IN THE UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

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| TERRI BRUCE,<br><br>Plaintiff,<br><br>vs.<br><br>STATE OF SOUTH DAKOTA and LAURIE GILL, in her official capacity as Commissioner of the South Dakota Bureau of Human Resources,<br><br>Defendants. | ) | Case No. 17-5080<br><br>DEFENDANTS STATE OF SOUTH DAKOTA AND LAURIE GILL'S BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT |

## INTRODUCTION

South Dakota has a self-insured health plan ("the Plan"). Coverage under the Plan is made available to state employees who want it. Members' dependents (including minor children) can also be covered. Terri Bruce ("Bruce") is a state employee and a Plan member.

Bruce sought pre-authorization under the Plan for a mastectomy for treatment of his gender dysphoria. That pre-authorization was denied on the basis that the "Plan specifically excludes coverage for Services (sic) or drugs related to gender transformations." (Am. Comp., Doc. 24, ¶4).

It is alleged that "[d]espite the broad healthcare coverage provided to every other employee, the Plan singles out transgender employees for unequal treatment by categorically depriving them of all medical care for gender dysphoria, regardless of whether those treatments are medically necessary . . . ." (Doc. 24, ¶2).

Bruce alleges that "[o]n its face" the Plan discriminates against employees because of sex in violation of the [*sic*] Title VII of the Civil Rights Act of 1964 and deprives transgender employees of equal treatment under the Equal Protection Clause of the Fourteenth Amendment." (Doc. 24, ¶10).

Bruce's Title VII discrimination claim is based on the following allegations:

- "Discrimination on the basis of **transgender status** or **gender nonconformity** is discrimination on the basis of 'sex' under Title VII." (Doc. 24, ¶52) (emphasis added).

- "By categorically excluding coverage for all medically necessary 'transgender services' or services related to 'gender transformation,' South Dakota has drawn a classification that discriminates based on transgender status and gender nonconformity. (Doc. 24, ¶53).

- "As a result of the exclusion in the Plan, non-transgender employees receive coverage for all their medically necessary healthcare, but transgender employees do not." (Doc. 24, ¶54).

- "Because medical transition from one sex to another inherently violates gender stereotypes, denying medically necessary coverage for such healthcare constitutes impermissible discrimination based on gender nonconformity." (Doc. 24, ¶55).

- "South Dakota's exclusion of medically necessary care for gender dysphoria is not based on standards of medical care; it is based on moral disapproval of, and discomfort with, transgender people and gender transition." (Doc. 24, ¶56).

- "By excluding all healthcare related to 'gender transformation' from the only available health plan it provides to employees, [the State of] South Dakota has unlawfully discriminated – and continues to unlawfully discriminate – on the basis of sex in violation of Title VII." (Doc. 24, ¶57).

Under his equal protection claim Bruce alleges:

- "By categorically excluding all medically necessary 'transgender services' or services related to 'gender transformation' South Dakota has unlawfully discriminated–and continues to unlawfully discriminate– against Mr. Bruce on the basis of **gender**, which is subject to heightened scrutiny under the Equal Protection Clause" (Doc. 24, ¶61); and "on the basis of **transgender status**,

which is independently subject to heightened scrutiny under the Equal Protection Clause." (Doc. 24, ¶62) (emphasis added).

- "The Plan's discriminatory exclusion is not narrowly tailored to serve a compelling governmental interest" (Doc. 24, ¶63); "is not substantially related to an important governmental interest" (Doc. 24, ¶64); and "lacks any rational basis and is grounded in sex stereotypes, discomfort with gender nonconformity, and moral disapproval of people who are transgender." (Doc. 24, ¶65).

Bruce does not seek damages. He seeks a judgment declaring that the State of South Dakota violated Title VII and that Laurie Gill, in her official capacity, violated the Equal Protection Clause. He also seeks injunctive relief requiring the "Defendants to remove the . . . exclusion from the [Plan] and evaluate whether Mr. Bruce's chest-reconstruction surgery and hormone therapy to treat his gender dysphoria are 'Medically Necessary' as defined by the [Plan] . . . . (Am. Comp. PFR B). Finally, Bruce seeks his reasonable costs and attorneys' fees under Title VII and 4 U.S.C. § 1988.

## STANDARD FOR SUMMARY JUDGMENT

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Only disputes over facts that might affect the outcome of the case under the governing substantive law will properly preclude summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In determining whether a genuine issue of material fact exists, this court views the evidence presented based upon which party has the burden of proof under the underlying substantive law. *Id.* Summary judgment is not appropriate if a dispute about a

material fact is genuine, that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.*; *Liebe v. Norton*, 157 F.3d 574 (8th Cir. 1998).

The moving party bears the burden of bringing forward sufficient evidence to establish that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The nonmoving party is entitled to the benefit of all reasonable inferences to be drawn from the underlying facts in the record. *Vette Co. v. Aetna Cas. & Sur. Co.*, 612 F.2d 1076, 1077 (8th Cir. 1980). The nonmoving party may not, however, merely rest upon allegations or denials in its pleadings, but must set forth specific facts by affidavits or otherwise showing that a genuine issue exists. *Forrest v. Kraft Foods, Inc.*, 285 F.3d 688, 691 (8th Cir.2002). "Where the record as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)(internal citations omitted).

"Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy, and inexpensive determination of every action'." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S.Ct. 2548, 2555, 91 L.Ed.2d 265 (1986).

**SUMMARY OF FACTS**

A Statement of Undisputed Material Facts as required under D.S.D. Civ. LR 56.1(A) has been filed in support of the Defendants State of South Dakota and Laurie Gill's Motion for Summary Judgment.

## ISSUES

**TITLE VII**

**I.**

**WHETHER THE WORD "SEX" IN TITLE VII IS CONFINED AND REFERS TO THE PHYSIOLOGICAL DIFFERENCES BETWEEN MALES AND FEMALES OR DOES IT ALSO MEAN "GENDER IDENTITY" AND "TRANSGENDER STATUS"?**

**II.**

**EVEN IF TITLE VII APPLIES TO GENDER IDENTITY OR TRANSGENDER STATUS, DOES BRUCE HAVE TO, AND CAN HE, PROVE INTENTIONAL DISCRIMINATION?**

**EQUAL PROTECTION**

**III.**

**WHETHER THE GENDER TRANSFORMATIONS EXCLUSION TREATS TRANSGENDER MEMBERS OF THE PLAN LESS FAVORABLY THEN OTHER SIMILARLY SITUATED NON-TRANSGENDER MEMBERS?**

**IV.**

**IF THE GENDER TRANSFORMATIONS EXCLUSION DISCRIMINATES AGAINST TRANSGENDER MEMBERS OF THE PLAN, WHAT STANDARD OF REVIEW APPLIES IN DETERMINING WHETHER THE DISCRIMINATION IS JUSTIFIED. FURTHER, UNDER THAT STANDARD OF REVIEW IS THAT EXCLUSION JUSTIFIED?**

## ARGUMENT AND AUTHORITIES

**TITLE VII**

**I.**

**THE WORD "SEX" IN TITLE VII IS CONFINED AND REFERS TO THE PHYSIOLOGICAL DIFFERENCE**

**BETWEEN MALES AND FEMALES AND DOES NOT INCLUDE "GENDER IDENTITY" OR "TRANSGENDER STATUS."**

**Introduction**

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) reads in part: "It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

The question here is not whether as a matter of policy, discrimination based on gender identity or transgender status should be prohibited by Title VII. The question is whether the "because of sex" language of Title VII, as a matter of law, prohibits such discrimination. The answer is unequivocally no. Any effort to expand the scope of Title VII's coverage, as Bruce seeks to do here, must be left to Congress, not the courts.

**A. Statutory Construction of the Word "Sex" in Title VII.**

Clearly, Title VII does not expressly include "gender identity" or transgender status" as protected traits or classes. By necessity, then, Bruce argues that "gender identity" or transgender status" discrimination is discrimination because of "sex" which is a protected class under Title VII.[1] Title VII does not define the word "sex." Therefore, Bruce's Title VII claim must be reviewed under the traditional canons of statutory construction.

[1]Again, Bruce also asserts a sex or gender stereotyping discrimination claim. That claim and theory is discussed elsewhere in this brief. *See, infra,* Issue I, Sec C, p. 19.

In her dissent in *F.A.A. v. Cooper*, 566 U.S. 284, 305, 132 S.Ct. 1441, 182 L.Ed.2d 497 (2010), Justice Sotomayor outlined the "traditional tools of statutory construction." Those tools are the statute's text, structure, history, and purpose. *Id.* The text, structure, history, and purpose of Title VII clearly indicate that the word "sex" in the statute means the biological and anatomical differences between males and females.

**(i) Text**

"'In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished.'" *F.A.A. v. Cooper*, at 306 (quoting *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475, 112 S.Ct. 2589, 120 L.Ed.2d 279 (1992)). *See* also *U.S. v. Smith*, 756 F.3d 1070, 1073 (8th Cir. 2014) ("If the language's meaning is unambiguous when 'read in its proper context, then, this first canon is also the last: judicial inquiry is complete.'") (citations omitted).

In interpreting the text of a statute, unless words are defined in the statute, a court must apply the ordinary-meaning rule. Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 69 - 78 (2012). Under the ordinary-meaning rule, courts are to give words their "**ordinary, contemporary, common meaning**," unless the text indicates they mean something else. *See Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014) (emphasis added) (Justice Scalia) ("It is a 'fundamental canon of statutory construction' that, 'unless otherwise defined, words will be interpreted as taking their ordinary, **contemporary**, common meanings.'" "Contemporary" is in reference to the period of time when the statute was enacted, not when a court is interpreting the statute later in time. In interpreting the word "clothes" in a statute, Scalia

looked to dictionaries "from the era" when the statute was enacted.) (citations omitted)(emphasis added). *See also Wisconsin Central Ltd. v. U.S.*, __ U.S. __, 138 S.Ct. 2067, 2074 (2018) ("[w]ords generally should be interpreted as taking their ordinary, contemporary, common meaning . . . at the time Congress enacted the statute."); *Mowlana v. Lynch*, 803 F.3d 923, 925 (8th Cir. 2015) (undefined terms in a statute are given their "ordinary meanings when the statute was enacted.")

Title VII was enacted in 1964. The dictionary definitions of "sex" during that period of time referred to the anatomic or physiological differences between males and females, especially in regard to their reproductive functions. For example, in 1961, *Webster's Third New International Dictionary* (1961) clearly defined "sex" and "gender" as separate and distinct concepts. "Sex" was defined as binary, "one of the two divisions of organic esp. human beings respectively designated male or female." *Id*. at 945. In contrast, "gender" was defined as "two or more subclasses . . . partly arbitrary, but also partly based on distinguishable characteristics such as shape, social rank, manner of existence . . . or sex (as masculine, feminine, neuter) and that determine agreement with and selection of other words or grammatical forms." *Id.* at 944. Similar definitions of "sex" appeared in other dictionaries during this time. *See also*, 9 Oxford English Dictionary 578 (1961) (defining "sex" as "[t]he sum of those differences in the structure and function of the reproductive organs on the ground of which beings are distinguished as male and female, and of the other physiological differences consequent on these."); The American Heritage Dictionary of the English Language (1st ed. 1969) (defining "sex" as "[t]he property or quality by which organisms are classified according to their reproductive functions[;] [e]ither of two divisions, designated male and female, of this classification"); The American College

Dictionary 1109 (1970) (defining "sex" as "the character of being either male or female or the sum of the anatomical and physiological differences with reference to which the male and the female are distinguished"); *Webster's New Collegiate Dictionary* 1054 (1979) ("the sum of the structural, functional, and behavioral characteristics of living beings that subserve reproduction by two interacting parents and that distinguish males and females"); *The Random House College Dictionary* 1206 (rev. ed. 1980) (defining "sex" as "either the male or female division of a species, esp. as differentiated with reference to the reproductive functions").

Even today, the definition of sex is based on the physiological or biological differences between males and females. *See, e.g.*, New Oxford American Dictionary (3d ed. 2010) ("sex" is "either of the two main categories (male and female) into which humans and many other living things are divided on the basis of their reproductive functions"); *Merriam-Webster's Collegiate Dictionary* 1140 (11th ed. 2011) ("either of the two major forms of individuals that occur in many species and that are distinguished respectively as female or male esp. on the basis of their reproductive organs and structures"); The American Heritage Desk Dictionary (5th ed. 2013) ("sex" is "[e]ither of the two divisions, female and male, by which most organisms are classified on the basis of their reproductive organs and functions[;] [t]he condition or character of being female or male"); American Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 451 (5th ed. 2013) (DSM-V) ("'[S]ex' . . . refer[s] to the biological indicators of male and female (understood in the context of reproductive capacity), such as in sex chromosomes, gonads, sex hormones, and nonambiguous internal and external genitalia"); Webster's New World College Dictionary 1331 (5th ed. 2014) ("either of the two divisions, male or female, into which persons, animals, or plants are divided, with reference to their reproductive functions");

Dictionary.com *accessed* October 12, 2018 ("sex" is "either the male or female division of a species, especially as differentiated with reference to the reproductive functions).

Up into the 1950s, "gender" was a word used generally only by linguists or grammarians in reference to grammatical classification. Joanne Meyerowitz, *A History of "Gender,"* 113 Am. Hist. Rev. 1346, 1353 (2008). In that same decade, a psychologist by the name of John Money used the term "gender" to refer to culturally formed roles for men and women; roles that are separate and distinct from "biological sex." *Id.* at 1354. It is generally accepted that in the early 1960s, Robert Stoller, a UCLA psychoanalyst, coined the term "gender identity." *Franciscan Alliance, Inc. v. Burwell*, 227 F.Supp.3d 660, n.25 (N.D.Tex 2016) (citing David Haig, *The Inexorable Rise of Gender and the Decline of Sex: Social Change in Academic Titles,* 1945-2001, Archives of Sexual Behav., Apr. 2004, at 93). Stoller reasoned that "sex was biological but gender was social." *Id.* In that same vein, "Virginia Prince (transgender activist who coined the term 'transgender') stated that 'I, at least, know the difference between sex and gender.'" *Id.* (citing Virginia Prince, *Change of Sex or Gender,* 10 TRANSVESTIA 53, 60 (1969)).[2]

The search for the meaning of "sex" in this case begins with, and by and large ends with, a reading of the text of Title VII when Title VII was enacted. "Sex" clearly then, and even today, refers to the biological differences between males and females.[3] It does not include "gender

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[2]The stark differences between "sex" on the one hand and gender identity and transgenderism is also presented at SUMF 1 - 25.

[3]It is important to note that in 1972, eight years after passing Title VII, Congress passed Title IX which prohibits discrimination in federally-funded education programs on the basis of "sex." 20 U.S.C. § 1681(a). Again, in 1972, the word "sex" was commonly understood to reference the physiological and biological differences between men and women. In the discussions regarding enacting Title IX, the legislators referred to the biological difference between men and women.

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identity" or "transgender status."

**(ii) Structure**

Title VII is not an all-inclusive employment discrimination statute. The substantive structure of Title VII constructs or establishes classes or categories of employees that are protected from discrimination by their employer. Those classes are race, color, religion, sex, or national origin. Equal pay discrimination, age discrimination, and ADA discrimination are clearly not mentioned in, and consequently not covered by, Title VII. Similarly, gender identity and transgender status discrimination are not mentioned in, and consequently not covered by, Title VII. Structurally, Title VII uses very explicit language which prohibits only certain categories of discrimination. These categories are not merely examples of discrimination that are prohibited; they are the only forms of discrimination prohibited under Title VII. This is telling as to congressional intent as to the scope of Title VII.

**(iii) History**

Congress's legislative activity since 1964 shows that Congress never intended "sex" to include "gender identity" or "transgender status." Since passing Title VII, Congress has looked

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117 Cong. Rec. 30407 (1971); 118 Cong. Rec. 5807 (1972). Indeed, that understanding by Congress is shown in Title IX which mandates equal treatment between the two sexes. *See*, *e.g.*, 20 U.S.C. § 1681(a)(8) (mandating comparable activities between students of "one sex" and "the other sex"). Title IX has been interpreted by the courts to prohibit federally-funded education programs from treating men more favorably than women or the other way around. *See*, *e.g.*, *N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 530 (1982). The fact that Title IX clearly contemplates "sex" as male and female is significant because the Eighth Circuit has held that the phrase "on the basis of sex" of Title IX means the same thing as the phrase "because of sex" under Title VII. *See Wolfe v. Fayetteville, Arkansas Sch. Dist.*, 648 F.3d 860, 866 (8th Cir. 2011). *See also Fox v. Pittsburg State University*, 2016 WL 4382733, *9 (D.Kan August 17, 2016) ("Courts have generally assessed Title IX discrimination claims under the same legal analysis as Title VII claims.") (citing *Gossett v. Okla. ex rel. Bd. of Regents*, 245 F.3d 1172, 1176 (10th Cir. 2001)).

at a number of proposals to protect "gender identity" and "sexual orientation." For example, in 1974, Bella Abzug and Edward Koch proposed a bill to amend the Civil Rights Act to include a new classification or category of "sexual orientation." Equality Act H.R. 14752, 93rd Cong. (1974). Similar proposed legislation followed. Civil Rights Amendments Act See H.R. 166, 94th Cong. (1975); Civil Rights Amendments Act of 1979 H.R. 2074, 96th Cong. (1979); A Bill To Prohibit Employment Discrimination On The Basis of Sexual Orientation, S. 2081 96th Cong. (1979). Those proposals were rejected. Similarly, in 1994, Congress rejected the Employment Non-Discrimination Act ("ENDA"), which was designed to prohibit employment discrimination on the basis of "sexual orientation." H.R. 4636, 103rd Cong. (1994). In 2007, 2009, and 2011, Congress rejected an even more far-reaching version of ENDA, which sought to add protections for "gender identity." H.R. 2015, 110th Cong. (2007); H.R. 2981, 111th Cong. (2009); S. 811, 112th Cong. (2011). Likewise, in 2013 and 2015, it was proposed to add "gender identity" as a classification or category under Title IX. Student Non-Disc. Act H.R. 1652, 113th Cong. (2013); Student Non-Disc. Act S. 439, 114th Cong. (2015). None of those bills were passed.[4]

This history clearly shows that Congress recognizes that "sex", as a protected class under Title VII, refers to one's biological sex as a male or a female. Certainly, the expanded proposed version of ENDA would be superfluous if "gender identity" or "transgender status" was already covered by Title VII.

Along with not adding "transgender status" as a protected group under Title VII, Congress has specifically excluded "transgender status" or "gender identity" from protection

[4]Congress has also rejected legislation to prohibit discrimination in federally-funded programs on the basis of "gender identity." Equality Act H.R. 3185, 114th Cong. (2015); Equality Act S 1858, 114th Cong. (2015).

under a federal disability discrimination law in two other pieces of legislation. Specifically, the Americans With Disabilities Act (42 U.S.C. § 12211(b)) provides: "Under this chapter, the term 'disability' shall not include – (1) transvestism, transsexualism, . . . gender identity disorders not resulting from physical impairments, or other sexual behavior disorders." The Rehabilitation Act (29 U.S.C. § 705(20)(F)(I)) has a similar exclusion. Once again, this clearly demonstrates that Congress knows and is aware of claims of discrimination against transgenders but has chosen not to protect them under these statutes. This adds further weight and significance to Congress's refusal to expand the scope of Title VII.

Congress did redefine the word "sex" as used in Title VII on one occasion. In *General Electric v. Gilbert*, 429 U.S. 125, 134-35 (1976), the Supreme Court narrowly construed the word "sex" under Title VII and held that it was not a discriminatory practice to exclude coverage for pregnancy from employer-provided disability benefits since there was "no risk from which men are protected and women are not. Likewise there is no risk from which women are protected and men are not." (citations omitted.) *See also*, *R.M.A. by Appleberry v. Blue Springs R-IV School District*, 2017 WL 3026757 (Mo. Ct. Of Appeals July 18, 2017) (court discussed *Gilbert* court's "narrow construction" of the phrase "on the basis of sex" under Title VII). In direct response, Congress abrogated the holding in *Gilbert*, widening the meaning of "sex" under Title VII to include discrimination "on the basis of pregnancy, childbirth, or related medical conditions." Pregnancy Discrimination Act of 1978, Pu. L. No. 95-55, § (k), 92 Stat. 2076 (1978) (codified as 42 U.S.C. § 2000e(k)). After that amendment, then, discrimination on the basis of "sex" under Title VII means to deprive "one sex of a right or privilege afforded the other sex, including a deprivation based on a trait unique to one sex." *Appleberry*. at *7. To be clear,

however, Congress did not, and has not, defined or redefined "sex" to include "gender identity," "transgender status," or "sexual orientation."

Only two proposed pieces of legislation protecting "gender identity" have been enacted since Title VII was codified. Specifically, in 2010, Congress passed hate crimes legislation which provided for stiffer penalties for crimes motivated by, among other things, "gender identity" or "sexual orientation." 18 U.S.C. § 249(a)(2). Then, in 2013, Congress reauthorized the Violence Against Women Act, which prohibits funded programs from discriminating "on the basis of . . . sex, gender identity, and sexual orientation, or disability." 34 U.S.C. 12291(b)(13)(A) (under the Violence Against Women Reauthorization Act of 2013, Pub. Law. 113-4). If under the hate crimes and VAWA statutes, "gender identity" and "sexual orientation" are the same as "sex", then those words are surplusage in those pieces of legislation. Holistically, in construing statutes, the courts are "'to give effect, if possible, to every clause and word'" in the statutory text. "'[A] statute ought . . . to be so construed that . . . no clause, sentence, or word shall be superfluous, void, or insignificant' [and courts should be] 'reluctant to treat statutory terms as surplusage' in any setting." *Duncan v. Walker,* 533 U.S. 167, 174, (2001)(citations omitted); *Gustafson v. Alloy & Co., Inc.*, 513 U.S. 516, 574, (1995) ("[t]he court will avoid a reading which renders some [statutory] words, altogether redundant."). Therefore, the terms "gender identity" and "sexual orientation" should be given the force and effect Congress intended in enacting the hate crimes and VAWA statutes.

In passing the hate crimes legislation and VAWA, Congress unmistakably demonstrated that it knows the difference between "sex", "gender identity", and "sexual orientation" and how to craft legislation that prohibits discrimination on that basis. Therefore, it is significant that

Congress has never added "gender identity" or "transgender status" under the protective umbrella of Title VII.

**(iv) Purpose**

In passing Title VII, Congress was primarily concerned with ending "race discrimination." *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977). "The amendment adding the word 'sex' to the Civil Rights Act was adopted one day before the House passed the Act without prior legislative hearings and little debate. It is, however, generally recognized that the major thrust of the 'sex' amendment was towards providing equal opportunities for women." *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (per curiam)(citations omitted). Stated differently, "the manifest purpose of Title VII"s prohibition against sex discrimination in employment is to ensure that men and women are treated equally . . . ." *Holloway*, 566 F.2d at 662. *See also Harris v. Forklife Sys., Inc.,* 510 U.S. 17, 25 (1993) ("The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.") (Ginsburg, J., concurring).

Congress's understanding of what "sex" means is entirely consistent with the purpose of Title VII. If the purpose of the word "sex" in Title VII is to ensure the sexes (male and female) are treated equally, and "sex" is something different from "gender identity" or "transgender status", then it is axiomatic that Title VII does not protect transgenders or transsexuals under the phrase "because of sex."

**B. Eighth Circuit Interpretation of the Word "Sex" in Title VII Comports with Congressional Intent – "Sex" is Limited to the Physiological Differences Between Males and Females**.

In construing Title VII, a number of courts - including the Eighth Circuit- have held that the term "sex" in Title VII does not mean "gender identity" or "transsexualism." Such was the conclusion of the Eighth Circuit in *Sommers v. Budget Mktg. Inc*., 667 F.2d 748 (8th Cir. 1982) (per curiam). There, the plaintiff, who was transsexual, claimed that her employment was terminated because of her gender identity, which she alleged was sex discrimination under Title VII. The plaintiff urged that "the court should not be bound by the plain meaning of the term 'sex' under Title VII as connoting either male or female gender, but should instead expand the coverage of the Act to protect individuals such as herself who are psychologically female, albeit biologically male." *Id*. at 749.

The Eighth Circuit was not persuaded and in rejecting Sommers' argument, the court wrote:

> [T]he Court does not believe that Congress intended by its laws prohibiting sex discrimination to require the courts to ignore anatomical classification and determine a person's sex according to the psychological makeup of that individual.

*Id*. at 749.

> [F]or the purposes of Title VII the plain meaning must be ascribed to the term 'sex' in absence of clear congressional intent to do otherwise. Furthermore, the legislative history does not show any intention to include transsexualism in Title VII. The amendment adding the word 'sex' to the Civil Rights Act was adopted one day before the House passed the Act without prior legislative hearings and little debate. It is, however, generally recognized that the major thrust of the 'sex' amendment was towards providing equal opportunities for women.

*Id*. at 750 (citations omitted).

> Also, proposals to amend the Civil Rights Act to prohibit discrimination on the basis of 'sexual preference' have been

> defeated. [S]ommers's claim is not one dealing with discrimination on the basis of sexual preference. Nevertheless, the fact that the proposals were defeated indicates that the word 'sex' in Title VII is to be given its **traditional definition**, rather than an expansive interpretation. Because Congress had not shown an intention to protect transsexuals, we hold that discrimination based on one's transsexualism does not fall within the protective purview of the Act.

*Id.* (citations omitted) (emphasis added). The effect of *Sommers* in this case cannot be clearer. Bruce's Title VII claim cannot withstand, and must yield to, the precedential rule laid down in *Sommers*. *See Hood v. United States*, 342 F.3d 861, 864 (8th Cir. 2003) ("The District Court, however, is bound, as are we, to apply the precedent of this circuit.") (citations omitted).

The Eighth Circuit does not stand alone. The reasoning of *Sommers* was mirrored by the following courts: *Etsitty v. Utah Transit Auth.,*502 F.3d 1215, 1221 (10th Cir. 2007) (As to Etsitty's claim that Title VII prohibits discrimination based on her status as a transsexual, the court concluded that "[i]n light of the traditional binary conception of sex, transsexuals may not claim protection under Title VII from discrimination based solely on their status as a transsexual. Rather, like all other employees, such protection extends to transsexual employees only if they are discriminated against because they are male or because they are female."); *Texas v. United States,* 201 F.Supp. 3d 810, 833 (N.D. Tex. 2016) ("[T]he plain meaning of the term sex" under the regulations for Title IX "meant the biological and anatomical differences between male and female students as determined at their birth."); *Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.,* 97 F.Supp. 3d 657, 674 (W.D. Pa. 2015), appeal dismissed (Mar. 30, 2016) ("Title IX does not prohibit discrimination on the basis of transgender itself because transgender is not a protected characteristic under the statute.")

Like the plaintiff in *Sommers*, Bruce is asking this court to expand Title VII to cover "gender identity" and "transgender status" as protected classifications or characteristics. But the word "sex" in Title VII cannot be reasonably taken to mean or include "gender identity" or "transgender status." Clearly, the meaning of "sex" is tethered to the biological differences between males and females. Moreover, creating new classifications or protected characteristics in Title VII is for Congress, not the courts. Common law rules can and do evolve through the courts. But statutory law moves through Congress. These differences have to be acknowledged and respected. If Title VII is to protect "gender identity" or "transgender status" discrimination, then Congress needs to amend Title VII. *See Etsitty v. Utah Transit Authority*, 502 F.3d 1215, 1222 n.2 (10th Cir. 2007) ("If transsexuals are to receive legal protection apart from their status as male or female, . . . such protection must come from Congress and not the courts."); *Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.,* 97 F.Supp. 3d 657, 676-77 (W.D.Pa. 2015) ("It is within the province of Congress-and not this Court-to identify those classifications which are statutorily prohibited [by Title VII]"); *Hinton v. Virginia Union U.,* __ F.Supp. 3d __, 2016 WL 2621967, at *5 (E.D. Va. May 5, 2016) ("Title VII is a creation of Congress and, if Congress is so inclined, it can either amend Title VII to provide a claim for sexual orientation discrimination or leave Title VII as presently written. It is not the province of unelected jurists to effect such an amendment."); *Henson v. Santander Consumer USA, Inc.*, __ U.S. __, 137 S.Ct. 1718, 1725 (2017) ("[w]hile it is of course our job to apply faithfully the law Congress has written, it is never our job to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done had it faced a question that, on everyone's account, it never faced.")

The phrase "because of sex" is not a riddle or Rubik's Cube to be solved by the courts. The meaning and understanding of "sex" is clear, direct, and understood. The "sex" of an individual is either male or female.

**C. Sex Stereotyping Claims Under Title VII.**

Bruce's "gender identity" discrimination claim has a component that is based on a sex or gender stereotyping/nonconformity (hereafter "sex stereotyping") body of law. Sex stereotyping involves discrimination against an individual because they are male or female but their behavior, dress, etc., does not conform to the stereotype of how a male or female is to behave, dress, etc. Such claims do constitute sex-based discrimination under Title VII. And all individuals, regardless of whether they are or are not transgender, are protected from discrimination based on sex-stereotyping. As a matter of law, however, Bruce cannot prove a sex-stereotyping claim.

The origin of a Title VII sex-stereotyping discrimination claim is from the Supreme Court's decision in *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989). The plaintiff was a woman denied partnership in an accounting firm. A number of partners indicated that the plaintiff appeared too masculine, and that she would improve her chances for partnership if she would "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." 490 U.S. at 236. In a plurality opinion, the Court held that the employer had discriminated against the plaintiff on the basis that she did not conform to stereotypes regarding how women should look and act. In the eyes of the Court, "these remarks about [the plaintiff] stemmed from an impermissibly cabined view of the proper behavior of women [and] resulted from sex stereotyping," which was discrimination based on "sex" under Title VII. *Id*. at 236-37. The Court's reasoning was as follows:

> As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '**in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.**' An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22; out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.

*Id*. at 251 (emphasis added).

To be clear, then, the court in *Price Waterhouse*, did not re-define the word "sex." *Price Waterhouse* stands for the singular proposition that under Title VII "sex" discrimination includes "disparate treatment of men and women resulting from **sex stereotypes**." *Id*. at 250-251 (emphasis added). That decision is well-reasoned because it was clear that under the plaintiffs' claim, her employer had used her sex against her (she should have acted more like a female). Disparate treatment was established where aggressive men were promoted but aggressive women were denied promotions. *Id*. Under a *Price Waterhouse* analysis, then, one looks at whether the claimant is a man or a woman who was discriminated against because their behavior, dress, etc., did not conform to the stereotype of how a member of their sex should behave or dress.

A transgender male or female is protected from sex stereotyping discrimination like any non-transgender male or female if the discrimination influences an employment decision. But here, in contrast, Bruce alleges that the gender transformation exclusion discriminates against transgender individuals based on his or her gender non-conformity and transgender status.

*Price Waterhouse* does not protect anyone, including transgenders, without evidence of sex stereotyping. Sex stereotyping (based on behavior, mannerisms, etc.) against a transgender is

far different and much more limited in scope than discriminating against a transgender just because they are transgender (based on their status or gender identity). Therefore, "transgender status" by itself is not sex stereotyping under Title VII.

Following, and based on *Price Waterhouse*, the Eighth Circuit has held that an adverse employment decision based on sex stereotyping is unlawful under Title VII. *Lewis v. Heartland Inns of Am., L.L.C.*, 591 F.3d 1033 (8th Cir. 2010) (evidence that a female employee suffered an adverse employment decision because she did not dress or act like a woman established a prima facie claim of sex stereotyping claim under Title VII). On the other hand, the Eighth Circuit has declined to protect sexual orientation or transgender status per se under Title VII. In *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) (per curiam), cert. denied 493 U.S. 1089, 110 S.Ct. 1158, 107 L.Ed.2d 1061 (1990), the Eighth Circuit held that Title VII does not prohibit employment discrimination or harassment on the basis of sexual orientation. It should be noted that *Williamson* was decided on June 2, 1989, while *Price Waterhouse* was decided on May 1, 1989. In its decision in *Williamson*, the Eighth Circuit referred back to and thereby reaffirmed its decision in *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748 (8th Cir. 1982) (transsexuals (status) not protected by Title VII). 876.F.2d at 70. Therefore, it is clear the Eighth Circuit has not interpreted *Price Waterhouse* to extend to transsexuals or sexual orientation without proof of sex stereotyping. *See Hunter v. United Parcel Service, Inc.,* 697 F.3d 697 (8th Cir. 2012) (summary judgment for employer affirmed where there was no evidence that sex or gender stereotyping influenced employer's decision not to hire a transgender applicant.) Therefore, *Sommers* still is good law and binding precedent in the Eighth Circuit.

The following cases recognized the *Price Waterhouse* stereotyping theory but refused to

extend Title VII protection to transgenders based solely on their status as transgenders. *Etsitty v. Utah Transit Authority*, 502 F.3d 1215, 1221 (10th Cir. 2007) ("Etsitty may not claim protection under Title VII based upon her transsexuality *per se*. Rather, Etsitty's claim must rest entirely on the Price Waterhouse theory of protection as a man who fails to conform to sex stereotypes."); *Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F.Supp. 3d 657, 674-82 (W.D. Pa. 2015) (discrimination based on transgender status not prohibited under Title IX - plaintiff failed to establish sex stereotyping claim); *Eure v. Sage Corp*., 61 F.Supp. 3d 651, 661 (W.D. Tex. 2014) (discrimination claim based on transgender status not actionable; plaintiff's sex stereotyping claim was actionable but was not supported by the facts).

The record in this case will not support the weight of a sex stereotyping claim. There is absolutely no evidence that the State adopted or maintains the gender transformations exclusion because transgender state-employees fail to conform to a stereotype of how he or she should dress, look, speak, or behave in the workplace based on his or her sex. In point of fact, Bruce himself does not claim that in his specific workplace he has been the subject of sex stereotyping. There is no evidence that he is not allowed and permitted to present himself consistent with the gender he identifies with.[5]

Clearly, *Price Waterhouse* had it right when it construed the prohibition of discrimination "because of sex" under Title VII to include discrimination based on non-conformance with sex stereotypes. But *Price Waterhouse* did not sanction using a Title VII sex stereotyping claim to

[5]Confirming the discussions between counsel at a meet-and-confer conference concerning discovery issues, Bruce's counsel indicated that Bruce was not "making a claim that he has experienced any abuse, animus, or hostile environment at work because he is transgender." (Letter of May 10, 2018, from Jerry Johnson to Joshua Block.)

require an employer-sponsored health plan to provide coverage for gender transformations where there is no evidence to support such a claim. Bruce's stereotyping claim and transgender status claim fall short as a matter of law under a *Price Waterhouse* analysis.

**II.**

**EVEN IF TITLE VII APPLIES TO "GENDER IDENTITY" OR "TRANSGENDER STATUS", BRUCE HAS TO, BUT CANNOT, PROVE INTENTIONAL DISCRIMINATION**.

"Title VII prohibits both intentional discrimination (known as 'disparate treatment') as well as, in some cases, practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities (known as 'disparate impact')." *Ricci v. DeStefano*, 557 U.S. 557, 577, 129 S.Ct. 2658 (2009). Section 2000e-2(a)(1) is Title VII's disparate treatment provision. *Id*. "A disparate-treatment plaintiff must establish 'that the defendant had a discriminatory intent or motive' for taking a job-related action." *Id*. (citations omitted). *See also Texas Dept. Of Housing and Community Affairs v. Inclusive*, ___ U.S. ___, 135 S.Ct. 2507 (2015) (In a disparate-treatment case, it must be proven that the defendant had a discriminatory intent or motive.) Here, Bruce has asserted a disparate-treatment claim under § 2000e-2(a)(1). (Doc. 24, ¶¶ 49, 51).

A benefits plan that is facially neutral cannot form the basis of a discriminatory treatment claim under Title VII. In *Wood v. City of San Diego*, 678 F.3d 1075 (9th Cir. 2012), a retired, female employee sued the city claiming that a surviving spouse benefit under the city's retirement plan discriminated on the basis of sex; the plan favored males. The Ninth Circuit acknowledged that "[r]etirement contributions and benefits must be facially neutral with respect to sex and other classifications protected under Title VII." *Id.* at 1080 (citations omitted). The

court held, however, that the employee could not prove discriminatory intent under her disparate treatment claim where the plan was "facially neutral: similarly situated male and female employees make the same contributions and receive the same benefits." *Id*. at 1080-81.

In *Krauel v. Iowa Methodist Medical Center*, 95 F.3d 674 (8th Cir. 1996), the medical center provided its employees with a self-funded, medical benefits plan. An exclusion in the plan excluded coverage for treatment of male or female infertility. Krauel, who had endometriosis, sued the medical center claiming that denial of coverage for her fertility treatments violated, among other things, Title VII. *Id*. at 675-76.

As to the general Title VII claim, the Eighth Circuit noted that "the Plan's infertility exclusion applies equally to all individuals, in that no one participating in the Plan receives coverage for treatment of infertility problems." *Id*. at 678. The employee was of the position, however, that she had evidence of intentional discrimination based on "sex" with IMMC's vice-president's statement that the cost of covering infertility treatments to female employees would be a financial burden on the company. *Id*. at 680-81.

The Eighth Circuit concluded that the employee had not presented evidence of intentional sex discrimination under her disparate-treatment claim. The Eighth Circuit noted that "[i]n an intentional discrimination claim, 'liability depends on whether the protected trait . . . actually motivated the employer's decision.'" *Id*. at 680 (citations omitted). It then wrote:

> In the circumstances of this case, we hold as a matter of law that the alleged statements do not rise to the level of sex discrimination. If the statements demonstrate anything at all, they may indicate that cost was a factor in IMMC's decision to exclude coverage for infertility treatment. That is irrelevant, however, unless the fertility treatment exclusion is a sex-based classification. We already have concluded, earlier in this opinion, that IMMC's infertility treatment

> exclusion is not a sex-based classification because it applies equally to all individuals, male or female. Thus Krauel's argument concerning IMMC's consideration of cost is irrelevant, and the District Court did not err in granting summary judgment in favor of IMMC on Krauel's intentional discrimination claim.

*Id*. at 680-81 (citations omitted).

Like infertility, the Eighth Circuit has concluded that contraception is sex or gender-neutral. Therefore, an insurance plan's exclusion of coverage for contraception for both sexes did not discriminate against female employees. In *In re Union Pacific Railroad Employment Practices Litigation*, 479 F.3d 936 (8th Cir. 2007), female employees sued their employer arguing that a contraception exclusion under their employee health insurance plan violated Title VII. *Id.* at 938. The plan excluded "all types of contraception, whether prescription, non-prescription or surgical and whether for men or women, unless an employee has a non-contraception medical necessity for the contraception." *Id.* at 939.

The Title VII claim was for sex-based disparate treatment of female employees. According to the court, "To establish this disparate treatment claim, [plaintiffs] must show in part, that 'other employees outside of the protected group were allegedly treated more favorably and were similarly situated in all relevant respects.'" *Id*. at 944. The district court had:

> [c]ompared the 'medicines or medical services that prevent employees from developing diseases or conditions that pose an equal or lesser threat to employees' health than does pregnancy.' It found that the health plans treated men more favorably because the plans covered preventive medicines and services such as medication for male-pattern baldness, routine physical exams, tetanus shots, and drug and alcohol treatments.

*Id*. at 944 (citations omitted).

On appeal, "in determining whether Union Pacific treated the similarly situated male

employees more favorably than the protected female employees, [the Eighth Circuit] compare[d] the health benefits that Union Pacific's plans provided for men and women." In doing so, the court concluded that:

> "We simply hold that the district court erred in using the comparator 'medicines or medical services that prevent employees from developing diseases or conditions that pose an equal or less threat to employees' health than does pregnancy.' As previously discussed, this case concerns Union Pacific's coverage of contraception for men and women. **The proper comparator is the provision of the medical benefit in question, contraception**. Union Pacific's health plans do not cover any contraception used by women such as birth control, sponges, diaphragms, intrauterine devices or tubal ligations or any contraception used by men such as condoms and vasectomies. Therefore, **the coverage provided to women is not less favorable than that provided to men.** Thus, there is no violation of Title VII."

*Id*. at 944-45 (emphasis added).

Here, the Plan's "transgender transformations" exclusion is facially neutral like the exclusions for infertility treatments and contraceptions in *Krauel* and *In Re Union Pacific*. The exclusion is indifferent about a member's sex; it applies equally to all individuals, male or female. The Plan covers all members to the same extent and for the same treatments.[6] The Plan denies coverage for services or procedures to males who are transitioning to become more like a female and females who are transitioning to become more like a male. Like infertility or contraception, the treatment excluded here is for a particular condition: gender dysphoria, whether for a male or a female. This is not disparate-treatment discrimination.

[6]The non-disparity in treatment of members under the Plan is discussed in more detail below under the Equal Protection issue.

**EQUAL PROTECTION**

**Introduction**

The Equal Protection Clause of the Fourteenth Amendment states that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. The Equal Protection Clause "is to secure every person within the State's jurisdiction against intentional arbitrary discrimination." *Engquist v. Or. Dep't of Agric*., 553 U.S. 591, 611 (2008) (quoting *Village of Willowbrook v. Olech*, 58 U.S. 562, 564 (2000) (per curiam)). Basically, under the Equal Protection Clause, all persons similarly situated should be treated alike. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 4783 U.S. 432, 439 (1985). Persons are similarly situated under the Equal Protection Clause when they are alike in all relevant respects. *Carter v. Arkansas,* 392 F.3d 965, 969 (8th Cir. 2004). If they are not, then the disparate treatment must be justified under one of three levels of judicial scrutiny which is discussed in more detail below.

**III.**

**THE GENDER TRANSFORMATION EXCLUSION DOES NOT TREAT TRANSGENDER MEMBERS OF THE PLAN LESS FAVORABLY THEN OTHER SIMILARLY SITUATED NON-TRANSGENDER MEMBERS.**

The similarly-situated element of an equal protection claim was discussed by the Eighth Circuit in *Carter v. Arkansas,* 392 F.3d 965 (8th Cir. 2004). There, a retired public school employee sued the state of Arkansas and certain officials claiming that their administration of a state employees' benefits plan violated his rights to equal protection and due process. One of the claims was that the defendants denied him his constitutional rights "because it contributed more

for health insurance premiums for state employees than for public school employees." *Id.* at 968.

As to the first element of an Equal Protection Claim, the Eighth Circuit wrote:

> As a threshold matter, in order 'to state an equal protection claim, appellant must have established that he was treated differently from others similarly situated to him.' [M]oreover, the two groups must be similarly situated 'in all relevant respects.'

*Id*. at 968-69 (citations omitted).[7]

The Eighth Circuit found public school employees, the group Carter was a member of, and state employees, the other group, were not similarly situated under the plan. "Here, public school employees and state employees are not similarly situated for purposes of this lawsuit challenging the amount of employer contributions to employee health insurance premiums because, as the state notes, the two groups have different employers." *Id.* at 969.

Bruce alleges that "by categorically excluding all medically necessary . . . services related to 'gender transformations' South Dakota has unlawfully discriminated . . . against [him] on the basis of gender" and "on the basis of transgender status". (Doc. 24, ¶¶ 61, 62).

Before considering Bruce's claim in this regard, one needs to turn to the Plan and study how it works in providing and excluding coverage. The Plan provides that: "Services that are not Medically Necessary will not be covered by the Plan." (Exh. 6, p. 45). Relatedly, it is stated that subject to the "limitations, exclusions, and other provisions of the Plan," "[m]embers shall be entitled to Medically Necessary services and supplies, if provided by or under the direction of a Physician." (Exh. 6, p. 46). The structure of the Plan, then, is to cover medically necessary

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[7]Elsewhere in the opinion, the Eighth Circuit stated that the "[p]laintiffs must be 'similarly situated to another group for purposes of the challenged government action.'" *Id*. at 969 (citation omitted).

services unless the coverage is otherwise limited by a provision, including an exclusion, within the Plan. (SUMF 67 - 69). The exclusion that is in dispute in this case sets forth that the Plan does not pay any benefits for "services or drugs related to gender transformations." (Exh. 6, pp. 53, 56; SUMF 71).

Bruce is unable to prove that the Plan discriminates against him or other transgenders; treats them differently from others similarly situated to them. For certain, discrimination means that one person or group of individuals (transgenders) are treated differently from a similarly situated person or group who are non-transgenders. Under the Plan, if both groups have the same medical conditions (meet the same clinical criteria), they both get coverage for the treatment of that condition, as long as the treatment is not excluded or otherwise limited under the Plan. (See Plan provisions cited in paragraph immediately above.) The Plan treats similarly situated Plan members alike. So, if Bruce and a non-transgender member (male or female) had breast cancer and a mastectomy was deemed medically necessary to treat their cancer, both Bruce and the non-transgender would have coverage for that procedure. (See Plan provisions in paragraph immediately above – cancer treatment is not excluded; *see also* Luther's Affidavit at SUMF 97). That is why the Plan has covered cancer-related mastectomies for males and females. (SUMF 99). As another example, women are sometimes given estrogen as "hormone replacement therapy" in order to treat symptoms of menopause. See MAYO CLINIC STAFF, *Menopause: Hormone Therapy: Is It Right For You?* MAYO CLINIC (Apr. 14, 2015), http://www.mayoclinic.org/diseases-conditions/menopause/in-depth/hormone-therapy/art-20046372. Under the Plan, a transgender man would get the same hormone treatment if he went into menopause. Another case in point would be a "medically necessary hysterectomy" for a

transgender man "and a cis-gender female. It is for that reason that on October 12, 2017, HMP provided [Bruce] with a 'medical necessity certification' for a hysterectomy and other similar treatment. . . ." (SUMF 97 - Luther Affidavit).

On the other hand, if individual members, or member groups (transgenders as one group and non-transgenders as the other), do not meet the same medical criteria for a diagnosis or for treatment they are not similarly situated and any disparity in coverage does not constitute discrimination. The court is asked to consider the following examples:

- Bruce or another transgender member have cancer that can be treated with medically necessary radiation. A non-transgender member has cancer that can only be treated with a medically necessary mastectomy and chemotherapy. Here, Bruce or the other transgender member are similarly situated to the non-transgender member in terms of a medical diagnosis - they have cancer - but they are not similarly situated to the non-transgender member in terms of required treatment. The fact that one gets coverage for radiation and the other gets a mastectomy and chemotherapy is not discriminatory;

- Bruce or another transgender member seek treatment for a medical condition not covered under the Plan, but a non-transgender member has coverage under the Plan for the same treatment but for a completely different medical condition. Specifically, a mastectomy for a transgender suffering from gender dysphoria is a completely different medical diagnosis than a non-transgender member diagnosed with breast cancer. One has cancer and the other does not. One gets a mastectomy under the Plan (member with cancer), and the other does not. Because the individuals are not similarly situated with respect to medical diagnosis, the fact that the Plan covers treatment for one condition but not the other is not discriminatory;

- Bruce wants coverage for a mastectomy for gynecomastia. A biological male wants coverage for a mastectomy for gynecomastia. Coverage is provided to the biological male member. Coverage is denied to Bruce because he is biologically a female and only a biological male can have gynecomastia. (SUMF 96 - Luther Affidavit). Since the members are not similarly situated, the fact that one gets coverage for a mastectomy and the other does not is not discriminatory.

As can be seen, then, the Plan is facially neutral in that similarly situated members

receive the same treatment under its terms and provisions.

**IV.**

**IF THE GENDER TRANSFORMATION EXCLUSION DISCRIMINATES AGAINST TRANSGENDER MEMBERS OF THE PLAN , THE RATIONAL BASIS STANDARD OF REVIEW DETERMINES WHETHER THE DISCRIMINATION IS JUSTIFIED. FURTHER, UNDER THAT STANDARD OF REVIEW, THE EXCLUSION IS JUSTIFIED.**

In the event this court believes that the exclusion discriminates against transgenders, there still is no denial of equal protection if the discrimination is justified. The U.S. Supreme Court has formulated three different levels of scrutiny or standards of review in analyzing whether disparate treatment is justified under the Equal Protection Clause. Each level of scrutiny is dependent on the type of classification being challenged. If state law or action classifies on the basis of a fundamental right or a suspect class, it is analyzed under a strict scrutiny standard. *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 312, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976). Strict scrutiny is used to analyze classifications based on race, alienage, and national origin (ancestry). *Id*. at 312, n.4. State law or action cannot survive under strict scrutiny unless the government can show that the law or action is narrowly tailored to a compelling government interest. *Grutter v. Bollinger*, 539 U.S. 306, 308, 123 S.Ct. 2325 (2003).

If state law or action classifies based on sex or illegitimacy, it is analyzed under an intermediate scrutiny standard. *Clark v. Jeter*, 486 U.S. 456, 461, 108 S.Ct. 1910, 100 L.Ed.2d 465 (1988). Such classifications are referred to as "quasi-suspect" and survive only if the government shows the classification is "substantially related to the achievement" of an important governmental objective. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724, 102 S.Ct. 3331,

73 L.Ed.2d 1090 (1982). This standard has "generally . . . been applied to discriminatory classifications based on sex or illegitimacy." *Clark*, 486 U.S. at 461.

Finally, if a state law or action does not classify on the basis of a suspect or quasi-suspect class, it is analyzed under a level of minimum scrutiny; called a rational basis review. *Heller v. Doe by Doe*, 509 U.S. 312, 319-21 (1993). Under that review, the state law or action must be "rationally related to a legitimate governmental purpose." *Clark*, 486 U.S. at 461.

**A. Intermediate Scrutiny**

Clearly, this case does not involve a fundamental right or a suspect class (classification based on race alienage, or national origin). Therefore, Bruce's equal protection claim cannot be analyzed under the strict scrutiny standard.

Bruce does claim, however, that the gender transformations exclusion is subject to heightened intermediate scrutiny, and that the exclusion does not serve a compelling, and is not substantially related to an important, government interest. (Doc. 24, ¶¶ 62-64). Alternatively, Bruce alleges that the exclusion "lacks any rational basis and is grounded in sex stereotypes, discomfort with gender non-conformity, and moral disapproval of people who are transgender." (Doc. 24, ¶ 65).

As established under the Title VII discussion of this brief, there has been no discrimination based on "sex" per se or "sex stereotyping." Therefore, the only basis for analyzing the exclusion under the intermediate scrutiny standard would be if "gender identity" or "transgender status" constitute a quasi-suspect class in and of themselves. Neither the U.S. Supreme Court nor the Eighth Circuit has decided whether individuals that are transgender constitute a quasi-suspect class because of their "gender identity" or "transgender status." See,

e.g., *Campbell v. Bruce*, 2017 WL 6334221, at *3 (W.D. Wis. Dec. 1, 2017) (The Supreme Court has not determined "whether transgender individuals constitute a protected class."); *Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep't of Educ.*, 208 F.Supp. 3d 850, 872(S.D. Ohio 2016) ("The Supreme Court has not decided whether transgender status is a quasi-suspect class under the Equal Protection Clause.") Therefore, there is no authority in this circuit supporting Bruce's allegation that his equal protection claim should be analyzed under the intermediate scrutiny standard.

**B. Rational Basis Standard**

A number of courts have held that an equal protection claim based on discrimination against a transgender's status as such is analyzed under a rational basis standard. *See, e.g.*, *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1228 (10th Cir. 2007) (Transgender employee terminated. Court concluded that transsexual status by itself is not a protected class under the Equal Protection Clause); *Johnston v. University of Pittsburgh,* 97 F. Supp.3d 657 (W.D. Pa. 2015) (held that the rational basis standard applies to distinctions based on transgender status); *Braninburg v. Coalinga State Hosp.,* 2012 WL 3911910, at *8 (E.D.Cal. Sept. 7, 2012) ("it is not apparent that transgender individuals constitute a suspect class").

Here, if the gender transformations exclusion treats transgender members differently from other members of the Plan - which it does not - that treatment must be analyzed under the rational basis standard of review. The rules or parameters of a rational-basis review have been described as follows:

> [r]ational-basis review in equal protection analysis 'is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.' Nor does it authorize 'the judiciary to sit as a super

> legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.' [a] classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose. Further, a legislature that creates these categories need not 'actually articulate at any time the purpose or rationale supporting its classification.'
> Instead, a classification 'must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'
>
> A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. 'A legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.' '[T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record. Finally, courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it 'is not made with mathematical nicety or because in practice it results in some inequality.'

*Heller v. Doe by Doe*, 509 U.S. 312, 320-2, (1992) (citations omitted). *See also, Carter*, 392 F.3d 965, 968 (8th Cir. 2004) (Under [a rational basis] review, a court must reject an equal protection challenge to a statutory classification 'if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.' Indeed, 'a legislative choice. . . may be based on rational speculation unsupported by evidence of empirical data.'")(citations omitted); *Indep. Charities of Am., Inc. v. Minnesota*, 82 F.3d 791, 797 (8th Cir. 1996) (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993)) ("Under rational review basis, challenged statutory classifications are accorded a strong

presumption of validity, which is overcome only if the party challenging them negates 'every conceivable basis which might support it.'")

Bruce is unable to negate every conceivable basis which might support the exclusion. Consequently, Bruce cannot establish that there is no rational basis for the gender transformations exclusion. In fact, the record shows that there is a strong scientific and rational basis for the exclusion.

First, as indicated in Defendants' Answer to Bruce's Interrogatory 1 (see SUMF 102), a significant number of members in the medical field have concluded that gender transitions or transformations (including administration of hormones, cross-sex drugs, procedures, etc.) actually can be harmful to the patient. Others have concerns that there is not enough scientific evidence to show that such treatments are safe. Specifically:

- After a thorough review of available literature and studies, experts for the Centers for Medicare & Medicaid Services concluded that "[b]ased on an extensive assessment of the clinical evidence . . . there is not enough high quality evidence to determine whether gender reassignment surgery improves health outcomes for Medicare beneficiaries with gender dysphoria and whether patients most likely to benefit from these types of surgical intervention can be identified prospectively." (SUMF 102; Exh 13, p. 31 - Decision Memo for Gender Dysphoria and Gender Reassignment Surgery, August 30, 2016).

- CMS noted conflicting study results some of which reported benefits while others reported harms. Some of the studies reviewed by CMS reported higher mortality rages and health risks for transgender patients who had used hormone therapy and/or had surgical reassignment. Specifically, higher rate of heart disease, stroke, cancer, suicide, and psychiatric hospitalization. (SUMF 102; Exh 13, pp. 29-30).[8]

[8]One of the studies discussed in the 2016 Memo Decision was the Dhejne study. That study tracked and compared the health of transgender individuals postoperatively with the non-transgender population in Sweden at large. The study did not compare transgender Swedes who had surgery with transgender Swedes who did not have surgery.

(continued...)

- CMS wrote that "[t]he medical science in this area is evolving. This review has identified gaps in the evidentiary base as well as recommendations for good study designs. The Institute of Medicine, the National Institutes of Health, and others also identified many of the gaps in the data." (SUMF 102; Exh 13, p. 30).

- CMS "encourage[d] robust clinical studies that will fill the evidence gaps and help inform which patients are most likely to achieve improved health outcomes with gender reassignment surgery, . . . ." (SUMF 102; Exh 13, p. 30).

- As to adults, there are significant questions about the safety of administering testosterone and estrogen over a long period of time if not over the life of the person seeking gender reassignment. The Institute of Medicine has noted that transgender elders "may be at increased risk for breast, ovarian, uterine, or prostate cancer" as well as cardiac or pulmonary problems as a result of hormone therapy. (Statement of Fact No. 102; Exhibit 13, Institute of Medicine of the National Academies, *The Health of Lesbian, Gay, Bisexual and Transgender People: Building a Foundation for Better Understanding*, p. 264 (2011)). Further, WPATH has reported that hormone therapy involves increased risk of Type 2 diabetes, gallstones, venous thromboembolic disease, cardiovascular disease and high blood pressure. (SUMF 102; Exh 5, SOC, p. 40 (State 000594))**.**

- As to children, WPATH has written that "Gender dysphoria during childhood does not inevitably continue into adulthood. Rather, in follow-up studies of prepubertal children (mainly boys) ... the dysphoria persisted into adulthood for only 6-23% of children." (SUMF 102; Exh 5, SOC, p. 11) (State 000594)). WPATH also observed that "Newer studies, also including girls, showed a 12-27% persistence rate of gender dysphoria into adulthood." *Id*. In other words,

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(...continued)
At page 30 of the 2016 Memo Decision, CMS wrote that "Dhejne et al., [study] (2011) tracked all patients who had undergone reassignment surgery (mean age 35.1 years) over a 30 year interval and compared them to 6,480 matched controls. The study identified increased mortality and psychiatric hospitalization compared to the matched controls. The mortality was primarily due to completed suicides (19.1-fold greater than in control Swedes), but death due to neoplasm and cardiovascular disease was increased 2 to 2.5 times as well. We note, mortality from this patient population did not become apparent until after 10 years. The risk for psychiatric hospitalization was 2.8 times greater than in controls even after adjustment for prior psychiatric disease (18%). The risk for attempted suicide was greater in male-to-female patients regardless of the gender of the control. Further, we cannot exclude therapeutic interventions as a cause of the observed excess morbidity and mortality. The study, however, was not constructed to assess the impact of gender reassignment surgery *per se*."

most children with gender dysphoria will not experience gender dysphoria after they become adults.

- Dr. Hruz believes that there is not sufficient medical/scientific evidence regarding:
    - Whether puberty blocking/suppression treatments are safe;
    - Whether the effects of puberty-blocking/suppression treatments are reversible and whether the suppressed puberty of a child or adolescent will resume in the event such treatment is stopped;
    - Whether children or adolescents will develop their normal reproduction function in the event puberty-blocking/suppression treatment is stopped;
    - Whether children or adolescents will, consistent with their age and biological sex, have normal bone and muscle development, as well as height growth, in the event puberty blocking/suppression treatment is stopped.

(SUMF 102).

- Dr. Hruz also notes as stated above that most of the children or adolescents who have gender dysphoria later accept the gender associated with their biological sex. According to Dr. Hruz, it cannot be determined or predicted with any medical certainty or probability which children or adolescents will continue to have gender dysphoria after reaching adulthood. If the persistence of gender dysphoria in a particular child or adolescent cannot be determined predicted, then it would seem to follow that those children or adolescents whose dysphoria would resolve if they were left alone, are receiving puberty-blocking/suppression and cross-sex hormones that they do not need and the safety of which is in question. (SUMF 102).

- The Hayes, Inc., a recognized research and consulting firm that evaluates medical technologies to determine patient safety, health outcomes, etc., concluded that the practice of using hormones and sex reassignment surgery to treat GD in adults is based on "very low" quality of evidence.

Dr. Hruz and Dr. Sutphin discussed in detail the nature of hormonal treatment, the types of surgical procedures, and the risks of each in their expert declarations, portions of which are incorporated into Defendants' Statement of Facts. (SUMF 24, 25, 29-51). There, these experts described: the nature of the hormonal treatment as part of transitioning; the risks of hormones

including sterility, stunting of height, loss of bone mass, etc.; the complex nature of the bottom surgeries; the irreversible nature of the surgeries; post-surgical complications; the evidence of high rates of suicide and other morbidities long after the surgery even though one of the purposes of the surgery is to avoid suicide; and the general lack of quality evidence of the long-term effects of these surgeries.

Second, the State has a financial interest in the good health and welfare of its employee members and other members of its medical or health plan. If services or drugs for gender transitions are covered, there is a significant risk that those services or drugs could negatively impact the future, health and welfare of its plan members and increase the healthcare costs of the State. As an employer, the State also has an interest in having healthy, productive employees. (SUMF 102).

Third, the State has limited financial resources to pay its costs of coverage under its self-insured health plan. Therefore, the State has an interest in conserving those limited resources especially where there is not enough evidence, and there is a medical dispute, regarding the safety or effectiveness of services or drugs for gender transformations. (SUMF 102). *See also* Statements of Facts 112 through 119 regarding the State's monitoring and discussions regarding the fiscal condition of the Health Plan; efforts to cut the costs for the Plan because of the increasing costs of health care; the constraints of a budget set for the Plan; and therefore the State's decision not to remove the exclusion from the Plan.

For costs related to gender transformations, the information that AON Hewitt provided to HMP indicated that if bottom surgeries were involved, it could add up to $720,000 to the costs of the Plan. (SUMF 111; Exh 14; Exh 16). Bruce's expert, Dr. Loren Schechter testified that he

has seen some bottom surgeries that have cost $100,000 and more. (Schechter depo., pp. 90-92).[9] Finally, Dr. Sutphin has indicated that these surgeries can well exceed $75,000. (SUMF 52).

## CONCLUSION

The word "sex" in Title VII is confined to the physiological differences between males and females. It does not include "gender identity" or transgender status." Any effort to expand the scope of Title VII's coverage to include "gender identity" or "transgender status," as Bruce seeks to do here, must be left to Congress. Even if Title VII were to cover "gender identity" or "transgender status," Bruce is unable to prove that the exclusion constitutes intentional discrimination. Simply put, the Plan, including the subject exclusion, is facially neutral and, therefore, Bruce cannot establish discriminatory treatment under Title VII.

Although Title VII "because of sex" language covers sex stereotyping, Bruce has absolutely no evidence to support such a claim.

Finally, as to Bruce's equal protection claim, the record shows that the Plan, including the subject exclusion, does not treat transgender members less favorably than other similarly situated non-transgender members. Similarly situated members receive the same treatment under the Plan. If there is any disparate treatment between similarly situated members, the gender transformations exclusion that disparity is justified under the rational basis standard under the equal protection clause.

For these reasons, it is respectfully requested that the court grant Defendants' summary judgment motion in all respects.

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[9]Dr. Loren Schechter is one of Bruce's experts. Pertinent portions Dr. Schechter's deposition are attached as Exh. 18 to the Affidavit of Jerry D. Johnson.

Dated this 26th day of October, 2018.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that he served a copy of the Defendants State of South Dakota and Laurie Gill's Brief in Support of Motion for Summary Judgment upon the persons herein next designated, on the date below shown, via electronic filing with the U.S. District Court, to-wit:

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