Appeal No. 0120160960
Hearing No. 510-2014-00396X
Agency No. 2014022

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
OFFICE OF FEDERAL OPERATIONS

Marc Lawrence,

Appellant,

v.

Beth F. Cobert, Acting Director, Office of Personnel Management,

Agency.

BRIEF IN SUPPORT OF APPEAL

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U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
OFFICE OF FEDERAL OPERATIONS

Marc Lawrence, Appellant, v. Beth F. Cobert, Acting Director, Office of Personnel Management, Agency.	Appeal No. 0120160960 Hearing No. 510-2014-00396X Agency No. 2014022 Date: June 8, 2016

BRIEF IN SUPPORT OF APPEAL

INTRODUCTION

One hopes that there are few instances in which the U.S. Office of Personnel Management (the "Agency" or "OPM") engages in plain, facial sex discrimination for which there is uncontroverted, direct evidence. That would explain – but not excuse – the Final Agency Decision ("FAD"), which invokes (i) inapplicable legal principles, such as OPM's obligations under the FEHBA, and the *McDonnell Douglas* test for cases where there is no direct evidence of discrimination (and its allowing the employer to articulate a legitimate nondiscriminatory reasons and requiring that the employee show any such reason to be pretextual); and (ii) legally insufficient excuses for its actions, such as the longstanding history of mistreatment of transgender people, and the relatively recent recognition of such mistreatment as sex discrimination.

Marc Lawrence, Complainant in the above-captioned case, respectfully submits this brief in support of his appeal. Mr. Lawrence is a transgender man who was denied health coverage for hormone-related care that routinely is insured for non-transgender males under the Federal Employees Health Benefits Program. The coverage was denied solely because of Mr.

Lawrence's transgender status, and the fact of his having undergone a gender transition. This denial constitutes discrimination on the basis of sex. 42 U.S.C. § 2000e-16(a); *Macy v. Dep't of Just.* (*Fed. Bureau of Alcohol, Tobacco, Firearms and Explosives*), Appeal No. 0120120821, 2012 WL 1435995, at *10 (E.E.O.C. April 20, 2012); *Lusardi v. Dep't of the Army*, Appeal No. 0120133395, 2015 WL 1607756, at *7 (E.E.O.C. April 1, 2015).

Macy and *Lusardi* both held that Title VII forbids discrimination against transgender employees, based either on their transgender status or based on their having undergone a gender transition. *Lusardi*, as in the instant matter, arose in the context of discrimination in the "terms, conditions, or privileges of employment." *See* 42 U.S.C. § 2000e-2(a)(1). Until January 1, 2016, Complainant's health plan explicitly excluded from coverage all medically necessary treatment related to an employee's transgender status, but did not exclude the same medical care for non-transgender employees. Complainant, a former employee of the Federal Bureau of Prisons, sought coverage for hormone therapy and office visits with his endocrinologist to monitor that treatment. Complainant's insurer denied coverage for his hormone-related care pursuant to the discriminatory exclusion in the health plan. This violates Title VII's central command that the terms of employment be free from discrimination based on sex.

The Agency issued a FAD on June 1, 2016, rejecting Mr. Lawrence's claims based largely on the argument that differential treatment of transgender people, including in their medical care, has not been understood as impermissible discrimination in the past. But the same may be said for myriad forms of discrimination prohibited by Title VII, such as discrimination based on one's accent or interracial marriage; the failure to recognize that conduct as discrimination in the past does not make it any more lawful on the day it occurs. The FAD also relies on the argument that changing the discriminatory practices of private carriers requires time

– an excuse rejected by the courts long ago as justification for discriminatory treatment. At its core, this appeal distills to the following question of law: whether the Agency could lawfully deny coverage to an insured simply because he is transgender. Pursuant to Title VII Commission precedent, the answer is no.

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

A. Procedural History

1. Mr. Lawrence timely initiated contact with an EEO counselor and filed a formal complaint after learning that coverage was denied for his October 3, 2013, and February 19, 2014, office visits with his endocrinologist pursuant to the blanket exclusion for transgender-related care in his plan. Report of Investigation ("ROI"), Affidavit of Marc A. Lawrence, Ex. G at 4-6.

2. After the Agency completed its investigation, Mr. Lawrence submitted a request for hearing on July 11, 2014. Ex. 8; FAD at 2 ¶ 6.

3. Mr. Lawrence amended his complaint to include a further denial of coverage for an office visit with Dr. Goodman that occurred on August 1, 2014, and subsequently amended his complaint again after he was denied coverage for hormone therapy. Exs. 9, 10. In sum, Mr. Lawrence challenges the denial of coverage for three office visits with his endocrinologist, and for hormone therapy, with total charges of $890.00 to date. Declaration of Marc Lawrence ("Lawrence Decl.") ¶¶ 8, 11-12.

4. The parties engaged in extensive written discovery, exchanging more than a thousand pages of documents, and Mr. Lawrence provided the Agency with a report by his expert, Dr. Feldman. Ex. 18 ¶ 2. Although the Agency insisted during the parties' Initial Conference that discovery was necessary in this case, the Agency did not depose either Mr.

Lawrence or his expert; nor did the Agency introduce any expert testimony of its own. Ex. 18 ¶ 3.

5. After the parties fully briefed cross-motions for summary judgment, Chief Judge Kokenge issued an order on August 14, 2015, stating that he had reviewed the briefing, and after "careful review" he had "determined that the issuance of a decision based on the record is appropriate," and that the holding "will be that the Agency discriminated against the Complainant on the basis of his sex (transgender male)." Ex. 12. Chief Judge Kokenge further ordered the parties to meet and confer to discuss settlement. Ex. 12.

6. On September 3, 2015, the parties submitted a joint report notifying Chief Judge Kokenge that settlement talks had failed. Ex. 13. Mr. Lawrence stated that based on the parties' discussions, he did not believe that settlement was achievable, and requested entry of a judgment on the merits to avoid prolonging the case. Ex. 13. The Agency requested assignment to a settlement judge. Ex. 13.

7. On September 15, 2015, Chief Judge Kokenge instructed the parties to arrange a conference with a settlement judge. Ex. 14.

8. To avoid further delaying a case that the judge said should be decided in Mr. Lawrence's favor, Mr. Lawrence withdrew his request for a decision on September 23, 2015, and requested that Chief Judge Kokenge order the Agency to issue a FAD within 60 days. Ex. 15.

9. On September 25, 2015, Chief Judge Kokenge issued an Order of Voluntary Dismissal, ordering the Agency to issue a FAD within 60 days of the order. Ex. 16; FAD at 2 ¶ 7. Because the certificate of service presumed receipt within five days, the deadline for the FAD expired on November 30, 2015. Ex. 16.

10. On January 27, 2016, two months after the Agency had failed to meet its deadline

to issue a FAD, Mr. Lawrence noticed an appeal to the Commission. The Commission dismissed the appeal on March 27, 2016, and ordered the Agency to issue a FAD. The Agency issued its FAD on June 1, 2016, finding in favor of the Agency.

B. Factual Background

As relevant to this appeal, Mr. Lawrence introduced the following facts to support his motion for summary judgment:[1]

11. Mr. Lawrence is a retiree from the Department of Justice, Federal Bureau of Prisons, where he worked for nearly 30 years. Lawrence Decl. ¶ 2; FAD at 3 ¶ 1.

12. Mr. Lawrence remains enrolled as a retiree for health insurance through the Federal Employee Health Benefits Program ("FEHBP"), in the Blue Cross and Blue Shield ("BCBS") Service Benefit Plan. Lawrence Decl. ¶ 3.

13. Mr. Lawrence is a transgender man who previously was diagnosed with gender dysphoria. Lawrence Decl. ¶ 5; ROI, Affidavit of Marc A. Lawrence, Ex. G at 3-4; FAD at 3 ¶ 2.

14. Gender dysphoria is discomfort or distress caused by a discrepancy between a person's gender identity and that person's sex assigned at birth. Declaration of Jamie L.

[1] Although the Agency disputed some of the facts set forth in Complainant's Motion for Summary Judgment, it did *not* dispute any of the material facts required to decide the case. First, treatment for gender dysphoria is medically necessary, and the Agency agreed in its briefing below. *See* Ex. 11 at 9 (conceding that treatment for gender dysphoria may be medically necessary for individuals with gender dysphoria). The FAD does not dispute this conclusion, protesting only that medical science has come to understand this fact over time. FAD at 6-7. Second, the coverage Mr. Lawrence was denied as a transgender person is routinely insured for non-transgender people, and the Agency agreed in its briefing below. *Id.* (admitting that many types of gender dysphoria-related care "are regularly performed for other conditions"). Because Mr. Lawrence's hormone-related coverage was denied solely because of his transgender status, Lawrence Decl. ¶¶ 9, 11, the central question to be answered is whether this violates Title VII.

Feldman, M.D., Ph.D. ("Feldman Decl.") ¶¶ 11-12.[2] This diagnosis is recognized by the American Psychiatric Association, the World Health Organization, the American Medical Association, and the Endocrine Society. Feldman Decl. ¶ 13.

15. Depending on the severity of the gender dysphoria, an individual may require mental health and medical treatment, including hormone therapy and surgical treatment, and ongoing medical monitoring. Feldman Decl. ¶¶ 14-23.

16. For transgender individuals who require hormone therapy as part of their transition, the treatment is neither cosmetic nor experimental. Feldman Decl. ¶ 18. Rather, the consensus among experts in the field, based on decades of clinical experience and medical research, is that such treatment is medically necessary and essential to the transgender patient's well-being. Feldman Decl. ¶ 18. In fact, hormone therapy is the only effective way to facilitate that treatment for many transgender people because hormones have a singular ability to feminize or masculinize one's secondary sex characteristics. Feldman Decl. ¶ 16.

17. Despite the consensus of experts about the medical necessity of treatment for gender dysphoria, prior to January 1, 2016, BCBS consistently excluded coverage for all transgender-related care, including the hormone-related care at issue here, in its policies through

[2] The Agency claimed below to dispute the opinions of Mr. Lawrence's expert, Dr. Jamie Feldman, M.D., Ph.D., because she had "not yet been certified as an expert by the Commission." Ex. 11 at 2. Remarkably, the Agency raised its objection to Dr. Feldman's testimony even though the Agency – after insisting on a period of lengthy discovery, and after receiving Dr. Feldman's expert report – declined to take her deposition, and introduced no expert evidence of its own. Ex. 18 ¶¶ 2-3. Nor did the Agency lodge any specific objections to Dr. Feldman's qualifications or expert opinions. Ex. 11 at 2. The Agency's objection thus fails as a matter of law. Pursuant to 29 C.F.R. § 1614.109(g)(2), a party may demonstrate disputes of fact by referring to countervailing evidence in the record or submitting an affidavit. The Agency did neither. Importantly, the Agency's subsequently-issued FAD raises no objections to Dr. Feldman's qualifications or opinions.

the FEHBP. Ex. 1 (pursuant to "Section 6. General exclusions – services, drugs, and supplies we do not cover," the 2013, 2014, and 2015 BCBS health plans prohibited coverage for all "[s]ervices, drugs, or supplies related to sex transformations"); FAD at 3 ¶¶ 4-5; Feldman Decl. ¶ 24.

18. Mr. Lawrence was diagnosed with gender dysphoria by a mental health professional, in accordance with the prevailing Standards of Care developed by the World Professional Association for Transgender Health ("WPATH"). Lawrence Decl. ¶ 5; Feldman Decl. ¶ 17. WPATH is the preeminent professional organization studying and promulgating treatment protocols for transgender patients. Feldman Decl. ¶ 5.

19. Mr. Lawrence's mental health provider referred him to an endocrinologist to initiate hormone therapy, which is generally maintained for the remainder of the transgender patient's life. Lawrence Decl. ¶ 6; Feldman Decl. ¶ 21.

20. Mr. Lawrence has periodic office visits with his endocrinologist, Dr. Neil F. Goodman, to monitor his hormone therapy, as recommended by the Standards of Care and the Endocrine Society's guidelines. Lawrence Decl. ¶ 7; Feldman Decl. ¶ 22.

21. Mr. Lawrence saw Dr. Goodman for that purpose on October 3, 2013, and February 19, 2014. Lawrence Decl. ¶ 7.

22. Mr. Lawrence subsequently learned that BCBS had refused all coverage for those office visits when he received an invoice from Dr. Goodman on March 16, 2014. Lawrence Decl. ¶ 8.

23. Mr. Lawrence spoke with Dr. Goodman's office, and then with a BCBS representative, and learned that the coverage had been denied pursuant to the blanket exclusion for transgender-related care in his plan. Lawrence Decl. ¶ 9.

24. Mr. Lawrence had an additional office visit with Dr. Goodman on August 1, 2014, for the purpose of monitoring his hormone therapy. Lawrence Decl. ¶ 10.

25. Mr. Lawrence received an Explanation of Benefits from BCBS on August 21, 2014, indicating that coverage was again denied pursuant to the exclusion in his health plan. Lawrence Decl. ¶ 11 Ex. B.

26. To date, Mr. Lawrence has been billed a total of $890.00 for office visits that BCBS has refused to cover pursuant to the exclusion. Lawrence Decl. ¶ 12.

27. On December 5, 2014, Mr. Lawrence was informed by BCBS that, for the first time since he had enrolled in the health plan, BCBS would no longer cover his hormone therapy, pursuant to the exclusion of coverage for transgender-related care. Lawrence Decl. ¶ 13 Ex. D.

28. The categorical exclusion in Mr. Lawrence's plan that treated hormone-related care for transgender men differently than hormone-related care for non-transgender men has no support in the scientific literature. Feldman Decl. ¶¶ 22-23. There is no medical or scientific basis for denying hormone replacement-related medical care to a transgender man such as Mr. Lawrence, while covering the same care for non-transgender men. Feldman Decl. ¶¶ 1-2. For example, office visits with a provider are an essential component of testosterone therapy, regardless of whether they are for a non-transgender man experiencing hypogonadism (testosterone deficiency) or a transgender man undergoing masculinizing or maintenance hormone therapy. Feldman Decl. ¶ 22.

29. Organizations including the American Medical Association; the American College of Obstetricians and Gynecologists, Committee Opinion of the Committee on Healthcare for Underserved Women; the American Psychiatric Association; the American Psychological Association; and others have called for an end to exclusions such as the one that appeared in Mr.

Lawrence's health plan. Feldman Decl. ¶ 26.

30. OPM negotiates and secures health coverage for federal employees and retirees. ROI, Affidavit of John O'Brien, Ex. H at 2-3.

31. Until January 1, 2015, OPM required all health plans for federal employees to maintain an exclusion for gender transition-related care. Ex. 2 (FEHB Program Carrier Letter No. 2014-17, describing prior OPM "requirement that FEHB brochures exclude 'services, drugs, or supplies related to sex transformations'").

32. OPM has a Benefits Review Panel that has "studied the exclusion of gender transition services from the FEHBP." Ex. 5 at 4-8. By June 16, 2014, the Benefits Review Panel had recommended that OPM "[r]emove [the] program exclusion" for transition-related care from the General Exclusions section of the FEHB brochure. Ex. 3.

33. The Agency began preparing a draft FAQ for carriers in connection with Benefits Review Panel's recommendation, although the FAQ was not ultimately circulated to carriers. Ex. 4. The draft FAQ included the following statements:

> **What is the new policy regarding medical services for transgender members of the FEHBP?**
>
> Effective upon the start of the 2014 plan year, all carriers are expected to delete the exclusion of 'services, drugs, or supplies related to sex transformations' from Section 6 of the FEHB plan brochure. At that time, carriers will begin offering coverage of medically necessary hormonal therapy and behavioral health care for individuals who meet Diagnostic and Statistical Manual (DSM) criteria for Gender Identity Disorder/Gender Dysphoria.

Ex. 4 at 1.

> **Why did OPM revise its policy?**
>
> We conducted a review of current medical evidence and clinical guidelines pertaining to gender reassignment and the status of health care available to transgender adults. This review yielded extensive data to support revis[ing] the exclusion and to recognize the

> medical necessity of specific interventions to facilitate gender congruence for certain individuals with a diagnosis of Gender Identity Disorder/Gender Dysphoria.

Ex. 4 at 2.

> **Will FEHBP cover feminizing and masculinizing hormone therapy?**
>
> Yes.

Ex. 4 at 2.

34. OPM did not, however, require carriers to eliminate the exclusion for the 2015 health plan. On June 13, 2014, OPM issued an FEHB Program Carrier Letter to provide "guidance for FEHB carriers regarding treatment of individuals who meet established criteria for a diagnosis of Gender Identity Disorder/Gender Dysphoria." Ex. 2. Specifically, the letter provides:

> There is an evolving professional consensus that treatment is considered medically necessary for certain individuals who meet established Diagnostic and Statistical Manual (DSM) criteria for a diagnosis of Gender Identity Disorder/Gender Dysphoria. Accordingly, OPM is removing the requirement that FEHB brochures exclude "services, drugs, or supplies related to sex transformations" in Section 6 of the FEHB plan brochure effective with the 2015 plan year.

Ex. 2; Ex. 5 at 12.

35. The letter eliminated OPM's requirement that all health plans exclude coverage for gender transition-related care for the 2015 health plan year, but allowed insurers the choice to retain the exclusion in their health plans. Ex. 2.[3]

[3] The FAD repeatedly mischaracterizes this Carrier Letter, describing it, for example, as having "ended the exclusion for sex transformation services." FAD at 7. But this Carrier Letter did not "end" the exclusion, instead permitting plans to maintain it in 2015, as the vast majority of health plans did. *See infra* n.12.

36. BCBS chose to retain the exclusion for transition-related health care in its plan. Ex. 1. Mr. Lawrence accordingly remained subject to the blanket exclusion in his health plan for transgender-related care through 2015, until the Agency revised its policy again. Ex. 1.

37. After the parties had briefed summary judgment below, OPM issued FEHB Program Carrier Letter No. 2015-12. Ex. 7. Citing "OPM's earlier guidance recognizing the evolving professional consensus that treatment may be medically necessary to address a diagnosis of gender dysphoria," the letter stated that "no carrier participating in the Federal Employees Health Benefits Program may have a general exclusion of services, drugs or supplies related to gender transition or 'sex transformations.'" Ex. 7.

38. Notwithstanding the prohibition in FEHB Program Carrier Letter No. 2015-12, BCBS retains an exclusion for all "[s]urgeries related to sex transformation." Ex. 17 at 68, 69.

ARGUMENT

I. STANDARD OF REVIEW.

Because the administrative judge made no factual findings below, the Commission's review of the record is de novo. 29 C.F.R. § 1614.405(a); *see also* Equal Employment Opportunity Management Directive for 29 C.F.R. Pt. 1614 ("EEO MD-110"), Ch. 9 § VI (Nov. 9, 1999). Under that standard, the Commission will review "the documents, statements, and testimony of record, including any timely and relevant submissions of the parties, and the Commission will issue its decision based on the Commission's own assessment of the record and its interpretation of the law." EEO MD-110, Ch. 9 § VI(A)(2). The Commission undertakes this review "without regard to the factual and legal determinations of the previous decision maker." *Id.*

II. THE EXCLUSION FOR GENDER DYSPHORIA-RELATED MEDICAL CARE CONSTITUTES UNLAWFUL DISCRIMINATION BASED ON SEX.

A. The FAD Analyzes Mr. Lawrence's Claims Under Inapplicable Law Because The Health Exclusion Is Direct Evidence of Sex Discrimination.

The exclusion for transition-related healthcare is sex discrimination, both because the exclusion targets a class of employees based on their transgender status, and because it penalizes employees for undergoing or having undergone a gender transition – each of which *Macy* and *Lusardi* specifically identified as violative of Title VII. Although a transgender employee's explanation of sex discrimination may take "any number of different formulations," these are not "different claims of discrimination," but rather are "simply different ways of describing sex discrimination." *Macy*, 2012 WL 1435995, at *10.

The FAD's legal analysis is flawed, incorrectly claiming that the facially discriminatory policy in Mr. Lawrence's health plan does not constitute direct evidence of discrimination, and instead analyzing his claim under the framework in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). *See* FAD at 4-10. But *McDonnell Douglas* and its progeny apply only to cases where the complainant relies on circumstantial evidence of discrimination.[4] "[T]he *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination" – such as the facially discriminatory policy here. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985); *see also Vera v. U.S. Postal Serv.*, Appeal No. 0120112478, 2013 WL 1856760, at *4 (E.E.O.C. April 26, 2013) ("[w]hen there is direct evidence of discrimination, the circumstantial evidence analysis established in *McDonnell Douglas* . . . is inapplicable";

[4] Although *McDonnell Douglas* does not apply here, the Agency is still liable even under that framework, as explained in Section II.C. below.

explaining that direct evidence can be "any written . . . policy or statement made by a management official that on its face demonstrates a bias against a protected group"); *accord Glenn v. Brumby*, 663 F.3d 1312, 1321 (11th Cir. 2011) (in a Title VII case, plaintiff is entitled to summary judgment with undisputed direct evidence that supervisor fired transsexual employee because of his discomfort with her gender nonconformity; no "justification" will be entertained). Accordingly, "[w]here a claim of discriminatory treatment is based upon a policy which on its face applies less favorably" to a group of employees based on sex, the complainant "need not otherwise establish the presence of discriminatory intent." *Gerdom v. Cont'l Airlines*, 692 F.2d 602, 608 (9th Cir. 1982); *see also Lusardi*, 2015 WL 1607756, at *6 ("[w]here there is direct evidence of discrimination, there is no need to prove a prima facie case").[5] Because there is direct evidence of discrimination here, no resort to burden-shifting analysis is needed or appropriate. *See Lusardi*, 2015 WL 1607756, at *6; *Trans World Airlines,* 469 U.S. at 121.

The health plan excluded Mr. Lawrence from certain health coverage for the simple reason that he is transgender and has undergone, in the plan's outmoded terms, a "sex transformation." Ex. 1. There can be no dispute that the exclusion treats Mr. Lawrence differently on its face than it does similarly situated non-transgender employees and retirees, since the health plan expressly targets transgender people for exclusion. *Id.* As explained more fully below, regardless of whether this is viewed as discrimination (i) because Mr. Lawrence has

[5] *See also* "Title VII / ADA: Health Insurance And Other Benefits, April 4, 2001, Re: Interim Final Rules for Nondiscrimination in Health Coverage in the Group Market" (April 4, 2001) (explaining, in an informal letter by EEOC Office of Legal Counsel, that "benefit limitations or exclusions for specific diseases or conditions, or for specific treatments, that primarily affect a particular race (*e.g.*, sickle cell anemia) or sex (*e.g.*, breast or prostate cancer) would violate Title VII"), *available at* http://www.eeoc.gov/eeoc/foia/letters/2001/titlevii_ada_insurance_benefits.html.

transitioned his gender, or (ii) because of his transgender status, the exclusion must be understood as impermissible sex discrimination. *See also* FAD at 4 (conceding that "disparate treatment against" a transgender person "would be related to the sex of the victim") (internal quotation marks omitted).[6]

1. Discrimination Because Of An Employee's Gender Transition Is "Discrimination Based On . . . Sex."

Macy confirmed that discrimination based on one's gender transition is discrimination based on sex. 2012 WL 1435995, at *14 n.10 ("discrimination against a transgender individual on the basis of an intended, ongoing, or completed gender transition is literally discrimination because of . . . sex") (internal quotation marks omitted); *see also id.* at *5 (complainant's description of discrimination as "gender transition/change of sex," was "simply [a] different way[] of stating the same claim of discrimination 'based on . . . sex,' a claim cognizable under Title VII."). Analogizing to discrimination against religious converts, *Macy* explained:

> Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only 'converts.' That would be a clear case of discrimination 'because of religion.' No court would take seriously the notion that 'converts' are not covered by the

[6] The FAD strains to argue that the health plan's facially discriminatory exclusion is not direct evidence of differential treatment. FAD at 9. But neither of the cases the FAD cites involve formal written policies that target a protected classification on their face, as the exclusion here does. *See Taylor v. Runyon*, 175 F.3d 861, 867 (11th Cir. 1999) (evaluating complainant's testimony about her supervisor's verbal justifications for denying a promotion, and nonetheless finding that case law "strongly suggests that the type of statement at issue here constitutes direct evidence"); *Johnson v. Dep't of the Army*, Appeal No. 01934836, 1996 WL 284766, at *2 (E.E.O.C. May 23, 1996) (evaluating claim that denial of promotion was based on sex, based on competing testimony about supervisor's explanation of denial). As the Commission has made clear, a "written policy" that "on its face demonstrates a bias against a protected group," as the exclusion here does, is direct evidence of discrimination. *Sharps v. U.S. Postal Serv.*, Appeal No. 01A52785, 2005 WL 3452125, at *2 (E.E.O.C. Dec. 2, 2005).

> statute. Discrimination "because of religion" easily encompasses discrimination because of a change of religion.

Id. at *11 (quoting *Schroer v. Billington*, 577 F. Supp. 2d 293, 306 (D.D.C. 2008)). The health plan exclusion is indistinguishable from that scenario; it is as if the Agency had a policy of allowing time off to attend religious services except for those associated with one's conversion from one faith to another. The Agency does not discriminate against either men or women who need hormone therapy-related medical care – only those who have transitioned from one sex to the other. A concession of discriminatory treatment of an employee because he is transitioning or has transitioned – as on the face of the exclusion for care related to a "sex transformation" – is direct evidence of sex discrimination for which no further judicial inquiry is needed. *See Glenn*, 663 F.3d at 1320-21 ("Brumby['s] admitt[ing] that his decision to fire Glenn was based on 'the sheer fact of the transition' . . . provides ample direct evidence to support the district court's conclusion" that sex discrimination occurred; "If this were a Title VII case, the analysis would end here."); *accord Macy*, 2012 WL 1435995, at *8 (citing *Glenn* in condemning discrimination based on "the sheer fact of the transition"); *see also id.* at *7 (describing as impermissible disparate treatment because a transgender person has "transitioned or is in the process of transitioning from one gender to another"). Just as it would be unlawful to deny benefits of employment to employees who have "transitioned" from one religion to another, it is equally unlawful to deny coverage to employees who have transitioned from one sex to the other.

2. Discrimination Because Of An Employee's Transgender Status Is "Discrimination Based On . . . Sex."

Macy also definitively establishes that Mr. Lawrence's claim of "discrimination based on transgender status" is "cognizable under Title VII's sex discrimination prohibition." 2012 WL 1435995, at *4; *see also id.* at *7 ("When an employer discriminates against someone because

the person is transgender, the employer has engaged in disparate treatment 'related to the sex of the victim.'") (citing *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000)); *see also id.* at *5 (explaining that descriptions of discrimination as based on "gender identity," "gender identity stereotyping" and "gender identity, . . . and/or transgender status" were "simply different ways of stating the same claim of discrimination 'based on . . . sex,' a claim cognizable under Title VII."). The exclusion discriminates against Mr. Lawrence based on his transgender status. Just as a company policy that imposes burdens or costs on pregnancy is sex discrimination, so too is excluding coverage for "sex transformations" – *i.e.*, medical care to transition to the other sex – that only transgender people as a class would utilize. *See, e.g.*, *Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991) (holding that the company's "use of the words 'capable of bearing children' . . . as the criterion for exclusion . . . must be regarded, for Title VII purposes, in the same light as explicit sex discrimination"); *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 684 (1983) ("for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex").

As Dr. Feldman explains, the "sex transformation" language in the plan is typical of exclusions applied by insurers to deny coverage of medical treatment for gender dysphoria, the diagnosis for transgender people in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition. Feldman Decl. ¶ 24. Because the exclusion targets on its face the medical care required for gender transition, the exclusion is thus defined by the group that *Macy* makes clear is protected under Title VII. *Cf. Erie Cnty. Retirees*

Ass'n v. Cnty. of Erie, 220 F.3d 193, 211 (3d Cir. 2000) (recognizing that differential treatment based on "Medicare eligibility" discriminates based on a proxy for employees' age).[7]

In sum, the exclusion is sex discrimination on its face, as it penalizes Mr. Lawrence for having changed his sex and for his transgender status. Because the exclusion is direct evidence of sex discrimination, no legal justification is available here.

B. Only A Bona Fide Occupational Qualification Can Justify A Facially Discriminatory Policy, But That Defense Is Inapplicable To Health Insurance Discrimination As A Matter Of Law – Making Clear That No Defense Exists For The Exclusion At All.

A policy that discriminates on the basis of sex on its face may be justified only where "gender is a 'bona fide occupational qualification reasonably necessary to the normal operation of the particular business or enterprise.'" *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989) (internal brackets omitted) (quoting 42 U.S.C. § 2000e-2(e)). However, where a case involves "the terms of a retirement [or fringe benefit] plan," the BFOQ defense "is inapplicable since the terms of a retirement [or fringe benefit] plan have nothing to do with occupational qualifications." *Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1084 n.13 (1983); *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1367 (9th Cir. 1986) ("we conclude that the BFOQ exception does not apply to the discriminatory provision of [health insurance] benefits involved here"). Title VII only permits an employer to "*hire and employ*" based on sex in the extremely narrow circumstances where sex is a BFOQ.

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[7] *See, e.g.*, *O'Donnabhain v. Comm'r of Internal Revenue*, 134 T.C. 34, 38 (2010) (explaining that the standard of care for gender dysphoria includes "the administration of cross-gender hormones to effect changes in physical appearance to more closely resemble the opposite sex"); Ex. 6 at 9, *NCD 140.3, Transsexual Surgery*, DAB No. 2576 (2014) (H.H.S.), 2014 WL 2558402 ("Transsexual surgery is a treatment option for the medical condition of transsexualism.").

42 U.S.C. § 2000e-2(e)(1) (emphasis added); *Johnson Controls*, 499 U.S. at 201 ("The wording of the BFOQ defense contains several terms of restriction that indicate that the exception reaches only special situations."). Moreover, the "employer bears the burden of establishing the BFOQ defense." *Gray v. Dep't of Veterans Aff.*, Appeal Nos. 0720050093, 0720050092, 0720050091, 2007 WL 506642, at *5 (E.E.O.C. Feb. 9, 2007). The Agency not only fails to carry this burden in its FAD, but also waives the defense by failing even to assert it. Accordingly, judgment should be entered for Mr. Lawrence in light of the Agency's facially discriminatory policy that is not, and cannot be, justified by a BFOQ.

C. Burden-Shifting Does Not Apply To Complainant's Claim, But The Exclusion Could Not Survive That Analysis Regardless.

Although burden-shifting analysis is not appropriate for the facially discriminatory exclusion here, the exclusion could not survive under any analysis. As explained above, *McDonnell Douglas* only applies where the complainant relies on circumstantial evidence of discrimination. Just as a policy that "on its face, discriminate[s] against every individual woman employed by the Department" is impermissible sex discrimination, *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 716 (1978), so too is a policy that on its face discriminates against every transgender employee and retiree of the federal government. *See Macy*, 2012 WL 1435995, at *7 (explaining that regardless of whether the differential treatment is based on gender nonconformity, "the fact that the person has transitioned or is in the process of transitioning," or simply because the employer "does not like that the person is identifying as a transgender person," in each instance the employer is making an unlawful "gender-based evaluation").

But the exclusion fares no better even if analyzed under the burden-shifting framework. As a threshold matter, the Agency acknowledges that discrimination against transgender

individuals is sex discrimination, and conceded below that Mr. Lawrence has stated a *prima facie* case. Ex. 10 at 10 (citing a public announcement that the Department of Justice will take the position in litigation that discrimination against transgender people is sex discrimination; and stating that "the Agency will concede that Complainant is able to establish a *prima facie* case" here); FAD at 4 (assuming Mr. Lawrence had established a "established a *prima facie* case"). Accordingly, under a burden-shifting framework the Agency's ability to justify the exclusion would rise and fall on its ability to produce a legitimate, non-discriminatory reason for the exclusion. As Mr. Lawrence explains below, no such justification exists.[8]

i. Neither the Agency's purportedly benign intent, nor evolving position on transition-related care, provides a legitimate justification for the exclusion.

The Agency claims that the discrimination Mr. Lawrence experienced may be excused because the Agency's intent was benign and has evolved over time, suggesting there "was no basis upon which to conclude that the presence of the exclusion" was "evidence of discriminatory animus." FAD at 9; *see also* Ex. 11 at 5, 7 (arguing that there "is simply no evidence that the Agency's actions were taken in order to intentionally discriminate against transgender individuals," or to demonstrate "bias" and "specific discriminatory or retaliatory

[8] As a preliminary matter, however, Mr. Lawrence clarifies the nature of his claim, which is not at odds with a health insurance system based on "OPM's discretion." FAD at 9. That is because discretion to administer a health plan does not confer discretion to discriminate. Mr. Lawrence does not challenge a health-related distinction that applies to all plan members equally, and instead challenges a distinction that targets transgender people explicitly. The FAD's reliance on *Nat'l Fed'n of Fed. Emps. v. Devine*, 679 F.2d 907 (D.C. Cir. 1981), is wholly inapposite for that reason, since that case involved a challenge to OPM's reduction in contributions to health premiums that applied to all employees equally. *Id.* at 908. Mr. Lawrence, in contrast, seeks nothing more than coverage free from targeted sex discrimination; Title VII demands nothing less.

intent"). But it does not matter whether an employer's discriminatory treatment is rooted in an undisputed truth, an innocent misunderstanding, or active bias – sex discrimination is no more tolerable in any of these circumstances. *See, e.g.*, *Manhart*, 435 U.S. at 707 (holding pension plan violated Title VII even though its differential treatment of women "involves a generalization that the parties accept as unquestionably true: Women, as a class, do live longer than men."); *Erie Cnty. Retirees Ass'n*, 220 F.3d at 212 ("The beneficence of an employer's purpose does not undermine the conclusion that an explicit gender-based policy is sex discrimination . . . .") (quoting *Johnson Controls*, 499 U.S. at 200); *cf. Parker v. Sony Pictures Entm't, Inc.*, 260 F.3d 100, 112 (2d Cir. 2001) ("It is, however, no defense to liability in a discrimination action to hold a good-faith, but erroneous, belief that the law permits taking an adverse job action on the basis of a prohibited factor").

The Agency attempts to justify the exclusion by pointing to the fact that medicine's recognition and treatment of gender dysphoria has evolved over the decades. FAD at 6-7. But the historical misunderstanding of transgender people cannot excuse the fact that OPM has continued to discriminate against transgender people in its insurance policies year after year, including after *Macy* was decided. Importantly, the parties agree: No dispute exists that access to transition-related care is medically necessary for many transgender patients, and the FAD does not suggest otherwise. *See also* Ex. 11 at 9 (the "Agency does not dispute that hormone therapy, mental health care, and gender confirming surgery may be medically necessary for individuals diagnosed with gender dysphoria"); Ex. 3 at 2 (OPM Benefits Review Panel finding "extensive data . . . to recognize the medical necessity of specific interventions to facilitate gender congruence" for individuals with gender dysphoria); Ex. 2 (Carrier Letter No. 2014-17, acknowledging the "evolving professional consensus that treatment is considered medically

necessary for certain individuals"); Ex. 5 at 12 (same); Feldman Decl. ¶¶ 15-18. Additionally, Courts have recognized both that gender dysphoria is a serious medical condition,[9] and that WPATH's Standards of Care – which describe the care medically necessary to treat gender dysphoria, including hormone-related care – are authoritative in the field.[10]

[9] *See*, *e.g.*, *Cuoco v. Moritsugu*, 222 F.3d 99, 106 (2d Cir. 2000) ("we have approved of the description of transsexualism as a profound psychiatric disorder, and treated it in another context as a medical condition") (internal quotation marks omitted); *De'lonta v. Johnson*, 708 F.3d 520, 522 (4th Cir. 2013) (describing gender dysphoria as a "medically recognized" condition); *Phillips v. Michigan Dep't. of Corr.*, 731 F. Supp. 792, 800 (W.D. Mich. 1990) (recognizing gender dysphoria as a "serious medical need"), *aff'd*, 932 F.2d 969 (6th Cir. 1991); *Fields v. Smith*, 712 F. Supp. 2d 830, 862 (E.D. Wis. 2010) (noting that several courts have recognized transition-related care as a "serious medical need"; collecting authorities), *aff'd*, 653 F.3d 550 (7th Cir. 2011); *White v. Farrier*, 849 F.2d 322, 325 (8th Cir. 1988) ("we . . . conclude that transsexualism is a serious medical need"); *Allard v. Gomez*, 9 Fed. Appx. 793, 794 (9th Cir. 2001) ("It is now undisputed that . . . the [gender identity] disorder constituted a serious medical need."); *Brown v. Zavaras*, 63 F.3d 967, 969 (10th Cir. 1995) ("gender dysphoria is a medically recognized psychological disorder"); *Kothmann v. Rosario*, 558 Fed. Appx. 907, 910 n.4 (11th Cir. 2014) (assuming, based on the parties' agreement, that treatment for gender dysphoria is a "serious medical need"); *O'Donnabhain*, 134 T.C. at 69 ("The evidence is clear that a substantial segment of the psychiatric profession has been persuaded of the advisability and efficacy of hormone therapy and sex reassignment surgery as treatment for GID, as have many courts."). The U.S. Supreme Court also has recognized gender identity as a serious medical condition, relying on its listing (as "transsexualism") in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders and the American Medical Association's Encyclopedia of Medicine (1989). *See Farmer v. Brennan*, 511 U.S. 825, 829 (1994).

[10] *See, e.g.*, *De'lonta*, 708 F.3d at 522-23 (noting that WPATH standards of care "are the generally accepted protocols for the treatment of GID"); *Sanders v. May Dep't Stores Co.*, 315 F.3d 940, 942 n.2 (8th Cir. 2003) (describing the standards of care promulgated by the organization now known as WPATH); *Soneeya v. Spencer*, 851 F. Supp. 2d 228, 231 (D. Mass. Mar. 29, 2012); ("The course of treatment for Gender Identity Disorder generally followed in the community is governed by the 'Standards of Care' promulgated by the World Professional Association for Transgender Health . . . ."); *Glenn v. Brumby*, 724 F. Supp. 2d 1284, 1289 n.4 (N.D. Ga. 2010) ("there is sufficient evidence that statements of WPATH are accepted in the medical community"), *aff'd* on other grounds, 663 F.3d at 1321; *O'Donnabhain*, 134 T.C. at 37 (WPATH "is an association of medical, surgical, and mental health professionals specializing in the understanding and treatment of GID" that "publishes 'Standards of Care' for the treatment of GID").

The Agency instead argues that the exclusion cannot be viewed as discriminatory when viewed through the legal and medical lens that existed in 1985, when the exclusion was first adopted. FAD at 9 (arguing that in 1985 medical care for transgender people was not as widely understood, and *Macy* had not yet been decided). But insurance plan terms must be evaluated in the present-day circumstances in which they were adopted, not the very first decade in which they were conceived. Contrary to the Agency's arguments, the exclusion is not an "action taken prior to the time when the discrimination laws became applicable." *Id.* Rather, as the Agency has explained at length, it negotiates and approves insurance packages on an annual basis. FAD at 5; ROI, Affidavit of John O'Brien, Ex. H at 3. Mr. Lawrence does not challenge a term negotiated and approved before the enactment of Title VII, or even before the issuance of *Macy*. He instead challenges an exclusion that the Agency has approved *every single year* from 1985 through 2015, and that still exists as a ban on surgery in some plans. Ex. 17 (exclusion for surgery). For that reason, the cases cited in the FAD on this point bear no resemblance to Mr. Lawrence's claims. FAD at 9-10. Mr. Lawrence's claims arose decades after Title VII was enacted, and after *Macy* was decided – in stark contrast to the authorities in the FAD, which involved ADA challenges to health plans adopted before the relevant ADA provisions were adopted. *Id.* (citing *Leonard F. v. Isr. Disc. Bank of N.Y.*, 199 F.3d 99 (2nd Cir. 1999) and *Modderno v. King*, 82 F.3d 1059 (D.C. Cir. 1996)).

The Agency points to its evolving position, noting that while the Agency previously required the exclusion in all health plans, the Agency subsequently made the exclusion optional (and since has barred the exclusion from the General Exclusions section of each health plan; although as Mr. Lawrence's current health plan shows, at least some plans continue to retain an exclusion, Ex. 17). The Agency focuses on a time line of events that have provided further

confirmation of the medical necessity of treatment for gender dysphoria, FAD at 6-7 (summarizing resolutions about gender dysphoria adopted by the major national medical and mental health professional organizations), but its time line is selective – after all, the internationally recognized protocols for the treatment of gender dysphoria have existed since 1979. In fact, as the time line shows, the problem is not "the pace at which medical consensus was reached," FAD at 8, since the preeminent medical and mental health organizations reached consensus *years* before OPM began to undertake its process of "consideration and study." FAD at 7. More importantly, the fact that the Agency belatedly has recognized the error of its ways and evolved (somewhat) is irrelevant – the legal reality remains that the discriminatory treatment of Mr. Lawrence and other transgender insureds has always violated Title VII, even if the recognition thereof has been slow in coming. *See Lawrence v. Texas*, 539 U.S. 558, 579 (2003) (the "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress"). The exclusion did not suddenly become more discriminatory, and Mr. Lawrence's hormone-related care did not suddenly become more medically necessary, at any specific point in time. Rather, the exclusion discriminated against Mr. Lawrence from the moment he was denied coverage for medical care that always has been medically necessary for him as a transgender man. Stated differently, sex discrimination is not remediable only when the employer understands or agrees that it is.

ii. Neither the Agency's discretion, nor deference to private sector discrimination, can excuse the exclusion.

The Agency's FAD argues that its delay in mitigating the discriminatory exclusion was justified because it "acted pursuant to the discretion provided by the [Federal Employee Health Benefits Act] to determine the type of benefits to be provided" as the medical community's views of transgender people "evolved." FAD at 7. The Agency cites a single district court case

decided in 1981 to support this argument. *Id.* (citing *Am. Fed'n of Gov't Emp., AFL-CIO v. Devine*, 525 F. Supp. 250 (D.D.C. 1981)). But *Devine* supports the arguments of Mr. Lawrence, not the Agency. *Devine* affirmed that OPM's actions are not immune to "judicial review" simply because the statutes provide OPM with "discretion" to administer employee health plans. 525 F. Supp. at 252 (quotation omitted). *Devine* overturned OPM's challenged action in that case – a refusal to accept health plans offering abortion coverage unless that coverage was restricted to circumstances in which the mother's health was endangered – under the Administrative Procedure Act. *Id.* at 251. The court concluded that OPM's Director had "abused his statutory authority" by ordering that restriction on health plans, *id.* at 253; OPM has similarly abused its authority here by approving an exclusion that discriminates based on sex.[11]

At bottom, the FAD's argument reduces to the following: Although the Agency purports to ban the exclusion in all of its plans now, the exclusion was permissible when Mr. Lawrence experienced denials in 2014 and 2015 because discrimination takes time to unwind through the private carrier contracting process. FAD at 7. But the exclusion's inherent discrimination is not inoculated simply because OPM cannot undo it instantly, after OPM embedded the discrimination in health contracts by making the exclusion mandatory year after year. Ex. 2 (FEHB Program Carrier Letter No. 2014-17, describing prior OPM "requirement that FEHB brochures exclude 'services, drugs, or supplies related to sex transformations'"). The need for

[11] The FAD cites *Devine* for the proposition that discrimination can be excused because of the pace at which "medical technology advance[s]," FAD at 7, but that discussion in *Devine* instead refers to the reason that federal statutes have defined required federal health coverage in broad, rather than specific, terms. 525 F. Supp. at 252. Nothing in *Devine* suggests that OPM's broad discretion is a license to single out a protected group for differential treatment in a health benefit that others receive as a matter of course.

private carriers to shed the exclusion is a situation of OPM's making, and the liability lies at the Agency's feet. It is well-established that "an employer that adopts a . . . benefit scheme that discriminates" on a prohibited basis violates the law "regardless of whether third parties are . . . involved in the discrimination." *Pion v. Off. of Pers. Mgmt.*, Appeal No. 05880891, 1988 WL 921549, at *3 (E.E.O.C. Oct. 18, 1988) (quotation omitted).

Moreover, the FAD's argument that no discrimination is actionable *unless and until* private carriers have gone through the contracting process to correct the discrimination would block virtually any insurance discrimination claim from proceeding, since by definition these claims challenge discriminatory practices that have not been corrected. That is clearly not the law. *See EEOC v. Atlanta Gas Light Co.*, 751 F.2d 1188, 1190 (11th Cir. 1985) (observing that there is a strong presumption of retroactivity in Title VII cases which can seldom be overcome; upholding compensation to male employees denied equal health coverage for a pregnant spouse); *EEOC v. Puget Sound Log Scaling & Grading Bureau*, 752 F.2d 1389, 1393-94 (9th Cir. 1985) (same). An employer's desire to delay equal treatment – or as the Agency describes it, "make adjustments" by submitting "coverage decisions for GID services . . . to the normal negotiation process," FAD at 7 – is rarely, if ever, a permissible interest on its own. *Cf. Baskin v. Bogan*, 766 F.3d 648, 668 (7th Cir. 2014) (rejecting the State's desire to "go slow" in allowing access to marriage for same-sex couples); *Latta v. Otter*, 771 F.3d 456, 474 n.16 (9th Cir. 2014) (same). The decision by the Departmental Appeals Board ("Appeals Board") of Department of Health and Human Services ("DHHS") invalidating the exclusion for transgender-related care in Medicare health plans underscores this point. *See* Ex. 6 at 1-2 (providing that insurers must stop enforcing the exclusion in Medicare plans "within 30 days" of the decision, without any delay for study of actuarial considerations).

OPM raises one last argument, suggesting that because "participants in every state and the District of Columbia had a plan option that included coverage for GID services beginning January 2015," the burden lies with the employee to avoid the discriminatory plan terms, not with the employer that approved them in the first place. But before January 1, 2015 – during which Mr. Lawrence was denied coverage for all three of his endocrinologist appointments, Lawrence Decl. ¶¶ 7-8, 10-11 – Mr. Lawrence had *no* non-discriminatory health plan options. Ex. 2. After OPM made the exclusion optional in plan year 2015, Mr. Lawrence's insurer both retained the exclusion, *and* announced that it no longer would cover Mr. Lawrence's hormone therapy. Ex. 1 (continuing to prohibit coverage for all "[s]ervices, drugs, or supplies related to sex transformations" in Section 6 of the 2015 health plan); Ex. 9. And during the 2015 plan year, only one insurer among the more than dozen carriers in Mr. Lawrence's home state of Florida began offering a non-discriminatory plan.[12]

Accordingly, non-transgender employees in Florida could choose from the more than dozen different carriers in that state, while Mr. Lawrence and other transgender employees were forced to either "choose" the one carrier that covered transition-related care (regardless of whether the plan met other critical health needs), or go without hormone-related coverage at all. Not a single non-transgender employee was forced onto one specific health plan to secure coverage for hormone-related care. *See* Ex. 1 (excerpts of health plans excluding coverage for hormone therapy solely for transgender people who require medical care for a gender transition ("sex transformation"), and not as a general matter). Because the only thing that separated these

[12] A review of all the health plan hyperlinks on this archived version of OPM's website reveals that all but one maintained the exclusion: https://web.archive.org/web/20150905141808/https://www.opm.gov/healthcare-insurance/healthcare/plan-information/plan-codes/2015/states/fl.asp.

groups was their sex, this distinction strikes at the heart of Title VII's prohibition on sex discrimination. OPM could not excuse a violation of law by offering hundreds of plans, if they also offered one that excluded medically necessary coverage for women or for Jewish people. The exclusion here is no more lawful, simply because it targeted transgender people.

III. MR. LAWRENCE IS ENTITLED TO DECLARATORY AND INJUNCTIVE RELIEF.

When an employee demonstrates that he has been subject to impermissible discrimination, the Agency is required to provide "full relief." 29 C.F.R. § 1614.501(a). Affording proper relief is not discretionary, but rather mandatory. *Id.* (relief afforded by the agency "shall" include relevant measures as appropriate under the circumstances). For all the reasons above, the undisputed evidence demonstrates that Mr. Lawrence is entitled to declaratory and injunctive relief. In addition, the Agency should notify all potentially affected employees that any remaining discriminatory exclusions for transition-related care in their health plans may no longer be enforced. *Id.*

Declaratory relief. The EEOC routinely provides declaratory relief to employees who have proven unlawful discrimination. *See, e.g.*, *Complainant v. Dep't of Just. (Fed. Bureau of Prisons*), Appeal No. 0720130008, 2014 WL 1340484, at *5, (E.E.O.C. March 27, 2014) (upholding Administrative Judge determination that included declaratory relief); *Kitson v. Dep't of Just. (U.S. Marshals Serv.)*, Appeal No. 0720100052, 2011 WL 674684, at *5 (E.E.O.C. Feb. 15, 2011) (modifying the AJ's order to include declaratory relief). Mr. Lawrence has demonstrated that the exclusion of coverage for medical care related to gender dysphoria is impermissible sex discrimination, and should be granted a declaratory judgment that the exclusion violates Title VII's prohibition on sex discrimination.

Injunctive relief. The governing regulation provides that where Complainant has proved his claim, the Agency shall cease the discriminatory conduct, and Mr. Lawrence is entitled to that relief in the form of an injunction. *See* 29 C.F.R. § 1614.501(a)(2) (the Agency must make a "[c]ommitment that corrective, curative or preventive action will be taken, or measures adopted, to ensure that violations of the law similar to those found will not recur"); 29 C.F.R. § 1614.501(a)(5) (the Agency must make a "[c]ommitment that the agency shall cease from engaging in the specific unlawful employment practice found in the case"); 29 C.F.R. § 1614.501(c)(2) (the Agency shall "eliminate any discriminatory practice and ensure it does not recur"); 29 C.F.R. § 1614.501(c)(5) (going forward, the Agency must provide "[f]ull opportunity to participate in the employee benefit denied"); *see also Liang v. U.S. Postal Serv.*, Appeal No. 0720090030, 2010 WL 1737901, at *3 (E.E.O.C. April 23, 2010) (describing the purpose of injunctive relief). In this case, an injunction should be entered prohibiting FEHBP health plans from either maintaining or enforcing exclusions for transgender-related health care.

Injunctive relief is still necessary and appropriate, notwithstanding OPM's requirement that carriers eliminate the exclusion from the General Exclusions section of their brochures. Ex. 7. For the Agency to claim otherwise would require it to "carry the heavy burden of demonstrating mootness" by showing that a Title VII violation "cannot reasonably be expected to recur," because interim "relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Cleveland Branch, NAACP v. City of Parma*, 263 F.3d 513, 530-31 (6th Cir. 2001) (internal quotation omitted); *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 727 (2013) ("a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur") (internal quotation omitted). The Agency cannot satisfy

that burden here. The change in policy here has appeared only in the form of a carrier letter, which is subject to reversal by future administrations. The carrier letter thus represents nothing more than voluntary compliance with Title VII, and "as a general rule, voluntary cessation of allegedly illegal conduct does not remove the power to hear and determine a case." *Schwartz v. Dep't of Just.*, Appeal No. 0120082783, 2008 WL 4107395, at *2 (E.E.O.C. Aug. 20, 2008). Moreover, the new policy has not irrevocably eradicated the effects of the violation, given that the blanket exclusion for transition-related care still lives on in Mr. Lawrence's plan, now appearing in other parts of the plan to prohibit "[s]urgeries related to sex transformation." Ex. 17.

Notification to all employees. As the regulations authorize, the Agency should be required to notify all potentially affected employees "of their right to be free of unlawful discrimination and [give] assurance that" exclusions of transgender-related care can no longer be enforced to bar coverage for transgender employees. 29 C.F.R. § 1614.501(a)(1); *see also Clements v. U.S. Postal Serv.*, Appeal No. 07A50052, 2006 WL 1910529, at *1 (E.E.O.C. June 29, 2006) (requiring the agency to notify all employees at the affected agency "of their right to be free of unlawful discrimination and assurance that the discrimination based on sex shall not recur").

Mr. Lawrence also respectfully requests his attorneys' fees and costs, as authorized by 29 C.F.R. § 1614.501(e).

CONCLUSION

For the reasons fully set forth above, Mr. Lawrence respectfully requests entry of a declaratory judgment finding that the exclusion of health coverage for transgender-related medical care is discrimination based on sex, and violates Title VII both facially and as applied to

him. Mr. Lawrence also requests a permanent injunction enjoining enforcement of any exclusion for transgender-related care, his out-of-pocket costs, notification to all potentially affected employees that the exclusion may no longer be enforced, and attorney's fees.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing BRIEF IN SUPPORT OF APPEAL, and Exhibits 1 through 18, were sent on June 8, 2016, addressed to the following, through the methods indicated below:

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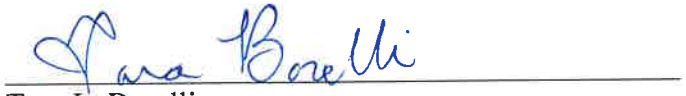

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