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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 REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

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Pursuant to Federal Rule of Civil Procedure 56, and this Court's orders at ECF Nos. 27, 34, Plaintiff Jennifer Fletcher ("Plaintiff" or "Ms. Fletcher") respectfully submits this combined reply in support of her Motion for Partial Summary Judgment (ECF No. 28, "Pl. Br."), and opposition to Defendant State of Alaska's Cross-Motion for Summary Judgment (ECF No. 36, "Def. Br.").[1]

INTRODUCTION

This case asks whether an employer can provide a favored group of non-transgender employees with surgical care while categorically excluding the same surgical care for a disfavored group of transgender employees on the basis of sex. As Defendant State of Alaska ("Defendant" or the "State") confirms in its brief, this case is ready for decision. The parties agree on the facts: Defendant does not dispute any fact in Plaintiff's motion, expressly agreeing "that there are no material issues of fact in dispute." Def. Br., ECF No. 36 at 9. The parties also agree that the legal question presented in this case "is whether the Health Plan's exclusion for gender transition surgery violates Title VII." Def. Br., ECF No. 36 at 4.[2] This Court must therefore decide whether it violates Title VII's promise of workplace equality to deny a woman coverage for medically necessary

[1] All abbreviations are either defined herein, or follow the terms defined in Plaintiff's Motion for Partial Summary Judgment. Pl. Br., ECF No. 28.

[2] Plaintiff's briefing and supporting evidence refer interchangeably to gender-confirming care, transition-related care, and sex reassignment surgery, all of which describe the medically necessary treatment that allows transgender people to align their physical characteristics with their gender identity.

surgery because she is transgender, when non-transgender women face no such exclusion. As explained below, Defendant's exclusion betrays Title VII's promise of employment free from arbitrary restrictions based on sex and must be found unlawful.

The State has already conceded all the facts necessary to decide this legal question. The State admits 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" who are transgender. Answer, ECF No. 14 ¶¶ 15, 18, 26, 27. Nor is there any dispute that the procedures denied to Ms. Fletcher—vaginoplasty and mammoplasty—are not categorically excluded for non-transgender women. Borelli Decl. Ex. C, ECF No. 32-4 at 10-12, Req. for Admis. 30, 34. It is also uncontested that Ms. Fletcher was denied this care pursuant to the 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, ECF No. 32-7 (bates no. SOA 000784); Borelli Decl. Ex. C, ECF No. 32-4 at 5-6, Req. for Admis. 13-16. In sum, the State has conceded that the surgery denied to Ms. Fletcher can be medically necessary, as illustrated by her own experience; that other employees receive this surgery; and Ms. Fletcher was denied this surgery because she is transgender. Nothing further is needed to answer the legal question here.

Defendant faces an insurmountable obstacle under Ninth Circuit law. Nearly two decades ago, the Ninth Circuit examined a sex discrimination claim brought by a transgender prisoner, expressly relied on Title VII authority to decide her claim, and

found that the discrimination based on her transgender status constituted impermissible sex stereotyping. *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000); *cf. Karnoski v. Trump*, 926 F.3d 1180, 1199-1201 (9th Cir. 2019) (concluding that the ban "on its face treats transgender persons differently than other persons, and consequently" heightened scrutiny applies; relying in part on *Virginia*'s sex discrimination analysis). This binding decision is the guiding star for Ms. Fletcher's claims, and Defendant's efforts to distract from it with irrelevant and out-of-circuit authorities should be disregarded. Similarly, statutory construction principles demand fidelity to the terms of Title VII itself, and Defendant's speculation about Congressional intent cannot override the plain language of the statute.

Ultimately, Defendant's exclusion allows only a certain kind of woman and a certain kind of man—those who are not transgender—to enjoy the full benefits of employment. The exclusion thus places transgender employees, and transgender employees only, in a bind: adhere to traditional gender-related expectations by foregoing medically necessary care, or obtain such care out-of-pocket without the coverage that other employees receive. That is exactly what Title VII forbids.

ARGUMENT

I. The plan's exclusion of care for "changing sex or sexual characteristics" discriminates based on sex.

As Ms. Fletcher explained in her Motion for Partial Summary Judgment, there are at least three ways that the exclusion constitutes impermissible sex discrimination. Pl. Br., ECF No. 28 at 19-28. First, the Ninth Circuit clarified nearly two decades ago how

to analyze claims of sex discrimination by transgender people under Title VII as impermissible sex stereotyping. *Schwenk*, 204 F.3d at 1200-02; Pl. Br., ECF No. 28 at 19-24. Second, the terms of the exclusion itself explicitly discriminate based on sex, no matter how sex is defined. Borelli Decl. Ex. F, ECF No. 32-7 (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"); Pl. Br., ECF No. 28 at 24-27. Third, the exclusion discriminates based on the fact of Ms. Fletcher's transition, which is inescapably because of sex. Pl. Br., ECF No. 28 at 27-28.

Defendant does not seriously contest the latter two theories. For example, Defendant does not dispute that the exclusion draws sex-based lines on its face by denying surgical care "related to changing sex or sexual characteristics," which is explicitly "because of … sex." 42 U.S.C. § 2000e-2(a)(1). Nor does Defendant dispute that the exclusion denies this care only to those who seek it for purposes of gender transition. *See* Borelli Decl. Ex. C, ECF No. 32-4 at 15-16, Req. for Admis. 44 (admitting that the exclusion "only affects transgender individuals enrolled in the AlaskaCare plan"). Either ground is sufficient independently to demonstrate that the exclusion discriminates based on sex. This should end the matter.

Defendant nevertheless contests Plaintiff's sex stereotyping theory.[3] While Defendant acknowledges "that a transgender individual [can] have a valid claim of sex

[3] Defendant represents that a handful of largely out-of-circuit decisions acknowledge "the viability of a sex-stereotyping theory but do not extend transgender discrimination

discrimination under Title VII," Defendant claims this is not such a case. Def. Br., ECF No. 36 at 12. Defendant makes that argument on three primary grounds: First, Defendant argues that the sex discrimination inherent in the exclusion should be excused because it denies access to certain surgical procedures for both transgender women and transgender men. Def. Br., ECF No. 36 at 9. Second, Defendant suggests that its conjecture about the intent of Congress should override the plain terms of the statute. Def. Br., ECF No. 36 at 10-12. Third, Defendant claims that Title VII's prohibition on sex stereotyping does not encompass Ms. Fletcher's claim. Def. Br., ECF No. 36 at 12-14. Finally, Defendant tries to cloak the exclusion's discrimination by misconstruing Ms. Fletcher's claim as seeking "special treatment." Def. Br., ECF No. 36 at 23-24. None of these arguments can absolve the sex discrimination that is plain on the face of the exclusion.

A. The exclusion is no less a violation of Title VII simply because it heaps sex discrimination on both transgender women and men.

Defendant argues that Title VII extends no further than group-based claims of

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beyond sex-stereotyping." Def. Br., ECF No. 36 at 15 n.41. These decisions generally originate from circuits lacking the binding guidance that *Schwenk* provides here, and are not instructive. Def. Br., ECF No. 36 at 15 n.41, *id.* n.43. Regardless, even these decisions acknowledge the viability of a sex stereotyping theory, which is one of several ways that this Court could resolve this case. Additionally, Defendant cites *Baker v. Aetna Life Ins. Co. & L-3 Commc'ns Corp.*, Def. Br., ECF No. 36 at 15 n.43, but that case found that the health plan at issue did not bar transition-related surgical care for transgender employees. No. 3:15-CV-3679-D, 2018 WL 572907, at *4-5 (N.D. Tex. Jan. 26, 2018). In contrast, both parties agree that Defendant maintains a blanket ban on such care here. Answer, ECF No. 14 ¶ 64; Borelli Decl. Ex. C, ECF No. 32-4 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.").

discrimination against either all women or all men as a whole—ironically citing a case that decidedly did *not* involve such wholesale discrimination yet nevertheless found a violation of Title VII. Def. Br., ECF No. 36 at 9 (suggesting Title VII only prohibits "disadvantageous terms" for "members of one sex" vis-à-vis "the other sex"; citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), which recognized that a male employee could bring a Title VII claim for same-sex sexual harassment by other men); Def. Br., ECF No. 36 at 19. Defendant claims that support for this position can be found in the "text of Title VII" itself, Def. Br., ECF No. 36 at 9, but the statutory text supports Ms. Fletcher, not the State. Title VII does not dispense freedom from workplace discrimination en masse, but rather "makes it unlawful 'to discriminate against any *individual* ... because of such *individual's* ... sex[.]'" *City of Los Angeles, Dep't of Water and Power v. Manhart*, 435 U.S. 702, 708 (1978) (quoting 42 U.S.C. § 2000e-2(a)(1)); *id.* at 708 (rejecting the notion that "the existence or nonexistence of 'discrimination' is to be determined by comparison of class characteristics").

Indeed, *Manhart* rejected the same defense Defendant offers here. The employer in *Manhart* argued that requiring female employees to pay higher retirement benefit premiums was justified because women tend to live longer than men, and thus, considering the benefits each group ultimately received as a whole, women and men were purportedly treated the same. 435 U.S. at 704. The employer argued "that the absence of a discriminatory effect on women as a class justifies an employment practice which, on its face, discriminated against individual employees because of their sex." *Id.* at 716. But *Manhart* found that even if the actuarial evidence about men and women as groups

were true, it could "not defeat the claim that the practice, on its face, discriminated against every individual woman employed" by defendant. *Id.* This is because "[t]he statute's focus on the individual is unambiguous." *Id.* at 708.

The Supreme Court has affirmed this principle repeatedly and unequivocally. For example, in *Connecticut v. Teal*, 457 U.S. 440 (1982), the Court held that an African-American plaintiff could challenge a written promotion exam with a discriminatory impact on black employees—even though the employer ultimately promoted a higher percentage of African-American employees than white employees. *Id.* at 444. The Court found that the employer's argument that black employees were ultimately promoted in proportionate numbers not only failed to defeat the individual plaintiff's prima facie showing, but could not even serve as a "defense" to the policy. *Id.* at 452. *Teal* reasoned that the "principal focus of the statute is the protection of the individual employee, rather than the protection of the minority group as a whole." *Id.* at 453-54.

The following year, the Supreme Court found it unlawful to pay women lower retirement benefits based on women's life expectancy as a group, holding again "that Title VII requires employers to treat their employees as *individuals,* not as simply components of a racial, religious, sexual, or national class." *Arizona Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1083 (1983) (quote omitted). The Supreme Court underscored this principle yet again in *Oncale*, when it recognized for the first time that same-sex sexual harassment violates Title VII. 523 U.S. at 79. Plaintiff Joseph Oncale was not required to present evidence that women at his worksite received more favorable treatment—nor could he have done so, given that

only men worked with him on the oil platform. *Id.* at 77. Nor did Mr. Oncale have to demonstrate that all other men were subjected to the same harassing treatment. Rather, he received protection from the harassment that he alone was subjected to as an individual. *Id.*

A few hypotheticals underscore this point: Had Price Waterhouse simultaneously denied partnership to a male colleague of Ann Hopkins because he was not "macho" or "manly" enough, their claims would not cancel each other out, as Defendant's logic suggests. Instead, both he and Ms. Hopkins would have stated independent Title VII claims against their employer. Similarly, if a female employee in Mr. Oncale's workplace had also been sexually harassed, *both* of them could seek relief under Title VII, rather than *neither* of them. Title VII would not permit an employer to "neutrally" fire every employee who was in an interracial relationship, *Holcomb v. Iona Coll.*, 521 F.3d 130, 138-39 (2d Cir. 2008); *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 891-92 (11th Cir. 1986), or to "neutrally" use racial epithets for every employee's race. Of course, if an employer's policy burdens one sex and not the other, that is one way to demonstrate a Title VII violation—but not the only way. It is thus well-established that, in applying Title VII, courts must focus on "fairness to individuals rather than fairness to classes," and Defendant's first argument fails on that basis. *Manhart*, 435 U.S. at 709; *see also Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001, 1012 (D. Nev. 2016) ("Title VII does not operate merely to keep men and women on an equal

footing, it protects people from all forms of sex stereotyping.") (quote omitted).[4]

Defendant's argument fails for another, more fundamental reason as well. Defendant's discriminatory exclusion does not in fact apply "neutrally" to both men and women. Def. Br., ECF No. 36 at 10. Instead, it subjects men and women to distinct sex-based requirements that are also grounded in stereotypes. Under the exclusion, employees assigned female at birth are restricted to stereotypes for women (*e.g.*, they must not eliminate their breasts to have a typically masculine chest), and employees assigned male at birth are restricted to stereotypes for men (*e.g.*, they must not have typically female organs, such as a vagina). In other words, a person assigned female at birth should not identify as male or have typically male sex characteristics, and a person assigned male at birth should not identify as female or have typically female sex characteristics. This violates Title VII.

Defendant also observes that not every transgender person will require any particular form of surgery. Def. Br., ECF No. 36 at 22-23 n.61. But the exclusion's discrimination against transgender people is not inoculated simply because it discriminates against some women (transgender women), but not all women, and some men (transgender men), but not all men. *Cf. Karnoski*, 926 F.3d at 1199 n.15 (finding discrimination despite military's argument that it "does not preclude service by *all*

[4] *Cf. Latta v. Otter*, 771 F.3d 456, 482-83 (9th Cir. 2014) (Berzon, J., concurring) (in the equal protection context, finding the argument that discriminatory terms apply equally to everyone revives the long-discredited reasoning of cases such as *Pace v. Alabama*, 106 U.S. 583 (1883), and *Plessy v. Ferguson*, 163 U.S. 537 (1896), which upheld anti-miscegenation and segregation rules respectively because they applied equally to African-American and white people).

transgender persons" and that a "subset of transgender persons" could still purportedly serve). Similarly, not every woman will become pregnant or have children, but that subset of women is equally protected from sex discrimination. *See Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (refusal to hire women with preschool-age children was facial sex discrimination); *see also Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1197-98 (7th Cir. 1971) (airline's policy of employing only subclass of unmarried female flight attendants violated Title VII). The same is true for the State's transgender employees who require surgical care.

B. Title VII's legislative history does not erase transgender people from its prohibition on sex discrimination.

"[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale*, 523 U.S. at 79. Defendant nonetheless points to the legislative history of Title VII to argue that the term "sex"[5] refers only to the "biological differences between males and females." Def. Br., ECF No. 36 at 10. But the Ninth Circuit expressly rejected that view in *Schwenk*, making clear that "'sex' under Title VII encompasses both sex—that is, the biological differences between men and women—*and* gender," including expectations and generalizations

[5] In support of this view, the State points to a dictionary definition of the term "sex" from 1963. Def. Br., ECF No. 36 at 10 n.29. But the uncited portions of the definitions in that very same dictionary show that the term had a much broader conception: "2. [t]he sum of the structural, functional, and behavioral peculiarities of living beings that … distinguish males and females." *Webster's New Collegiate Dictionary* 795 (7th ed. 1963), *available at* https://archive.org/details/webstersseventhn00unse/page/n821.

associated with one's birth-assigned sex. 204 F.3d at 1202. But even if "sex" did have a narrow meaning, denying medically necessary vaginoplasty and mammoplasty for those assigned male at birth while covering such care for those assigned female at birth is clear sex discrimination. *See Boyden v. Conlin*, 341 F. Supp. 3d 979, 995 (W.D. Wis. 2018).

The State next argues that, because Congress amended Title VII in 1978 to include pregnancy discrimination, it would have enacted a similar amendment had it intended for "sex" to also include gender identity. Def. Br., ECF No. 36 at 11. But Congress made clear that the amendment did not augment or expand the terms of Title VII, but rather corrected the Supreme Court's failure to appreciate Title VII's broad, remedial intent. The amendment repudiated the ruling that Title VII's protection from sex discrimination did not extend to pregnancy as a condition in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). The amendment clarified that "[b]y concluding that pregnancy discrimination is not sex discrimination within the meaning of Title VII, the Supreme Court disregarded the intent of Congress … to protect all individuals from unjust employment discrimination, including pregnant women." *Discrimination on the Basis of Pregnancy, 1977: Hearing on S. 995 Before the Subcomm. on Labor of the Senate Comm. on Commerce,* 95th Cong. 1 (1977), *available at* https://bit.ly/2meSlm9; *see also Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 679 (1983) ("Proponents of the bill repeatedly emphasized that the Supreme Court had erroneously interpreted Congressional intent …").

Similarly, the State notes that Congress has used the phrase "gender identity" in other contexts, while proposals to explicitly add "gender identity" to the text of Title VII

have not been enacted. Def. Br., ECF No. 36 at 11-12. But the use of "gender identity" in other, later legislation says nothing about the meaning of the term in 1964, "because legislatures may add such language to clarify or to settle a dispute about [a] statute's scope rather than solely to expand it." *Fabian v. Hosp. of Cent. Connecticut*, 172 F. Supp. 3d 509, 527 (D. Conn. 2016). Congress can adopt a belt-and-suspenders approach in which statutes contain overlapping provisions, *U.S. v. Carona*, 660 F.3d 360, 369 (9th Cir. 2011), as illustrated by the inclusion of both "sex" and "gender identity" in some statutes. The decision not to enact "gender identity" amendments does not say anything about "sex" for Title VII purposes, as "[c]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994) (internal quotation marks and citation omitted). "Congressional inaction cannot amend a duly enacted statute." *Id.* at 186 (quotations omitted).

Of course, ultimately it does not matter how broadly or narrowly sex is defined. If an employer makes a decision because of the sex it has ascribed to a person, the employer has made a decision "because of … sex." 42 U.S.C. § 2000e-2(a)(1). That alone answers the question, rendering irrelevant the debate about what sex meant in 1964.

C. The exclusion violates Title VII's prohibition on sex stereotyping.

Defendant claims that this case "does not fall under the gender stereotyping standard announced in *Price Waterhouse* [*v. Hopkins*, 490 U.S. 228 (1989)]," because there "is no claim that the State denied Plaintiff a promotion or subjected her to a hostile

work environment because she failed to 'act like a woman' or 'act like a man.'" Def. Br., ECF No. 36 at 13. But *Price Waterhouse* did not *create* Title VII's prohibition of sex-stereotyped discrimination, which derives instead from the broad, remedial purposes of the statute itself. *Fabian*, 172 F. Supp. 3d at 522. Anti-stereotyping protections thus cannot be limited to the facts at issue in *Price Waterhouse* itself.

As Plaintiff explained in her opening brief, the Ninth Circuit has already elucidated how to apply sex stereotyping protections to claims by transgender people in *Schwenk*. Pl. Br., ECF No. 28 at 19-21. Defendant nonetheless strains to distinguish *Schwenk* from this case. Def. Br., ECF No. 36 at 13-14. Defendant notes that *Schwenk* was "a prison sexual assault case" brought under the Gender Motivated Violence Act ("GMVA"), rather than Title VII. Def. Br., ECF No. 36 at 14. But *Schwenk* could not have been clearer that Title VII controlled its analysis, because "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." 204 F.3d at 1200-01. The Ninth Circuit then analyzed Crystal Schwenk's claims using Title VII as its guiding authority, and its reasoning thus binds this Court. *Id.* at 1201-02.

Defendant next suggests that the sex stereotyping analysis in *Schwenk* and *Price Waterhouse* does not apply because Ms. Fletcher has not shown discrimination based on a failure to "behave in accordance with an employer's expectations for men or women." Def. Br., ECF No. 36 at 14 (quote omitted). But that is indeed what this case is about. *Schwenk* itself helps illustrates this point: the prison guard's demands for sex "began only after he discovered that" Ms. Schwenk was transgender—*i.e.*, that she "considered

herself female" despite being assigned male at birth. 204 F.3d at 1202; *see also id.* (the guard's actions were thus motivated at least in part "by her assumption of a feminine … demeanor" rather than the "masculine … demeanor" typically associated with a male birth-assigned sex). Indeed, by definition transgender people are those "whose outward behavior and inward identity do not meet social definitions" associated with the sex assigned to them at birth. *Id.* at 1201. This describes Ms. Fletcher's claims too. Ms. Fletcher was denied coverage for this surgery because she is transgender—that is, because she identifies as female rather than with her birth-assigned sex. If Ms. Fletcher were a non-transgender woman, whose gender identity matched her birth-assigned sex, she would have been eligible to seek this care. Borelli Decl. Ex. C, ECF No. 32-4 at 10-11, Req. for Admis. 30; Borelli Decl. Ex. C, ECF No. 32-4 at 12, Req. for Admis. 34 (non-transgender women may obtain vaginoplasty and mammoplasty under AlaskaCare, but transgender women are denied coverage for gender-confirming surgery).

Ms. Fletcher thus is denied this care because she fails to conform to her employer's expectation that individuals should not surgically alter their body to match a gender different from their birth-assigned sex. *See Boyden*, 341 F. Supp. 3d at 997 (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"). This "entrenches" the sex-stereotyped "belief that transgender individuals must 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*.

Defendant nonetheless urges the Court to turn away from the Ninth Circuit's clear guidance on this analysis, and ignore *Schwenk*'s application of Title VII principles to transgender people, to instead apply *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir. 2006); Def. Br., ECF No. 36 at 13, 19. But *Jespersen* does not relate to transgender people at all, and instead involved sex-differentiated grooming standards for men and women. 444 F.3d at 1105-06. On a record devoid of any evidence showing that the grooming policy harmed anyone based on sex, the Court found that plaintiff could not prevail. *Id.* at 1109-11; *see also* Def. Br., ECF No. 36 at 17 (citing *Gerdom v. Cont'l Airlines, Inc.*, 692 F.2d 602, 605-06 (9th Cir. 1982), which observed in dicta that evenhanded grooming rules may be permissible). That could not be farther from this case. There is nothing evenhanded about the exclusion of care for transgender people, and the serious harms it inflicts on transgender people are both extensively documented and undisputed. Ms. Fletcher introduced evidence that denying transition-related care for gender dysphoria can impose extreme harm on transgender people, and that she herself suffered harm related to this denial of surgery. *See, e.g.*, Ettner Decl., ECF No. 30 ¶¶ 16, 18-19; Schechter Decl., ECF No. 31 ¶¶ 18-19; Fletcher Decl., ECF No. 29 ¶¶ 13-15. Defendant's effort to squeeze this case into the unsuited and irrelevant mold of *Jespersen* should be disregarded.[6]

[6] Defendant's reference to *Bauer v. Lynch*, 812 F.3d 340 (4th Cir. 2016), does not help its case. Def. Br., ECF No. 36 at 17 n.46; *id.* 19 n.52. *Bauer* involved a male plaintiff's challenge to differing physical fitness standards for men and women in the FBI Academy, accounting for typical strength-related differences between them. *Id.* at 343. *Bauer* does not discuss transgender people, let alone excuse discriminatory employment terms that target them. The standards challenged in *Bauer* were adopted to help ensure that women

The reality is that Defendant faces a wall of authority in the Ninth Circuit making clear that employer discrimination because an individual is transgender discriminates based on sex. *See, e.g.*, *Schwenk*, 204 F.3d at 1200-02; *Prescott v. Rady Children's Hosp.-San Diego*, 265 F. Supp. 3d 1090, 1099 (S.D. Cal. 2017) (concluding based on *Schwenk* that "discrimination on the basis of transgender identity is discrimination on the basis of sex"); *Stockman v. Trump*, No. EDCV171799JGBKKX, 2017 WL 9732572, at *15 (C.D. Cal. Dec. 22, 2017) (*Schwenk* "strongly suggested that discrimination on the basis of one's transgender status is equivalent to sex-based discrimination"); *Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001, 1014 (D. Nev. 2016) (concluding based on *Schwenk* that "gender-identity discrimination is actionable under Title VII"); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015) (concluding based on *Schwenk* that "discrimination against transgender individuals is a form of gender-based discrimination subject to intermediate scrutiny"); *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").[7]

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had equal access to FBI Academy training. *Id.* at 343-44. The exclusion here does the opposite, by strictly excluding transgender people from the surgical procedures available to others.

[7] The magistrate judge's report and recommendation in *Toomey v. Arizona*, No. 4:19-cv-00035-RM-LAB, ECF No. 46 (D. Ariz. June 24, 2019) ("*Toomey* slip op."), which recommends dismissal of a Title VII challenge to a health plan exclusion in Arizona, is an outlier and should not persuade this Court. Def. Br., ECF No. 36 at 17. The recommendation's suggestion that discrimination because a person is transgender is not

As Plaintiff explained in her motion for partial summary judgment, out-of-circuit decisions considering similar health care exclusions have concluded that they constitute unlawful sex discrimination. Pl. Br., ECF No. 28 at 22-23; *see also, e.g.*, *Flack v. Wisconsin Dep't of Health Servs.*, No. 18-CV-309-WMC, 2019 WL 3858297, at *10, 14-15 (W.D. Wis. Aug. 16, 2019) (granting summary judgment on plaintiffs' sex discrimination claims challenging exclusion of transition-related care from Wisconsin's Medicaid program); *Boyden*, 341 F. Supp. 3d at 995 (holding that exclusion of transition-related care constitutes sex discrimination under Title VII); *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). Defendant tries to distinguish these decisions by noting that they also involved other authorities, such as the equal protection clause or Affordable Care Act, 42 U.S.C. § 18116, et seq. Def. Br., ECF No. 36 at 16. While the burdens of proof and remedies may vary under other laws, the essence of what constitutes sex discrimination does not. *See, e.g.*, *Glenn v. Brumby*, 663 F.3d 1312, 1316-18 (11th Cir. 2011) (relying interchangeably on Title VII and equal protection authorities to rule for the transgender plaintiff).

Defendant also misunderstands the reference in Ms. Fletcher's brief to *Rosati v. Igbinoso*, 791 F.3d 1037 (9th Cir. 2015), which denied a motion to dismiss a prisoner's

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sex discrimination conflicts directly with the reasoning in *Schwenk*. *Toomey* slip op. 6. The plaintiff in *Toomey* has objected to the recommendation, *Toomey*, No. 4:19-cv-00035-RM-LAB, ECF No. 49 (D. Ariz. July 2, 2019), which remains pending *de novo* review by the district court.

claims challenging a denial of gender-confirming surgery. Def. Br., ECF No. 36 at 15. Plaintiff does not seek to "extend[] Eighth Amendment case law to [her] Title VII claim." Def. Br., ECF No. 36 at 15. Instead, *Rosati* demonstrates that the Ninth Circuit has already recognized that transition-related care can be medically necessary, even finding that denying such care can rise to the level of deliberate indifference in the Eighth Amendment context. 791 F.3d at 1040; Pl. Br., ECF No. 28 at 18. Since then, the Ninth Circuit has issued yet another ruling authoritatively establishing that fact: "As this and many other courts have recognized, [the prisoner plaintiff's] gender dysphoria is a sufficiently serious medical need to implicate the Eighth Amendment." *Edmo v. Corizon, Inc.*, --- F.3d ---, No. 19-35017, 2019 WL 3978329, at * 19 (9th Cir. Aug. 23, 2019). But no factual dispute exists on this point regardless—Defendant has already admitted that surgery can be necessary for gender dysphoria, and it is undisputed that it was medically necessary for Ms. Fletcher. *See, e.g.*, Answer, ECF No. 14 ¶¶ 26-27; Ettner Decl., ECF No. 30 ¶¶ 49, 53; Fletcher Decl., ECF No. 29 ¶¶ 13-15.

Finally, the fact that the State "covers other treatments for gender dysphoria," including "hormone therapy and counseling," strengthens rather than weakens Plaintiff's argument. Def. Br., ECF No. 36 at 13, 16, 23 n.61. "An employer that offers one fringe benefit on a discriminatory basis cannot escape liability because he also offers other benefits on a nondiscriminatory basis." *Arizona Governing Comm.*, 463 U.S. at 1082 n.10. The prison policies in *McQueen*, *Denegal*, and *Norsworthy* also provided hormone therapy for gender dysphoria, but those courts found that the refusal to provide surgery still discriminated against transgender prisoners. *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); *Denegal v. Farrell*, No. 115CV1251DADMJSPC, 2017 WL 2363699, at *4, 6-7 (E.D. Cal May 31, 2017), *report and recommendation adopted*, No. 115CV01251DADMJSPC, 2017 WL 4237099 (E.D. Cal. Sept. 25, 2017); *Norsworthy*, 87 F. Supp. 3d at 1109.

In fact, the State's coverage for this treatment underscores its recognition—confirmed in its binding admissions—that gender dysphoria is a well-recognized diagnosis for which treatment can be medically necessary. As Defendant admits, AlaskaCare "covers only those services and supplies that are medically necessary," Answer, ECF No. 14 ¶ 36—including the counseling and hormone therapy currently covered. Defendant further admits that "gender dysphoria is a recognized medical condition" that "can be treated," that this treatment "can be medically necessary," and that "surgical care [can] be medically necessary … [for] certain individuals" who are transgender. Answer, ECF No. 14 ¶¶ 15, 18, 26, 27. As the undisputed expert testimony establishes, there is no medical basis to categorically exclude surgical care for a diagnosis that *Defendant* agrees warrants medical treatment. Ettner Decl., ECF No. 30 ¶ 42; Schechter Decl., ECF No. 31 ¶ 39. Counseling and hormone therapy are not substitutes for surgical intervention where surgery is needed, Ettner Decl., ECF No. 30 ¶ 42, as Defendant acknowledges by conceding that "surgical care could be medically necessary to treat gender dysphoria in certain individuals." Answer, ECF No. 14 ¶ 26. The exclusion is thus both arbitrary as a matter of medicine, and invidious as a matter of law.

D. Defendant's attempt to recast the exclusion as "neutral," and Ms. Fletcher's claim as seeking "preferential treatment," must fail.

Defendant's attempt to camouflage the exclusion as neutral and generally applicable, purportedly like an exclusion for "gastric by-pass surgery," is not persuasive. Def. Br., ECF No. 36 at 17. A gastric by-pass surgery exclusion does not rest on any sex-based criteria—unlike the exclusion for surgery "related to changing sex or sexual characteristics" challenged here. Borelli Decl. Ex. G, ECF No. 32-8 (2018 plan, bates no. SOA 000560); Borelli Decl. Ex. H, ECF No. 32-9 (2019 plan, bates no. FLETCHER 003773). Whereas a gastric by-pass exclusion affects everyone—male or female, and regardless of whether they are transgender—in the same way, here the State admits that the exclusion "only affects transgender individuals," which is a sex-based classification for the reasons above. Borelli Decl. Ex. C, ECF No. 32-4 at 15-16, Req. for Admis. 44. The range of other exclusions listed in Defendant's statement of facts, such as exclusions for care relating to smoking, obesity, infertility, spinal disorders, and surgery to correct the outer ear, are irrelevant for the same reason. Def. Br., ECF No. 36 at 5-6.[8]

Defendant's reliance on *Saks v. Franklin Covey Co.*, 316 F.3d 337 (2d Cir. 2003), and *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674 (8th Cir. 1996), suffers from the

[8] Defendant claims that granting Plaintiff relief would lead to "absurd results," including that transgender women could receive chest reconstruction surgery while men are denied care for gynecomastia. Def. Br., ECF No. 36 at 23 n.62. But to the extent any such inconsistency exists, it is already part of the plan, separate and apart from Ms. Fletcher's claim. Under the current terms of the plan, non-transgender women can receive chest reconstruction surgery, while men are denied treatment for gynecomastia. Nothing about treating non-transgender and transgender women *equally* creates that supposed inconsistency. And to the extent the State deems surgery not medically necessary for gynecomastia, the State has admitted the opposite for the surgical care at issue here.

same analytical defect. Def. Br., ECF No. 36 at 20. *Saks* involved a challenge to an exclusion of coverage for surgical impregnation procedures. 316 F.3d at 341. Unlike Ms. Fletcher's case, *Saks* found that the exclusion failed to harm anyone differentially, because no one could receive coverage for surgical impregnation, regardless of whose underlying infertility created the need for it. *Id.* at 347; *see also id.* (finding that each plan participant is "equally disadvantaged by the exclusion"). *Krauel* is inapplicable for the same reason: no employee could receive coverage for infertility under the exclusion challenged there. 95 F.3d at 680; *see also* Def. Br., ECF No. 36 at 20-21 n.58 (citing *In re Union Pac. R.R. Employment Practices Litig.*, 479 F.3d 936, 938-39 (8th Cir. 2007) (contraception not covered for any employee)). The exclusion here, on the other hand, denies a specific class of employees surgical care that others receive based on explicitly sex-based criteria. Borelli Decl. Ex. F, ECF No. 32-7 (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"). Accordingly, cases involving challenges to exclusions that deny the relevant care to *everyone* shed no light here.

Defendant next suggests that Plaintiff's claim amounts to a request for "preferential" or "special" treatment, because Ms. Fletcher seeks care "not available to other members of the health plan." Def. Br., ECF No. 36 at 23-24. But that is like claiming that health coverage for an employee's same-sex spouse is "special treatment" because no heterosexual employee would seek coverage for same-sex spouse. Denying one class of employees the *same* health coverage others receive is not immunized simply

because others would not use that care for a same-sex spouse, or for gender transition. As the Ninth Circuit has instructed, discrimination based on transgender status, including because the individual needs transition-related health care, constitutes sex discrimination because transgender status is inherently a sex-based characteristic. *See* Sect. I(C), *supra*; Pl. Br., ECF No. 28 at 21. Stated differently, Defendant cannot justify the exclusion by claiming that it applies equally to a group for whom it has no application. The Supreme Court repeatedly has explained that the proper focus of the inquiry "is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2451 (2015) (internal quotation marks and citation omitted).

A related iteration of Defendant's argument posits that comparing non-transgender and transgender women is a "false equivalency" because transgender women need surgical care for a different diagnosis, *i.e.*, gender dysphoria. Def. Br., ECF No. 36 at 21. Importantly, however, the Ninth Circuit recently ruled that the denial of transition-related care to transgender people in the military—also to treat gender dysphoria—discriminates against them. *Karnoski*, 926 F.3d at 1199, 1201 (with limited exceptions, "transition-related medical care is … prohibited" for transgender people under the military ban; finding that heightened constitutional scrutiny must be applied to the ban). *Schwenk* also rejected an argument analogous to the one Defendant makes here. The prison guard argued there that an assault committed because the prisoner was transgender could not be sex discrimination because it was instead based on gender dysphoria, which he claimed was "not an element of gender." 204 F.3d at 1195. The Ninth Circuit rejected that

distinction, explaining that transgender individuals are people "whose outward behavior and inward identity do not meet social definitions" associated with their birth-assigned sex, *id.* at 1201, and "[d]iscrimination because one fails to act in the way expected of a man or woman is forbidden under" *Price Waterhouse* as impermissible sex discrimination, *id.* at 1202.

Additionally, the fact that this care is subject to a blanket denial *only* when it is needed for the purpose of transition demonstrates the sex discrimination inherent in the exclusion. By categorically excluding coverage on this basis, Defendant is impermissibly "insisting that [employees' anatomy] match[] the stereotype associated with their" sex assigned at birth, *Price Waterhouse*, 490 U.S. at 251, and imposing stereotypical notions of how sex organs and gender identity ought to align. Another way to understand this is as follows: under AlaskaCare, "if a natal female were born without a vagina, she could have surgery to create one," which would not be subject to the blanket exclusion. *Flack v. Wis. Dep't of Health Servs.*, 328 F. Supp. 3d 931, 948 (W.D. Wis. 2018). A "natal male suffering from gender dysphoria would be denied the same medically necessary procedure" under the exclusion. *Id.* The surgery is thus available if it *reaffirms* one's birth assigned sex, and is denied if it *diverges* from that birth-assigned sex. This is discrimination because of sex.

Defendant tries to gloss over its binding admissions and other evidence in the case that chest reconstruction surgery can be medically necessary for both non-transgender and transgender women, now suggesting that it is always a "cosmetic procedure." Def. Br., ECF No. 36 at 21 n.59, 22. But Defendant cannot walk away from its own binding

admissions, or contravene Plaintiff's unrebutted expert testimony to the contrary, especially by selectively cherry-picking statements on the topic (Def. Br., ECF No. 36 at 22, *id.* 22 n.61), while ignoring the expert testimony that Defendant left unrebutted. *See* Borelli Decl. Ex. C, ECF No. 32-4 at 10, Req. for Admis. 28-29 (Defendant's admission that mammoplasty or breast reconstruction surgery can be medically necessary for non-transgender women); Ettner Decl., ECF No. 30 ¶¶ 22, 29 (for some, "hormones alone will not provide sufficient breast development to approximate the female torso," and chest reconstruction surgery thus "has a dramatic, irreplaceable, and permanent effect on reducing gender dysphoria, and thus unquestionable therapeutic results"); Schechter Decl., ECF No. 31 ¶ 25 (chest reconstruction surgery is generally accepted in the medical community as medically necessary treatment for transgender women). Ms. Fletcher also introduced corroborating testimony about the medical necessity of chest reconstruction surgery for her. Fletcher Decl., ECF No. 29 ¶¶ 13-15. Defendant chose not to depose her or the two experts in this matter, or to introduce its own rebuttal expert testimony. Accordingly, the only evidence in the record on this issue establishes the medical necessity of this care.

Additionally, the discriminatory exclusion here is entirely separate from any provision excluding cosmetic care, and Ms. Fletcher was informed that she could not receive this care because it was not covered by her plan, not because it is purportedly "cosmetic." Pl. Br., ECF No. 28 at 15-16. Surgical treatment for transgender employees with gender dysphoria is entirely different from cosmetic surgery for non-transgender persons, since it is directed at changing primary and secondary sex characteristics to

resolve the clinically significant distress resulting from gender dysphoria. Ettner Decl., ECF No. 30 ¶¶ 39, 54; Schechter Decl., ECF No. 31 ¶¶ 20, 26-28. This is different from non-transgender persons seeking cosmetic surgery to "beautify" their bodies, since they have no similar medical need. Moreover, the benefits of surgery to treat gender dysphoria extend beyond improving a person's psychological well-being to include curing peoples' suicidal ideation and impulse to self-harm and allowing them to function in their daily lives at work, school, and in maintaining healthy relationships with family and friends. Ettner Decl., ECF No. 30 ¶¶ 18-19, 35-36, 49; Schechter Decl., ECF No. 31 ¶¶ 18, 33-34. Surgery to treat gender dysphoria can save peoples' lives; the same is not true for surgery to enhance a non-transgender person's self-image.

Similarly, Defendant invokes yet another clause that was not the basis for denying Ms. Fletcher's request for surgical care, *i.e.*, an exclusion for "alter[ing] the shape or appearance of a sex organ." Def. Br., ECF No. 36 at 23. Defendant suggests that this somehow uniquely applies to transgender people, as if non-transgender people who receive treatment for vaginoplasty are somehow not altering sex organs. To the extent that exclusion precludes cosmetic changes to sex organs, that has no application to medically necessary care for the treatment of gender dysphoria. Nor is there anything fundamentally different about the surgery that transgender and non-transgender women receive. Def. Br., ECF No. 36 at 23 (incorrectly suggesting that only non-transgender women receive treatment for vaginal prolapse). The undisputed expert testimony in this case shows, for example, that non-transgender women may also undergo vaginoplasty because they can suffer from "congenital absence of the vagina," like a transgender

woman. Schechter Decl., ECF No. 31 ¶ 31. Title VII does not allow an employer to cover this procedure for some but not others based on the judgment that only women assigned female at birth are deserving of it.

E. None of the State's other arguments defeat Ms. Fletcher's claims.

Defendant's remaining arguments amount to a series of attacks on straw men. Plaintiff's claim is not that "all possible treatments for gender transition must be provided." Def. Br., ECF No. 36 at 24; *id.* 21. Instead, her claims are tailored to procedures—vaginoplasty and chest reconstruction surgery—that are available to non-transgender women. Nor does Plaintiff argue that she has merely "been subjected to a discriminatory impact," Def. Br., ECF No. 36 at 24, since she has not raised a disparate impact claim here.

Ms. Fletcher does not argue that she should receive coverage simply because this care is medically necessary for her. Def. Br., ECF No. 36 at 24-25. That fact establishes her eligibility for this care, since the plan only covers medically necessary care, but she has never suggested that this fact alone translates into a Title VII violation. Ms. Fletcher does not disagree that a health plan can "exclude a treatment even if at times it can be considered medically necessary." Def. Br., ECF No. 36 at 24. A health plan simply cannot do so on the basis of sex—as the plan does here by excluding care when it is "related to changing sex or sexual characteristics." Borelli Decl. Ex. G, ECF No. 32-8 (2018 plan, bates no. SOA 000560); Borelli Decl. Ex. H, ECF No. 32-9 (2019 plan, bates no. FLETCHER 003773). For this reason, Defendant's case is not helped by its invocation of *Winters v. Costco Wholesale Corp.*, 49 F.3d 550 (9th Cir. 1995), which did

not involve a discrimination claim, but instead determined what a plan's own coverage terms required for infertility treatment under ERISA.[9] *Id.* at 551; Def. Br., ECF No. 36 at 25. There is nothing revelatory about Defendant's argument that health plans can maintain various exclusions of care that do not discriminate. Although true, that simply does not answer Ms. Fletcher's claim.

In a footnote, Defendant also attempts to resuscitate cost as a justification for its discrimination. Def. Br., ECF No. 36 at 24 n.66. But Ms. Fletcher has not merely "intimate[d]" that the costs of treating transgender people equally in group health plans are nominal, but rather has introduced unrebutted expert testimony on that point. Schechter Decl., ECF No. 31 ¶¶ 35-36; Ettner Decl., ECF No. 30 ¶ 43. Defendant introduced none, and in fact Defendant's own consultant reached the same conclusion. Borelli Decl. Ex. I, ECF No. 32-10 (bates nos. SOA 001257 - 001258). Additionally, Defendant says nothing to contravene the blackletter Title VII law establishing that, apart from a BFOQ, no justification can be offered for facial discrimination based on sex, and in any event, cost cannot supply such a justification regardless. Pl. Br., ECF No. 28 at 29-30.

Finally, Defendant suggests that Ms. Fletcher's case should be "dismissed" because the Supreme Court has granted a writ of certiorari in *R.G. & G.R. Harris Funeral Homes, Inc. v. E.E.O.C.*, 139 S. Ct. 1599 (2019). Def. Br., ECF No. 36 at 18. This is puzzling, given that the writ of certiorari was granted in April—well before Defendant

[9] ERISA refers to the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, et seq.

joined a stipulated request to set a briefing schedule for cross-motions for summary judgment and requesting oral argument on those motions. ECF No. 26. Review of the decision *Harris Funeral Homes* does not justify a stay, let alone "dismiss[al]" of Ms. Fletcher's claims, which should be adjudicated pursuant to the Ninth Circuit's operative and binding guidance in this area. *Schwenk*, 204 F.3d at 1200-02. Both parties agreed that the record was sufficiently developed for purposes of adjudicating Title VII liability, ECF No. 26, and nothing has changed since the parties began the summary judgment briefing to which they both stipulated. This case should proceed to decision.

CONCLUSION

For all the reasons above, Ms. Fletcher respectfully requests that the Court deny Defendant's Cross-Motion for Summary Judgment, and grant her Motion for Partial Summary Judgment by finding that the exclusion in Defendant's plan violates Title VII.

Dated: September 17, 2019

Respectfully submitted,

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CERTIFICATE OF LENGTH

In accordance with Local Civil Rule 7.4, and this Court's orders at Nos. 27, 34, I hereby certify that this document does not exceed 9,975 words.

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CERTIFICATE OF SERVICE

I hereby certify that on September 17, 2019, I electronically filed the foregoing document and any attachments with the Clerk of the Court by using the CM/ECF system, causing a copy of the foregoing document and any attachments to be served on all counsel of record.

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