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 OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

As explained in Plaintiff's Memorandum in Support of his Motion for Summary Judgment, ECF No. 33, at 1, the South Dakota State Employee Health Plan ("SDSEHP" or the "Plan") singles out transgender employees for unequal treatment by categorically excluding coverage for all "[s]ervices or drugs related to gender transformations" to treat gender dysphoria (the "'gender transformations' exclusion") even when that care would qualify as "Medically Necessary" under the Plan's generally applicable standards and procedures. By denying Mr. Bruce and other transgender employees an equal opportunity to prove that their care is medically necessary under the same standards and procedures that apply to other medical conditions, the "gender transformations" exclusion discriminates on the basis of sex, in violation of Title VII, and discriminates on the basis of gender and transgender status, in violation of the Equal Protection Clause of the Fourteenth Amendment. *See Boyden v. Conlin*, 17-cv-264-wmc, 2018 WL 4473347 (W.D. Wis. Sept. 18, 2018) (striking down similar exclusion in Wisconsin State employee health plan).[1]

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[1] *See also 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, which prohibits discrimination on the basis of sex); *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

For all the same reasons that Plaintiff's Motion for Summary Judgment should be granted, Defendants' Motion for Summary Judgment should be denied. Despite the overwhelming weight of authority in this Circuit recognizing that discrimination against transgender individuals is a form of discrimination on the basis of sex under Title VII and similar antidiscrimination statutes,[2] Defendants now seek summary judgment based on outdated legal arguments from *Sommers v. Budget Marketing.*, 667 F.2d 748 (8th Cir. 1982), that cannot be reconciled with the Supreme Court's subsequent decisions in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), or with the Eighth Circuit's most recent decision on this topic in *Lewis v. Heartland Inns of Am., L.L.C.*, 591 F.3d 1033, 1037 (8th Cir. 2010). Under *Price Waterhouse*, *Oncale*, and *Lewis*, the "gender transformations" exclusion facially discriminates on the basis of transgender employees' gender nonconformity and that discrimination "would not occur but for the victim's sex." *Lewis*, 591 F.3d at 1040.

Defendants' arguments under the Equal Protection Clause also fail as a matter of law. Mr. Bruce merely seeks an opportunity to prove that his care is medically necessary

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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.").

[2] *See Tovar*, 2018 WL 4516949, at *3; *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).

under the same standards and procedures that apply to other medical conditions. Under heightened scrutiny—or any standard of scrutiny—Defendants have failed to produce any admissible evidence explaining how Defendants' asserted interests in protecting employee safety and reducing costs justifies a sweeping and categorical ban on *all* transition-related care, even when that care satisfies the Plan's generally applicable standards of medical necessity. "The breadth of the [categorical exclusion] is so far removed from these particular justifications that . . . it [is] impossible to credit them." *Romer v. Evans*, 517 U.S. 620, 635 (1996).

For all the reasons set forth in Plaintiff's Memorandum in Support of his Motion for Summary Judgment, and for all the reasons below, Defendants' Motion for Summary Judgment should be denied.

ARGUMENT

I. The "Gender Transformations" Exclusion Violates Title VII.

Three district courts within the Eighth Circuit have already recognized that discrimination against transgender individuals is a form of discrimination on the basis of sex under Title VII and similar civil rights statutes. *See 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). Defendants ask this Court to disregard the decisions of other district courts and create an intra-Circuit split, but all of Defendants'

arguments are foreclosed by binding precedent from *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), and *Lewis v. Heartland Inns of Am., L.L.C.*, 591 F.3d 1033, 1037 (8th Cir. 2010). Under those precedents, the "gender transformations" exclusion facially violates Title VII because it facially discriminates "because of . . . sex."

A. Discrimination Based on a Person's Transgender Status or Gender Nonconformity Is Discrimination "Because of Such Individual's . . . Sex" Even Under Defendants' Definition of the Term "Sex."

Defendants devote a substantial portion of their Memorandum in Support of Summary Judgment ("Defs.' Mem."), ECF No. 35, to arguing about the definition of the statutory term "sex." *Id.* at 7-11. According to the Defendants, Title VII of the Civil Rights Act of 1964 does not prohibit discrimination against transgender individuals because "the word 'sex' in the statute means the biological and anatomical differences between males and females." *Id.* at 8. That definition of "sex" does not accurately reflect the ordinary meaning of sex in 1964 or today.[3] But for purposes of this case, there is no need to engage in a debate over the definition of "sex" because even under Defendants'

[3] Defendants attempt to draw a sharp distinction between the term "sex" and the term "gender," with the term "sex" referring to physical characteristics and the term "gender" referring to behavioral characteristics. But those terms of art do not reflect the *ordinary* meaning of sex in 1964 or today. The term "sex" typically refers to men and women in general, including *both* physical attributes and cultural and behavioral ones. *See* "sex, n., 4a," OED Online, Oxford University Press (defining sex as "a social or cultural phenomenon, and its manifestations" and collecting definitions dating back to 1651); Webster's Third New International Dictionary 2081 (1961) (defining sex as the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction ... and that is typically manifested as maleness and femaleness.").

proposed definition, discrimination on the basis of a person's transgender status or gender non-conformity is still "discrimination because of such individual's . . . sex" under Title VII.

The critical statutory language in this case is not the word "sex," but the words "because of." "Title VII prohibits an employer from 'discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of … sex*[.]'" *Lewis*, 591 F.3d at 1037 (quoting 42 U.S.C. § 2000e-2(a)(1) (emphasis in *Lewis*). The Supreme Court has made clear that "the words 'because of' do not mean '*solely* because of.'" *Price Waterhouse*, 490 U.S. at 241 (plurality). Rather, "[d]iscrimination occurs when sex 'was a motivating factor for any employment practice, even though other factors also motivated the practice.'" *Lewis*, 591 F.3d at 1037 (quoting 42 U.S.C. at § 2000e-2(m)); *accord Price Waterhouse*, 490 U.S. at 284 (Kennedy, J., dissenting) ("[S]ex is a cause for the employment decision whenever, *either by itself or in combination with other factors*, it made a difference to the decision.") (emphasis added).

If an employer discriminates against an employee for having (a) a male gender identity and (b) a female sex assigned at birth based on external anatomy, then the employee's sex assigned at birth is inherently a motivating factor for the discrimination. *See EEOC v. R.G. &. G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 576 (6th Cir. 2018), *pet. for cert. filed* No. 18-107 (June 24, 2018). "By definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth." *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of*

Educ., 858 F.3d 1034, 1048 (7th Cir. 2017). And, as the Eighth Circuit explained in *Lewis*, when an employee is discriminated against for failing to conform to sex stereotypes, "*the discrimination would not occur but for the victim's sex*." *Lewis*, 591 F.3d at 1040 (quoting *Smith v. Salem*, 378 F.3d 566, 574 (6th Cir. 2004) (emphasis in *Lewis*)).

Defendants attempt to distinguish *Lewis* by drawing a distinction between discrimination based on a person's gender-nonconforming mannerisms and appearance (which, Defendants concede, is "discrimination because of such individual's . . . sex") and discrimination based on a person's transgender status (which, Defendants contend, is *not* "discrimination because of such individual's. . . sex"). Defs.' Mem. at 20-23. But the vast majority of courts have rejected that distinction as illogical and arbitrary. *See Glenn*, 663 F.3d at 1316; *accord Harris Funeral Homes*, 884 F.3d at 577; *Whitaker*, 858 F.3d at 1048. By definition, any discrimination based on an employee's failure to conform to their sex assigned at birth is discrimination that "would not occur but for the victim's sex." *Lewis*, 591 F.3d at 1040. Any discrimination based on the lack of congruence between a person's gender identity and their sex assigned at birth, is thus "discrimination . . . because of sex," even under Defendants' preferred definition of the term.

B. Defendants' Arguments Based on Legislative Intent Cannot Narrow Title VII's Broad Statutory Text.

Defendants further attempt to limit the scope of Title VII by arguing that Congress's purpose in prohibiting sex discrimination was to protect employment opportunities for women, not to protect transgender people from discrimination. Defs.'

Mem. at 15. But the Supreme Court rejected that method of statutory interpretation in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), when it held that Title VII prohibits sexual harassment between two men even though "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII." *Id.* at 79. Justice Scalia explained on behalf of a unanimous court that "[s]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id.*

As demonstrated by *Oncale*, the plain text of Title VII applies to "discrimination of any kind that meets the statutory requirements," *Oncale*, 523 U.S. at 79, and cannot be narrowed to reach only the particular forms of sex discrimination recognized by Congress in 1964. "While every statute's *meaning* is fixed at the time of enactment, new *applications* may arise in light of changes in the world." *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018). Title VII thus protects employees from sexual harassment even though "the concept of 'sexual harassment' as gender discrimination had not been recognized or considered by the courts" when Congress enacted Title VII. *Davis v. Monroe Cty. Bd. Of Educ.*, 526 U.S. 629, 664 (1999) (Kennedy, J., dissenting); *see also Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 114 (2d Cir. 2018) (en banc), *pet. for cert. filed* No. 17-623 (June 21, 2018) (discussing how "sexual harassment and hostile work environment claims" "were initially believed to fall outside the scope of Title VII's prohibition"). The statute also extends to harassment between members of the same sex even though many judges have stated they "cannot believe that Congress … could have

intended it to reach such situations." *McWilliams v. Fairfax Cty. Bd. Of Supervisors*, 72 F.3d 1191, 1196 (4th Cir. 1996), *abrogated by Oncale*, 523 U.S. 75.

The same is true here. Sex-based discrimination that harms transgender individuals is a "reasonably comparable evil" that falls squarely within the statute's plain text. *Oncale*, 523 U.S. at 79; *see Harris Funeral Homes*, 884 F.3d at 577; *Whitaker*, 858 F.3d at 1048. Congress may not have specifically contemplated how the statutory text would apply to people who are transgender, but "[t]he fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning." *Union Bank v. Wolas*, 502 U.S. 151, 158 (1991). The courts may not "rewrite 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." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017).

C. Defendants' Arguments Based on Subsequent Legislative History Cannot Narrow the Broad Statutory Text.

Defendants also contend that sex discrimination against transgender people is implicitly excluded from Title VII because Congress passed unrelated statutes in 2009 and 2013 that explicitly protect individuals based on "gender identity." *See* Defs.' Mem. at 14 (citing 18 U.S.C. § 249(a)(2) and 42 U.S.C. § 13925(b)(13)(A)). But Congress's use of the term "gender identity" in different statutes passed in 2009 and 2013 says nothing about the meaning of "because of . . . sex" in a statute adopted by Congress in 1964. *Cf. Marvin M. Brandt Revocable Tr. v. United States*, 134 S. Ct. 1257, 1268 (2014) ("The

statutes the Government cites do not purport to define (or redefine) the [terms of an earlier statute]."); *Almendarez-Torres v. United States*, 523 U.S. 224, 237 (1998) ("These later enacted laws . . . do not [purport to] declare the meaning of earlier law."). By using the overlapping terms of "sex" and "gender identity" in statutes passed in 2009 and 2013, Congress simply "cho[se] to use both a belt and suspenders to achieve its objectives." *Harris Funeral Homes*, 884 F.3d at 578.

Failed proposals to add the term "gender identity" to Title VII (*see* Defs.' Mem. at 12) are even less probative because "[c]ongressional inaction cannot amend a duly enacted statute." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186 (1994). Indeed, the Supreme Court has declared that such "[p]ost-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation." *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011); *cf. Massachusetts*, 549 U.S. at 529-30 ("That subsequent Congresses have eschewed enacting binding emissions limitations to combat global warming tells us nothing about what Congress meant . . . in 1970 and 1977.").[4]

Even if it were permissible to interpret an earlier statute based on subsequent Congresses' legislative intent, "failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute." *United States v. Craft*, 535

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[4] Defendants also note that Congress in 1991 passed legislation specifically excluding transgender people from the Americans with Disabilities Act and the Rehabilitation Act. *See* Defs.' Mem. at 12-13. Far from supporting Defendants' arguments, the exclusions in those statutes demonstrate that when Congress wants to exclude transgender people from antidiscrimination protections it knows how to do so.

U.S. 274, 287 (2002) (internal quotation marks omitted). "A bill can be proposed for any number of reasons, and it can be rejected for just as many others." *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 170 (2001). The first legislative proposal to explicitly add protections for discrimination based on gender identity was introduced in 2007, *see* H.R. 2015, 110 Cong. 1st Sess. (2007), after the Sixth and Ninth Circuits had already held that Title VII prohibits discrimination against transgender people. *See Smith* 378 F.3d at 574-75; *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000). In this context, "another reasonable interpretation of that legislative non-history is that some Members of Congress believe that . . . the statute requires, not amendment, but only correct interpretation." *Schroer v. Billington*, 577 F. Supp. 2d 293, 308 (D.D.C. 2008); *see also Harris Funeral Homes*, 884 F.3d at 578; *Whitaker*, 858 F.3d at 1047-48.

D. The Eighth Circuit's Decision in *Sommers* Does Not Control This Case.

Before *Price Waterhouse* and *Oncale* were decided, the Eighth Circuit held in *Sommers v. Budget Marketing*, 667 F.2d 748 (8th Cir. 1982), that discrimination on the basis of sex did not include discrimination based on transgender status. Defendants argue that this Court remains bound by *Sommers* (Defs.' Mem. at 19-21), but "[d]istrict courts are not bound by a court of appeals' decision that has been undermined by a subsequent decision of the Supreme Court." *United States v. Haas*, 599 F. Supp. 2d 1061, 1068 (N.D. Iowa 2008), *aff'd*, 623 F.3d 1214 (8th Cir. 2010) (citations omitted); *see also United States v. Egenberger*, 424 F.3d 803, 805 (8th Cir. 2005) ("The district court does not continue to be bound by prior interpretations of the law that are contrary to the Supreme Court's most recent announcement.").

Price Waterhouse and *Oncale* have abrogated *Sommers* as binding precedent. As the Sixth, Seventh, Ninth, and Eleventh Circuits have already recognized, *Sommers* and other pre-*Price Waterhouse* precedents "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)); *see also Smith*, 378 F.3d at 573 (recognizing that *Sommers*, *Ulane*, and *Holloway* were "eviscerated by *Price Waterhouse*"); *Glenn v. Brumby*, 663 F.3d 1312, 1318 n.5 (11th Cir. 2011) (same).

Moreover, to the extent that the Eighth Circuit's decision in *Sommers* was based on the conclusion that "the legislative history does not show any intention to include transsexualism in Title VII," *Sommers*, 667 F.2d at 750, that reasoning was abrogated by *Oncale*, which clarified that Title VII prohibits sexual harassment between two people of the same sex even though "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII." 523 U.S. at 79; *see Glenn*, 663 F.3d at 1318 n.5 (explaining that "[t]he pre-*Price Waterhouse* cases' reliance on the presumed intent of Title VII's drafters is also inconsistent with *Oncale*").

In the 20 years since the Supreme Court decided *Oncale*, the Eighth Circuit has never treated *Sommers* as controlling precedent—or even cited it at all.[5] To the contrary, the Eighth Circuit has repeatedly "assume[d] for purposes of [an] appeal that the prohibition on sex based discrimination under Title VII . . . encompasses protection for transgender individuals." *Tovar v. Essentia Health*, 857 F.3d 771, 775 (8th Cir. 2017); *accord Hunter v. United Parcel Serv., Inc.*, 697 F.3d 697, 702 (8th Cir. 2012). And although the Eighth Circuit has not explicitly decided the question, it has cited the Sixth Circuit's decision in *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004), as "instructive." *Lewis*, 591 F.3d at 1036 (citing approvingly to *Smith*'s conclusion that discrimination against a transgender firefighter violated Title VII).

After *Price Waterhouse* and *Oncale*, the controlling precedent in the Eighth Circuit is *Lewis*, and courts within this Circuit applying *Lewis* have recognized that discrimination against transgender individuals is actionable as a form of sex stereotyping that "would not occur but for the victim's sex." *Lewis*, 591 F.3d at 1040.

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[5] Defendants note that the Eighth Circuit referred to *Sommers* with a "cf." citation in *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) (per curiam), which held that Title VII does not prohibit discrimination based on sexual orientation. *See* Defs.' Mem. at 21. But after the Supreme Court's decision in *Oncale*, the Eighth Circuit cautioned that *Williamson* was "a pre-*Oncale* case," and explained that *Williamson* does not foreclose a plaintiff from bringing a claim that he was harassed and labelled as gay "in an effort to debase his masculinity." *Schmedding v. Tnemec Co.*, 187 F.3d 862, 864 & n.3 (8th Cir. 1999); *accord Wolfe v. Fayetteville, Ark. Sch. Dist.*, 648 F.3d 860, 867 (8th Cir. 2011) (reaffirming that Title VII prohibits discrimination motivated by a person's "failure to conform to stereotypical male characteristics").

E. The "Gender Transformations" Exclusion Facially Discriminates "Because of . . . Sex."

As explained in Mr. Bruce's Memorandum in Support of his Motion for Summary Judgment (Pl.'s Mem. at 24-29), the "gender transformations" exclusion facially discriminates on the basis of sex because a person's "transitioning status constitutes 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 v. H&H Elec., Inc.*, No. 4:14-CV-00583-SWW, 2015 WL 5437101, at *3 (E.D. Ark. Sept. 15, 2015) (same). By its explicit terms, the "gender transformations" exclusion declares that medically necessary care will not be covered if the purpose of the care is to "transform[]" an employee's physiological and anatomical characteristics to conform to the employee's gender identity instead of the employee's sex assigned at birth. The exclusion is, therefore, discriminatory on its face. *See Boyden*, 2018 WL 4473347, at *14.[6]

By contrast, the cases relied upon by Defendants involved facially neutral exclusions of coverage for infertility, *see Krauel v. Iowa Methodist Medical Center*, 95

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[6] In addition to facially discriminating based on gender nonconformity, the South Dakota State Employee Health Plan also facially discriminates based on an employee's sex assigned at birth. *See Boyden*, 2018 WL 4473347, at *12; *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)).

F.3d 674 (8th Cir. 1996), and contraception, *see In re Union Pacific Railroad Employment Practices Litigation*, 479 F.3d 936 (8th Cir. 2007). *See* Defs.' Mem. at 24-26 (relying on *Krauel* and *In re Union Pacific*). When a policy is facially neutral a plaintiff must show discriminatory intent to establish a violation of Title VII, but when an exclusion is facially discriminatory no additional evidence of motive is necessary. *See Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc.,* 499 U.S. 187, 199 (1991) (explaining that "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy").

Moreover, the "gender transformations" exclusion is not rendered facially neutral simply because it applies equally to transgender men transitioning from female to male and to transgender women transitioning from male to female. The Eighth Circuit made clear in *Lewis* that Title VII does not "compel a woman alleging sex discrimination to prove that men were not subjected to the same challenged discriminatory conduct," 491 F.3d at 1040, because "the ultimate issue [under Title VII] is the reasons for the individual plaintiff's treatment, not the relative treatment of different groups within the workplace," *id.* at 1039. A policy requiring men to adhere to male stereotypes and women to female stereotypes does not treat men and women the same; it subjects individuals to different sets of stereotypes based on their sex. *See Harris Funeral Homes*, 884 F.3d at 574; *Zarda*, 883 F.3d at 123; *cf. Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (explaining that "[s]tereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men"). A policy that discriminates against individual employees for failing to adhere to

sex stereotypes thus violates Title VII even when the policy imposes sex stereotypes on both men and women.[7]

II. The "Gender Transformations" Exclusion Violates the Equal Protection Clause of the Fourteenth Amendment.

A. The "Gender Transformations" Exclusion Discriminates on the Basis of Gender and Transgender Status.

As explained in Plaintiff's Memorandum of Law in Support of his Motion for Summary Judgment, the "gender transformations" exclusion is subject to heightened scrutiny for two reasons. Pl.'s Mem. at 29-31. First, for all the same reasons that the "gender transformations" exclusion discriminates on the basis of sex under Title VII, it also discriminates on the basis of gender under the Equal Protection Clause. *See Brown v. Dep't of Health & Human Servs.*, No. 8:16CV377, 2016 WL 6637937, at *4 (D. Neb. Nov. 9, 2016) (holding that transgender plaintiff stated valid claim under Equal Protection Clause based on gender nonconformity).

Second, the "gender transformations" exclusion is also subject to heightened scrutiny because it discriminates on the basis of transgender status. Pl.'s Mem. at 30. As Defendants concede, the level of scrutiny for classifications based on transgender status

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[7] Courts within the Eighth Circuit recognized the same principle in the context of laws prohibiting same-sex couples from marrying. Even though such laws applied equally to gay men and gay women, courts with in the Eighth Circuit concluded that such laws facially discriminated against individual men and women on the basis of sex. *See Jernigan v. Crane*, 64 F. Supp. 3d 1260, 1286 (E.D. Ark. 2014), *aff'd*, 796 F.3d 976 (8th Cir. 2015) ("That Arkansas's restriction on same-sex marriage imposes identical disabilities on men and women does not foreclose a claim that the laws discriminate based on gender."); *accord Rosenbrahn v. Daugaard*, 61 F. Supp. 3d 845, 859 (D.S.D. 2014).

is an open question in this Circuit. *See* Defs.' Mem. at 32-33. In the absence of controlling Eighth Circuit precedent, this Court must decide the level of scrutiny by analyzing the traditional criteria that the Supreme Court uses to identify suspect or quasi-suspect classifications. As explained in Plaintiff's Memorandum in Support of his Motion for Summary Judgment, discrimination against transgender people meets all of the criteria for applying heightened scrutiny. Pl.'s Mem. at 30 (collecting cases).

Defendants argue that the "gender transformations" exclusion does not discriminate against transgender people because everyone, whether transgender or not, is denied transition-related care for gender dysphoria. *See* Defs.' Mem. at 28-32. But the Supreme Court has refused to "distinguish between status and conduct" when a particular characteristic is a defining element of a protected class. *See Christian Legal Soc. v. Martinez*, 561 U.S. 661, 689 (2010) (refusing to distinguish between discrimination against gay individuals and discrimination against people who engage in same-sex intimate conduct); *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (O'Connor, J., concurring) (explaining that state sodomy ban was unconstitutional because "the conduct targeted by this law . . . is closely correlated with" being lesbian, gay, or bisexual); *cf. Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews."). Applying these precedents, lower courts have rejected such attempts to distinguish between transgender status and gender transition because a person's need to transition is the "very characteristic that defines them as transgender in the first place." *Karnoski v. Trump*, No. C17-1297-MJP, 2018 WL 1784464, at *6 (W.D.

Wash. Apr. 13, 2018), *appeal filed*, No. 18-35347 (9th Cir. Apr. 30, 2018); *accord Doe 2 v. Trump*, 315 F. Supp. 3d 474, 495 (D.D.C. 2018).

Defendants also contend that the exclusion does not discriminate because transgender beneficiaries seeking transition-related care are treated the same as beneficiaries seeking care for other non-covered treatments. Defs.' Mem. at 29-30. But "[t]he fact that not all medically necessary procedures are covered, therefore, does not relieve defendants of their duty to ensure that the insurance coverage offered to state employees does not discriminate on the basis of sex or some other protected status." *Boyden*, 2018 WL 4473347, at *16. The "gender transformations" exclusion facially classifies treatment for exclusion on the basis of gender and transgender status, and the Equal Protection Clause requires that Defendants provide a constitutionally adequate explanation for that differential treatment.

B. The "Gender Transformations" Exclusion Cannot Survive Heightened Scrutiny—or Any Standard of Scrutiny.

As explained in Plaintiff's Memorandum in Support of his Motion for Summary Judgment, 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. Pl.'s Mem. at 16-24. Under any standard of scrutiny, none of Defendants' asserted governmental interests provides a constitutionally adequate basis for denying Mr. Bruce that equal opportunity.

1. Defendants' Asserted Interest in Protecting Employees' Health Cannot Survive Heightened Scrutiny—or Any Standard of Scrutiny

Defendants attempt to justify the "gender transformations" exclusion by asserting that transition-related care has not been proven safe and effective. Defs.' Mem. at 35-37. As explained in Plaintiff's Memorandum in Support of his Motion for Summary Judgment, however, Defendants' allegations regarding safety are *post hoc* rationalizations developed in response to litigation. Pl.'s Mem at 32-33. The undisputed evidence shows that Defendants' decision to maintain the "gender transformations" exclusion was driven solely by a desire to avoid additional costs. Under heightened scrutiny, these *post hoc* assertions cannot be considered. *See Boyden*, 2018 WL 4473347, at *18.

Moreover, under heightened scrutiny, Defendants bear the burden of demonstrating that the challenged policy actually serves the asserted interest in patient safety. In order to carry that burden, Defendants must establish a "direct, substantial relationship between objective and means." *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982). As discussed below and in Plaintiff's Memorandum in Support of Motion for Summary Judgment, all of Defendants' arguments regarding the safety of transition-related care are based on disputed questions of fact that cannot serve as a basis for summary judgment. *See* Pl.'s Mem. at 5-10. And, even if all of Defendants' factual assertions were accepted as true, Defendants have failed to provide *any* admissible evidence that their asserted objective in protecting patient safety is substantially related to their categorical ban on coverage for *all* transition-related care even when the care would

qualify as medically necessary under the Plan's generally applicable procedures. Any legitimate interest in protecting employees' safety is already served by the Plan's generally applicable requirement that covered services qualify as medically necessary. The additional, categorical exclusion of transition-related care "is gratuitous." *Orr v. Orr*, 440 U.S. 268, 282 (1979); *see id.* at 283 ("Where, as here, the State's compensatory and ameliorative purposes are as well served by a gender-neutral classification as one that gender classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex.").

Indeed, even under rational basis review, the argument that the "gender transformations" exclusion protects patient safety is "so attenuated as to render [it] irrational." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985). The "gender transformations" exclusion does not protect employees from unsafe treatments; its only function is to exclude coverage for transition-related treatments that would otherwise qualify as safe and effective under the Plan's generally applicable terms. 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 medical necessity are not sufficient to protect the health and safety of patients receiving transition-related care. *Cf. id.* at 450 ("[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.").

None of Defendants' evidence comes close to justifying the "gender transformations" exclusion's categorical ban.

First, Defendants argue that there is not sufficient evidence to show that transition-related care is safe for patients. As discussed in Plaintiff's Memorandum in Support of his Motion for Summary Judgment, those assertions are directly rebutted by Plaintiff's expert witnesses and conflict with the stated views of every major medical organization to opine on the issue. Pl.'s Mem. at 5-10. Indeed, Defendants have failed to offer *any* admissible evidence supporting a medical justification for their categorical ban. Defendants rely primarily on a 2016 Decision Memo from the Center for Medicare & Medicaid Services (Defs.' Mem. at 25-26), but as discussed in Plaintiff's Memorandum In Support of his Motion for Summary Judgment (Pl.'s Mem. at 10), the CMS Memo does not support Defendants' categorical ban. Instead, the CMS Memo reaffirmed that Medicare providers must evaluate transition-related care on an individualized basis to determine whether the care is medically necessary.[8]

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[8] Defendants quote at length from the CMS Memo's discussion of a study by Dhejne in Sweden, which found that transgender people in Sweden were more likely than the population at large to have health disparities, even after undergoing transition-related surgery. *See* Defs.' Mem. at 35 n.8. As Dr. Brown explained, however, "statistically, transgender people as a group are at greater risk of experiencing those conditions as a result of the stressors inherent in being prevented from transitioning or obtaining medical care throughout all, or much, of their lives. Some studies have documented that these health disparities can persist even after transition-related treatment because of the continuing effects of discrimination and the reality that gender dysphoria-specific treatments are not panaceas for all problems that a person may experience in their life (nor were these treatments designed to be)." *See* Brown Supp. Report & Decl. ¶ 15 (Block Decl. Ex. 6, ECF No. 31-6).

Second, Defendants argue that transition-related hormone therapy can create health risks. But every medical intervention has risks and benefits. The question is whether the benefits are likely to exceed the risks. *See* Brown Supp. Report & Decl. ¶ 18 (Block Decl. Ex. 6, ECF No. 31-6). There is no reason why those risks and benefits cannot be assessed under the generally applicable standard of medical necessity that applies to treatments for other medical conditions.[9]

Third, Defendants rely on the personal view of their designated expert, Dr. Hruz, that transition-related puberty blockers and hormone therapy should not be provided to transgender youth because some pre-pubertal transgender children "desist" from identifying as transgender once they reach adolescence. As explained in Plaintiff's Memorandum of Law in Support of his Motion for Summary Judgment, Dr. Hruz has no training or experience treating gender dysphoria and is not qualified to provide expert testimony on the topic. *See* Pl.'s Mem. at 7. Dr. Hruz's personal views regarding the appropriateness of providing transition-related care contradict the stated views of every major medical organization to address the issue, including the American Academy of Pediatrics and the Endocrine Society. *Id.* at 8-9. And even if Dr. Hruz's arguments regarding transgender youth were accepted by the mainstream medical community, they

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[9] Defendants also mischaracterize the extent of the potential risks associated with hormone therapy. Dr. Brown testified that "[a]lthough Defendants suggest that transgender people may be at greater risks of developing certain cancers and thromboembolic events as a result of extended hormone use, newer literature has debunked that argument." Brown Supp. Report & Decl. ¶ 19.

would still not provide a basis for denying transition-related care to transgender adults. "While some older studies have suggested that gender dysphoria in pre-pubertal youth may not always persist through puberty, there is no support in the medical literature for the notion that gender dysphoria in post-pubertal adolescents or adults will resolve itself without medical intervention." Brown Supp. Report & Decl. ¶ 23.

In short, Defendants have offered no explanation for why their asserted concerns about safety cannot be fully addressed through the Plan's generally applicable procedures for evaluating whether other types of medical care are "medically necessary." Under any standard of scrutiny, "[t]he breadth of the [categorical exclusion] is so far removed from these particular justifications that . . . it [is] impossible to credit them." *Romer v. Evans*, 517 U.S. 620, 635 (1996).

2. Defendants' Asserted Interest in Reducing Costs Cannot Survive Heightened Scrutiny—or Any Standard of Scrutiny.

As explained in Plaintiff's Memorandum in Support of his Motion for Summary Judgment, Defendants' asserted interest in reducing costs cannot survive any standard of scrutiny because a governmental interest in reducing costs cannot justify arbitrary discrimination between similarly situated groups. Pl.'s Mem. at 31-32. Despite moving for summary judgment, Defendants have failed to provide any reason why the costs of covering medically necessary transition-related care should be treated differently from the costs of covering other medically necessary treatments. The record shows that Defendant Gill could not think of any amount of money—no matter how small—that she

would have been willing to pay to cover medically necessary transition-related care. *See id.* at 31.

Moreover, Defendants' own documents refute their *post hoc* suggestion that covering transition-related care would be unusually expensive. Defendants' consulting company estimated that the "most likely" cost of covering all transition-related care—including phalloplasty surgeries—would be a one-time cost of $154,667, which would amount to an additional cost of just $0.43 per Plan beneficiary for a single year. *See* Johnson Decl. Ex. 17, ECF No. 37-17, at 4. Now, in an effort to inflate costs, Defendants focus on a "worst case" scenario in which South Dakota employs six transgender employees (which would be three times the national average for an employer of the same size), in which all of those employees are transgender men, and in which all of those employees have phalloplasty, which is more expensive than other types of surgeries. *See id.*; Defs.' Mem. at 38. But as Plaintiff's expert rebuttal witness testified, the majority of transgender men do not undergo phalloplasty. Schechter Dep. at 134 (Bowie Decl. Ex. 2). Defendants' hypothetical concerns regarding one particular type of surgery do not provide any rational basis for categorically excluding *all* transition-related care, including chest-reconstruction surgery and hormone therapy, regardless of how expensive or inexpensive the surgery actually is.

CONCLUSION

For all these reasons, and for all the reasons set for in Plaintiff's Memorandum of Law in Support of his Motion for Summary Judgment, Defendants' Motion for Summary Judgment should be denied.

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 7,425 words.

Dated: December 3, 2018

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

CERTIFICATE OF SERVICE

I certify that on December 3, 2018, I served this document on Defendants by filing electronically, thereby causing automatic electronic service to be made on defendants.

Dated: December 3, 2018

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