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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

JOSEF ROBINSON,

Plaintiff,

v.

DIGNITY HEALTH d/b/a CHANDLER REGIONAL MEDICAL CENTER,

Defendant.

Case No. 4:16-cv-03035-YGR

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS COMPLAINT PURSUANT TO RULE 12(b)(6)

Hearing Date: September 20, 2016
Hearing Time: 2:00 p.m.

Hon. Yvonne Gonzalez Rogers

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Plaintiff, Josef Robinson submits the following Memorandum of Points and Authorities in opposition to the Motion to Dismiss for Failure to State a Claim filed by Defendant, Dignity Health d/b/a Chandler Regional Medical Center ("Dignity Health").

STATEMENT OF ISSUES TO BE DECIDED

1. Whether the Complaint states a valid claim that Dignity Health's employer-provided healthcare plan discriminates against Mr. Robinson because of sex, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*

2. Whether the Complaint states a valid claim that Dignity Health's employer-provided healthcare plan discriminates against Mr. Robinson on the basis of sex, in violation of Section 1557 of the Affordable Care Act, 42 U.S.C. § 18116.

INTRODUCTION

Dignity Health categorically excludes all insurance coverage for "[t]reatment, drugs, medicines, services and supplies for, or leading to, sex transformation surgery" from the health care plans it offers to Arizona employees, including Plaintiff. Dkt. No. 1 ("Compl.") Ex. C at 62. The exclusion applies to all forms of transition-related care regardless of whether the treatment would be deemed medically necessary according to the guidelines established by the plan's third-party administrator. As a result of the categorical exclusion, Mr. Robinson has to pay out-of-pocket for medically necessary hormone therapy, had to pay out-of-pocket for medically necessary chest surgery, and remains unable to complete medically necessary phalloplasty in accordance with the accepted standards of care for treating gender dysphoria.

Plaintiff has adequately stated a claim that Dignity Health's categorical exclusion of transition-related care discriminates against him and other transgender employees because of sex, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* ("Title VII"). As the vast majority of courts have recognized, discrimination against transgender individuals constitutes discrimination on the basis of sex under Title VII and analogous statutes. Discrimination based on sex encompasses all discrimination related to the sex of the victim, including discrimination based on transgender individuals' nonconforming "outward behavior and inward identity." *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000). The out-of-

circuit cases Dignity Health relies upon to exclude transgender status from the scope of Title VII are not good law in this Circuit because they are based on a Seventh Circuit decision, *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), which the Ninth Circuit explicitly repudiated in *Schwenk*. As discussed below, Dignity Health's insurance policy excluding all coverage for care related to "sex transformation" constitutes sex discrimination on its face, and facially discriminatory policies violate Title VII regardless of the employer's motive for discriminating. Moreover, in this case, Dignity Health's decision to categorically exclude coverage for transition-related care was, in fact, motivated by disapproval of gender nonconformity.

For the same reasons that the Complaint adequately alleges that the "sex transformation" exclusion discriminates based on sex under Title VII, the Complaint also adequately alleges that the exclusion discriminates based on sex under Section 1557 of the Affordable Care Act, 42 U.S.C. § 18116 ("Section 1557"). The U.S. Department of Health and Human Services Office of Civil Rights ("OCR") has issued regulations making explicit that Section 1557 prohibits covered employers from maintaining "a categorical coverage exclusion or limitation for all health services related to gender transition" in their employer-sponsored health care plans. 45 C.F.R. § 92.207(b)(4). The regulation clarifies what Section 1557 already required, but even if, as Dignity Health argues, such exclusions were not illegal until the effective date of the regulations, the relevant effective date for Dignity Health is June 18, 2016—not January 1, 2017—and Mr. Robinson has claims for injunctive relief regardless of which effective date applies.

For all these reasons, Mr. Robinson has stated valid claims under both Title VII and Section 1557, and Dignity Health's motion to dismiss should be denied.

FACTUAL BACKGROUND

Dignity Health owns and operates the fifth largest health care system in the United States and receives federal financial assistance. Compl. ¶¶ 2, 60. Its corporate headquarters is in San Francisco, California. *Id.* ¶ 16. Plaintiff, Josef Robinson, is an employee of Dignity Health, working as a nurse at the Dignity Health Chandler Regional Medical Center. *Id.* ¶ 5. Mr. Robinson has been a Dignity Health employee since January 1, 2014. *Id.* ¶ 30.

Gender Identity and Gender Dysphoria

Mr. Robinson is a man who is transgender. *Id.* ¶ 22. That means that he was assigned the sex of female at birth, but his gender identity is male and he identifies as a man. *Id.* "Gender identity" is a well-established medical concept, referring to one's sense of oneself as belonging to a particular gender. *Id.* ¶ 23. Typically, people who are designated female at birth based on their external anatomy identify as girls or women, and people who are designated male at birth identify as boys or men. *Id.* For transgender individuals, however, the sense of one's self—one's gender identity—differs from the sex assigned to them at birth. *Id.* Transgender men are men who were assigned "female" at birth, but have a male gender identity. *Id.*

The medical diagnosis for the feeling of incongruence beyond one's gender identity and one's sex assigned at birth, and the resulting distress caused by that incongruence, is "gender dysphoria" (previously known as "gender identity disorder"). *Id.* ¶ 24. Gender dysphoria is a serious medical condition codified in the Diagnostic and Statistical Manual of Mental Disorders (DSM-V) and International Classification of Diseases (ICD-10). *Id.* The criteria for diagnosing gender dysphoria are set forth in the DSM-V (302.85). *Id.* The widely accepted standards of care for treating gender dysphoria are published by the World Professional Association for Transgender Health ("WPATH"). *Id.* ¶ 25. The WPATH Standards of Care have been recognized as the authoritative standards of care by the leading medical organizations,[1] the U.S. Department of Health and Human Services,[2] and federal courts.[3] *Id.*

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[1] *See* Lambda Legal Def. & Educ. Fund, Professional Organization Statements Supporting Transgender People in Health Care (2013), *available at* http://www.lambdalegal.org/sites/default/files/publications/downloads/fs_professional-org-statements-supporting-trans-health_4.pdf.

[2] Dep't of Health & Human Servs., NCD 140.3, Transsexual Surgery (Docket No. A-13-87), 18 (2014), *available at* http://www.hhs.gov/dab/decisions/dabdecisions/dab2576.pdf; Decision of Medicare Appeals Council, Docket # M-15-1069 (Jan. 21, 2016), *available at* http://www.hhs.gov/dab/divisions/medicareoperations/macdecisions/m-15-1069.pdf.

[3] *See, e.g.*, *Cruz v. Zucker*, No. 14-CV-4456 (JSR), 2016 WL 3660763, at *4 n.4 (S.D.N.Y. July 5, 2016) ("The Court puts significant weight on the WPATH Standards of Care.").

Under the WPATH standards, medically necessary treatment for gender dysphoria may require medical steps to affirm one's gender identity and help an individual transition from living as one gender to another. *Id.* ¶ 26. This treatment, often referred to as transition-related care, may include hormone therapy, surgery (sometimes called "sex reassignment surgery"), and other medical services that align individuals' bodies with their gender identities. *Id.* The exact medical treatment varies based on the individualized needs of the person. *Id.* According to every major medical organization and the overwhelming consensus among medical experts, treatments for gender dysphoria, including surgical procedures, are effective, safe, and medically necessary when clinically indicated to alleviate gender dysphoria. *Id.* ¶ 27. [4]

In the past, public and private insurance companies excluded coverage for transition-related care based on the erroneous assumption that such treatments were cosmetic or experimental. *Id.* ¶ 28. Today, however, the medical consensus recognizes that such discriminatory exclusions of transition-related healthcare have no basis in medical science. *Id.* Indeed, federal courts—including the Ninth Circuit—have held that prison policies that categorically exclude coverage for transition-related surgery constitute deliberate indifference to serious medical need, in violation of the Eighth Amendment's prohibition against cruel and unusual punishment.[5]

In support of its motion to dismiss, Dignity Health improperly disputes the Complaint's allegations that transition-related healthcare is medically necessary for some individuals with gender dysphoria. Dkt. No. 27 ("Dignity Mem.") 4 (citing Center for Medicare and Medicaid Services ("CMS"), Proposed Decision Memo for Gender Dysphoria and Gender Reassignment Surgery (CAG-00446N) (June 2, 2016) ("CMS Memo"), *available at*

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[4] *See* Professional Organization Statements, *supra* n.1.

[5] *Rosati v. Igbinoso*, 791 F.3d 1037, 1040 (9th Cir. 2015) (motion to dismiss); *De'lonta v. Johnson*, 708 F.3d 520, 525 (4th Cir. 2013) (same); *Fields v. Smith*, 653 F.3d 550, 554-59 (7th Cir. 2011) (permanent injunction); *Norsworthy v. Beard*, 87 F. Supp. 3d 1164, 1195 (N.D. Cal. 2015) (preliminary injunction), *appeal dismissed and remanded*, 802 F.3d 1090 (9th Cir. 2015); *Soneeya v. Spencer*, 851 F. Supp. 2d 228, 252 (D. Mass. 2012) (permanent injunction).

https://www.cms.gov/medicare-coverage-database/details/nca-proposed-decision-memo.aspx?NCAId=282). On a motion to dismiss, however, "[a]llegations of fact in the complaint must be taken as true and construed in the light most favorable to the nonmoving party." *Hernandez v. Wood*, No. 13-CV-05633-YGR, 2016 WL 1070663, at *11 (N.D. Cal. Mar. 18, 2016).

Moreover, the full text of the document cited by Dignity Health does not support Dignity Health's position. Medicare previously excluded coverage for transition-related surgery, but in 2014, the highest tribunal within the Department of Health & Human Services responsible for reviewing Medicare policy struck down the categorical exclusion based on "a consensus among researchers and mainstream medical organizations that transsexual surgery is an effective, safe and medically necessary treatment for transsexualism." Dep't of Health & Human Servs., NCD 140.3, Transsexual Surgery (Docket No. A-13-87), 18 (2014), *available at* http://www.hhs.gov/dab/decisions/dabdecisions/dab2576.pdf. Since that decision, Medicare contractors have been required to determine the medical necessity of transition-related care on an individualized basis. Decision of Medicare Appeals Council, Docket # M-15-1069 (Jan. 21, 2016), *available at* http://www.hhs.gov/dab/divisions/medicareoperations/macdecisions/m-15-1069.pdf (requiring contractor to pay for Medicare recipient's transition-related surgery).

The CMS Memo cited by Dignity Health addresses whether to issue a National Coverage Determination establishing nationwide standards for Medicare contractors to follow when determining whether an individual's claim for transition-related care is medically necessary.[6] The CMS Memo does not recommend adopting a National Coverage Determination and instead recommends that Medicare contractors should continue evaluating medical necessity for transition-related care "on an individual claim basis." CMS Memo § I. In reaching that

[6] The CMS Memo is a draft proposal. The final version of the document will be issued on August 31, 2016, after considering additional comments from the medical community and the public. *See* National Coverage Analysis (NCA) Tracking Sheet for Gender Dysphoria and Gender Reassignment Surgery (CAG-00446N), *available at* https://www.cms.gov/medicare-coverage-database/details/nca-tracking-sheet.aspx?NCAId=282.

conclusion, CMS noted that the average age of participants in clinical studies regarding treatment for gender dysphoria were "in the 20s and 30s," which made it difficult for CMS "to assess generalizability to the Medicare population which is comprised predominantly of adults' age 65 years and older." *Id.* § VIII.A.2. CMS thus determined that its "review of the clinical evidence for gender reassignment surgery was inconclusive *for the Medicare population at large.*" *Id.* § I (emphasis added). The CMS memo provides no support for categorical exclusions of coverage. To the contrary, contractors must continue to evaluate medical necessity on an individualized basis. *Id.* And, in any event, it would be improper to draw inferences from the CMS memo on a motion to dismiss. *Hernandez*, 2016 WL 1070663, at *11.

Dignity Health Plan's Categorical Exclusion of Coverage

Dignity Health provides health care coverage to employees, including Mr. Robinson, through a self-funded plan administered by United Medical Resources ("UMR"), a fully owned subsidiary of United Healthcare. Compl. ¶ 31. The plan offered to employees at Chandler Regional Medical Center is the Dignity Health Arizona Preferred Plan ("Dignity Health Plan"). *Id.* Ex C.

Mr. Robinson began working at Chandler Regional Medical Center in 2014 as an employee of Dignity Health. *Id.* ¶ 30. His health plan, like all of the health plans offered to Dignity Health employees in Arizona, categorically excludes coverage for "[t]reatment, drugs, medicines, services and supplies for, or leading to, sex transformation surgery." *Id.* Ex. C at 62. The plan leaves no role for the third-party administrator to assess whether any particular treatment is medically necessary for any particular patient. The Dignity Health Plan has a separate exclusion for care that is "Not Medically Necessary." *Id.* Ex. C at 61. Thus, the only function of the "sex transformation" exclusion is to exclude coverage for medically necessary transition-related care that would otherwise be covered.

In making determinations about whether procedures are medically necessary, Dignity Health generally relies on United Healthcare's coverage determination guidelines. *Id.* Ex. C at

85-86. But the Dignity Health Plan does not follow United Healthcare's coverage determination guidelines for gender dysphoria. *Id.* ¶ 34.[7] The coverage guidelines for gender dysphoria covers medically necessary treatments for gender dysphoria in accordance with the WPATH Standards of Care, including, *inter alia*, continuous hormone replacement therapy, complete hysterectomy, orchiectomy, penectomy, vaginoplasty, vaginectomy, clitoroplasty, labiaplasty, salpingo-oophorectomy, metoidioplasty, scrotoplasty, urethroplasty, placement of testicular prosthesis, phalloplasty, thyroid chondroplasty, bilateral mastectomy, and augmentation mammoplasty. *Id.* Dignity Health, however, categorically refuses to provide coverage for any of the foregoing procedures when used to treat gender dysphoria. *Id.* ¶ 35.

In contrast, Dignity Health provides coverage for many of the same procedures as "reconstructive surgery" when used to treat medical conditions other than gender dysphoria. *Id.* Ex. C at 29. The insurance plan covers medically necessary breast reductions, reconstructive breast surgery following mastectomies, reconstructive surgery "to improve a significant functional impairment of a body part," reconstructive surgery "to correct the result of an accidental injury," and reconstructive surgery "to correct a gross anatomical defect." *Id.* The Dignity Health Plan specifically notes that "[t]he fact that physical appearance may change or improve as a result of Reconstructive Surgery does not classify surgery as Cosmetic treatment when a physical impairment exists and the surgery restores or improves function." *Id.* Ex. C at 88. But when the same procedures are used to provide medically necessary transition-related care, the Dignity Health plan excludes coverage for those procedures as "sex transformation."

Denial of Coverage for Mr. Robinson's Medically Necessary Care

As a result of the "sex transformation" exclusion, Mr. Robinson had to pay out of pocket for medically necessary hormone therapy throughout 2015. *Id.* ¶ 37. Mr. Robinson was also

[7] United Healthcare Coverage Determination Guideline CDG.011.05: Gender Dysphoria (Gender Identity Disorder) Treatment (Oct. 1, 2015), *available at* https://www.unitedhealthcareonline.com/ccmcontent/ProviderII/UHC/en-US/Assets/ProviderStaticFiles/ProviderStaticFilesPdf/Tools%20and%20Resources/Policies%20and%20Protocols/Medical%20Policies/Medical%20Policies/Gender_Identity_Disorder_CD.pdf.

forced to pay out of pocket for a medically necessary chest surgery performed on August 24, 2015. *Id.* ¶¶ 39-41. In rejecting Mr. Robinson's request for coverage and subsequent appeals, the third-party administrator did not determine that the procedure was not medically necessary. Instead, the third-party administrator relied exclusively on the plan's "sex transformation" exclusion. *Id.* Exs. D, E, F. According to the third-party administrator, the exclusion categorically prohibits all "treatment related to th[e] diagnosis" of gender dysphoria. *Id.* Ex. F.

Looking ahead to 2016, Mr. Robinson faced the prospect of more medically necessary hormone therapy and medically necessary phalloplasty scheduled for March 2016, which he could not afford to pay out of pocket. *Id.* ¶¶ 42-43. Disheartened and frustrated, Mr. Robinson's fiancée, Melissa Mayo, wrote to Dignity Health's Chief Executive Officer ("CEO") in San Francisco and asked for Dignity Health to provide "a fully inclusive equitable benefits plan" in 2016 to cover medically necessary transition-related care in accordance with standards established by the WPATH. *Id.* Ex. G at 7.

In response to the email from Mr. Robinson's fiancée, Dignity Health's CEO wrote: "Thanks for sharing this very unfortunate situation. I am asking our head of HR to look into this matter and to then follow up with you. Thanks for bringing this to my attention." *Id.* ¶ 45 & Ex. G at 4. On October 26, 2015, the Chief Human Resources Officer provided the following information to Mr. Robinson's fiancée by email:

> You have raised a unique issue that warrants more thought and review. I have spoken with our employee benefits team as well as our policy staff. All agree that the issue you have raised is both unique and important. Rather than provide an answer that is not thoroughly and carefully considered from all angles, I'd like to convene a small team of individuals from HR, Mission, Ethics and potentially operations to discuss your situation.

Id. ¶ 46 & Ex. G at 1. On November 6, 2015, the Chief Human Resources Officer provided the following update:

> Thank you for raising this issue for contemplation and discernment. We held our discussion with representatives from HR Policy, Employee Benefits, Total

> Rewards, Mission Integration and Ethics on Thursday morning, November 5th. We discussed your situation through the lens of our values, our internal policy and our ethical & religious directives. We also considered our medical plan insurance coverages for both fully insured plans in California and self-funded plans in Arizona and individual state requirement statutes, but we did not have an employment attorney involved in the meeting.
>
> With specific intent, we deliberated whether our existing policies were discriminatory and inconsistent with our organization values as you stated in your letter. We found no evidence of discriminatory practice in the employee benefit plan documents, internal practice or the administration of the plan.

Id. ¶ 47 & Ex. H at 1. With respect to insurance coverage for 2016, the email advised Mr. Robinson and his fiancée "to complete the open enrollment process and make selections that are important to you." *Id.* Ex. H at 2.

As a result of Dignity Health's refusal to lift its exclusion for "sex transformation" procedures, Mr. Robinson was forced to cancel his scheduled surgery for medically necessary phalloplasty and forgo the money he had paid as a deposit. *Id.* ¶ 43. Mr. Robinson also continues to pay out of pocket for his medically necessary hormone therapy. *Id.* ¶ 37.

ARGUMENT

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* "Allegations of fact in the complaint must be taken as true and construed in the light most favorable to the nonmoving party." *Hernandez*, 2016 WL 1070663, at *11.

I. Dignity Health's Categorical Exclusion for Care Related to "Sex Transformation" Violates Title VII.

A. Under Title VII, Discrimination Based on a Person's Transgender Status Is Discrimination "Because of Such Individual's . . . Sex."

The First, Sixth, Ninth, and Eleventh Circuits have all recognized that discrimination against transgender individuals is discrimination because of sex under federal civil rights statutes and the Equal Protection Clause of the Constitution. *See Glenn v. Brumby*, 663 F.3d 1312, 1316-19 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 573-75 (6th Cir. 2004); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1201-03 (9th Cir. 2000).

Title VII protects employees from any differential treatment that takes their sex "into account," including disparate treatment based on an employee's gender nonconformity. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989). For example, in *Price Waterhouse* the Supreme Court ruled that an employer discriminated on the basis of "sex" when it denied promotion to an employee based, in part, on her failure to conform to assumptions about how women should look and how they should behave. The employee was advised that if she wanted to advance in her career she should be less "macho" and learn to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* at 235. *Price Waterhouse* illustrated that Title VII is not limited to protections based on an employee's status as a male or a female, but instead extends to all discrimination that "is related to the sex of the victim." *Schwenk*, 204 F.3d at 1202.

Applying *Price Waterhouse*, the Ninth Circuit in *Schwenk* squarely rejected the argument, asserted here by Dignity Health, that discrimination "because of [a person's] transsexuality" is not discrimination because of sex. *Schwenk*, 204 F.3d at 1200. The Ninth Circuit explained that transgender women are individuals who were assigned a male sex at birth but "whose outward behavior and inward identity d[oes] not meet social definitions of masculinity," *id.* at 1201, and "[d]iscrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII," *id.* at 1202. *Schwenk* thus established that "discrimination against transgender individuals is a form of gender-based discrimination." *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015); *accord Latta v. Otter*, 771 F.3d 456, 495 n.12 (9th Cir. 2014) (Berzon, J., concurring) (citing *Schwenk* for proposition that "discrimination on the basis of transgender status is also gender discrimination"). "[N]either a

woman with male genitalia nor a man with stereotypically female anatomy, such as breasts, may be deprived of a benefit or privilege of employment by reason of that nonconforming trait." *Kastl v. Maricopa Cty. Cmty. Coll. Dist.*, No. CIV.02-1531PHX-SRB, 2004 WL 2008954, at *2 (D. Ariz. June 3, 2004). "The nature of the discrimination is the same; it may differ in degree but not in kind, and discrimination on this basis is a form of sex-based discrimination," under Title VII. *Glenn*, 663 F.3d at 1319.

In reaching this conclusion, *Schwenk* explicitly repudiated earlier decisions, including *Holloway v. Arthur Andersen*, 566 F.2d 659 (9th Cir. 1977), and *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), in which courts had adopted a narrow construction of the term "sex" based on presumptions about legislative intent. *Schwenk* explained that "[t]he initial judicial approach taken in cases such as *Holloway* [and *Ulane*] has been overruled by the logic and language of *Price Waterhouse*." *Schwenk*, 204 F.3d at 1201. Other Courts of Appeals and the vast majority of District Courts agree that *Price Waterhouse* "eviscerated" the reasoning of *Holloway* and *Ulane*. *Glenn*, 663 F.3d at 1318 n.5 (collecting cases).

In the face of established precedent, Dignity Health attempts to rewrite *Schwenk* as a decision based solely on transgender individuals' mannerisms and appearance, not their transgender status. Dignity Mem. 10. That arbitrary and illogical distinction cannot be reconciled with *Schwenk*'s statement that transgender individuals are gender nonconforming in both their "outward behavior *and inward identity*." *Schwenk*, 204 F.3d at 1201 (emphasis added). As the Eleventh Circuit explained, there is inherently "a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms." *Glenn*, 663 F.3d at 1316. Thus, "it would seem that any discrimination against transsexuals (as transsexuals)—individuals who, by definition, do not conform to gender stereotypes—is . . . discrimination on the basis of sex as interpreted by *Price Waterhouse*." *Finkle v. Howard Cty., Md.*, 12 F. Supp. 3d 780, 788 (D. Md. 2014); *see Rumble v. Fairview Health Servs.*, No. 14-CV-2037 SRN/FLN, 2015 WL 1197415, at *2 (D. Minn. Mar. 16, 2015) ("Because the term 'transgender' describes people whose gender expression differs from their assigned sex at birth, discrimination based on an individual's transgender status

constitutes discrimination based on gender stereotyping."). For purposes of Title VII, it does not matter whether a transgender plaintiff is perceived "to be an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual." *Schroer v. Billington*, 577 F. Supp. 2d 293, 305 (D.D.C. 2008). "[D]iscrimination on the basis of gender stereotypes, or on the basis of being transgender, or intersex, or sexually indeterminate, constitutes discrimination on the basis of the properties or characteristics typically manifested in sum as male and female—and that discrimination is literally discrimination 'because of sex.'" *Fabian v. Hosp. of Cent. Conn.*, No. 3:12-CV-1154 (SRU), 2016 WL 1089178, at *13 (D. Conn. Mar. 18, 2016).

Dignity Health does not identify any court within the Ninth Circuit that has drawn a distinction between a transgender person's mannerisms and that person's transgender status. Instead, Dignity Health relies exclusively on out-of-circuit cases decided by courts that still adhere to "[t]he initial judicial approach taken in cases such as *Holloway*" and *Ulane*, which *Schwenk* explicitly repudiated. *Schwenk*, 204 F.3d at 1201. *See* Dignity Mem. 6-7, 11-13; *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221 (10th Cir. 2007) (agreeing with *Ulane*); *Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 671 n.14 (W.D. Pa. 2015) ("[B]ecause neither the Supreme Court nor the Third Circuit has addressed the precise issue, this Court will follow the definition embraced by *Ulane* and its progeny."), *appeal dismissed*, Mar. 30, 2016; *Eure v. Sage Corp.*, 61 F. Supp. 3d 651, 662 (W.D. Tex. 2014) (relying on absence of Fifth Circuit precedent); *Creed v. Family Express Corp.*, No. 3:06-CV-465RM, 2007 WL 2265630, at *2 (N.D. Ind. Aug. 3, 2007) (following *Ulane*); *Oiler v. Winn-Dixie La., Inc.*, No. CIV. A. 00-3114, 2002 WL 31098541, at *6 (E.D. La. Sept. 16, 2002) ("[T]he Court agrees with *Ulane* and its progeny."); *see also Johnson v. Fresh Mark, Inc.* 337 F. Supp. 2d 996, 1000 (N.D. Ohio 2003) (relying on *Ulane*), *aff'd* 98 F. App'x 461, 462 (6th Cir.

2004) (relying on *Ulane* in unpublished decision before Sixth Circuit repudiated *Ulane* in *Smith*).[8]

Even worse, many of the out-of-circuit cases cited by Dignity Health do not even involve discrimination based on transgender status at all. They are cases about discrimination on the basis of sexual orientation. *See* Dignity Mem. 7; 11; *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000); *Hinton v. Va. Union Univ.*, No. 3:15cv569, 2016 WL 2621967, at *2 (E.D. Va. May 5, 2016); *Christiansen v. Omnicom Grp., Inc.*, No. 15 Civ. 3440 (KPF), 2016 WL 951581, at *2 (S.D.N.Y. Mar. 9, 2016); *Mowery v. Escambia Ct.y Utils. Auth.*, No. 3:04CV382-RS-EMT, 2006 WL 327965, at *9 (N.D. Fla. Feb. 10, 2006). Cases about sexual orientation are not relevant here because an individual's gender identity and sexual orientation are two different things. "While the relationship between gender identity and sexual orientation is complex, and sometimes overlapping, the two identities are distinct." *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1081 (9th Cir. 2015). Unlike sexual orientation, a person's gender identity is literally part of a person's sex. *See Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764 (6th Cir. 2006) (reasoning that discrimination based on a person's sexual orientation is not discrimination for "fail[ing] to act and/or identify with his or her gender"); *Fabian*, 2016 WL 1089178, at *11 n.8 (holding that circuit precedent excluding sexual orientation discrimination from Title VII does not also exclude discrimination based on transgender status); *Lewis v. High Point Reg'l Health Sys.*, 79 F. Supp. 3d 588, 590 (E.D.N.C. 2015) (same).[9]

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[8] The one decision decided in a jurisdiction that has repudiated *Ulane* is *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 100 F. Supp. 3d 594, 599 (E.D. Mich. 2015). That decision purported to draw a distinction between discrimination based on transgender status and discrimination based on gender nonconformity under *Price Waterhouse*. But the court's distinction appears to be purely theoretical because the court still held that the complaint stated a valid claim under *Price Waterhouse*.

[9] Moreover, even if precedents regarding sexual orientation were relevant, the vitality of those precedents have been increasingly called into question—including in decisions Dignity Health purports to rely upon. *See Hively v. Ivy Tech Cmty. Coll.*, No. 15-1720, 2016 WL 4039703, at *14 (7th Cir. July 28, 2016) (adhering to circuit precedent while describing precedent as "illogical"); *Christiansen*, 2016 WL 951581, at *13 (suggesting that the Second Circuit overrule its earlier precedent in *Simonton*). *See also Latta*, 771 F.3d at 495 (Berzon, J., concurring) ("[T]he social exclusion and state discrimination against lesbian, gay, bisexual, and transgender

Dignity Health's distinction between gender nonconformity and transgender status is gerrymandered to make *Schwenk* compatible with *Ulane*. But the Ninth Circuit did not attempt to make *Schwenk* compatible with *Ulane*; it repudiated *Ulane* entirely. Because transgender individuals are inherently gender nonconforming in both their "outward behavior and inward identity," *Schwenk*, 204 F.3d at 1200, any discrimination based on a person's transgender status is necessarily discrimination based on that person's sex under *Schwenk*.

B. Dignity Health's Argument Based on Subsequent Legislative History Improperly Relies on Suppositions About Legislative Intent.

Dignity Health's only substantive argument for why transgender status must be excluded from the definition of "sex" is that such an exclusion is compelled by "the history of legislative efforts on this subject." Dignity Mem. 6. Dignity Health does not argue that the plain meaning of the statutory term "sex" excludes transgender status.[10] Dignity Health also does not argue that the original intent of Congress was to exclude transgender status from the scope of Title VII's protections.[11] Instead, Dignity Health argues that Congress's subsequent failure to pass additional legislation explicitly protecting individuals from discrimination based on gender identity indicates that Congress does not intend for discrimination based on transgender status to be included within the definition of sex in Title VII. *See* Dignity Mem. 7-8; *cf. Hively*, 2016 WL

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people reflects, in large part, disapproval of their nonconformity with gender-based expectations."); *Videckis v. Pepperdine Univ.*, 100 F. Supp. 3d 927, 937 (C.D. Cal. 2015).

[10] The dictionary definitions of the term "sex," both at the time Title VII was enacted and today make clear that the term "sex" encompasses all the "morphological, physiological, and behavioral" components of a person's sex. *Fabian*, 2016 WL 1089178, at *12.

[11] As the unanimous Supreme Court explained in *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998), Title VII applies to all discrimination because of "sex" whether or not a particular form of discrimination was contemplated by the legislators who passed the statute. *See Glenn*, 663 F.3d at 1318 n.5. "[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." *Oncale*, 523 U.S. at 79; *cf. Barr v. United States*, 324 U.S. 83, 90 (1945) ("[I]f Congress has made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular application may not have been contemplated by the legislators.").

4039703, at *14 (adhering to Seventh Circuit precedent that Title VII does not protect against sexual orientation discrimination because "Congress has time and time again said 'no,' to every attempt to add sexual orientation to the list of categories protected from discrimination by Title VII").

The Supreme Court, however, has repeatedly warned that the acts of subsequent Congresses "deserve little weight in the interpretive process." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994). As the Ninth Circuit recently emphasized in an opinion, "the acts of a subsequent legislature tell us nothing definitive about the meaning of laws adopted by an earlier legislature." *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC*, 666 F.3d 1216, 1223 (9th Cir. 2012). Moreover, even if the acts of subsequent legislatures were probative, "failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute." *United States v. Craft*, 535 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). "Congress does not express its intent by a failure to legislate." *Atkinson v. Inter-Am. Dev. Bank*, 156 F.3d 1335, 1342 (D.C. Cir. 1998).

With respect to discrimination based on transgender status, Congress did not consider legislation with explicit protections until 2007, after the First, Sixth, and Ninth Circuits had already ruled that Title VII and analogous statutes already prohibit discrimination against transgender individuals. *See Schroer*, 577 F. Supp. 2d at 308 (discussing different versions of bills introduced in 2007). In this context, Congress's failure to pass explicit protections "does not require the conclusion that gender identity was not already protected by the plain language of the statute, because legislatures may add such language to clarify or to settle a dispute about the statute's scope rather than solely to expand it." *Fabian*, 2016 WL 1089178, at *14 n.12. As the Supreme Court has explained, "[c]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (internal quotation marks omitted); *cf. ABKCO Music, Inc.*

v. LaVere, 217 F.3d 684, 691 (9th Cir. 2000) ("An amendment in the face of an ambiguous statute or a dispute among the courts as to its meaning indicates that Congress is clarifying, rather than changing, the law."); *Piamba Cortes v. Am. Airlines, Inc.*, 177 F.3d 1272, 1283 (11th Cir. 1999) ("[A]n amendment does not necessarily indicate that the unamended statute meant the opposite of the language contained in the amendment." (alterations incorporated)).

Dignity Health's arguments regarding the definition of "disability" in the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 1211(b), and the Rehabilitation Act, 29 U.S.C. § 705(2)(F)(i), are even more tenuous. The fact that Congress expressly excluded "gender identity disorders" from the definition of "disability" in those statutes does not demonstrate that transgender status is also implicitly excluded from the definition of "sex" in Title VII. To the contrary, it shows that when Congress wants to limit the scope of antidiscrimination statutes, it knows how to do so explicitly.[12]

C. Dignity Health's Categorical Exclusion of Coverage for Treatment Related to "Sex Transformation" Facially Discriminates Based on Sex.

Title VII prohibits employers from discriminating "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). In passing Title VII, Congress "decided that classifications based on sex, like those based on national origin or race, are unlawful." *City of L.A., Dep't of Water & Power v. Manhart*, 435 U.S. 702, 709 (1978). Providing fringe benefits, such as insurance policies, that facially classify based on sex violates Title VII regardless of whether the sex classification reflects a valid generalization or an irrational stereotype. *Id.*; *Ariz. Governing*

[12] Moreover, the exclusions of "gender identity disorders" from the scope of the ADA and Rehabilitation Act are themselves subject to ongoing dispute. In a pending case, the United States recently argued that the exclusions no longer apply to gender dysphoria because the exclusions are limited to "gender identity disorders not resulting from physical impairments," 42 U.S.C. § 12211(b)(1), and the emerging scientific evidence indicates that gender dysphoria has physical and biological roots. *See generally* United States' Second Statement of Interest, *Blatt v. Cabela's Retail, Inc.*, No. 5:14-cv-4822-JFL (E.D. Pa. Nov. 16, 2015), *available at* http://www.glad.org/uploads/docs/cases/blatt-v-cabelas/blatt-v-cabelas-doj-soi-11-16-15.pdf.

Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris, 463 U.S. 1073, 1082 (1983).

On its face, Dignity Health's exclusion of all health care related to "sex transformation" discriminates against transgender employees on the basis of sex. Under the exclusion, the same procedures that are covered as medically necessary treatments for non-transgender employees are excluded from coverage when related to "sex transformation." *See Denegal v. Farrell*, No. 1:15-CV-01251-DAD-MJS (PC), 2016 WL 3648956, at *7 (E.D. Cal. July 8, 2016) (holding that plaintiff stated equal protection claim based on allegation that prison "discriminate[s] against transgender women by denying surgery (vaginoplasty) that is available to cisgender women"); *Norsworthy*, 87 F. Supp. 3d at 1120 (holding that plaintiff stated claim for sex discrimination based on allegation that "considering her need for medically necessary surgery, and vaginoplasty in particular, Defendants treated her differently from a similarly situated non-transgender woman in need of medically necessary surgery"); *Cruz v. Zucker*, No. 14-CV-4456 (JSR), 2016 WL 3660763, at *17 (S.D.N.Y. July 5, 2016) (holding that "categorical exclusion on treatments of gender dysphoria" discriminates on the basis of "sex" under Section 1557).

Even though the word "sex" is included in the title of the "sex transformation" exclusion, Dignity Health asserts that its exclusion is "facially neutral" because the exclusion was not (according to Dignity Health) motivated by discriminatory intent. Dignity Mem. 14-16. The Supreme Court emphatically rejected the same argument in *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991). The Court explained that "absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy." *Id.* "Whether an [official] practice involves disparate treatment through explicit facial discrimination does not depend on why the [official] discriminates but rather on the explicit terms of the discrimination." *Id.* The fact that Dignity Health has not harassed Mr. Robinson "because he dressed spoke, or behaved like a man," Dignity Mem. 16, does not allow Dignity Health to discriminate against him in providing facially discriminatory employee health benefits. *Cf. Norris*, 463 U.S. at 1082

n.10 ("An employer that offers one fringe benefit on a discriminatory basis cannot escape liability because he also offers other benefits on a nondiscriminatory basis.").[13]

Moreover, even if Title VII applied only to discrimination motivated by an employer's disapproval of an employee's "noncompliance with gender stereotypes," Dignity Mem. 16, that motive is abundantly present here. The Dignity Health plan covers medically necessary mastectomies for women but excludes coverage of medically necessary mastectomies for transgender men. Similarly, the plan covers medically necessary vaginoplasties for non-transgender women but excludes coverage for medically necessary vaginoplasties for transgender women who were assigned a male sex at birth. The exclusion reflects the assumption that people assigned a female sex at birth should have typically female anatomy and that people assigned a male sex at birth should have typically male anatomy. *Cf. Kastl*, 2004 WL 2008954, at *2 ("[N]either a woman with male genitalia nor a man with stereotypically female anatomy, such as breasts, may be deprived of a benefit or privilege of employment by reason of that nonconforming trait."). Indeed, as discussed in Plaintiff's opposition to Dignity Health's motion to transfer venue, there is extrinsic evidence that Dignity Health retained the exclusion to enforce some of its corporate officers' religious convictions about the sexual differences of men and women. Even if proof of motive were required, the facts alleged in the Complaint create the plausible inference that Dignity Health's discriminatory policy was motivated by disapproval of gender nonconformity in violation of Title VII.

II. Dignity Health's Categorical Exclusion for Care Related to "Sex Transformation" Violates Section 1557 by Discriminating Against Employees on the Basis of Sex.

There is no question that Plaintiff has a valid claim that Dignity Health's categorical exclusion for treatments related to "sex transformation" violates the final regulations

[13] None of the cases cited by Dignity Health involved a facially discriminatory policy like the policy at issue in this case. The cases all discussed motive and intent to distinguish between disparate treatment challenges to *facially neutral policies* and disparate impact challenges to those policies. *See Ricci v. DeStefano*, 557 U.S. 557, 577 (2009); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993); *AFSCME v. Washington*, 770 F.2d 1401, 1405 (9th Cir. 1985).

implementing 1557. The regulations expressly provide that organizations receiving federal funding and "principally engaged in providing or administering health services" may not discriminate as part of their "employee health benefit program." 45 C.F.R. § 92.208(a). The regulations further provide that "a categorical coverage exclusion or limitation for all health services related to gender transition" constitutes unlawful discrimination on the basis of sex. *Id.* § 92.207(b)(4). Moreover, while the regulations do not require coverage for care that is not medically necessary, *see* Dignity Mem. 22, they prohibit covered employers from categorically excluding all coverage for transition-related care without regard to whether the requested care is or is not necessary.[14]

Dignity Health nevertheless argues that Mr. Robinson's claim under Section 1557 must be dismissed because, according to Dignity Health, the relevant provisions of the regulations do not become effective until January 1, 2017. Dignity Mem. 19. That argument misconstrues the regulations and the underlying statutory text. As discussed below, the underlying text of Section 1557 already prohibited Dignity Health from discriminating against its transgender employees, and the effective dates of the regulations entitle Mr. Robinson to damages and injunctive relief.

A. Section 1557 Prohibited Dignity Health from Excluding Transition-Related Care Before the Regulations Went Into Effect.

Section 1557 prohibits health care institutions receiving federal financial assistance from discriminating on grounds prohibited by, *inter alia*, Title IX. Title IX, in turn, prohibits discrimination "on the basis of sex." At the time Section 1557 was passed, the Supreme Court had already held that Title IX "on its face" prohibits not only discrimination against third parties, but also discrimination against an entity's own employees. *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 520 (1982). Moreover, as Dignity Health concedes, courts often look to Title VII case law when interpreting the scope of sex discrimination under Title IX. Dignity Mem. 17-18.

[14] As discussed in the Factual Background section, Dignity Health's attempt to dispute the medical necessity of transition-related care is improper on a motion to dismiss, and the document cited by Dignity Health does not support its assertions.

Relying on that case law, the very first case to apply Section 1557 held that an individual's transgender status is part of that individual's "sex" under Section 1557. *Rumble*, 2015 WL 1197415, at *2. For all the same reasons that the text of Title VII prohibits employers from categorically excluding transition-related care from employee health insurance benefits, Title IX prohibits health care institutions receiving federal funding from doing so as well. *Cruz*, 2016 WL 3660763, at *17 (holding that "categorical exclusion on treatments of gender dysphoria" violated Section 1557 before implementing regulations went into effect).[15]

By expressly prohibiting employers principally engaged in providing healthcare from categorically excluding transition-related care from their employees' healthcare plans, the implementing regulations do not impose new requirements; they simply make explicit what is already prohibited by the statutory text. When interpreting Title IX, the Supreme Court has repeatedly held that discriminatory conduct expressly prohibited by implementing regulations was already prohibited by the underlying statute. For example, in *Jackson v. Birmingham Board of Education*, 544 U.S. 167, 176-77 (2005), the Supreme Court held that retaliation against an individual for complaining about sex discrimination was discrimination "on the basis of sex" under Title IX. The defendant argued that, under *Alexander v. Sandoval*, 532 U.S. 275 (2001), plaintiffs did not have a private right of action based on retaliation because the ban on retaliation was contained only in an implementing regulations, 34 C.F.R, § 100.7(e). *See Jackson*, 544 U.S. at 177-78. But the Court explained that its decision did not need to "rely on the Department of Education's regulation at all, because the statute *itself* contains the necessary prohibition." *Id.* at 178 (emphasis in original); *see also Davis*, 526 U.S. at 647 (holding that text of Title IX holds schools liable for deliberate indifference to sexual harassment by other students even though agency first issued guidance on issue after harassment of student had already taken place); *N.*

[15] Even before the regulations were issued, States were already issuing insurance bulletins alerting that the Affordable Care Act (in addition to applicable State laws) prohibited categorical exclusions in health care plans. *See Nondiscrimination in Health Programs & Activities*, 80 Fed. Reg. 54172, 54189-90 (proposed Sept. 8, 2015).

Haven, 456 U.S. at 522 (holding that text of Title IX itself prohibits discrimination against employees).

Moreover, as part of its memorandum accompanying the final regulations, OCR emphasized that "Section 1557 has been in effect since its passage as part of the ACA in March 2010, and covered entities have been subject to its requirements since that time." *Nondiscrimination in Health Programs & Activities*, 81 Fed. Reg. 31376, 31430 (May, 18, 2016). OCR stated that "[t]o delay implementation of the final rule would delay *the existing and ongoing protections* that Section 1557 *currently provides* and has provided since enactment." *Id.* (emphases added). The regulations thus provided clarity by explicitly stating that categorical exclusions of transition-related care are prohibited, but did not change the underlying requirements of Section 1557. "A rule simply clarifying an unsettled or confusing area of the law . . . does not change the law, but restates what the law according to the agency is and has always been: It is no more retroactive in its operation than is a judicial determination construing and applying a statute to a case in hand." *Pope v. Shalala*, 998 F.2d 473, 483 (7th Cir. 1993) (internal quotation marks omitted), *overruled on other grounds*, *Johnson v. Apfel*, 189 F.3d 561 (7th Cir. 1999)).

Dignity Health argues that Section 1557 could not have required coverage for medically necessary transition-related care because, according to Dignity Health, transition-related care is not required by Medicare and Medicaid. Dignity Mem. 18-19. Those assertions are both wrong and irrelevant. As discussed above, *see supra* at 5-6, Medicare has required that providers provide medically necessary transition-related care on an individualized basis since 2014. In addition, at least one federal court has held that categorical exclusions of transition-related care also violate the federal Medicaid statute. *Cruz*, 2016 WL 3660763, at *10. In any event, whether or not such exclusions are prohibited by these statutes has no bearing on whether they are prohibited by Section 1557.

B. Under Section 1557's Regulations, Mr. Robinson Has Claims for Damages Beginning July 18, 2016, and Ongoing Claims for Injunctive Relief.

Even if Dignity Health's liability is tied solely to the implementing regulations, Dignity Health must stop discriminating against Mr. Robinson *now* even if it does not "change" its "health plan benefit design" until January 1, 2017. The regulations became effective on July 18, 2016, "except to the extent that [the regulations] require changes to health insurance or group health plan benefit design," which become effective on January 1, 2017. 45 C.F.R. § 92.1. OCR explained that the delay was "necessary for issuers to avoid the administrative challenges associated with applying the final rule's requirements in the middle of a plan year or policy year." *Nondiscrimination in Health Programs & Activities*, 81 Fed. Reg. at 31430.

As an employer with a self-insured health plan, Dignity Health faces none of these administrative challenges. Dignity Health does not have to change its health plan design in order to stop discriminating against Mr. Robinson because, under the existing plan, Dignity Health retains ultimate discretion to decide whether to cover a procedure. Compl. Ex. C at 71-72. (explaining procedure for voluntary appeals of benefit denials to Dignity Health). To the extent there are any factual disputes regarding Dignity Health's ability to comply with the regulations without changing plan design, those disputes cannot be resolved on a motion to dismiss.

Accordingly, even if Mr. Robinson is not entitled to damages for conduct occurring before July 18, 2016, he is entitled to damages based on Dignity Health's continued refusal to provide him with medically necessary transition-related care from that date forward, damages which he has already incurred. Dignity Health asserts that it "was not subject to the requirements of the regulation at the time the Plan's exclusion impacted [Mr.] Robinson," Dignity Mem. at 21, but Mr. Robinson continues to be "impacted" by the exclusion to this day. He continues to pay for medically necessary hormone therapy out of pocket, and he continues to lack coverage for medically necessary phalloplasty surgery in accordance with his treatment under the WPATH standards of care.

At a bare minimum, the Section 1557 claim cannot be dismissed because it includes a request for injunctive relief. Even if Dignity Health's liability did not begin until January 1, 2017, Mr. Robinson would still be entitled to an injunction and declaratory judgment.

CONCLUSION

For all these reasons, Mr. Robinson has stated valid claims under both Title VII and Section 1557, and Dignity Health's motion to dismiss should be denied.

Respectfully submitted,

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