

1 ROBERTA L. STEELE, SBN 188198 (CA)  
 2 MARCIA L. MITCHELL, SBN 18122 (WA)  
 3 PETER F. LAURA, SBN 116426 (CA)  
 4 AMI SANGHVI, SBN 4407672 (NY)  
 5 U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
 6 San Francisco District Office  
 7 450 Golden Gate Ave., 5th Floor West  
 8 P.O. Box 36025  
 9 San Francisco, CA 94102  
 10 Telephone No. (415) 522-3077  
 11 Fax No. (415) 522-3425  
 12 [Peter.Laura@eoc.gov](mailto:Peter.Laura@eoc.gov)

*Attorneys for Amicus Curiae EEOC*

10 UNITED STATES DISTRICT COURT  
 11 NORTHERN DISTRICT OF CALIFORNIA

13 JOSEF ROBINSON,

14 Plaintiff,

15 vs.

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

18 Defendant.

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

**REPLY OF THE EQUAL  
 EMPLOYMENT OPPORTUNITY  
 COMMISSION TO DEENDANT'S  
 RESPONSE TO EEOC'S AMICUS  
 BRIEF**

Hon. Yvonne Gonzalez Rogers  
 Hearing Set: 9/27/16 at 2:00 pm  
 Courtroom 1, 4<sup>th</sup> Floor

26 ///

27 ///

28 ///

**TABLE OF CONTENTS**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

I. ARGUMENT ..... 1

    A. Dignity Health’s Response Distorts EEOC’s Arguments and Addresses  
       Arguments EEOC Did Not Make ..... 1

        1. EEOC Never Argued that this Court Should Find that Robinson  
           is Covered Under a New Title VII Classification Called  
           “Transgender Status” ..... 2

        2. Dignity Health Does Not Respond to EEOC’s Arguments Concerning  
           the Exclusion in the Health Plan for “Sex-Transformation”-Related  
           Treatment ..... 5

    B. Dignity Health’s Other Arguments Do Not Suggest that Dismissal  
       is Appropriate..... 6

II. CONCLUSION..... 9

**TABLE OF AUTHORITIES**

<b><u>Cases</u></b>	<b>Page(s)</b>
<i>Carcano v. McCrory</i> , No. 1:16-cv-00236, 2016 WL 4508192 (M.D.N.C. Aug. 26, 2016) .....	9
<i>Christiansen v. Omnicom Group</i> , No. 1:15-cv-03440 (KPF), 2016 WL 951581 (S.D.N.Y. March 9, 2016) .....	5
<i>EEOC v. RG&amp;GR Harris Funeral Homes</i> , No. 2:14-cv-13710, 2016 WL 4396083 (E.D. Mich. Aug. 18, 2016) .....	8
<i>Glenn v. Brumby</i> , 663 F.3d 1312 (11th Cir. 2011) .....	3, 4, 5, 7
<i>G.G. ex rel. Grimm v. Gloucester County School Board</i> , 822 F.3d 709 (4th Cir. 2016) .....	8
<i>Johnston v. University of Pittsburgh</i> , 97 F.Supp.3d 657 (W.D. Pa. 2015) .....	8
<i>Macy v. Holder</i> , Appeal No. 0120120821, 2012 WL 1435995 (EEOC April 20, 2012) .....	3, 6, 7
<i>Nichols v. Azteca Rest. Enters.</i> , 256 F.3d 864, 874 (9th Cir. 2001) .....	4, 5
<i>Price Waterhouse v. Hopkins</i> , 490 U.S. 228 (1989) .....	2, 3, 8
<i>Schroer v. Billington</i> , 577 F.Supp.2d 293 (D.D.C. 2008) .....	3, 6
<i>Schwenk v. Hartford</i> , 204 F.3d 1187 (9th Cir. 2000) .....	<i>passim</i>
<i>Smith v. City of Salem</i> , 378 F.3d 566 (6th Cir. 2004) .....	2, 3, 4, 7
<i>In re Union Pac. R.R. E’ment Practices Litig.</i> , 479 F.3d 936 (8th Cir. 2007) .....	6
 <b><u>Statutes</u></b>	
42 U.S.C. §2000e-16(b) .....	7
42 U.S.C. §2000e-2(a) .....	<i>passim</i>

1 Pursuant to this Court’s September 1, 2016, order [ECF 48], the Equal Employment  
2 Opportunity Commission submits this Reply to Dignity Health’s (Chandler’s) Response to EEOC’s  
3 Brief as Amicus Curiae. In its initial brief, the Commission argued that Defendant’s motion to  
4 dismiss should be denied because Robinson stated a plausible claim for relief under Title VII when  
5 he alleged that Defendant discriminates on the basis of sex by refusing to cover medically necessary  
6 treatment for his gender dysphoria, where the plan would cover medically necessary treatment for  
7 other serious health conditions. The Commission also addressed arguments Defendant made to  
8 support its motion to dismiss the complaint.

9 As is apparent from the absence of relevant citations to EEOC’s Brief, Dignity Health’s  
10 Response largely ignores EEOC’s actual arguments. Instead, Defendant distorts arguments EEOC  
11 did make, addresses arguments EEOC did not make, and quotes at length from cases even Defendant  
12 has trouble linking to the case at hand. Nothing in the Response undermines the Commission’s  
13 bottom-line position that Defendant’s motion to dismiss should be denied because the complaint  
14 states a plausible claim for relief.

## 15 I. ARGUMENT

### 16 A. Dignity Health’s Response Distorts EEOC’s Arguments and Addresses 17 Arguments EEOC Did Not Make

18 Dignity Health’s principal discussion of the substance of EEOC’s Brief begins on page 8 of  
19 its Response. [See ECF 47, at pp. 8:6-12:27] Dignity Health makes two arguments, neither of  
20 which has merit.<sup>1</sup>

---

21  
22 <sup>1</sup> Dignity Health asserts that in addition to the arguments in its Response, Defendant “incorporates  
23 by reference” the arguments in its reply to Robinson’s opposition because “EEOC’s brief largely  
24 repeats points already made by Robinson.” [ECF 47, at p. 8 n.12] Neither this Court nor the  
25 Commission should be expected to dig through a separate brief and guess which arguments there  
relate to something in EEOC’s Brief. If it believes it has a response to a point in EEOC’s Brief,  
Dignity Health must identify that point and make the argument in its Response. See Civ. L.R. 7-  
4(a)(5).

26 EEOC also observes that Defendant’s assertion that EEOC’s arguments are the same as Robinson’s  
27 contradicts the highly improper — and false — suggestion in Defendant’s Opposition to EEOC’s  
28 Motion to File that EEOC’s Brief was “the result of a strategic arrangement” — essentially,  
collusion — between the EEOC and Robinson to divide up the arguments. [ECF 44, at p. 2:11-18]  
In fact, as per its custom, the Commission did not share its brief or arguments with either party in  
advance. Rather, both parties were informed of EEOC’s decision to submit a brief at the same time,

1                                   **1. EEOC Never Argued that this Court Should Find that Robinson is**  
2                                   **Covered Under a New Title VII Classification Called “Transgender**  
3                                   **Status”**

4                                   According to Dignity Health, EEOC takes the position that “transgender status” is or should  
5                                   be a separate category of coverage under Title VII. Defendant argues that EEOC attempts to “force  
6                                   a transgender status theory into the sex stereotyping mold” that courts have recognized and adopted.  
7                                   But, Defendant continues, “[n]othing in *Price Waterhouse* [or other cases cited by the Commission]  
8                                   supports extending [the] holding or reasoning outside the stereotyping context.” [ECF 47, at pp.  
9                                   8:18-19, 9:2, 10:24-25, 11:11-12]

10                                  This argument responds to arguments Dignity Health may wish EEOC had made, rather than  
11                                  ones it actually did make. In fact, the Commission has not argued that “transgender status” is a  
12                                  separate protected category that this Court should create in resolving Robinson’s suit. Indeed,  
13                                  EEOC’s Brief uses the term “transgender status” only six times, three times referring to Plaintiff’s  
14                                  complaint [ECF 49-1, at pp. 3:8, 4:28, 12:5] and three times responding to Defendant’s use of the  
15                                  term [*id.*, at pp. 3:13, 6:25, 8 n.4]. It is not a term that EEOC used in an affirmative argument.

16                                  What EEOC did argue, consistently throughout its brief, is that the allegations in the  
17                                  complaint state a plausible claim of coverage under a sex stereotyping/gender nonconformity theory  
18                                  that flows directly from *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989). The Commission  
19                                  stated, “discrimination against transgender individuals” such as Robinson “because of their gender  
20                                  nonconformity is discrimination on the basis of sex.” [ECF 49-1, at p. 1:15-17] As authority, the  
21                                  Commission cited a series of cases that fully support what EEOC is arguing. For example, EEOC  
22                                  cited *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000). [See ECF 49-1, at pp. 4:23, 6:2-4]  
23                                  *Schwenk* describes *Price Waterhouse*, 490 U.S. at 240, as holding that Title VII barred  
24                                  “discrimination based on the fact that [plaintiff] failed ‘to act like a woman’ — that is, to conform to  
25                                  socially-constructed gender expectations.” *Schwenk* further explains that Title VII prohibits  
26                                  discrimination “because one fails to act in the way expected of a man or woman” — as is true for  
27                                  transgender individuals such as Robinson. EEOC also cited *Smith v. City of Salem*, 378 F.3d 566,

---

28                                  on Friday August 19, and until the brief was filed on Monday August 22, neither party knew what it  
would say.

1 572 (6th Cir. 2004) [ECF 49-1, at p. 6:7], which, in holding that the transgender plaintiff was  
2 covered by Title VII’s ban on sex discrimination, states that “[s]ex stereotyping based on a person’s  
3 gender non-conforming behavior is impermissible discrimination.” In our view, to the extent  
4 Robinson alleges that he was the victim of discrimination because, as a transgender man, he fails to  
5 “conform to socially constructed gender expectations” — by seeking to change his female-appearing  
6 body to match his male gender identity — those allegations state a plausible claim that the  
7 discrimination is because of sex.

8 The Commission further relied on *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011),  
9 which refutes the notion that there is some necessary distinction between sex stereotyping and  
10 “transgender status.” *Glenn* explained that “[a] person is defined as transgender precisely because of  
11 the perception that his or her behavior transgresses gender stereotypes. ‘[T]he very acts that define  
12 transgender people as transgender are those that contradict stereotypes of gender-appropriate  
13 appearance and behavior.’” *Id.* at 1316 (citation omitted). The Court continued, “There is thus a  
14 congruence between discriminating against transgender and transsexual individuals and  
15 discrimination on the basis of gender-based behavioral norms” (*id.*). [ECF 49-1, at p. 11:5-10]  
16 Finally, the Commission cited *Macy v. Holder*, Appeal No. 0120120821, 2012 WL 1435995 (EEOC  
17 April 20, 2012), which analyzed *Price Waterhouse*, *Schwenk*, *Smith*, and *Glenn*, as well as *Schroer*  
18 *v. Billington*, 577 F.Supp.2d 293 (D.D.C. 2008), and concluded, in accordance with those cases, that  
19 “discrimination against a transgender individual because he or she is transgender is, by definition,  
20 discrimination ‘based on ... sex,’” and therefore violates Title VII. [ECF 49-1, at p. 6:10-14 (quoting  
21 *Macy*)]

22 Dignity Health argues that those cases do not stand for the proposition that Title VII prohibits  
23 discrimination against transgender individuals outside the context of a sex stereotyping/gender  
24 nonconformity theory. [ECF 47, at pp. 8:18-9:1-21] The Commission agrees that the cases do not  
25 hold that transgender status is a separate category of Title VII coverage. Our point is that  
26 discrimination against transgender individuals is inherently a form of sex stereotyping. The cases  
27 apply *Price Waterhouse*’s sex stereotyping analysis to plaintiffs who, because they are transgender,  
28 fail to conform to socially constructed gender expectations. *See, e.g., Glenn*, 663 F.3d at 1316

1 (noting “congruence” between discriminating against transgender individuals and discrimination  
2 based on gender-based behavioral norms). Defendant’s attempts to explain why the cases do not  
3 support EEOC’s argument are unpersuasive. [*See, e.g.*, ECF 47, at p. 5:10-13 (citing *Schwenk*);  
4 p. 8:12-17 (citing ECF 49-1, at p. 4:19-21) (“Discrimination against an individual like Plaintiff based  
5 on the fact that, although assigned the female sex at birth, he fails to *act in the way expected* of a  
6 woman[,] constitutes discrimination on the basis of sex”) (emphasis added by Defendant). There is  
7 no discrepancy between EEOC’s position and the parentheticals in Defendant’s list of cases. [ECF  
8 47, at pp. 8:18-9:21]

9 Nor does Dignity Health cite anything suggesting that EEOC is seeking to create a new  
10 category for coverage under Title VII. Defendant seems to assume that Plaintiff’s use of the term  
11 “transgender status” in his complaint and EEOC’s statement that the complaint states a plausible  
12 claim for relief mean that Plaintiff — and, so, EEOC — are asking the court to add a new category  
13 for “transgender status” to Title VII’s list of protected classifications. [*See, e.g.*, ECF 47, at pp.  
14 10:23-25, 11:9-12; *see also* p. 6:5-9 (quoting *EEOC v. RG&GR Harris Funeral Homes*, 2:14-cv-  
15 13710, 2016 WL 4396083, at \*20 & n.15 (E.D. Mich. Aug. 18, 2016))] Any such assumption is  
16 unfounded. As EEOC understands it, Plaintiff is using the term “transgender status” as a shorthand  
17 for the fact that Plaintiff is transgender and therefore by definition does not “conform to socially-  
18 constructed gender expectations.” *Schwenk*, 204 F.3d at 1201-02. Indeed, the complaint uses the  
19 term interchangeably with “gender nonconformity.” [*See, e.g.*, ECF 1, at ¶54 (“transgender status or  
20 gender nonconformity”)] As *Schwenk*, *Smith*, and *Glenn* all recognize, discrimination against a  
21 transgender individual because of his gender nonconformity — his transgender status — is  
22 discrimination on the basis of sex. There is no need to create a new protected classification.

23 Dignity Health further stresses that “a court cannot read Title VII to protect a category that  
24 Congress has not acted to protect.” [ECF 47, at p. 10:9-10] That is beside the point since EEOC is  
25 not arguing that the Court should create a new “category.” EEOC cited numerous cases where  
26 courts interpreted existing classifications to encompass subsets of that classification, as, for example,  
27 unfeminine women and unmanly men as subsets of “sex.” [ECF 49-1, at pp. 7:13-8:5 (citing, *e.g.*,  
28 *Price Waterhouse*, 490 U.S. at 251; *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 874 (9th Cir.

2001))] Defendant attempts to distinguish these cases, asserting that “interpreting existing categories is a different exercise from adding new categories, as the EEOC ... ask[s] the Court to do.” [ECF 47, at p. 10:23-25] To repeat, EEOC is not asking the court to add new categories — there is no need to do so. Transgender/gender nonconformity fits comfortably within the existing category of “sex.”<sup>2</sup>

Based on the allegations in the complaint, there can be no doubt that Plaintiff here “fail[s] to conform to sex stereotypes concerning how a [woman — Plaintiff’s birth-assigned sex —] should look and behave.” *Glenn*, 663 F.3d at 1318 (citation omitted). According to the complaint, he has been taking male hormones, has had a double mastectomy, and is seeking medically necessary phalloplasty surgery. [ECF 1, at ¶¶ 38-42] That is not behavior stereotypically associated with individuals of Plaintiff’s birth-assigned sex. Defendant never explains why it does not fall squarely into the category of gender non-conforming behavior.

## 2. Dignity Health Does Not Respond to EEOC’s Arguments Concerning the Exclusion in the Health Plan for “Sex-Transformation”-Related Treatment

Regarding the exclusion in Dignity Health’s employee health plan for treatment, drugs, and services for or leading to “sex transformation surgery,” EEOC mainly argued that the allegations of disparate treatment in Plaintiff’s complaint state a plausible claim for relief under Title VII. The Commission noted that the exclusion is not facially neutral since it targets and is limited to persons seeking “sex transformation surgery,” all of whom are transgender. [ECF 49-1, at p. 12:15-18 & n.6] The Commission also analogized to *Glenn*, noting that this Court could reasonably infer that, like the decisionmaker in that case (663 F.3d at 1320-21), Dignity Health is, at the very least, “uncomfortable” with employees’ gender non-conformity and the fact that they seek to change their bodies to conform to their gender identity. [ECF 49-1, at pp. 9:14-10:1]

Dignity Health takes issue with the latter suggestion, stressing that Plaintiff does not allege

<sup>2</sup> Defendant asserts that EEOC’s “policy arguments are for Congress, not courts.” [ECF 47, at pp. 10:7-11:12] Other than noting EEOC’s statement that courts interpret Title VII liberally, Defendant points to no policy argument that EEOC has made. The cited paragraph [ECF 49-1, at p. 10:15-23] simply describes the district court decision in *Christiansen v. Omnicom Group*, No. 1:15-cv-003440 (KPF), 2016 WL 951581 (S.D.N.Y. March 9, 2016).



1 that he has suffered any adverse treatment at work because of his gender identity. [ECF 47, at  
2 p. 12:18-27] That is beside the point. EEOC’s focus — and Plaintiff’s — is on the plan exclusion  
3 that singles out and denies coverage for medically necessary treatment, including surgery, for “sex  
4 transformation purposes.” Title VII prohibits discrimination in employee benefits as well as in  
5 hiring and firing.

6 Dignity Health further argues that EEOC “fail[ed] to meaningfully address [Dignity  
7 Health’s] neutral policy.” [ECF 47, at p. 11:17-18] As noted above, EEOC argued that the  
8 allegations in the complaint state a plausible claim that the plan exclusion is not facially neutral.  
9 Defendant notes that Plaintiff did not allege a disparate impact claim [*Id.*, at p. 12:4-5] — a non-  
10 sequitur to the extent the exclusion is facially discriminatory — but otherwise does not respond to  
11 EEOC’s argument. Repeatedly characterizing the exclusion as facially neutral adds nothing to the  
12 analysis. We therefore stand on our brief. [ECF 49-1, at pp. 12-13]

13 **B. Dignity Health’s Other Arguments Do Not Suggest that Dismissal**  
14 **is Appropriate**

15 Dignity Health also addresses two arguments that Defendant acknowledges EEOC did not  
16 make.

17 First, Defendant argues that the Court should accord little or no deference to *Macy*, 2012 WL  
18 1435995, an EEOC federal sector decision holding that discrimination against a transgender  
19 employee based on her gender nonconforming conduct is actionable under Title VII. Defendant  
20 points out that this decision represents a change from earlier EEOC decisions when “EEOC  
21 emphatically took the *opposite* position.” [ECF 47, at p. 2:1-2 (listing cases from 1994)] In light of  
22 this inconsistency with EEOC’s prior pronouncements, Defendant asserts, *Macy* should be given  
23 little weight. [*Id.*, at p. 3 (citing, *e.g.*, *In re Union Pac. R.R. E’ment Practices Litig.*, 479 F.3d 936,  
24 943 (8th Cir. 2007)]

25 It is true that in the last five years — which Defendant considers “recent” — the Commission  
26 has reevaluated its understanding of Title VII’s protection of transgender individuals. *See Macy*,  
27 2012 WL 1435995 at \*11 n.16. Since issuance of the 1994 decisions cited by Defendant, three  
28 Circuits including the Ninth, as well as a number of district courts including *Schoer*, 577 F.Supp.2d

1 293, have held that discrimination against transgender individuals based on their gender  
2 nonconformity constitutes discrimination on the basis of sex. And while Congress may not have  
3 been considering the problems of discrimination faced by transgender individuals, ““statutory  
4 prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably  
5 comparable evils, and it is ultimately the provisions of our laws, rather than the principal concerns of  
6 our legislators by which we are governed.” *Macy*, 2012 WL 1435995, at \*10 (quoting *Oncale v.*  
7 *Sundowner Offshore Servs.*, 523 U.S. 75, 79-80 (1998) (alterations in *Macy*)). Based on this  
8 authority, *Macy* concluded that Title VII’s prohibition on discrimination “because of ... sex” should  
9 logically extend to sex-based discrimination of any kind that meets the statutory requirements,  
10 including discrimination against transgender individuals. 2012 WL 1435995 at \*10. Thus, the  
11 Commission changed its position for the same reason EEOC here urges this Court to reject  
12 Defendant’s motion to dismiss — because the developments in the law made the continued carve-out  
13 for transgender individuals unsupportable.

14 But in any event there is no need for this Court to decide how much, if any, deference to  
15 accord this federal sector decision.<sup>3</sup> As Defendant concedes, the Commission has not “argue[d] that  
16 its present view” — presumably, *Macy* — “is entitled to deference.” [ECF 47, at p. 3:6] For good  
17 reason. Like *Macy*, EEOC’s position here is based largely on cases such as *Schwenk*, *Smith*, and  
18 *Glenn* which, in our view, correctly interpret Title VII. Thus, we believe that the Court should reach  
19 the result we advocate not because it is entitled to deference but because it is correct. Based on  
20 *Schwenk*, *Smith*, *Glenn*, and the other decisions — including *Macy* — cited in EEOC’s brief, this  
21 Court should find that the allegations in the complaint state a plausible claim for relief under Title  
22 VII.

23 Second, Dignity Health faults the Commission for “omit[ting] mention of recent rulings  
24

---

25 <sup>3</sup> *Macy* is not a policy guidance; it is an EEOC decision in a federal sector case. The Commission’s  
26 role in the federal sector differs significantly from its role in the more familiar private sector, where  
27 EEOC investigates charges, conciliates, and, occasionally, files suit. In the federal sector, the  
28 Commission acts as an adjudicator. *See* 42 U.S.C. §2000e-16(b) (EEOC “shall have the authority to  
enforce the provisions [of the federal sector provisions]”). *Macy* resolved a Title VII claim brought  
by a federal employee (Mia Macy) against the employing federal agency (Department of Justice). It  
sets out EEOC’s position on transgender coverage and is precedential within the federal sector.

1 rejecting its view” as well as “recent developments in transgender discrimination cases.” [ECF 47,  
2 at pp. 4:1-8:5] Defendant uses this discussion to expound on decisions that have, at best, marginal  
3 relevance. Indeed, Defendant never explains why they matter to the issues actually raised in  
4 EEOC’s brief.

5 Initially, Dignity Health asserts that the Commission should have cited an out-of circuit  
6 district court decision, *Harris*, 2016 WL 4396083. [ECF 47, at pp. 4:2-6:18] In Defendant’s view, it  
7 is “telling” that the Commission never mentioned that the *Harris* court “rejected the theory of  
8 transgender status discrimination that the EEOC’s brief asserts is the definitive law of the United  
9 States.” [*Id.*, at p. 4: 10-11]

10 In fact, the decision would have added nothing to the Commission’s discussion of Title VII  
11 coverage in this case. As Defendant acknowledges [ECF 47, at p. 5:21-22], *Harris* was decided on a  
12 ground not relevant to Defendant’s motion. 2016 WL 4396083 at \*14-16 (Religious Freedom  
13 Restoration Act). And no matter how many times Defendant baldly asserts that it does, the  
14 Commission’s brief does not advocate for a “theory of transgender status discrimination.” Thus,  
15 whatever *Harris* had to say on that point, the discussion is not relevant here. And, as even  
16 Defendant recognizes [ECF 47, at p. 5:6-7], the *Harris* court accepted the position that EEOC is  
17 advocating — that the charging party was in fact covered by Title VII under a *Price Waterhouse*  
18 sex/gender-nonconformity theory. *See Harris*, 2016 WL 4396083 at \*1.

19 Defendant also argues that the Commission should have mentioned that the Supreme Court  
20 agreed to stay the mandate in *G.G. ex rel. Grimm v. Gloucester County School Board*, 822 F.3d 709  
21 (4th Cir. 2016), so as to allow the defendant school district time to file a petition for certiorari.  
22 EEOC cited *Grimm* in a footnote noting that the Court there found “unpersuasive” *Johnston v.*  
23 *University of Pittsburgh*, 97 F.Supp.3d 657 (W.D. Pa. 2015), an out-of-circuit case on which  
24 Defendant frequently relied. [ECF 49-1, at p. 7 n.3]

25 The main point of the footnote, however, was that *Johnston*, which concerns a student and  
26 use of sex-segregated bathrooms, does not resemble this case factually, and Defendant made no  
27 attempt to reconcile it with *Schwenk* (204 F.3d at 1201), which rejected the authority on which  
28 *Johnston* relies (97 F.Supp.3d at 671-78 & n.14 (citing *Ulane v. E. Airlines*, 742 F.2d 1081, 1085

1 (7th Cir. 1984)). [*See* ECF 49-1, at p. 7 n.3] That is still true. While criticizing EEOC for its  
 2 “neglect,” Defendant itself neglects to reconcile *Johnston* and *Schwenk* — or to explain why such  
 3 out-of-circuit decisions addressing sex-segregated bathroom use [*see also* ECF 49-1, at pp. 7-8 &  
 4 n.10 (citing *Texas v. U.S.*, No. 7:16-cv-00054-O, 2016 WL 4426495 (N.D.Tex. Aug. 21, 2016),  
 5 *Carcano v. McCrory*, No. 1:16-cv-00236, 2016 WL 4508192 (M.D.N.C. Aug. 26, 2016)] should  
 6 undermine EEOC’s argument that Defendant’s motion to dismiss Plaintiff’s facially plausible Title  
 7 VII complaint should be denied.

## 8 **II. CONCLUSION**

9 Plaintiff’s complaint adequately alleges that he was denied coverage for medically necessary  
 10 treatment based on his sex, in violation of Title VII. None of Defendant’s arguments undermine  
 11 EEOC’s position. This Court should therefore hold that the complaint withstands Defendant’s  
 12 motion.

13 Respectfully submitted,

14  
 15 DATED: September 8, 2016

16 EQUAL EMPLOYMENT OPPORTUNITY  
 17 COMMISSION

18 P. DAVID LOPEZ  
 19 General Counsel

20 JENNIFER S. GOLDSTEIN  
 21 Associate General Counsel

22 BARBARA L. SLOAN  
 23 Attorney

24 Office of General Counsel  
 25 131 M Street N.E., 5th Floor  
 26 Washington, D.C. 20507  
 27 (202) 663-4721  
 28 FAX: (202) 663-7090

By: /s/ Peter F. Laura

PETER F. LAURA  
 Senior Trial Attorney

San Francisco District Office  
 Phillip Burton Federal Building  
 450 Golden Gate Ave., Suite 5000  
 San Francisco, CA 94102  
 415-522-3077

**CERTIFICATE OF SERVICE**

I certify that on September 8, 2016, I electronically submitted the foregoing Reply of the Equal Employment Opportunity Commission as Amicus Curiae with the Clerk of Courts using the CM/ECF system which will automatically send email notification of such filing to the attorneys of record.

DATED: September 8, 2016

/s/ Peter F. Laura  
PETER F. LAURA  
Senior Trial Attorney  
San Francisco District Office  
Equal Employment Opportunity  
Commission

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28