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UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

Jennifer Fletcher, Plaintiff, vs. State of Alaska, Defendant.	Case No. 1:18-cv-00007-HRH

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Plaintiff Jennifer Fletcher, by and through her undersigned counsel, moves the Court for an order granting partial summary judgment in favor of Plaintiff and against Defendant on Plaintiff's Complaint for Declaratory Relief and Damages Under Title VII (42 U.S.C. § 2000e, et seq.). This motion is based on the statement of material facts and argument below; the declarations of Jennifer Fletcher, Dr. Randi Ettner, Dr. Loren Schechter, and Tara L. Borelli; and all the pleadings and papers on file, and any argument the Court may consider.

INTRODUCTION

This case challenges the blanket exclusion of coverage for gender-confirming surgery[1] in the State of Alaska (the "State") employee health plan—an exclusion that categorically denies such care to transgender people, even though the same surgical care is provided to non-transgender people. As part of compensation for employment, the State provides its employees health coverage through a self-funded plan, the terms of which are set by the State. Plaintiff Jennifer Fletcher is a legislative librarian who works for the State, and has been enrolled in that health plan since she began her employment in 2012. She was denied coverage for medically necessary surgery because she is transgender, forcing her to shoulder the burden of paying for it out of pocket. Because

[1] This motion and its underlying exhibits refer interchangeably to gender-confirming care, and transition-related care, both of which describe the medically necessary treatment that allows transgender people to align their physical characteristics with their gender identity.

the same care is available to her non-transgender colleagues, who are not subjected to the same categorical exclusion, Ms. Fletcher is essentially provided with less compensation than her coworkers. This exclusion contravenes a well-established medical consensus that such surgical treatment can be medically necessary and even life-saving. The State itself concedes that gender-confirming care can be medically necessary for transgender people, yet it continues to renew the same blanket exclusion in the health plan year after year. On this basis, Ms. Fletcher requests that the Court enter partial summary judgment in her favor, and find that the blanket exclusion violates the prohibition on sex discrimination in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. ("Title VII").

FACTUAL BACKGROUND

I. Transgender People and Treatment of Gender Dysphoria

Gender identity is a person's internal sense of one's sex, such as male or female. Expert Decl. of Randi C. Ettner, Ph.D. in Supp. of Pltf.'s Mot. for Partial Summ. J. ("Ettner Decl.") ¶ 13; Def.'s Answer, ECF No. 14 ("Answer") ¶ 11. Gender identity is a deeply felt and core component of human identity that everyone possesses. Ettner Decl. ¶ 13. Although a majority of people have a gender identity that matches their sex assigned at birth, that is not true for transgender people, who are defined as transgender because their gender identity differs from their birth-assigned sex. Ettner Decl. ¶ 14; Expert Decl. of Loren S. Schechter, M.D. in Supp. of Pltf.'s Mot. for Partial Summ. J.

("Schechter Decl.") ¶ 17.[2]

Left untreated, the dissonance between one's gender identity and sex assigned at birth can be associated with clinically significant distress or significant impairment of functioning. Answer ¶ 3; Ettner Decl. ¶ 15-17. The medical diagnosis for that incongruence and distress is gender dysphoria. Answer ¶¶ 3, 15; Ettner Decl. ¶ 15. Gender dysphoria is a well-recognized medical condition codified in the *International Classification of Diseases* (ICD 10th revision: World Health Organization) and the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders-5th edition* ("DSM-5"). Answer ¶ 15; Ettner Decl. ¶¶ 13-15. Gender dysphoria is manifested by symptoms such as preoccupation with ridding oneself of the primary and/or secondary sex characteristics associated with one's birth-assigned sex. Ettner Decl. ¶ 16-17.

[2] Plaintiff introduces testimony from Dr. Ettner and Dr. Schechter, both of whom are widely recognized as experts in the field of treatment for transgender people, with decades of experience treating transgender patients and publishing peer-reviewed research. *See Kothmann v. Rosario*, 558 F. App'x 907, 909 (11th Cir. 2014) (citing Dr. Ettner's expert testimony); *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1137 (D. Idaho 2018) (relying on expert testimony of Dr. Ettner); *Edmo v. Idaho Dep't of Correction*, 358 F. Supp. 3d 1103, 1113 (D. Idaho 2018) (relying on Dr. Ettner's evidentiary hearing testimony); *Hicklin v. Precynthe*, No. 4:16-CV-01357-NCC, 2018 WL 806764, at *2 (E.D. Mo. Feb. 9, 2018); *Norsworthy v. Beard*, 87 F. Supp. 3d 1164, 1170-72, 1177-78 (N.D. Cal. 2015), *appeal dismissed and remanded*, 802 F.3d 1090 (9th Cir. 2015); *Fields v. Smith*, 712 F. Supp. 2d 830, 841 (E.D. Wis. 2010), supplemented (July 9, 2010), a*ff'd*, 653 F.3d 550 (7th Cir. 2011) (relying on trial testimony of Dr. Ettner); *Sundstrom v. Frank*, 630 F. Supp. 2d 974, 986-87 (E.D. Wis. 2007) (denying motion to exclude Dr. Ettner's testimony). *See also Flack v. Wis. Dep't of Health Servs.*, 328 F. Supp. 3d 931, 948 (W.D. Wis. 2018) (relying on expert testimony from Dr. Schechter); *Boyden v. Conlin*, 341 F. Supp. 3d 979, 1002 n.17 (W.D. Wis. 2018) (same).

Gender dysphoria is a highly treatable condition. Answer ¶ 18; Ettner Decl. ¶ 18; Schechter Decl. ¶¶ 19-20. Without treatment, however, gender dysphoria can result in significant clinical distress, debilitating depression, suicidality, and other attendant issues that can ravage healthy development and strip one of the ability to function effectively in daily life. Ettner Decl. ¶¶ 16, 18; Schechter Decl. ¶ 18. Gender dysphoric patients who are assigned male at birth but identify as female and lack access to appropriate care may become so desperate for relief that they may resort to life-threatening attempts at auto-castration—removal of the testicles—in the hopes of eliminating the major source of testosterone that kindles the distress. Ettner Decl. ¶ 19. Gender dysphoria often intensifies with age, and as gender dysphoric individuals approach middle age, they may experience an exacerbation of symptoms. Ettner Decl. ¶ 20.

Standards of care establishing treatment protocols were originally promulgated in 1979 by the World Professional Association for Transgender Health ("WPATH"), and have been revised through multiple editions as scientific advances were made in the understanding, management, and care of transgender individuals. Schechter Decl. ¶ 21; Ettner Decl. ¶ 21. The American Medical Association ("AMA"), the Endocrine Society, the American Psychological Association, the American Psychiatric Association, the World Health Organization, the American Academy of Family Physicians, the American Public Health Association, the National Association of Social Workers, the American College of Obstetrics and Gynecology, and the American Society of Plastic Surgeons all endorse protocols in accordance with the WPATH standards. Ettner Decl. ¶ 21.

Once a diagnosis is established, a treatment plan is developed based on the individual medical needs of the patient. Ettner Decl. ¶ 23. Treatment involves bringing a person's appearance and lived experience into alignment with their gender identity, through an individualized process that may involve social, legal, and medical transition. Ettner Decl. ¶¶ 22-23. Social transition includes conveying a transgender person's true sex to others through social signifiers such as dress and grooming. *Id.* ¶¶ 22, 25. Legal transition involves correcting one's name and gender marker on identification documents. Decl. of Jennifer Fletcher in Supp. of Pltf.'s Mot. for Partial Summ. J. ("Fletcher Decl.") ¶ 11. Depending on one's needs, medical transition may include hormone therapy to feminize or masculinize the body, and surgery to alter primary and secondary sex characteristics. *Id.* ¶¶ 22, 26-29; Answer ¶ 24-25. The medical consensus, supported by decades of methodologically sound and rigorous scientific research, is that this care is medically necessary. Ettner Decl. ¶¶ 26, 29-31; Answer ¶¶ 26-27 (admitting that treatment for gender dysphoria can be medically necessary, including surgical care).

Surgery is often the last and most considered treatment option for transgender people. Schechter Decl. ¶ 22. Not every individual requires surgical care, but for those with severe gender dysphoria, surgery can be medically necessary to alleviate their dysphoria. Schechter Decl. ¶ 22; Ettner Decl. ¶¶ 30, 32; *see also* Schechter Decl. ¶¶ 26-27 (no particular treatment or surgical care is inherently medically necessary or cosmetic; rather, the underlying diagnosis determines that, and the medical consensus recognizes surgical treatment for gender dysphoria as medically necessary). For transgender women

such as Ms. Fletcher, genital reconstructive surgery removes the testes as the major source of testosterone in the body, and affords typically female uro-genital structures, both of which can be crucial to attenuating or eliminating gender dysphoria. Ettner Decl. ¶ 32; Schechter Decl. ¶ 25. Breast reconstructive surgery also can have a dramatic, irreplaceable, and permanent effect on reducing gender dysphoria. Ettner Decl. ¶ 29.

Surgeries are considered "effective" from a medical perspective if they have a "therapeutic effect." Ettner Decl. ¶ 32. Decades of research confirms that gender confirmation surgery is therapeutic and therefore effective in treating gender dysphoria. Ettner Decl. ¶¶ 31-34, 37. The AMA, Endocrine Society, American Psychological Association, and American Psychiatric Association, and other similar organizations all endorse surgical treatment in accordance with the WPATH SOC, as medically necessary and effective care. Ettner Decl. ¶ 31; Schechter Decl. ¶¶ 23-24. Studies have shown that by alleviating the suffering and dysfunction caused by severe gender dysphoria, gender confirmation surgery improves virtually every facet of a patient's life. Ettner Decl. ¶ 35.

The safety and efficacy of gender-confirming surgery is illustrated by the fact that surgeons perform similar surgical procedures on non-transgender people. Schechter Decl. ¶¶ 29-34. For example, surgeons regularly perform chest reconstruction surgeries to treat individuals with cancer; similarly, they correct conditions such as congenital absence of the vagina or reconstruction of the vagina/vulva following treatment for cancer, traumatic injury, or infection. Schechter Decl. ¶ 31. "There is no medical basis to conclude that the same surgical procedures are more or less safe simply because they are

used to treat gender dysphoria, versus other underlying medical conditions." Schechter Decl. ¶ 30.

Finally, gender-confirming surgery is cost-effective for a number of reasons. Schechter ¶¶ 35-36; Ettner Decl. ¶ 43. Transgender people constitute a small minority group, ranging from 0.1 to 0.6% of the population; not all will require gender-confirming surgery, and others will be precluded for health or age-related reasons; and providing equal access to medically-necessary surgery is more cost-effective than treating the resulting consequences, such as depression, anxiety, and suicidality. Ettner Decl. ¶ 43; Schechter Decl. ¶ 36. The State's own data confirm this. The State requested analysis from its medical claims administrator regarding claims for gender dysphoria-related care spanning 2014 through 2017. Decl. of Tara L. Borelli in Supp. of Pltf.'s Mot. for Partial Summ. J. ("Borelli Decl.") Ex. J (bates no. SOA 056904). That analysis showed that over a two-year period, the vast majority of claims for gender-confirming care were made for treatment of only eight plan members, Borelli Decl. Ex. J (bates no. SOA 056903)—a tiny fraction of the plan's thousands of members. Borelli Decl. Ex. I (bates no. SOA 001257).

Defendant designated no testifying experts in this case, and has adduced no evidence that would create a material dispute of fact regarding the scientific consensus described above. Indeed, Defendant affirmatively concedes core aspects of this consensus:

- "The State admits that gender dysphoria is a recognized medical condition." Answer ¶ 15.
- "The State admits gender dysphoria can be treated." Answer ¶ 18.
- "The State admits there are treatments for gender dysphoria that can be medically necessary . . ." Answer ¶ 27.
- The State "[a]dmit[s] that surgical care could be medically necessary to treat gender dysphoria in certain individuals." Answer ¶ 26.

The State's recognition of gender dysphoria as a serious condition for which medically necessary treatment is available is also apparent in the AlaskaCare Employee Health Plan ("AlaskaCare") itself. The State has already "removed its [prior] exclusion of coverage for transition-related hormone therapy and counseling" to allow coverage for that care, and admits that AlaskaCare covers only those services and supplies that are medically necessary. Answer ¶ 35-36; *see also* Borelli Decl. Ex. A at 12, Interrog. 12 (AlaskaCare "has historically provided counseling" for gender dysphoria, and beginning January 1, 2018, began covering hormone therapy as well).

The blanket exclusion for surgical care thus stands in stark contrast to the plan's coverage for other forms of care. *See* Answer ¶ 64 ("The State admits it has maintained an exclusion for sex reassignment surgery while providing coverage for other forms of treatment for gender dysphoria."). There is no support in the medical or scientific literature for providing access to non-surgical care, as the State currently does, while simultaneously maintaining a blanket exclusion of surgical care regardless of an

individual's medical needs. Ettner Decl. ¶ 42; Schechter Decl. ¶ 39. Counseling and hormone therapy are not substitutes for surgical intervention where surgery is needed, Ettner Decl. ¶ 42, as the State acknowledges by conceding that "surgical care could be medically necessary to treat gender dysphoria in certain individuals." Answer ¶ 26.

Nor is there any dispute that the surgical exclusion treats transgender people differently. The State admits that for non-transgender women, vaginoplasty and mammoplasty can be medically necessary, and such procedures are partially or wholly covered under AlaskaCare. Borelli Decl. Ex. C at 10-12, Req. for Admis. 28, 29, 33 (mammoplasty or breast reconstruction surgery, and vaginoplasty, can be medically necessary for non-transgender women); Borelli Decl. Ex. C at 10-12, Req. for Admis. 30, 34 (AlaskaCare partially or wholly covers those procedures for non-transgender women).[3] The State further admits that for transgender women, "surgical care could be medically necessary to treat gender dysphoria," Answer ¶ 26—but the State refuses to cover those procedures under its blanket policy. Borelli Decl. Ex. B at 2, Interrog. 6 (admitting that "[n]either 'vaginoplasty' nor 'mammoplasty/breast reconstruction' are specifically excluded" from AlaskaCare, but gender reassignment surgery is, "which may encompass one or both of these procedures"). In other words, this care is covered for eligible plan members—unless a transgender person requires it for purpose of transition.

[3] *See also* Borelli Decl. Ex. F (bates no. SOA 000859) (describing coverage provided pursuant to the Women's Health and Cancer Rights Act of 1998, 29 U.S.C. § 1185b et seq., mandating coverage of "all stages" breast reconstruction surgery, including but not limited to prostheses).

As the State concedes, this exclusion "only affects transgender individuals enrolled in the AlaskaCare plan." Borelli Decl. Ex. C at 15-16, Interrog. 44.

In sum, the State admits that gender dysphoria is a recognized, treatable medical condition, and that surgical care can be a medically necessary part of that treatment. Answer ¶¶ 15, 18, 26-27. Nonetheless, the State maintains a categorical exclusion of coverage for the very surgical care that it admits can be medically necessary—even though the same underlying surgery is generally available to non-transgender people. Answer ¶¶ 16, 20, 31, 37, 56; Borelli Decl. Ex. C at 10-12, Req. for Admis. 30, 34.

II. Plaintiff Jennifer Fletcher

Ms. Fletcher is a woman. Answer ¶¶ 9, 47; Fletcher Decl. ¶ 5. She is also transgender. Answer ¶¶ 9, 47; Fletcher Decl. ¶ 6. Ms. Fletcher is 37 years old, and works as a legislative librarian for the State. Answer ¶¶ 1, 9, 45, 72-73; *see also id.* ¶ 10 (admitting that the State is an employer as defined by Title VII); Fletcher Decl. ¶ 2. Ms. Fletcher began working for the State in 2012 as a project coordinator for a digitization project and was promoted to legislative librarian in 2014. Fletcher Decl. ¶ 3. Ms. Fletcher holds a master's degree in Library Science. Fletcher Decl. ¶ 3. Ms. Fletcher has been enrolled in AlaskaCare throughout her employment with the State. Answer ¶¶ 10, 46; Borelli Decl. Ex. C at 3, Req. for Admis. 8.

Ms. Fletcher is classified as female on her employment records with the State, and the State admits that Ms. Fletcher lives as, and wants others to understand her as, the woman that she is. Borelli Decl. Ex. C at 2-3, Req. for Admis. 2, 7 (admitting that Ms.

Fletcher "presents herself and wishes others to identify her as a stereotypical woman") (quotation marks omitted).

At any early age, Ms. Fletcher was aware that she felt "different" than the boys who were her friends, and knew that she identified with more typically female behaviors. Fletcher Decl. ¶¶ 7-9. Gender dysphoria remained a painful constant in Ms. Fletcher's life, and when she was older she would furtively try on her mother's and sister's clothing to get relief from the dysphoria. Fletcher Decl. ¶ 7. She knew at a young age that it was not safe to reveal her gender incongruity to others, since gender nonconforming behavior could be harshly punished. Fletcher Decl. ¶ 7. She was six years old when a friend of hers was beaten by his father for playing with dolls. Fletcher Decl. ¶ 7.

Not knowing why these feelings of gender incongruence arose, Ms. Fletcher tried to conform to society's expectations of male behavior, and to bury her escalating feelings of femininity throughout adolescence. Ettner Decl. ¶¶ 46-47; Fletcher Decl. ¶ 8. But by adulthood, the despair, and at times, suicidal ideation, was overwhelming. Ettner Decl. ¶ 47; Fletcher Decl. ¶ 9. After she loaded a firearm and pointed it at herself, she was forced to come to terms with the fact that she is transgender. Ettner Decl. ¶ 47; Fletcher Decl. ¶ 9. Ms. Fletcher began receiving medical treatment, and by 2014 she had been diagnosed with gender dysphoria, had socially transitioned, and was receiving feminizing hormone therapy. Fletcher Decl. ¶¶ 10-12.

Hormone therapy alone, however, was not able to reduce the significant gender dysphoria Ms. Fletcher experienced from the incongruence between her gender identity

and her typically male anatomy. Ettner Decl. ¶ 49. It made even everyday activities of living fraught and distressing. Ettner Decl. ¶ 49. For example, Ms. Fletcher experienced distress when using public restrooms or locker rooms designated for women and therefore avoided going to places where she might need to use these facilities, increasing her sense of feeling isolated and alone. Ettner Decl. ¶ 49; Fletcher Decl. ¶ 14. Indeed, Ms. Fletcher had experienced such profound distress related to her genitalia that she attempted to engage in genital self-surgery in her adolescence, although she ultimately abandoned such attempts. Fletcher Decl. ¶ 14. While treatment is individualized, for people who experience this kind of anatomical dysphoria, there are no treatment options other than surgery. Ettner Decl. ¶ 49. Ms. Fletcher was nonetheless denied this medically necessary care pursuant to AlaskaCare's blanket exclusion for gender-confirming care. Borelli Decl. Ex. C at 4, 7, Req. for Admis. 9, 10, 21 ("The State admits that surgical procedures related to changing sex or sexual characteristics including procedures to alter the appearance or function of the body are excluded from benefits.").

III. The State's Discriminatory Exclusion of Gender-Confirming Care, and Denial of Medically Necessary Care to Ms. Fletcher

AlaskaCare is a self-funded health plan available to certain classes of State employees and their dependents. Answer ¶¶ 2, 10; Borelli Decl. Ex. B at 2, Interrog. 6. The State contracts with Aetna Life Insurance Company ("Aetna") to administer the AlaskaCare plan as the third-party administrator and medical claims administrator. Answer ¶ 41; Borelli Decl. Ex. C at 5, Req. for Admis. 12; Borelli Decl. Ex. D at 2, Req. for Admis. 12. As third-party administrator, Aetna oversees the day-to-day claims

operation of the plan. Borelli Decl. Ex. B at 2, Interrog. 6. Employees and dependents who are enrolled in the plan receive "benefits for medical services and procedures that are medically necessary and not otherwise excluded" from the plan. Borelli Decl. Ex. B at 2, Interrog. 6.

Because the plan is self-funded, the State has control over the medical services that are excluded from coverage, including gender-confirming surgery. Borelli Decl. Ex. C at 4-6, Req. for Admis. 11, 12, 15. The AlaskaCare plan is reviewed periodically—at least annually—by the State's Division of Retirement and Benefits (the "Division"), and changes and recommendations are submitted to the Commissioner of Administration for review and approval. Borelli Decl. Ex. A at 6-7, Interrog. 6. The State Division makes its determinations in part based on consultation with its fiscal consultants. Borelli Decl. Ex. A at 6-7, Interrog. 6.

The State received analysis from its fiscal consultant, Segal Consulting ("Segal"), which the State engaged "to determine the potential fiscal impact of covering treatment for gender dysphoria, including surgical care, in AlaskaCare." Answer ¶ 38; Borelli Decl. Ex. C at 8, Req. for Admis. 23. In a memorandum dated September 20, 2016, Segal reported that "some combination of psychotherapy, [hormone therapy,] and gender reassignment surgery" is generally regarded as "most crucial to address" gender dysphoria, and as "medically necessary" by "major insurance carriers." Borelli Decl. Ex. I (bates nos. SOA 001255 - 001256) (quotation marks omitted). Segal estimated that the cost of covering gender-confirming care, including surgical treatment, would represent a

small fraction of the annual cost of the overall claims, ranging from 0.03% to 0.05% each year. Borelli Decl. Ex. I (bates nos. SOA 001257 - 001258) at 3-4. The Division "discussed the September 20, 2016 memorandum" from Segal "with the Commissioner's Office," but "[n]o further action was taken directly related to the September 20, 2016 memorandum." Borelli Decl. Ex. A at 5-6, Interrog. 4.

The State chooses, on at least an annual basis, to retain the exclusion for gender-confirming surgery. Borelli Decl. Ex. A at 6-7, Interrog. 6. For example, in 2016, the Division and the Commissioner of Administration "began reviewing the challenged coverage exclusion as a part of its periodic review process." Borelli Decl. Ex. A at 9-10, Interrog. 10. A "decision was made to clarify the availability of mental health counseling for gender-identity issues and to allow for hormone therapy," effective January 1, 2018, Borelli Decl. Ex. A at 9-10, Interrog. 10, but the surgical exclusion was retained in the 2017 health plan. Borelli Decl. Ex. F (bates no. SOA 000784) (excluding coverage for "[a]ny treatment, drug, service or supply related to changing sex or sexual characteristics, including: [s]urgical procedures to alter the appearance or function of the body"). The State retained the exclusion in the 2018 and 2019 health plans as well. Borelli Decl. Ex. G (bates no. SOA 000560) (2018 AlaskaCare plan, retaining exclusion); Borelli Decl. Ex. H (bates no. FLETCHER 003773) (2019 plan, same); *accord* Borelli Decl. Ex. G (bates no. SOA 000553) and Borelli Decl. Ex. H (bates no. FLETCHER 003765) (excluding pharmacy benefits for "[a]ny treatment, drug or supply related to changing sex or sexual characteristics, with the exception of hormones and hormone therapy").

As medical claims administrator, Aetna must follow the terms of the AlaskaCare plan, and "cannot independently alter" the terms that are set by the State. Borelli Decl. Ex. C at 7, Req. for Admis. 19, 20. The decision to exclude gender-confirming surgical care is accordingly a decision made by the State, not Aetna. Borelli Decl. Ex. C at 6, Req. for Admis. 16; Borelli Decl. Ex. B at 1-2, Interrog. 6 (admitting that the "State establishes specific exclusions" in AlaskaCare).

Aetna confirmed this fact when Ms. Fletcher attempted to seek preauthorization for her gender-confirming surgery. Borelli Decl. Ex. C at 3-5, Req. for Admis. 9, 10, 13 (the State "admits Plaintiff requested pre-certification" for her surgery from Aetna in November 2016, which denied the request in its capacity as medical claims administrator). Ms. Fletcher inquired about coverage in November 2016 through Aetna's patient portal, asking whether gender-confirmation surgery would be covered under the 2017 health plan, since the handbook was not yet available; whether such a procedure would be covered if performed outside the United States; and how to request preauthorization. Fletcher Decl. Ex. A (bates no. FLETCHER 003595). After being informed that the exclusion would remain the same in 2017 plan, Ms. Fletcher asked Aetna to reconsider, and requested a list of covered providers who could perform the surgery in the United States. Fletcher Decl. Ex. A (bates nos. FLETCHER 003590-92).

Ms. Fletcher subsequently communicated with an Aetna representative over email, who informed her that because AlaskaCare is a self-funded plan, "all plan design decisions," including the exclusion, "are made by the Plan Administrator (i.e. State of

Alaska)." Fletcher Decl. Ex. B (bates no. FLETCHER 003537). For that reason, the representative explained that "we [at Aetna] do not have any authority to change this. . . . [I]t is up to the State of Alaska for the plan design and there is nothing that we can enforce or change." Fletcher Decl. Ex. B (bates nos. FLETCHER 003535 - 003537).

Ms. Fletcher was thus denied coverage pursuant to the 2017 health plan's exclusion for "[a]ny treatment, drug, service or supply related to changing sex or sexual characteristics, including: [s]urgical procedures to alter the appearance or function of the body." Borelli Decl. Ex. F (bates no. SOA 000784); Borelli Decl. Ex. C at 5-6, Req. for Admis. 13-16. Ms. Fletcher obtained gender-confirming surgery, specifically vaginoplasty and mammoplasty, in June 2017. Fletcher Decl. ¶ 19. Had Ms. Fletcher had access to such care through the AlaskaCare plan, she would have obtained those surgical services in the United States. Fletcher Decl. ¶ 19. The State's denial of coverage, however, forced her to pay out-of-pocket, diverting funds that she would have instead used to continue paying off her student loans and other debt. Fletcher Decl. ¶ 19. Ms. Fletcher accordingly secured a surgeon in Thailand, which charged a lower fee than she otherwise would have paid in the United States. Fletcher Decl. ¶ 20. Mitigating her damages this way came with associated burdens, since her mother had to travel abroad with Ms. Fletcher as well to care for her. Fletcher Decl. ¶ 20. But Ms. Fletcher was anxious to obtain this surgical care to reduce the significant anatomical dysphoria she was experiencing. Fletcher Decl. ¶ 20.

Dr. Ettner evaluated Ms. Fletcher to assess the medical necessity of this surgical care, meeting in-person with Ms. Fletcher at Dr. Ettner's office on November 19, 2018. Ettner Decl. ¶ 44. Dr. Ettner conducted a clinical and psychometric evaluation of Ms. Fletcher, including a clinical interview and administration of a series of psychodiagnostic tests with high levels of reliability and validity to corroborate the clinical assessment. Ettner Decl. ¶ 52. Dr. Ettner concluded on the basis of this assessment that gender confirmation surgery was medically necessary for Ms. Fletcher and the only means of alleviating her lifelong gender dysphoria. Ettner Decl. ¶ 53.

Ms. Fletcher exhausted administrative remedies with the U.S. Equal Employment Opportunity Commission, which determined that the surgical exclusion violates Title VII, before Ms. Fletcher timely filed this suit. Answer ¶¶ 67-68; Fletcher Decl. Exs. C, D.

LEGAL STANDARD

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The materiality requirement ensures that "only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The non-moving party "may not rest upon the mere allegations or denials of his pleading, but ... must set forth specific facts showing that there is a genuine issue for trial." *Id.* (quote omitted).

ARGUMENT

Title VII provides that it shall be an unlawful employment practice for an

employer "to discriminate 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). This necessarily prohibits sex discrimination in "[h]ealth insurance and other fringe benefits," which "are compensation, terms, conditions, or privileges of employment." *Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 682 (1983) (quote omitted).

I. The State's Exclusion of Gender-Confirming Care Violates Title VII.

Defendant has admitted all facts required to determine liability under Title VII. The State concedes that "gender dysphoria is a recognized medical condition," that it "can be treated," that this treatment "can be medically necessary," and that "surgical care [can] be medically necessary . . . [for] certain individuals." Answer ¶¶ 15, 18, 26, 27. Indeed, the Ninth Circuit has already held that the denial of medically necessary transition-related surgical care to a transgender prisoner can constitute deliberate indifference to serious medical needs in violation of the Constitution. *Rosati v. Igbinoso*, 791 F.3d 1037, 1040 (9th Cir. 2015).[4] The State already covers care for counseling and hormone therapy as treatment for gender dysphoria, which it also concedes are medically necessary.[5] Answer ¶ 35-36. The State further admits that the exclusion "only affects

[4] Numerous other courts have reached the same conclusion. *See Fields v. Smith*, 653 F.3d 550, 556 (7th Cir. 2011); *De'Lonta v. Angelone*, 330 F.3d 630, 635 (4th Cir. 2003); *Keohane v. Jones*, 328 F. Supp. 3d 1288, 1302-6 (N.D. Fla. 2018) (appeal filed); *Hicklin v. Precynthe*, No. 4:16-CV-01357-NCC, 2018 WL 806764, at *11 (E.D. Mo. Feb. 9, 2018).

[5] Nothing about the plan's current coverage for counseling and hormone therapy inoculates its discriminatory exclusion of surgical care. "An employer that offers one fringe benefit on a discriminatory basis cannot escape liability because he also offers

transgender individuals enrolled in the AlaskaCare plan." Borelli Decl. Ex. C at 15-16, Req. for Admis. 44.

As explained below, Defendant's targeted exclusion of gender-confirming care constitutes impermissible sex discrimination for at least three reasons. First, long-established Ninth Circuit authority holds that discriminating because someone is transgender constitutes impermissible sex stereotyping, and that ruling binds the Court here. Second, no resort to sex-stereotyping analysis is even needed, since the express terms of the exclusion discriminate based on sex—no matter how "sex" is defined. Third, the exclusion discriminates based on the fact of Ms. Fletcher's transition, which is inescapably because of sex.

A. Binding Ninth Circuit authority holds that discrimination because a person is transgender relies on impermissible sex stereotypes.

Nearly twenty years ago, the Ninth Circuit expressly held that discrimination because someone is transgender is sex discrimination. *Schwenk v. Hartford*, 204 F.3d 1187, 1200 (9th Cir. 2000) (finding that discrimination "because of . . . transsexuality" is discrimination based on sex). That analysis controls this case. The Ninth Circuit considered this question in the case of Crystal Schwenk, a transgender woman who was sexually assaulted in prison, and sought remedies under a subtitle of the Violence Against Women Act of 1994, called the Gender Motivated Violence Act ("GMVA"). *Id.* at 1192 n.2. The defendant prison guard argued that the attack could not have occurred because

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other benefits on a nondiscriminatory basis." *Arizona Governing Comm. For Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1081 n.10 (1983).

of gender, as the GMVA requires, because Ms. Schwenk had alleged that the assault occurred because she is transgender. *Id.* at 1200. The prison guard claimed that being transgender "is not an element of gender," but instead discrimination based on gender dysphoria—a medical condition which the guard characterized as "a psychiatric illness." *Id.*

Schwenk squarely rejected that argument in a ruling with particular significance here, observing that "Congress intended proof of gender motivation under the GMVA to proceed in the same way that proof of discrimination on the basis of sex or race is shown under Title VII." *Id.* at 1200-01.[6] *Schwenk* proceeded to analyze carefully how the question of discrimination because one is transgender would be determined under Title VII, thus answering the specific question before this Court. *Schwenk* refused to accept the argument that discrimination because one is transgender could merely be reduced to discrimination based on a medical condition such as gender dysphoria. *Id.* at 1200. Responding to the prison guard's argument that targeting someone because they are transgender is somehow distinct from "sex" or "gender"—terms that *Schwenk* found are synonymous for purposes of Title VII—the Court responded, "[w]e disagree." *Id.* at 1200. Instead, the Court made clear that "sex" includes an individual's "gender or sexual identity" as well as "socially-constructed gender expectations." *Id.* at 1202.

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[6] Like Title VII, the GMVA prohibits discrimination "because of" sex. *Compare* 34 U.S.C. § 12361(d)(1) (GMVA's prohibition on crime committed "because of gender") *with* 42 U.S. Code § 2000e-2(a)(1) (Title VII's prohibition on discrimination in the terms of employment "because of . . . sex").

Schwenk cites the GMVA at 42 U.S.C. § 13981 et seq., which was subsequently recodified at 34 U.S.C. § 12361, et seq.; this brief cites the latter statute.

As *Price Waterhouse v. Hopkins* established, discrimination based on the failure "to act in the way expected of a man or woman is forbidden under Title VII." *Schwenk*, 204 F.3d at 1202 (relying on *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)). *Schwenk* clarifies that Title VII is no less offended when the discrimination targets transgender people, who by definition are those "whose outward behavior and inward identity did not meet social definitions" of the sex assigned to them. *Id.* at 1201.[7] Accordingly, discrimination because an individual is transgender necessarily relies upon sex stereotypes. *See Glenn*, 663 F.3d at 1316 ("[T]he very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior."); *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."). Thus, after *Hopkins* and *Schwenk*, it is unlawful to discriminate against a transgender person because he or she does not conform to an employer's expectations for men or women. *See also Latta v. Otter*, 771 F.3d 456,

[7] Other circuit courts agree. *See Rosa v. Park W. Bank & Tr. Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1048 (7th Cir. 2017) ("By definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth."); *Smith v. City of Salem*, 378 F.3d 566, 573-75 (6th Cir. 2004) ("discrimination against a plaintiff who is a transsexual—*and therefore* fails to act and/or identify with his or her gender [assigned at birth]—is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*") (emphasis added); *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) ("A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes.").

495 n.12 (9th Cir. 2014) (Berzon, J., concurring) (discrimination because one is transgender is gender discrimination); *cf. Karnoski v. Trump*, No. 18-35347, 2019 WL 2479442, at *13 (9th Cir. June 14, 2019) (affirming in the constitutional law context that courts should look to sex discrimination jurisprudence to analyze discrimination against transgender people).

District courts throughout the Ninth Circuit have faithfully applied this guidance, finding that "Title VII . . . recognize[s] that discrimination on the basis of transgender identity is discrimination on the basis of sex." *Prescott v. Rady Children's Hosp.-San Diego*, 265 F. Supp. 3d 1090, 1099 (S.D. Cal. 2017); *see also Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001, 1013 (D. Nev. 2016) (the "unanimous panel" in *Schwenk* held "that Title VII applies both to discrimination based on concepts of sex and discrimination based on other stereotypes about sex, including gender identity"); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015) (under *Schwenk*, "discrimination against transgender individuals is a form of gender-based discrimination"); *cf. F.V. v. Barron*, 286 F. Supp. 3d 1131, 1144 (D. Idaho 2018) (analyzing a sex discrimination constitutional claim, and holding that "to conclude discrimination based on gender identity or transsexual status is not discrimination based on sex is to depart from advanced medical understanding in favor of archaic reasoning").

District courts in other circuits have reached the same conclusion in cases involving challenges to similar health plan exclusions. *See, e.g.*, *Boyden v. Conlin*, 341 F. Supp. 3d 979, 995 (W.D. Wis. 2018) (finding that where a health plan excluded

gender-confirming care for transgender people, but provided the same care to non-transgender people, that "is a straightforward case of sex discrimination") (quote omitted);[8] *Flack v. Wis. Dep't of Health Servs.*, 328 F. Supp. 3d 931, 948 (W.D. Wis. 2018) (reaching same conclusion in a case challenging exclusion of gender-confirming care from Medicaid coverage); *Cruz v. Zucker*, 195 F. Supp. 3d 554, 581 (S.D.N.Y. 2016) (holding that "categorical exclusion o[f] treatments of gender dysphoria" discriminates on the basis of "sex" under Section 1557 of Affordable Care Act); *cf. Tovar v. Essentia Health*, 342 F. Supp. 3d 947, 952-53 (D. Minn. 2018) (denying motion to dismiss sex discrimination claim under Affordable Care Act), *on remand from* 857 F.3d 771 (8th Cir. 2017); *Rumble*, 2015 WL 1197415, at *18 (same). As *Boyden* explained, a health plan exclusion for gender-confirming care "implicates sex stereotyping by limiting the availability of medical transitioning, . . . thus requiring transgender individuals to maintain the physical characteristics of their [birth-assigned] sex." 341 F. Supp. 3d at 997. This "entrenches" the sex-stereotyped "belief that transgender individuals must

[8] In analogous circumstances, other courts in this circuit have found cognizable sex discrimination claims where non-transgender women were "provided vaginoplasty under certain circumstances," and "transgender women [we]re not provided the same procedure under any circumstances." *Denegal v. Farrell*, No. 115CV1251DADMJSPC, 2017 WL 2363699, at *2, 6-7 (E.D. Cal May 31, 2017), *report and recommendation adopted*, No. 115CV01251DADMJSPC, 2017 WL 4237099 (E.D. Cal. Sept. 25, 2017). *See also McQueen v. Brown*, No. 215CV2544JAMACP, 2018 WL 1875631, at *2-3 (E.D. Cal. Apr. 19, 2018), *report and recommendation adopted*, No. 215CV2544JAMACP, 2018 WL 2441713 (E.D. Cal. May 31, 2018) (finding that transgender woman in prison stated cognizable claim by alleging that her request for gender-confirming surgery was treated differently that "a non-transgender inmate's request for medically-necessary surgery"); *Norsworthy*, 87 F.Supp.3d at 1120-21 (challenge to prison regulation making it, at a minimum, more difficult for transgender women to obtain vaginoplasty than non-transgender woman stated a sex-based equal protection claim).

preserve the genitalia and other physical attributes of their [birth-assigned] sex over not just personal preference, but specific medical and psychological recommendations to the contrary." *Id*. The exclusion in the AlaskaCare plan constitutes impermissible sex stereotyping for the same reason.

B. The express terms of the exclusion impose differential treatment based on sex.

This Court need not even consider a sex stereotyping theory, however, to hold that the exclusion facially discriminates based on sex. The central inquiry for a Title VII claim is whether "the discrimination is related to [] sex." *Schwenk*, 204 F.3d at 1202. The exclusion itself answers this question, by prohibiting "[a]ny treatment, drug, service or supply related to *changing sex or sexual characteristics*, including: [s]urgical procedures to alter the appearance or function of the body." Borelli Decl. Ex. F (bates no. SOA 000784) (emphasis added). Even if the exclusion did not refer to "changing sex or sexual characteristics"—which alone evinces facial discrimination—where a "policy cannot be stated without referencing sex," it is expressly "based upon a sex-classification." *Whitaker*, 858 F.3d at 1051.

This recognition does not "create a new 'class' of people covered under Title VII." *Macy v. Holder*, DOC 0120120821, 2012 WL 1435995, at *11 (E.E.O.C. Apr. 20, 2012). Just as Title VII does not separately enumerate protection for classes consisting of "macho" women, or employees in interracial relationships, who are already protected under the statute's prohibition against discrimination based on "sex" and "race," the same is true of transgender people. *See Price Waterhouse*, 490 U.S. at 235 (plaintiff Ann

Hopkins was criticized for being "macho"); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1118 (9th Cir. 2004) (discrimination based on employee's interracial relationship violates Title VII). Title VII protects *every* individual from sex discrimination, and there is no carve-out for discrimination against transgender people. *See Glenn*, 663 F.3d at 1318-19 ("[a]ll persons, whether transgender or not, are protected from discrimination"; "Because these protections are afforded to everyone, they cannot be denied to a transgender individual.")

The analysis is not altered because the sex-based exclusion refers to gender transition—to the contrary, that underscores the sex-based nature of the exclusion. *See Karnoski*, 2019 WL 2479442, at *14 (rejecting the argument that the ban on military service by transgender people discriminated on purportedly neutral, non-sex-related grounds of "gender transition" or "gender dysphoria"). The State admits as much, conceding that the exclusion "only affects transgender individuals enrolled in the AlaskaCare plan." Borelli Decl. Ex. C at 15-16, Req. for Admis. 44. Just as a company policy that denies coverage for pregnancy-related care is sex discrimination, so too is a policy that excludes coverage for "changing sex"—*i.e.*, medical care to align one's body with one's gender identity—that only transgender people as a class would utilize. *See, e.g.*, *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW 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, 462 U.S. at 684 ("for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex"). *Cf. Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1160 n.23 (9th Cir. 2013) ("discriminating against individuals with gray hair is a proxy for age discrimination"); *Erie Cty. Retirees Ass'n v. Cty. 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).

Stated differently, the exclusion denies medically necessary vaginoplasty and mammoplasty to women like Ms. Fletcher whose sex assigned at birth was male, but covers such care for women whose sex assigned at birth was female. Borelli Decl. Ex. C at 10-11, Req. for Admis. 30; Borelli Decl. Ex. C at 12, Req. for Admis. 34 (AlaskaCare partially or wholly covers vaginoplasty and mammoplasty for some diagnoses, but not for gender-confirming surgery to treat transgender women). Denying access to coverage because of one's sex assigned at birth is a clear-cut form of sex discrimination. *See Boyden*, 341 F. Supp. 3d at 995 (discrimination in coverage for vaginoplasty based on one's birth-assigned sex is "straightforward" case of sex discrimination; citing *Flack*, 328 F. Supp. 3d at 948). To be sure, most individuals whose birth-assigned sex is male will not have a medical need for vaginoplasty or mammoplasty; but for those who do have such a medical need, Title VII forbids denying them coverage merely because they were assigned male at birth rather than female.

Nor is the exclusion somehow immunized from review because it denies gender-confirming care to both transgender men and transgender women. Such an argument ignores the key question of whether one's sex has been taken into account, as is clearly the case here. *See City of Los Angeles, Dep't of Water and Power v. Manhart*, 435 U.S. 702, 708 (1978) ("[Title VII] makes it unlawful 'to discriminate against any *individual* ... because of such *individual's* ... sex[.]' The statute's focus on the individual is unambiguous.") (quoting 42 U.S.C. § 2000e-2(a)(1)); *cf. Loving v. Virginia*, 388 U.S. 1, 8 (1967) (rejecting "the notion that mere 'equal application' of a statute containing racial classifications" removes it from scrutiny under the Fourteenth Amendment).

C. Discrimination based on gender transition is impermissible sex discrimination.

The AlaskaCare exclusion discriminates based on sex for a third and independent reason: discrimination based on gender transition is necessarily because of sex, just as discrimination based on religious conversion is necessarily because of religion. Firing an employee because she converts from Christianity to Judaism "would be a clear case of discrimination 'because of religion,'" even if the employer "harbors no bias toward either Christians or Jews but only 'converts.'" *Schroer v. Billington*, 577 F. Supp. 2d 293, 306 (D.D.C. 2008); *accord Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 527 (D. Conn. 2016). The same principle applies to discrimination based on sex.

Just as it would be unlawful to deny benefits of employment to employees who "transition" from one religion to another, it is equally unlawful to deny coverage to employees who transition to align their sex-related characteristics with their gender

identity. The exclusion itself expressly prohibits care when it is for purposes of "*changing* sex or sexual characteristics," making clear that the fact of transition is what is targeted for discriminatory treatment. Borelli Decl. Ex. F (bates no. SOA 000784) (emphasis added); *see also Flack*, 328 F. Supp. 3d at 949 ("discriminating on the basis that an individual was going to, had, or was in the process of changing their sex—or the most pronounced physical characteristics of their sex—is *still* discrimination based on sex").

Accordingly, while a prima facie case can be articulated by a transgender employee "through any number of different formulations," such as the theories above, they are not "different claims of discrimination." *See Macy*, 2012 WL 1435995, at *10. Rather they are "simply different ways of describing sex discrimination." *Id.*

II. Because the Exclusion Facially Discriminates, No Legal Justification is Available, and No Legitimate Justification for the Exclusion Exists Regardless.

"Where 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 plaintiff "need not otherwise establish the presence of discriminatory intent." *Gerdom v. Cont'l Airlines*, 692 F.2d 602, 608 (9th Cir. 1982).[9] An employer policy that facially discriminates on the basis of sex can be justified only by a bona fide occupational qualification ("BFOQ"). *Johnson Controls*, 499 U.S. at 200 ("an explicit gender-based policy is sex discrimination

[9] Because there is direct evidence of discrimination here, resort to burden-shifting analysis is neither needed nor appropriate. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985).

under [Title VII] and thus may be defended only as a BFOQ"); *Frank v. United Airlines, Inc.*, 216 F.3d 845, 853 (9th Cir. 2000) ("[d]isparate treatment is permissible under Title VII only if justified as a bona fide occupational qualification").

A BFOQ allows exclusion of individuals from employment in very narrow circumstances, and has no applicability with regard to health coverage. *Johnson Controls*, 499 U.S. at 200. This is because the terms of a health plan "have nothing to do with occupational qualifications." *Norris*, 463 U.S. at 1084 n.13 (Marshall, J., joined by Brennan, White, Stevens, and O'Connor, JJ., concurring) (holding that the BFOQ exception was inapplicable to sex discrimination in the terms of a retirement plan); *see also EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1367 (9th Cir. 1986) (in a challenge to provision of health insurance only to married men who were "head of household," and not married women, the court held that "the BFOQ exception does not apply to the discriminatory provision of benefits involved here").

Even if Defendant were permitted to raise other defenses to the facial discrimination in its health plan, which it is not, Defendant could not satisfy any standard for excusing sex discrimination. Title VII does not permit Defendant to justify the exclusion based on an interest in cost-savings. "That argument might prevail if Title VII, contained a cost-justification defense comparable to the affirmative defense available in a price discrimination suit. But neither Congress nor the courts have recognized such a defense under Title VII." *Manhart*, 435 U.S. at 716-17 (footnotes omitted); *see also Johnson Controls*, 499 U.S. at 210 (rejecting notion of a "Title VII defense" based on the

"cost of employing members of one sex"); *Norris*, 463 U.S. at 1085 n.14 (Marshall, J., joined by Brennan, White, Stevens, and O'Connor, JJ., concurring). In other words, Title VII does not banish sex discrimination from the workplace only when doing so is free. Instead, "arguments that expense justifies discriminatory conduct met their Waterloo" in *Manhart*. *EEOC v. Ind. Bell Tel. Co.*, 256 F.3d 516, 523 (7th Cir. 2001) (en banc).

CONCLUSION

For all the reasons above, the exclusion fails the simple test of whether it treats the employee "in a manner which but for that person's sex would be different," because that is precisely what the exclusion does. *Id.* at 711. This Court should accordingly grant Ms. Fletcher partial summary judgment on her Title VII claim by finding that the exclusion in Defendant's plan violates Title VII.

Dated: July 1, 2019 Respectfully submitted,

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CERTIFICATE OF LENGTH

In accordance with Local Civil Rule 7.4, and this Court's June 4, 2019 Order (ECF No. 27), I hereby certify that this document does not exceed 10,000 words.

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CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2019, I electronically filed the foregoing document and all attachments with the Clerk of the Court by using the CM/ECF system, causing a copy of the foregoing document and all attachments to be served on all counsel of record.

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