IN THE UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

TERRI BRUCE, Plaintiff, vs. 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 DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND SUPPORTING BRIEF

INTRODUCTION

Bruce claims that the State and Gill have tried to create "[a] disputed question of fact with respect to whether transition related care is medically necessary. . . ." (Doc. 33, pp. 3-4). The State and Gill are not trying to demonstrate that there is a fact issue as to medical necessity and, therefore, Bruce is not entitled to a summary judgment. As shown below, an exclusion eliminates coverage for medically necessary treatment covered by the exclusion.[1] Therefore, the issue of medical necessity is not material to the motions for summary judgment filed by Bruce or by the State and Gill.[2] The exclusion itself is the only material issue before this court.

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[1]The Plan has a number of exclusions that exclude coverage for medically necessary medical treatment or services. See, for example, exclusions (g), (h), (k), (m), (n), (p) - Doc 37-6, pp 57-57. To the extent that those exclusions apply to any particular procedure, the member (transgender or not) is denied the opportunity to prove the medical necessity of the procedure.

[2]To be clear, however, Dr. Hruz and Dr. Sutphin have indicated that the medical necessity of mastectomies and other transition drugs and procedures is not supported by scientific and medical evidence. (Doc. 36, ¶¶ 26 to 52). But that evidence is not offered to demonstrate an issue of fact on medical necessity but to demonstrate that there is a rational basis for the

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Bruce indicates that a number of private insurance companies cover transition-related care as medically necessary treatment for gender dysphoria. That is true; and not surprising. Indeed, unless there is a governing statute or regulation indicating otherwise, coverage under an insurance or health plan is a matter of contract. *Bundul v. Travelers Indemnity Co.*, 753 N.W.2d 761 (Minn.Ct.App. 2008). Therefore, given the numerous types of insurance plans that exist in the health coverage field, benefits vary widely. Here, the Plan excludes coverage for such treatment and as discussed in more detail elsewhere, the issue is whether that exclusion violates Title VII or the Equal Protection Clause of the Fourteenth Amendment. It does not.

Bruce also identifies a number of medical organizations, including the American Medical Association, that have issued "policy statements and guidelines declaring that [the different] forms of treatments for gender dysphoria can be medically necessary for transgender individuals." (Doc. 33, p. 1). Bruce writes that notwithstanding those policy statements, standards of care, and guidelines, "the 'gender transformation' exclusion deprives [him]-and other transgender employees-of the opportunity to prove that their transition-related care is medically necessary under the same standards and procedures that apply to other medical conditions." (Doc. 33, p. 1). In effect, Bruce wants this court to rewrite the contract, and remove this the exclusion from the Plan, so that HMP can evaluate whether the mastectomy he seeks, and the hormone therapy he is receiving, are "'Medically Necessary' in accordance with the Plan's generally applicable standards and procedures." (Doc. 33, p. 2). This would be plain error.

Insurers or administrators of a health plan or program have no legal obligation to provide

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exclusion in the event this court finds the exclusion to be discriminatory under an equal protection analysis.

coverage for categories of health interventions or services that are specifically excluded under the plan or program; **no matter how much the intervention is determined to be medically necessary.** If there is such an exclusion, a medical-necessity analysis or determination does not even need to be made because it is irrelevant. Such an analysis is not a determinant of coverage. The exclusion is. This analysis is supported by the following authorities: (1) *Hawaii Medical Service Ass'n v. Adams*, 120 Haw 446, 209 P.3d 1260 (Ct. App. 2009) (Held: "[i]f a service [was] 'specifically excluded' from coverage, the health plan [was] not required to perform the statutory medical-necessity analysis and [was] not required to cover the 'specifically excluded' services no matter how medically necessary the health intervention may be." *Id*. Since the plan excluded coverage for allogeneic stem-cell transplants to treat multiple myeloma, the plan was not required to provide coverage even though the transplant was medically necessary.); *Delmarva Health Plan, Inc. v. Aceto,* 750 A.2d 1213 (Del. Ch. 1998) (court noted that insurer could amend the policy to exclude medically necessary lung transplants.); *Peterson v. American Life & Health Ins. Co*., 48 F.3d 404 (9th Cir. 1995), cert. denied, 516 U.S. 942 (1995) (exclusion of bypass surgery was enforceable under health policy); *Garcia v. Pacificare of California, Inc*., 750 F.3d 1113 (9th Cir. 2014) (same as to myoelectric prosthetics); *Wilcox v. Group Health Plan, Inc*., 2009 WL 910695 (E.D. Mo. Mar. 31, 2009) (same as to exclusion denying insured coverage for dental implant after suffering facial trauma); *Cullum v. Mutual of Omaha Ins. Co*., 840 F.2d 619 (8th Cir. 1988) (same as to exclusion under plan for treatment of lung disorder for infant); *Garred v. General American Life Ins. Co.*, 774 F.Supp. 1190 (W.D. Ark 1991) (same as to excluded coverage for psychological testing for a physical or mental condition); *Ellis by Ellis v. Patterson*, 859 F.2d 52 (8th Cir. 1988) (Arkansas was not obligated to provide Medicaid

coverage for a liver transplant for a infant. Congress had passed a statute giving the states the right to determine whether "to include organ transplants in their Medicaid plans." *Id*. at 55); *Dexter v. Kirschner,* 984 F.2d 979 (9th Cir. 1992) (Arizona had the discretion not to provide Medicaid coverage for autologous bone marrow transplants; *Tourdot v. Rockford Health Plans, Inc*., 439 F.3d 351 (7th Cir. 2006) (no coverage under policy excluding coverage for injuries sustained while plan member was engaged in an "illegal act-driving under the influence); *Carter v. ENSCO Inc*., 438 F.Supp.2d 669 (W.D. La 2006) (under "illegal activity" exclusion no coverage under medical plan for medical expenses where plan member hurt while driving under the influence).

Clearly, then, a private or government health plan or program can exclude coverage for treatment of specified medical conditions. Bruce admits that "gender dysphoria" is a medical condition. (Doc. 33, p. 5). As stated before, the issue is whether the Plan can categorically exclude treatment for this medical condition without violating Title VII or the Equal Protection Clause.

ARGUMENT AND AUTHORITIES

TITLE VII

I.

THE WORD "SEX" IN TITLE VII IS CONFINED TO THE PHYSIOLOGICAL DIFFERENCE BETWEEN MALES AND FEMALES AND DOES NOT INCLUDE "GENDER IDENTITY" OR "TRANSGENDER STATUS."

Introduction

Bruce argues that he is entitled to a summary judgment under his Title VII discrimination

claim and denial of equal protection claim. In his brief, Bruce first addresses his equal protection claim and then his Title VII claim. Generally, "[a] court . . . should not decide constitutional issues if the case may properly be decided on other grounds." *Nader 2000 Primary Committee, Inc. v. Hazeltine*, 110 F.Supp.2d 1201 (D.S.D. 2000). Therefore, the State and Gill will first address Bruce's Title VII claim and then his equal protection claim.

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

Title VII does not expressly include "gender identity" or "transgender status" as protected traits or classes. Consequently, in their opening brief, the State and Gill properly and thoroughly analyzed Bruce's Title VII claim under traditional canons of statutory construction. (Doc. 35, pp. 6-15). When examined under the light of those canons, it is clear that the "because of sex" phrase of Title VII does not cover "gender identity" and, therefore, does not protect transgenders per se.

Bruce's summary judgment brief notably did not offer a statutory interpretation of Title VII under these canons. (Doc. 33). Presumably, Bruce will discuss these canons in his brief resisting the summary judgment motion of the State and Gill. When he does, it will be clear that Bruce can offer no reasonable interpretation under the canons which support his Title VII claim.

B. Eighth Circuit Interpretation of the Word "Sex" in Title VII Comports with Congressional Intent - "Sex" is Limited to the Physiological Difference Between Males and Females – "Sex" Does Not Include "Gender Identity" or "Transgender Status"

In support of his position that the word "sex" includes the concepts of "gender identity" and "transgender status," Bruce gives short shrift to and even glosses over Eighth Circuit controlling precedent on this issue (i.e., *Sommers v. Budget Mktg. Inc.*, 667 F.2d 748 (8th Cir.

1982) (per curiam)) and goes to the Sixth Circuit's recent decision in *Equal Employment Opportunity Commission v. R.G. & G. R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018). In that case, Harris Funeral Homes had a sex-specific dress code for employees. Male employees were required to wear suits and ties and female employees were to wear skirts and business jackets. Stephens, a biological male, was employed by the funeral home as a funeral director and embalmer. At first, Stephens presented as a male at work. Later, Stephens started presenting as a transgender woman at work. The funeral home terminated Stephens for refusing to wear suits and ties as required of males under the dress code.

The Equal Employment Opportunity Commission sued Harris Funeral Home. The EEOC claimed that the funeral home violated Title VII by terminating Stephens because: (1) Stephens' transition from male to female did not conform to the funeral home's sex or gender based stereotypes; and/or (2) Stephens' transgender or transitioning status. *Id*. at 566-57. Harris Funeral Home moved to dismiss the complaint for failure to state a claim under Title VII. *Id*. at 569. The district court ruled that the Title VII claim could not proceed under the theory that the funeral home had fired Stephens "based solely upon [Stephens'] transgender and/or transitioning status." *Id*. at 570. "[T]he district court agreed with the Funeral Home that transgender status is not a protected trait under Title VII." *Id*. On the other hand, the district court allowed the EEOC to proceed under the *Price Waterhouse* sex stereotyping claim since, like anyone else, a transgender individual is protected from sex-stereotyping in their employment under Title VII.

Later, the parties filed cross-motions for summary judgment. The district court found that although there was direct evidence to support the sex stereotyping claim, the funeral home was exempt from Title VII based on the Religious Freedom Restoration Act of 1993 ("RFRA"). *Id*.

On appeal, the Sixth Circuit found that the district court was right in finding evidence of sex stereotyping, but had erred in exempting the funeral home from that claim under the RFRA. *Id*. at 571, 581. The Sixth Circuit stated that the funeral home's "decision to fire Stephens because Stephens was 'no longer going to represent himself as a man' and 'wanted to dress as a woman' falls squarely within the ambit of sex-based discrimination that *Price Waterhouse* and *Smith* forbid." *Id*. at 572. The Sixth Circuit also held that the district court had erred in dismissing the EEOC's claim of discrimination on the basis of Stephens' transgender and transitioning status. *Id*. at 571. In the opinion of the court "[d]iscrimination on the basis of transgender and transitioning status is necessarily discrimination on the basis of 'sex.'" *Id*. Therefore, the EEOC should have been given an opportunity to prove up that claim. *Id*. The court reasoned that "it is analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex." *Id*. at 575.

The State and Gill believe that with this decision, the Sixth Circuit became the first federal appeals court to hold that discrimination based on transgender status per se is sex discrimination under Title VII. Prior to this decision, the Sixth Circuit, like all other federal appeals courts addressing the issue, had only recognized transgender discrimination if it involved sex stereotyping.

To hold, as the Sixth Circuit did, that adverse employment decisions against a transgender merely because they are transgender constitutes sex-based stereotyping, is to discard the prima facie elements of a stereotyping claim laid down in *Price Waterhouse*. Decisions like *Harris Funeral Homes* relax the evidentiary elements to be proven in a stereotyping claim and

thereby reduce the evidentiary bar for such claims. There was no indication in *Price Waterhouse* that the Supreme Court would countenance protecting transgender individuals without proof of actual stereotyping.

In stark contrast to the Sixth Circuit, the Eighth Circuit has not embraced a broad view of what "sex" means under Title VII. In construing Title VII, the Eighth Circuit has held that the term "sex" in Title VII does not mean "gender identity" or "transsexualism." Instead, the "sex" of an individual is either male or female. *See Sommers v. Budget Mktg. Inc.*, 667 F.2d 748 (8th Cir. 1982) (per curiam). Therefore, the Eighth Circuit has held that "discrimination based on one's transsexualism does not fall within the protective purview of . . ." Title VII. *Id*. at 750.[3]

In an attempt to stay clear of the binding authority crafted by the Eighth Circuit in *Sommers*, Bruce characterizes *Sommers* as a pre-*Price Waterhouse* precedent and implies that the Eighth Circuit will no longer follow that decision. (Doc. 33, pp. 26-27). The Eighth Circuit has indicated to the contrary by re-affirming *Sommers* after *Price Waterhouse*. Specifically, *Price Waterhouse* was decided on May 1, 1989. On June 2, 1989, the Eighth Circuit filed its decision in *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) (per curiam), cert. denied 493 U.S. (1990), holding that Title VII does not prohibit employment discrimination or harassment on the basis of sexual orientation. In doing so, the Eighth Circuit referred back to, and thereby reaffirmed, its decision in *Sommers*. *Id*. at 70.

The fate of Bruce's transgender status claim under *Sommers* cannot be clearer. Bruce's

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[3]*See also, Etsitty v. Utah Transit Auth.,*502 F.3d 1215, 1221 (10th Cir. 2007); *Texas v. United States,* 201 F.Supp. 3d 810, 833 (N.D. Tex. 2016); *Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.,* 97 F.Supp. 3d 657, 674 (W.D. Pa. 2015) which were discussed in the State's and Gill's opening brief. (Doc. 35, p. 17).

Title VII claim cannot withstand, and must yield to, the precedential rule laid down in *Sommers*. Transgender status is based on gender identity, an attribute or characteristic that is different than that person's biological sex.[4]

C. Sex Stereotyping Claims Under Title VII.

Under *Price Waterhouse*, an employee, including a transgender employee, is protected from sex stereotyping under Title VII. Bruce relies on a number of decisions in support of his claim that "gender identity" or "transgender status" discrimination per se constitutes sex stereotyping under Title VII. But, that is not the law in the Eighth Circuit and many other circuits.

(1) Title IX and Title VII Decisions Relied on By Bruce

Clearly, Title VII and Title IX, which prohibit discrimination on the basis of "sex" in employment (Title VII), and in educational activities or programs receiving federal funding (Title IX), regard sexual stereotyping as a form of sex-based discrimination. Bruce opens his argument that the gender transformations exclusion constitutes sex stereotyping under Title VII by citing to the Seventh Circuit's decision in *Whitaker v. Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017). There, the Seventh Circuit ruled that "gender identity" or "transgender status" discrimination constitutes sex stereotyping under Title IX. The Seventh Circuit believed that "a transgender individual does not conform to the sex-based stereotypes of

[4]Bruce noted that in *Tovar v. Essentia Health*, 857 F.3d 771, 775 (8th Cir. 2017), the Eighth Circuit assumed for purposes of that appeal that Title VII covers transgender individuals. To "assume for purposes of an appeal" is akin to "assuming something arguendo" to further an argument. That assumption does not even rise to the level of dicta. Further, a panel of the Eighth Circuit cannot overrule *Sommers*. Only the Eighth Circuit sitting en banc can do that. *United States v. Lucas*, 521 F.3d 861, 867 (2008).

the sex that he or she was assigned at birth," *Id*. at 1048, and "a policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX." *Id*. at 1049. As a result, the court allowed Whitaker, a female-to-male transgender high school student, to use the boys' bathroom at his school.

In part, the Seventh Circuit justified its decision that "gender identity" or "transgender status" discrimination constituted sex stereotyping in light of its decision two months earlier in *Hively v. Ivy Technical Community College*, 853 F.3d 339 (7th Cir. 2017) (en banc). *Id*. at 1048. In *Hively*, the Seventh Circuit held that a gender (sexual) orientation discrimination claim constituted sex stereotyping and, therefore, was sex-based discrimination under Title VII. *Id.* at 351-352. According to the majority, Hively, a gay woman, had not been promoted at Ivy Tech because of her employer's female stereotyping; she should be sexually attracted to males and not females. It followed, then, that sexual orientation discrimination was the equivalent of sexual stereotyping discrimination. The *Hively* majority acknowledged that its decision was contrary to "almost all of our sister circuits." *Id*. 341-42**.** In departing from what the other circuits had held, the *Hively* majority maintained it was not amending Title VII, but merely engaged in an exercise of statutory interpretation. *Id*. at 343.

Dissenting, Justice Sykes succinctly reasoned that under Title VII, "sexual orientation is not on the list of forbidden categories of employment discrimination . . . ." *Id*. at 360. "[A]ll circuits agree that sexual-orientation discrimination is a distinct form of discrimination and is not synonymous with sex discrimination." *Id*. at 361. Justice Sykes then rebuked the majority for its ruling with the following discourse:

> Any case heard by the full court is important. This one is momentous. All the more reason to pay careful attention to the limits on the court's role. The question before the en banc court is one of statutory interpretation. The majority deploys a judge-empowering, common-law decision method that leaves a great deal of room for judicial discretion. So does Judge Posner in his concurrence. Neither is faithful to the statutory text, read fairly, as a reasonable person would have understood it when it was adopted. The result is a statutory amendment courtesy of unelected judges. Judge Posner admits this; he embraces and argues for this conception of judicial power. The majority does not, preferring instead to smuggle in the statutory amendment under cover of an aggressive reading of loosely related Supreme Court precedents. Either way, the result is the same: the circumvention of the legislative process by which the people govern themselves.

Id. at 359-60.[5]

The amendment of Title VII by the majority in *Hively* has made that decision an anomaly. Clearly, the rule laid down in *Hively* is contrary to the law in most other circuits, including the law established by the Eighth Circuit 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). Again, in *Williamson*, the Eighth Circuit determined that Title VII does not prohibit employment discrimination based on sexual orientation. Plainly, **if** by its own admission, the Seventh Circuit's decision in *Whitaker* is a logical, analytical extension of its decision two

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[5]In his concurring opinion, Justice Posner straightforwardly admitted:

> I would prefer to see us acknowledge openly that today we, who are judges rather than members of Congress, are **imposing on** a half-century-old statute a meaning of "sex discrimination" that the Congress that enacted it would **not have accepted**. This is something courts do fairly frequently to avoid statutory obsolescence and concomitantly to avoid placing the entire burden of updating old statutes on the legislative branch.

Id. at 357 (emphasis added).

months earlier in *Hively* **and** *Hively* is contrary to, and in fact implicitly challenges, Eighth Circuit law laid down in *Williamson*, **then** it is a logical consequence that the Eighth Circuit would reject the rationale in *Whitaker*.[6] In the Eighth Circuit, neither sexual orientation discrimination nor gender identity or transgender per se discrimination is prohibited by Title VII.

Moving on from *Whitaker*, Bruce relies on yet another Seventh Circuit's decision, *Boyden v. Conlin*, 2018 WL 4473347 (W.D. Sept. 18, 2018). In *Boyden*, transgender-women employees of the State of Wisconsin claimed, among other things, that "[t]he State's exclusion of . . . of 'surgery and sex hormones associated with gender reassignment' from health insurance coverage provided to state employees . . ." constituted sex discrimination under Title VII. *Id*. at *1. Characterizing transitioning surgery as Gender Confirming Surgery, the Seventh Circuit wrote:

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[6]Up until 2017, all eleven of the courts of appeal had held that Title VII does not cover sexual-orientation discrimination. *Higgins v. New Balance Athletic Shoe, Inc*., 194 F.3d 252, 259 (1st Cir. 1999); *Simonton v. Runyon*, 232 F.3d 33, 36 (2d Cir. 2000); *Bibby v. Philadelphia Coca Cola Bottling Co*., 260 F.3d 257, 261 (3d Cir. 2001), cert. denied, 534 U.S. 1155 (2002); *Wrightson v. Pizza Hut of Am., Inc*., 99 F.3d 138, 143 (4th Cir. 1996); *Blum v. Gulf Oil Corp*., 597 F.2d 936, 938 (5th Cir. 1979) (per curiam); *Vickers v. Fairfield Med. Ctr*., 453 F.3d 757, 762 (6th Cir. 2006), cert. denied, 551 U.S. 1104 (2007); *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1062 (7th Cir. 2003); *Williamson v. A.G. Edwards & Sons, Inc*., 876 F.2d 69, 70 (8th Cir. 1989) (per curiam), cert. denied, 493 U.S. 1089 (1990); *DeSantis v. Pacific Tel. & Tel. Co*., 608 F.2d 327, 329-30 (9th Cir. 1979), abrogated on other grounds, *Nichols v. Azteca Rest. Enters., Inc*., 256 F.3d 864, 874-75 (9th Cir. 2001); *Medina v. Income Support Div*., 413 F.3d 1131, 1135 (10th Cir. 2005); *Evans v. Georgia Reg'l Hosp*., l850 F.3d 1248, 1255 (11th Cir.), cert. denied, 138 S.Ct. 557 (2017). In 2017, the Second and Seventh Circuits, both of which sat en banc, overruled prior decisions they had made by holding that discrimination on the basis of sexual orientation is discrimination because of sex under Title VII. See *Zarda v. Altitude Express, Inc*., 883 F.3d 100, 112-15, 124-31 (2d Cir. 2018) (en banc), petition for cert. pending, No. 17-1623 (filed May 29, 2018); *Hively v. Ivy Tech Community College*, 853 F.3d 339, 343-52 (7th Cir. 2017) (en banc).

> There is no dispute that when performing GCS, surgeons use many of the same procedures used to treat other medical conditions. For example, surgeons regularly perform mastectomies and chest/breast reconstruction, hysterectomies, salpingo-oophorectomies (surgical removal of fallopian tubes and ovaries), and orchietomies (surgical removal of testes) to treat individuals with cancer or a genetic predisposition to cancer, such as the BRCA genes, or as part of treatment for a traumatic injury.
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> The parties have stipulated that . . . coverage extends to breast reduction surgery, mastectomy, mammoplasty (breast reduction surgery), penectomy (surgical removal of penis), orchiectomy, phalloplasty (surgical creation of a penis), vaginoplasty (surgical creation of a vagina), hysterectomy, and salpingo-oophorectomy, to treat various medical conditions. . . .

Id. at *7.

The Seventh Circuit held "[t]he Exclusion at issue here 'denies coverage for medically necessary surgical procedures based on a patient's *natal* sex." *Id*. at *12 (emphasis in original), (quoting *Flack v. Wis. Dep't of Health Servs*., 2018 WL 3574875 (W.D. Wis. July 25, 2018). According to the court, "[a] natal female born without a vagina qualifies for coverage of a vaginoplasty, but not the plaintiffs here because their natal sex is male." *Id*. at *12. "As such, this is a 'straightforward case of sex discrimination.'" *Id*. (quoting *Flack*, at *12). The court was of the view that the exclusion:

> implicate[d] sex stereotyping by limiting the availability of medical transitioning ... thus requiring transgender individuals to maintain the physical characteristics of their natal sex. [W]hether because of differential treatment based on natal sex, or because of a form of sex stereotyping where an individual is required effectively to maintain his or her natal sex characteristics, the Exclusion on its face treats transgender individuals differently on the basis of sex, thus triggering the protections of Title VII....

Id. at *14.

The flaw in the Seventh Circuit's analysis is that a natal female born without a vagina, or whose vagina was disfigured or injured by trauma, is in a far different medical position from the standpoint of medical condition and treatment than a biological male who was born with genitalia (i.e., a penis) matching his biological sex but wants a penectomy and then a vaginoplasty. With the natal female, transgender or not, the medical condition is a congenital defect (born without a vagina) or disfigurement caused by a traumatic event. As a result of that medical condition, there would be coverage for one procedure; a vaginoplasty (formation or reconstruction of a vagina). And that would be true (there would be coverage) if a transgender man (biological female) wanted (even though he was a transgender man) a vaginoplasty because of a congenital defect or disfigurement from a traumatic event.[7]

On the other hand, a transgender woman (biological male) who wants a vaginoplasty involves a completely different medical condition and medical procedures than what was discussed in the paragraph above. First, the transgender woman would not be suffering from the congenital defect of being born without a vagina or from a disfigured vagina from a traumatic event. The transgender woman was born with a penis matching her biological sex (no

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[7]To be more specific, a transgender man (biological female) might want a vaginoplasty because of a congenital defect or vaginal injury even though that individual identifies with the male gender but still, for any number of reasons, does not want male genitalia. For example, Bruce himself wants to keep his vagina. Recently one of Bruce's physicians wrote in a clinical record that Bruce did not want any medical procedure on his female genitalia "that could jeopardize" his sexual function and ability to have an orgasm as a biological female. Therefore, even today Bruce would be covered for a medically necessary vaginoplasty.

The actual clinical record is more graphic than what has been stated above. Rather than make that record part of the court record, this is to advise Bruce's counsel the record has been produced as State Medical 000234. It is assumed that Bruce's attorneys have no objection to the manner in which that record is being handled in this brief.

congenital defect and no traumatic event) and she now wants a vagina. Therefore, the gender transformations exclusion would be applied to a medical condition different than the medical condition caused by a congenital defect or a traumatic event. Not only is there a stark contrast between the medical conditions in these examples, there is a marked difference in the treatments for those conditions. The biological female referenced in the paragraph above needing a vaginoplasty is in need of one medical procedure. The transgender woman requires a penectomy (removal of her penis) and then the formation of a vagina (vaginoplasty). Therefore, the exclusion in *Boyden* and in the case at bar have nothing to do with sex stereotyping. The exclusions are based on significant distinctions between medical conditions of plan members and the resulting difference in treatment.

Quite frankly, the flaw in the Seventh Circuit's stereotyping analysis is even more fundamental than the discussion in the two previous paragraphs. The breasts and vagina of a biological female, and the penis of a biological male, are not stereotypes. They are biological realities; they are medical facts. Therefore, to exclude health coverage for hormone treatments to change secondary sex characteristics (e.g., prevent the growth of breasts); or to remove and create different secondary sex characteristics (e.g., mastectomy and re-contouring into a male-like chest) or primary sex characteristics (e.g., remove a vagina and create a penis) is not based on a stereotype of what the breasts or genitalia of an individual should be. Therefore, an exclusion that excludes health coverage for removing normal, healthy, biological, sexual anatomy that a person was born with does not constitute sex stereotyping under Title VII. How can the notion that a biological male should have a penis and a biological female should have a vagina, and that they should not be removed if they are healthy, be a stereotype.

It is clear that the Seventh Circuit sees itself as a transformative court. In a series of recent decisions, it has ignored and broken the restraints of stare decisis and has legislated to keep the law apace of social changes in this country. Now, in that circuit, Title VII prohibits discrimination based on sexual orientation (*Hively*); Title IX prohibits discrimination based on transgender status (*Whitaker*); and transgender transformation exclusions involve sex stereotyping by virtue of the fact that the exclusions are based on the belief that transgender individuals must keep their genitalia and other physical characteristics of their natal sex (*Boyden*). The Seventh Circuit has been actively championing social change by, in a free-wheeling fashion, expanding the scope of the term "sex" under Title VII and Title IX. In doing so, the Seventh Circuit engaged in legislating and, thereby, exceeded its role as a court of law. It is one thing to be a transformative court with respect to common law principles; it is yet another to tinker with statutes and, thereby, exceed the role of a court of law or judicial tribunal. Make no mistake, this is what Bruce is asking this court to do here. If Title VII is to protect "sexual orientation", "gender identity", and "transgender status", then Congress needs to amend Title VII - not this court.

(a) True *Price Waterhouse* stereotypes claims

As outlined in the State's and Gill's opening brief (Doc. 35), *Price Waterhouse* stands for the singular proposition that under Title VII "sex" discrimination includes "disparate treatment of men and women resulting from sex stereotypes." *Price Waterhouse v. Hopkins,* 490 U.S. 228, 250-251 (1989). Under a *Price Waterhouse* analysis, one looks at whether the claimant is a man or a woman who was discriminated against because their behavior, mannerisms, dress, etc., did not conform to a stereotype of how a member of their birth sex should behave or dress.

As further indicated in the State's and Gill's opening brief, the Eighth Circuit, as well as other circuits, have recognized the limits of *Price Waterhouse*. The Eighth Circuit has specifically recognized that sex stereotyping as described in *Price Waterhouse* is unlawful under Title VII. *See, 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).[8] On the other hand, 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). Without evidence of genuine sex stereotyping, *Sommers* and *Williamson* are still binding precedent in the Eighth Circuit. Clearly, the Eighth Circuit does not believe that *Price Waterhouse* has expanded the meaning of the word "sex" under Title VII.[9]

Bruce asserts that the following cases support his argument that transgender status per se is protected under Title VII. But these cases are nothing more than pure *Price Waterhouse*

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[8]The Eighth Circuit stated again in *Quick v. Donaldson Co., Inc.*, 90 F.3d 1372, 1377 (8th Cir. 1996) that "sex" under Title VII means "either 'man' or 'woman' and thereby bars discrimination against women because they are women and against men because they are men."

[9]*See also*, *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).

stereotyping decisions; discrimination claims based on non-conforming behaviors, mannerisms, and appearances. Such is not the case here, and, therefore these cases are easily distinguishable. *See Glen v. Brumby*, 663 F.3d 1312, 1320-21 (11th Cir. 2011) (transitioning, transgender women attorney fired because employer believed it was inappropriate for her to come to work "dressed" and "made up" as a woman); *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004) ("complaint sets forth the conduct and mannerisms . . . [that] did not conform with his employers' and co-workers' sex stereotypes of how a man should look and behave. . . .")[10]; *Rosa v. Park West Bank & Trust Co*., 214 F.3d 213, 215-16 (1st Cir. 2000) (court ruled that transgender plaintiffs can state claims under Equal Credit Opportunity Act based on sex-stereotyping theory); *Schwenk v. Hartford*, 204 F.3d 1187, 1200 (9th Cir. 2000) (applying *Price Waterhouse*, held that transgender plaintiff could state claim under the Gender Motivated Violence Act based on a sex-stereotyping theory); *Dawson v. H&H Electric, Inc*., 2015 WL 5437101, *2-3 (E.D. Ark. Sept. 15, 2015) (claim recognized under Title VII where employee terminated because she was a transitioning to a woman and her female attire and make-up she did not conform to stereotypes associated with men).

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

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[10]The Eighth Circuit cited *Smith* with approval in *Lewis v. Heartland Inns. of Am., L.L.C*., at 1038-39. However, it was cited in a true non-conforming, stereotype discrimination claim. Further, the Sixth Circuit itself has characterized *Smith* as a stereotyping case only. In *Harris Funeral Home,* it stated: "We did not expressly hold in *Smith* that discrimination on the basis of transgender status is unlawful, although the opinion has been read to say as much-both by this circuit and others." *Harris* at 577. Then, the Sixth Circuit went on to say "[w]e now directly hold: Title VII protects transgender persons because of their transgender or transitioning status, because transgender or transitioning status constitutes an inherently gender non-conforming trait." *Id*. at 577.

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 is or her sex. The exclusion has nothing to do with mannerisms or nonconforming behavior. 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. So Bruce's argument must be that the State punishes him stereotypically under its medical plan but not at his daily work.

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 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.

(2) ACA Decisions Relied on by Bruce

In analyzing the ADA decisions cited by Bruce, this court's attention is respectfully drawn to *Franciscan Alliance, Inc., v. Burwell*, 227 F.Supp.3d 660 (N.D.Tex. 2016). There, private healthcare providers and eight states sued the U.S. Department of Health and Human Services (HHS) and its Secretary. The plaintiffs sought an injunction against the enforcement of, an HHS rule which "implement[ed] Section 1557 of the ACA [Patient Protection and Affordable Care Act] . . . which prohibits discrimination by a health program or activity receiving federal financial assistance on the grounds prohibited under four federal nondiscrimination statutes incorporated [into] Section 1557." *Id*. at 670. One of the nondiscrimination statutes

incorporated into Section 1557 is the sex discrimination provisions of Title IX. *Id*. As a result, the ACA "forbids discriminating on the basis of sex." *Id*. The HHS rule interpreted discrimination "on the basis of sex" under Title IX - and therefore Section 1557 - to encompass "gender identity" which could be different from an individual's birth sex. *Id*. at 670-71. "One of the 'discriminatory actions prohibited' under the Rule was 'having or implementing a categorical insurance coverage exclusion or limitation for all health services related to gender transition.'" *Id*. at 672.

The district court addressed "[w]hether Defendants exceeded their authority under the ACA in the challenged [rule's] interpretation of sex discrimination. . . ." *Id*. at 670. That required the court to determine "[w]hat constitutes Title IX sex discrimination." *Id*. at 687. "Plaintiffs claim[ed] the Rule violates the [Administrative Procedures Act] because it is contrary to law and exceeds statutory authority by (a) interpreting Title IX's prohibition of sex discrimination to include gender identity. . . ." *Id*. at 685. The plaintiffs claimed Title IX only applied to biological, sex discrimination. *Id*. at 686.

It was clear to the court from the text, structure, and purpose of Title IX that the word sex "refers to 'the biological and anatomical differences between male and female students as determined at their birth.'" *Id*. at 687 (citation omitted). According to the court, "[i]n promulgating the Rule, HHS revised the core of Title IX sex discrimination under the guise of simply incorporating it." *Id.* at 687. The court held that the rule violated the Administrative Procedures Act by "contradicting existing law and exceeding statutory authority. . . ." *Id.* at 670.

It then issued a nation-wide injunction against HHS enforcing the rule.[11]

Bruce ignores the decision in *Franciscan*. In preference to *Franciscan*, Bruce relies on decisions from two Minnesota U.S. District Courts in *Rumble v. Fairview Health Services,* 2015 WL 1197415 (D.Minn. March 16, 2015) and *Tovar v. Essentia Health*, 2018 WL 4516949 (D.Minn. Sept. 20, 2018). In *Rumble,* the claim was that Rumble received sub-standard medical treatment from the defendants "because of his status as a transgender man." *Id.* at *1. The court stated that it believed that this was "the first case that requires interpretation of Section 1557." *Id.* at *9. Offering little in the way of analysis or reasoning, the district court ruled that discrimination based on an individual's transgender status constituted gender-stereotyping sex discrimination under Title IX, and therefore Section 1557. Based on that ruling, the court denied defendants' motion to dismiss Rumble's claim.[12]

The court in *Rumble* did not follow *Sommers* explaining that *Price Waterhouse* had "eviscerated" *Sommers*. *Id*. at *2. The Eighth Circuit, however, does not believe that *Price Waterhouse* eviscerated its decision in *Sommers*. In *Hunter v. United Parcel Service, Inc*., 697

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[11]On August 24, 2017, *In Religious Sisters of Mercy v. Price*, 3:16-cv-00386-DLH-ARS (ECF 56), the District Court of North Dakota, Eastern Division, recognized the force of the nation-wide injunction entered in *Franciscan* and stayed a suit filed in North Dakota challenging the same HHS rule.

[12]Later, the district court stayed the litigation as to the Section 1557 claim for two reasons. One reason was that the U.S. Supreme Court had granted a writ of certiorari in *Gloucester Cnty. Sch. Bd. v. G.G.*, 137 S.Ct. 369 (2016). *Gloucester* was a school bathroom case which involved the issue of whether Title IX prohibited discrimination based on gender identity. That case was later remanded without that issue being decided by the Supreme Court. *Gloucester City*, 137 S.Ct. at 1239. The second was the issuance of the nationwide injunction in *Franciscan Alliance*. Acknowledging that the district court in *Franciscan Alliance* held that the "on the basis of sex" provision in Title IX referred only to biological sex discrimination, and for that reason had entered a nationwide injunction, the court in *Rumble* stayed the litigation as to the Section 1557 claim.

F.3d 697 (8th Cir. 2012), a job applicant, a biological female that identified as a male, sued UPS alleging that when it declined to hire him, UPS had discriminated against him because of his gender identity, sexual orientation, and a psychological disability. As to the gender identity claim, the Eighth Circuit held that there was not sufficient evidence to establish that UPS knew Hunter was "born female and attempting to deviate from his transitional gender stereotypes." *Id*. at 704. Therefore, he did not have a Title VII stereotyping, claim under *Price Waterhouse*. Nowhere in that decision did the Eighth Circuit indicate that Title VII protected a transgender based on that status alone and without evidence of stereotyping or nonconforming conduct.

In *Tovar*, a health plan that Essentia Health provided to its employees and their dependents contained an exclusion "for all health services related to gender transition." *Id*. at *1. As a result, Essentia denied Tovar's son, a participant under the plan, coverage for medical treatment for gender dysphoria, including reassignment surgery. The claim was that Essentia violated Section 1557 of the ACA. Essentia filed a motion to dismiss. The court held that Title IX's prohibition against sex discrimination included discrimination based on gender identity. Citing to *Whitaker* and *Glen v. Brumby*, the court reasoned that "'[b]y definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth." *Id*. at *3. The court ruled that Section 1557 prohibited discrimination based on gender identity and the motion to dismiss was denied.

Finding the decision in *Whitaker, Brumby,* and *Harris Funeral Home* to be well-reasoned, the Court in *Tovar* mentioned but did not even address the analysis of the court in *Franciscan*, much less the existence and analysis of *Sommers*, as to why sex was limited to a male and a female. This was just a ruling on a motion to dismiss and it remains to be seen what the final

outcome will be if the case goes up to the Eighth Circuit.

Bruce's Section 1557 decisions offer no analysis of the text, structure, history or purpose of Title VII and Title IX, or the legislative history of Congress since enacting these statutes, in support of their conclusion that under these statutes sex and gender identity or transgender status per se are the same as "sex." The meaning of "sex" under Title VII is not an open or undetermined question in the eyes of the Eighth Circuit Court. *Sommers* and *Williamson* are still good law.

(3) Medicaid Decisions Relied on By Bruce

The district court that decided *Boyden* had earlier decided in *Flack v. Wis. Dep't of Health Servs.*, 328 F.Supp.3d 931 (W.D. Wis. 2018) to issue a preliminary injunction against a transition exclusion under Wisconsin's Medicaid program. Wisconsin's Medicaid program categorically denied coverage for transsexual surgery and related drugs. Based on the same reasoning used later in *Boyden* – that the sexual reassignment surgical procedures are the same procedures used with other medical conditions – the court found that the exclusion denied coverage based on the birth sex of a transgender. Therefore, the analytical weaknesses previously shared with this court with respect to *Boyden* apply here as well.

Flack also does not represent the Eighth Circuit view as to whether a state Medicaid program can exclude coverage for sex reassignment surgery. In *Smith v. Rasmussen*, 249 F.3d 755 (8th Cir. 2001), a disabled Medicaid recipient sued Iowa's Department of Human Services under § 1983 and due process clause after the denial of his request for benefits for sex reassignment surgery. Iowa's Medicaid program had a regulation that excluded Medicaid coverage for such surgeries. The Department of Human Services had retained a medical peer

review foundation to make recommendations regarding whether to cover such surgeries. Toward that end, the foundation reviewed medical literature and contacted various medical organizations and advised the department that there was a lack of medical consensus regarding the use of such treatment. After reviewing the report, the department entered into a rulemaking process after which the exclusion was adopted. Since the department had, among other things, considered the current state of medical knowledge, the Eighth Circuit found that it was not able to find, as it had 20 years earlier in *Pinneke v. Preisser*, 623 F.2d 546 (8th Cir. 1980), that the exclusion was unreasonable, arbitrary or inconsistent with the federal Medicaid Act. *See also*, *Ellis by Ellis v. Patterson, supra*, where the Eighth Circuit held that Arkansas was not obligated to provide Medicaid coverage for a liver transplant for an infant. (p. 5 of this brief).

In any case, state Medicaid programs are controlled by the federal Medicaid Act and the state programs must be consistent with that Act. The federal Medicaid Act does not apply to the State of South Dakota's self-funded health plan. Therefore, that Act has no application to Bruce's claims.

(4) Eighth Amendment Decisions

Finally, Bruce cites to Eighth Amendment decisions in *Fields v. Smith*, 653 F.3d 550, 559 (7th Cir. 2011) (holding that Wisconsin statute prohibiting "even the consideration of hormones or surgery" as transition-related care for prisoners was facially invalid under Eighth Amendment); *Hicklin v. Precynthe*, No. 4:16-CV-01357-NCC, 2018 WL 806764, at *11 (E.D. Mo. Feb. 9, 2018) ("The denial of hormone therapy based on a blanket rule, rather than an individualized medical determination constitutes deliberate indifference in violation of the Eight Amendment."). (Doc. 33, p.3). Eighth Amendment law uses standards and principles that are

foreign to the standards and principles used under Title VII. The question here is whether gender identity or transgender status are sex under Title VII. That is not an inquiry under the Eighth Amendment. Therefore, these decisions have no bearing on Bruce's claims.

II.

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

Bruce's often-repeated claim that he and other transgender members are being denied the opportunity to show that their transition-related care is medically necessary under the same standards, guidelines, and procedures that apply to other covered medical conditions does not demonstrate discrimination as a matter of law. Discrimination on the basis of sex involves depriving an individual or group of individuals of one sex of something afforded an individual of another sex or a deprivation based on a trait unique to one sex. Bruce's status as a transgender man is not a status unique to one sex. Both biological males and females can be transgenders suffering from gender dysphoria.

Further, the gender transformations exclusion is not used as a method by which to deprive one sex of something afforded to the other sex. In their initial brief, the State and Gill discussed the caselaw which has held that a benefits plan that is facially neutral cannot form the basis of a discriminatory treatment claim under Title VII. (Doc. 35, pp. 23-26). Again, see, *Wood v. City of San Diego*, 678 F.3d 1075, 1080-81 (9th Cir. 2012) (retirement benefits plan was "facially neutral: similarly situated male and female employees make the same contributions and receive the same benefits."); *Krauel v. Iowa Methodist Medical Center*, 95 F.3d 674, 680-81 (8th Cir. 1996) (Held: infertility treatment exclusion in employer, self-funded medical benefits was not "a

sex-based classification because it applies equally to all individuals, male or female.); *In re Union Pacific Railroad Employment Practices Litigation*, 479 F.3d 936 (8th Cir. 2007) (no violation of Title VII where employee health plan had an exclusion that covered all types of contraception whether for a man or a woman.)

Here, the Plan's "transgender transformations" exclusion is facially neutral like the exclusions for infertility treatments and contraception 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.[13] 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 medical condition: gender dysphoria, whether for a male or a female. That is not disparate-treatment discrimination.

EQUAL PROTECTION

III.

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

Bruce posits that the gender transformations exclusion denies him in particular, and any other transgenders in general, an equal opportunity to prove "that his care is medically necessary under the same standards and procedures that apply to other medical conditions." (Doc. 33, p. 3). Therein, lies his claim of a denial of equal protection.

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

Bruce relies heavily on *McDaniel v. Precythe*, 897 F.3d 946, 950 (8th Cir. 2018). Missouri required the Director of the Department of Corrections to invite "at least eight reputable citizens" and the state attorney general to witness the execution of an inmate. *Id.* at 948. A death penalty reporter claimed he was denied equal protection where the director had "unfettered discretion" in determining which applicants would be selected as a witness. *Id*. The reporter had been critical of the state's "execution practices" which allegedly resulted in the director ignoring his application to be a witness. *Id*. at 948-49. The gravamen of the reporter's claim was that without procedures for selecting witnesses, he was being denied the same opportunity as other applicants to witness an execution. In finding that, the reporter had standing to sue, the Eighth Circuit wrote: "In an equal protection case . . . 'when the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing.'" *Id*. at 950 (citations omitted).

Bruce uses *McDaniel* in a context in which it was never decided. Clearly, the grievance in *McDaniel* was that the reporter was denied the same opportunity as others to witness an execution. The benefit that he wanted an equal opportunity to pursue was to be a witness at an execution. In the case at bar, the benefit provided by the State's Plan is coverage of medical services. Bruce receives the same benefit (coverage) that any similarly situated member receives. The Plan does not make it more difficult for a transgender member to obtain coverage for treatment for the same medical condition for which a cisgender member is eligible. For example, the Plan does not place a barrier in front of transgenders making it more difficult for him or her

to get cancer treatment or a hysterectomy than it is for a cisgender member to get the same treatment. Both individuals or groups are on an equal footing in seeking treatment for the same medical condition.[14]

On the other hand, if individual members, or member groups (transgenders as one group and cisgenders 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. (*See e.g.*, Doc. 35, p. 30.) Clearly, the Plan is facially neutral in that similarly situated members receive the same treatment under its terms and provisions.

Unless there is an exclusion that pertains to a particular medical condition or form of treatment, all requests for coverage are assessed under the same medical necessity standards and guidelines. Bruce has a medical condition, gender dysphoria, that he seeks to treat through hormones and transitional surgery. That treatment is excluded under the Plan. Bruce claims that to deny him, and other transgenders, of the opportunity to show the medical necessity of their requested transitioning treatment denies them the same opportunity given to cisgender members in proving the medical necessity of treatment **for different medical conditions**.

All members of the Plan are denied an opportunity to assert medical necessity under any

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[14]The Supreme Court cases cited in *McDaniel* bolster the State's and Gill's argument in this regard. *See*, *Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993) (held that contractors had standing to challenge an ordinance that gave minority contractors an advantage over non-minority contractors in being awarded certain city contracts. Both groups should have an equal chance in bidding on the same contract); *Gratz v. Bollinger*, 539 U.S. 244, 123 S.Ct. 2411, 156 L.Ed.2d 257 (2003) (where Michigan university used racial preferences in admission decisions, held that Caucasian applicants had standing to sue where they were denied an equal opportunity to compete for admission); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, __ U.S. __, 137 S.Ct. 2012, 198 L.Ed.2d 551 (2017) (church-owned daycare should have an equal opportunity as secular organizations to seek a public grant).

number of circumstances covered by a Plan exclusion. (*See* multitude of exclusions for services and supplies at Doc. 37-6, pp. 53-57.) All of those exclusions exclude coverage for treatment even if it meets accepted standards of medicine" under the Plan definition of medical necessity. (*See*, as a limited example, exclusions (g), (h), (k), (m), (n), (p) - Doc 37-6.) In order for Bruce's argument to have merit, then there can never be an exclusion under a government-sponsored health plan. That is nonsensical. The issue is whether all members are treated alike under the exclusions and under the non-excluded coverages provided under the Plan.

To illustrate Bruce's argument in a different light, Bruce argues that if treatment is medically necessary, that treatment can never be excluded under the Plan. Under this nonsensical reasoning, an exclusion would never be operative and would be pure surplusage. When viewed from this perspective, it is clear that there is no merit to Bruce's argument that medical necessity is the sole determinate of coverage under the Plan.[15]

Finally, the Plan does not "singl[e] out transition-related care for a different and unequal set of standards and procedures" in determining the medical necessity of that care. It excludes the care from coverage without regard to medical necessity.

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.

[15]As shown on pages 3-4 of this brief, the courts have clearly recognized that an exclusion can obviate the need to determine medical necessity.

In the event this court believes that the exclusion discriminates against transgenders, there still is no denial of equal protection of the discrimination is justified.

A. Intermediate Scrutiny

Bruce argues that gender identity and transgender status are quasi-suspect classifications to be reviewed under the heightened scrutiny standard in the event the classifications cause disparate treatment between those similarly situated. Again, the transformations exclusion does not discriminate based on gender identity or transgender status. It is respectfully submitted, then, that this court should not even have to engage in any equal protection analysis beyond this point. If this court disagrees, then it should apply the rational basis standard of review which will sustain the exclusion.

From the standpoint of an equal protection analysis, neither the Supreme Court nor the Eighth Circuit have 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."). No Eighth Circuit cases could be found in this regard as well. Therefore, there is no authority in this circuit supporting Bruce's argument that his equal protection claim should be analyzed under the intermediate scrutiny standard.[16]

[16]The Eighth Circuit has declined to find homosexuality as a class requiring heightened scrutiny and applied rational basis review in *Richenberg v. Perry*, 97 F.3d, 256, 260-61 (8th Cir. 1996), (continued...)

In arguing for the application of the heightened scrutiny standard of review, Bruce cites to *United States v. Virginia*, 518 U.S. 515 (1996) and *Glen v. Brumby*, 663 F.3d 1312 (11th Cir. 2011). But in *Virginia*, the person that was discriminated against was a woman (gender) who had been excluded from a program at a military college because of her sex. *Virginia* did not involve any gender identity/transgender issues or claims.

Glen also does not apply to the case at hand. *Glen* involved a biological male who was a transgendered woman, fired because of her gender nonconformity. The employer thought it "inappropriate" for Glen to come to work "dressed as a woman" and the employer found it "unsettling" and "unnatural." *Id*. at 1320. In other words, *Glen* involved a clear instance of sex stereotyping under *Price Waterhouse*. Since the employment decision was based on "sex", the heightened standard was applied. Here, for reasons previously discussed, Bruce cannot challenge the exclusion of the Plan under a sex-stereotyping claim as a matter of law.

Both *Virginia* and *Glen* involved decisions based on "sex" in one form or another. As shown in the State's and Gill's initial brief, gender identity and transgender status are not the same as "sex."

Bruce then argues that without regard to the concept of sex, transgender status "in its own right" is protected under the heightened scrutiny standard. (Doc. 33, p. 30). Bruce cites a number of cases that have held that "transgender status meets all four of the traditional criteria for identifying suspect or quasi-suspect classifications." *Id.* Those standards are identified as: 1) "transgender people have historically been subject to discrimination or differentiation.";

(...continued)
cert. denied 522. U.S. 807 (1997).

2) "transgender status bears no relation to an ability to contribute to society"; 3) "transgender individuals exhibit immutable or distinguishing characteristics that define them as a discrete group"; and 4) "transgender people 'as a class, are a minority or politically powerless.'" *Id.* (citations omitted).[17]

The record in this case will not support a finding that transgender status meets all of the required elements of the criteria for identifying transgenders as a quasi-suspect class. First, as to the third element, the record in this case contains testimony from Dr. Hruz that there is "strong evidence against the theory that gender identity is determined at or before birth and is unchangeable." (Doc. 36, ¶ 24). That evidence included the high rate of resolution of gender dysphoria in children and adolescents by the time they reach adulthood. *Id*.

Second as to the fourth element, Justice Scalia wrote more than twenty years ago that homosexual individuals were "a politically powerful minority." *Romer v. Evans*, 517 U.S. 620, 635 (1996) (dissenting opinion). That reality also applies to transgenders.

Therefore Bruce has not demonstrated a basis of any kind to analyze the exclusion under anything other than a rational basis standard.

B. Rational Basis Standard

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

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[17]One of the cases cited by Bruce is *Evancho v. Pine-Richland Sch. Dist*.,237 F. Supp. 3d 267, 288 (W.D. Pa. 2017). It should be noted that a sister court in that same judicial district ruled that the rational basis standard applies to distinction based on transgender status. See, *Johnston v. University of Pittsburg*, 97 F.Supp.3d 657 (W.E. Pa. 2015). Therefore, there are conflicting decisions on this issue in the Western District of Pennsylvania that have not been resolved by the Third Circuit.

rational basis standard of review. *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"). As discussed in the State's and Gill's initial brief, the rules that apply under a rational-basis review are: 1) the classification is given "a strong presumption of validity"; 2) there must be a "rational relationship between the disparity of treatment and some legitimate governmental purpose"; 3) the state is not required to "'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'"; 4) "a State . . . has no obligation to produce evidence to sustain the rationality of a . . . classification"; 5) a classification "'may be based on rational speculation unsupported by evidence or empirical data'"; 6) "'the 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.'"; and 7) "a classification does not fail rational-basis review because . . . 'in practice it results in some inequality.'" *Heller v. Doe by Doe*, 509 U.S. 312, 320-2 (1992) (citations omitted)

Under these guiding principles, 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.

(1) Risks Forming Rational Basis

As set forth in the State's and Gill's Answer to Bruce's Interrogatory 1 (Doc. 36, ¶¶102, 103; Doc. 37-12, 37-13), which is discussed in great detail in their initial brief (Doc 35., pp. 35-39), a significant number of members in the medical field have concluded that gender transitions or transformations (including administration of hormones, cross-sex drugs, and surgical procedures) actually can be harmful to the patient. Others have concerns that there is not enough scientific evidence to show that such treatments are safe.[18] The latter concerns have been expressed by, among others, the Centers for Medicare & Medicaid Services in its Decision Memo of August 30, 2016; The Institute of Medicine; The National Institutes of Health. In that same vein, Dr. Hruz notes that children and adolescents with gender dysphoria are receiving puberty blocking hormones when if left alone their gender dysphoria would desist. Yet, by receiving these hormones, these children and adolescents can suffer irreversible changes biologically and physiologically.

In 1989, the U.S. Department of Health and Human Services rendered a decision indicating that transsexual surgery was controversial and Medicare would not cover it. (Brown, pp. 39-40). In 2014, an appeals board for the U.S. Department of Health and Human Services rescinded the blanket exclusion under the 1989 decision and Medicare started covering such surgeries where medically necessary. (Brown, pp. 41-43). In Brown's original expert report, dated March 18, 2018, he cited to the 2014 decision in support of his opinion that these surgeries are safe and effective. (Brown, pp. 43, 55-61; Doc 31-5, ¶ 40).

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[18]There are reports and supporting data showing higher rates of heart disease, stroke, cancer, suicide, psychiatric hospitalizations for transgender patients using hormone therapy and/or undergoing surgical reassignment. *Id.*

After preparing his original report, Brown received a copy of the State's and Gill's answers of March 26, 2018 (served on that same day) to Bruce's first set of interrogatories and requests to produce. (Brown, pp. 44-45). Those discovery responses indicated that a 2016 Memo Decision from CMS, in part, supported the exclusion in the Plan. (Doc 36, ¶¶ 101 - 105; 37-12, 37-13). Brown's original expert report was not served until March 29, 2018, after the Defendants had served their discovery responses disclosing their knowledge of the 2016 Memo Decision. Within a few days of receiving the Defendants' discovery responses, Brown was asked to prepare a supplemental report which was designed to respond to the Defendants' reliance on the 2016 Memo Decision. (Brown, pp. 45, 46, 47, 48). In his supplemental report of April 8, 2018, Brown for the first time identified the 2016 Memo Decision. (Brown, p. 47; Doc 31-6, ¶ 8). Brown admitted he was aware of the 2016 decision before being retained in this case. (Brown, pp. 36-38). Admittedly, the 2016 Memo Decision did not rescind the 2014 Memo Decision. The 2016 Memo Decision did, however, and Brown never disclosed this in his original report, disagree with the 2014 Memo Decision by pointing out the risks and hazards of transformation treatment. Further, the 2016 Memo Decision indicated on the very first page of the decision that CMS was encouraging "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, which types of surgery are most appropriate, and what types of physician criteria and care setting(s) are needed to ensure that patients achieve improved health outcomes." (Doc 37-13).

Did Brown give a fair representation of the conclusions reached by the CMS in 2016? No, and the reason is obvious; the 2016 Decision by itself provides a rational basis for the

transformation exclusion.[19]

In addition to minimizing the import of the 2016 Memo Decision, Bruce tries to discredit the character, credentials, and testimony of Dr. Hruz and Dr. Sutphin. It is true that neither of these physicians have treated patients for gender dysphoria. Hruz is a pediatric endocrinologist who practices medicine, and teaches at the medical school at Washington University in St. Louis. His training and credentials are impressive. (Doc. 37-1, ¶¶ 2-7). During his deposition, Dr. Hruz tried to explain to Bruce's attorneys why he does not treat patients for gender dysphoria. Specifically, as the then chief of endocrinology at Washington University School of Medicine, Dr. Hruz was tasked to look at the scientific evidence to determine if St. Louis Children's Hospital should start a gender dysphoria program. (Hruz depo. pp. 14-16. 58-59.) He did not limit his study to research only relating to pediatric patients with gender dysphoria. (*Id*. at pp. 26, 27, 65-66, 78-80, 88-92, 125-126, 161-178, 193-195, 245-247). After doing a "rigorous" study, he "concluded that there was not enough evidence to support" starting a program at the Children's Hospital providing hormone to pediatric patients to treat their gender dysphoria. (*Id.* at 14-15, 37-38, 122-124, 134).

In turn Dr. Sutphin is a well-trained plastic surgeon with a sub-speciality of micro surgery obtained at San Francisco. (Doc. 37-2). He too gave sound reasons in his declaration why he will not do transformation surgeries. *Id*.

Although Bruce tries to trivialize these experts, their concerns are supported by, among other things, by the 2016 Memo Decision.

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[19]Bruce's brief also conspicuously fails to discuss a fair reading of the conclusions reached by CMS in the 2016 Memo Decision. (Doc. 33, pp. 9-10).

(2) State's Financial Interest in Health and Welfare of Plan Members as Rational Basis For Exclusion

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. (Doc. 36, ¶ 102).

(3) State's Limited Financial Resources as Forming Rational Basis For Exclusion

The State has limited financial resource 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. (Doc. 36, ¶102). (*See also* Doc. 36, ¶¶ 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.)

C. Justification Under Heightened Scrutiny

If this court determines that Bruce's equal protection claim must be analyzed under a heightened scrutiny standard, the reasons expressed above meet that standard as well.

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 deny Bruce's summary judgment motion and grant the summary judgment motion filed by the State and Gill.

Dated this 3rd day of December, 2018.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the Defendants ' Response to Plaintiff's Motion for Summary Judgment and supporting Brief 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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