provisions limiting healthcare to "medically necessary" treatments already serves Defendants' interest in health and safety. The only function of the categorical exclusion is to exclude medical care that would otherwise qualify as medically necessary under the Plan's generally applicable standards.

There is no rational connection between Defendants' asserted interest in protecting health and safety and Defendants' categorical exclusion of transition-related care even when it meets the Plan's standard for medical necessity.

CONCLUSION

For all these reasons, Plaintiff's motion for summary judgment should be granted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with D.S.D. LR 7(B)(1), I certify that this Memorandum of Law contains 8,985 words.

Dated: October 26, 2018

/s/*James D. Leach*
James D. Leach

CERTIFICATE OF SERVICE

I certify that on October 26, 2018, I served this document on Defendants by filing electronically, thereby causing automatic electronic service to be made on defendants.

Dated: October 26, 2018

/s/*James D. Leach*
James D. Leach