

**STATE OF CONNECTICUT
COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES**

**IN RE: PETITION FOR DECLARATORY RULING REGARDING
HEALTH INSURERS' CATEGORIZATION OF CERTAIN GENDER CONFIRMING
SURGERIES AS COSMETIC**

**BRIEF OF INTERVENORS RYLIE ROBILLARD, GLBTQ LEGAL ADVOCATES &
DEFENDERS, NATIONAL CENTER FOR TRANSGENDER EQUALITY, AND
CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND**

INTRODUCTION

Gender dysphoria is a serious medical condition that requires treatment. People with gender dysphoria, however, continue to be subjected to pernicious discrimination in access to vital healthcare. Many insurance and employer-sponsored health benefit plans, for example, continue to deny coverage for medically necessary and recognized treatments, most notably facial feminization surgeries, breast augmentation, and other treatments that bring the body into congruence with a person's affirmed gender to eliminate gender dysphoria. *See, e.g.*, Petition for Declaratory Ruling Regarding Health Insurers' Categorization of Gender Confirming Surgeries as Cosmetic (the "Petition"), Exs. A, B, C, H & I. The categorical exclusion of these procedures as *per se* cosmetic, and therefore never medically necessary, is wholly out-of-step with authoritative medical standards of care and the significant and well-designed body of research establishing their efficacy in alleviating or eliminating gender dysphoria. The Intervenors Rylie Robillard, GLBTQ Legal Advocates & Defenders, National Center for Transgender Equality, and Connecticut Women's Education and Legal Fund (the "Intervenors") have separately filed the Affidavit of Randi Ettner, Ph.D. ("Ettner Aff."). Dr. Ettner's testimony describes why these procedures are essential components of comprehensive gender-confirming care and details the medical literature.

The Petition raises three questions about whether the State of Connecticut, municipalities, or insurers violate statutes enforced by the Commission by offering or administering insurance or benefit plans that deem facial feminization surgery and related procedures as *per se* cosmetic or otherwise not medically necessary. The categorical exclusion of accepted treatments for gender dysphoria facially discriminates on the basis of gender identity or expression, sex, and disability without justification in violation of Conn. Gen. Stat. § 46a-60(b)(1). *See* Argument I, *infra* (arguing that the Commission should answer Questions 1 and 2 in the affirmative). Because a ruling that self-funded employer plans may not lawfully contain those exclusions would end the denial of healthcare to transgender employees, the Commission need not address the third question related to the liability of insurers that sell or administer such plans. Nonetheless, if the Commission addresses that issue, insurers who sell or administer such plans violate Conn. Gen. Stat. §§ 46a-60(b)(1), 46a-60(b)(5), 46a-58(a) and 46a-64. *See* Argument II, *infra* (arguing that the Commission should answer Question 3 in the affirmative).

STATEMENT OF FACTS

A. Gender Identity and Gender Dysphoria.

Gender identity is a well-established concept in medicine, referring to one's internal psychological sense of their own gender. Ettner Aff. ¶ 4. At birth, infants are classified as male or female. Ettner Aff. ¶ 5. This classification becomes the person's sex assigned at birth. *Id.* An individual whose gender identity is different than their sex assigned at birth is transgender. Ettner Aff. ¶ 6. If unaddressed, the incongruence between a transgender person's sex assigned at birth and gender identity results in gender dysphoria, a serious medical condition characterized by significant and persistent distress and discomfort with one's sex assigned at birth. Ettner Aff. ¶ 7. The diagnostic criteria for gender dysphoria are set forth in the Diagnostic and Statistical Manual

of Mental Disorders (DSM-5) (302.85). Ettner Aff. ¶ 9. Without treatment, individuals with gender dysphoria experience a range of debilitating psychological symptoms, such as anxiety, depression, and suicidality. Ettner Aff. ¶ 10. In the absence of effective treatment, many people with gender dysphoria are unable to adequately function in occupational, social, or other areas of life, and experience stigmatization, social isolation, impaired self-esteem, and other mental health harms. *Id.*

B. The Purpose and Goals of Medical Treatment for Gender Dysphoria.

Gender dysphoria is highly treatable and can be ameliorated or cured through medical treatment. Ettner Aff. ¶ 11. There are internationally recognized and accepted standards of care for the treatment of gender dysphoria that are endorsed by authoritative professional medical associations, including the American Medical Association, American Psychological Association, and American Psychiatric Association. *Id.* These standards are the World Professional Association of Transgender Health (WPATH) *Standards of Care for the Health of Transsexual, Transgender and Gender Non-conforming People* (7th version) (hereinafter, the “Standards of Care”), published in 2011. Ettner Aff. ¶¶ 2, 11. Many transgender individuals undergo a medically indicated and supervised gender transition that involves one or more individually tailored components, namely: changes in gender expression and role, hormone therapy to feminize or masculinize the body, surgery to change primary and/or secondary sex characteristics, and psychotherapy. Ettner Aff. ¶ 12. As Dr. Ettner explained:

A key component of medical treatment for people with gender dysphoria is to live, function in society, and be regarded by others consistent with their gender identity. Because the essence of gender dysphoria is the incongruence of the body and one’s identity, the goal of gender transition is to establish an authentic appearance in a person’s affirmed gender in order to eliminate the debilitating symptoms of gender dysphoria. If this goal is impeded, it will undermine an individual’s core identity and psychological health.

Ettner Aff. ¶ 13.

Consistent with this goal, facial feminization surgery, breast augmentation, and related treatments that bring the body into congruence with an individual's affirmed gender are essential treatments for gender dysphoria. Ettner Aff. ¶ 3. With respect to facial features, there are recognized anatomic differences between people who were assigned male or female at birth and went through a typical puberty in that gender. Ettner Aff. ¶¶ 14-15 (describing differences and feminizing surgical procedures). These differences are related to bone structure, skin type, distribution of facial hair and fat, hairline shape, and prominence of the thyroid cartilage or Adam's apple. *Id.* For some patients, facial feminization surgeries "*may be the sole and most effective method of treating their gender dysphoria,*" Ettner Aff. ¶ 17 (emphasis added), and more important in terms of psychological adaptation than genital surgeries. Ettner Aff. ¶ 18. In addition to ameliorating the significant dysphoria many transgender women experience when they look in the mirror and see features strongly associated with being male, facial feminization, breast augmentation, and related procedures affect the social perception of gender that determines how a transgender person functions in the world. Ettner Aff. ¶¶ 17, 34-35. If an individual with gender dysphoria is being "misgendered" in their daily life, this will amplify their dysphoria and exacerbate psychological harm. Ettner Aff. ¶ 17.

Facial feminization surgery and related procedures are not only medically necessary in certain cases, they are also "often life-saving." Ettner Aff. ¶ 3. The inability to present an appearance others recognize as female often leads to social hostility and even violence. Ettner Aff. ¶ 17. Dr. Ettner described two particularly tragic instances of transgender patients who lacked access to gender-affirming treatments. They were regularly mistaken as having a gender consistent with their sex assigned at birth, which led to one suffering a violent assault and the

other dying by suicide. Ettner Aff. ¶ 37. The profound impact that marked masculine features can have on all aspects of life for transgender women has been extensively described in the peer-reviewed medical literature on the therapeutic goals of facial feminization surgery. Ettner Aff. ¶ 18 (quoting studies).

C. Facial Feminization Surgeries, Breast Augmentation and Related Procedures are Safe, Effective, Evidence-Based, and Medically Necessary in Accordance with Accepted Professional Standards of Care.

In 2016, WPATH, the authoritative source of standards for the treatment of gender dysphoria in the medical profession, issued a clarification of its 2011 guidelines which identified “medically necessary gender affirming/confirming surgical procedures,” including facial feminization surgery, breast augmentation, and voice therapy, and concluded that these procedures are not “cosmetic” or “elective.” World Prof’l Ass’n for Transgender Health, *Position Statement on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A.* 3 (2016); Ettner Aff. ¶ 36.

In fact, a review of the current scientific literature reflects a “robust body of research that these procedures alleviate or eliminate gender dysphoria.” Ettner Aff. ¶¶ 38, 19-35. The most recent literature review of the impact of facial feminization surgery conducted by Berli et al. in 2017 examined three retrospective cohort studies that used standard and reliable quantitative psychometric evaluations. Ettner Aff. ¶¶ 22-26. All of these studies demonstrated improved quality-of-life evaluation outcomes in physical, mental, and social functioning and patient satisfaction. *Id.* Berli et al. concluded that “[t]he current level of evidence is close to the maximal level of evidence that can be expected for a surgical procedure.” Ettner Aff. ¶ 26. Subsequently, two multi-center prospective studies in 2017 and 2019 provided evidence of additional significance that facial feminization surgery produces “improved quality of life outcomes.”

Ettner Aff. ¶¶ 27 (describing studies) and 30 (explaining value of prospective studies). Further, a groundbreaking study in 2020 using artificial intelligence found that images of transgender women prior to facial feminization surgery were misidentified as male 47% of the time, but after facial feminization surgery were correctly identified 98% of the time, the same rate as for non-transgender female control images. Ettner Aff. ¶ 28. “The growing assemblage of well-designed research documents the efficacy of facial feminization surgery as treatment for gender dysphoria and is consistently statistically significant and irrefutable.” Ettner Aff. ¶ 30. No study of facial feminization surgery has refuted its positive impact on treatment of gender dysphoria in appropriate cases. Ettner Aff. ¶ 33. Studies of breast augmentation for transgender women who have had insufficient breast development from hormone therapy establish similar positive results. Ettner Aff. ¶ 34 (describing literature review and prospective study demonstrating improved psychosocial well-being in transgender women for whom breast augmentation is necessary to establish a female appearance).

In addition to efficacy, the evidence demonstrates that facial feminization, breast augmentation, and related procedures are safe and have exceedingly low complication rates. Ettner Aff. ¶¶ 27, 31, 32, 34. In fact, the procedures used as part of facial feminization surgery, breast augmentation, and related procedures include many of the same interventions used to treat other medical conditions. Ettner Aff. ¶ 32 (describing uses for other diagnoses). The fact that these analogous procedures are routinely performed and considered safe in medicine provides evidence that they are also safe when used for treatment of gender dysphoria. *Id.*

D. Facial Feminization Surgery, Breast Augmentation, and Related Procedures are Not Cosmetic When Undertaken to Treat Gender Dysphoria.

No treatment, when used for the purpose of treating gender dysphoria, can be categorically deemed cosmetic. Ettner Aff. ¶ 16. These procedures do not have the goal of enhancing beauty or appearance; rather, when undertaken to treat gender dysphoria, they are clinically indicated by medical consensus for purposes of treatment. *Id.* The underlying medical diagnosis and the goal of treatment in accordance with accepted medical standards establish the medical necessity. *Id.* As with all medical care, the medical necessity of a therapy must be assessed on a case-by-case basis depending on the severity and presentation of a person’s gender dysphoria. Ettner Aff. ¶ 35.

ARGUMENT

I. STATE OR MUNICIPAL EMPLOYER-SPONSORED HEALTH PLANS THAT EXCLUDE TREATMENTS FOR GENDER DYSPHORIA VIOLATE CONN. GEN. STAT. § 46A-60 BECAUSE THEY DISCRIMINATE ON THE BASIS OF GENDER IDENTITY OR EXPRESSION, SEX, AND DISABILITY.

The categorical exclusion of coverage of certain treatments for gender dysphoria—because such treatments are deemed *per se* “cosmetic” or otherwise deemed not medically necessary—violates Conn. Gen. Stat. § 46a-60(b)(1) because it facially discriminates on the basis of sex, gender identity or expression, and disability status, without any legitimate justification. *See* § A, *infra*. Such exclusions purposefully deny coverage of medically necessary care for gender dysphoria, while covering the medically necessary care of other health conditions. The same is true when a health benefit plan excludes coverage of certain medically necessary procedures for the treatment of gender dysphoria, while covering the *same* procedures for the treatment of other diagnoses. *See* § B, *infra*. In either case, coverage of medically

necessary care would not have been denied but for the person’s sex, gender identity or expression, and disability status, in violation of Conn. Gen. Stat. § 46a-60(b)(1). Such exclusions contradict a robust body of scientific and clinical evidence, and can only be explained by myths, fears, stereotypes, and bias toward those who need a stigmatized form of healthcare.

A. State and Municipal Employer-Sponsored Health Benefit Plans that Categorically Exclude Treatments for Gender Dysphoria Facially Discriminate on the Basis of Sex, Gender Identity or Expression, and Disability.

Conn. Gen. Stat. § 46a-60(b)(1) prohibits an employer¹ from discriminating against an employee “in compensation or in terms, conditions or privileges of employment . . . because of the individual’s . . . sex, gender identity or expression . . . mental disability . . . [or] physical disability.” The statutory language plainly prohibits discrimination against transgender people and people with gender dysphoria. *See* §§ 1, 2, and 3, *infra*, addressing the scope of gender identity or expression, sex, and disability antidiscrimination protections.

The illustrative policies identified in the Petition categorically exclude facial feminization surgeries, breast augmentation, and other similar transition-related treatments for gender dysphoria. *See, e.g.*, Anthem BlueCrossBlueShield policy, Petition, Ex. A (excluding treatments “considered cosmetic when used to improve the gender specific appearance of an individual who has undergone or is planning to undergo sex reassignment surgery”); UnitedHealthcare/Oxford policy, Petition, Ex. B (excluding procedures considered “cosmetic and not medically necessary when performed as part of gender reassignment”); Regence policy, Petition, Ex. C (excluding facial feminizing and other procedures “considered not medically necessary for gender dysphoria”); State of Connecticut Employee Plan, Petition, Ex. H (excluding surgeries

¹ An employer includes the state or a political subdivision. Conn. Gen. Stat. § 46a-51(10).

“considered cosmetic when used to improve the gender specific appearance of an individual who has undergone or is planning to undergo gender reassignment”); University of Connecticut Student Plan, Petition, Ex. I (excluding “[c]osmetic procedures related to Gender Reassignment”). These categorical exclusions of coverage of certain treatments for gender dysphoria (the “Exclusions”) facially discriminate on the basis of gender identity or expression, sex, and disability status in violation of Conn. Gen. Stat. § 46a-60(b)(1). “A policy is facially discriminatory and constitutes direct evidence when the terms of the policy classify employees based upon their protected trait.” *EEOC v. Hickman Mills Consol. Sch. Dist. No. 1*, 99 F. Supp.2d 1070, 1076 (W.D. Mo. 2000) (granting summary judgment for plaintiff in claim challenging public school district’s facially discriminatory age-based retirement benefits policy); *see also New Directions Treatment Servs. v. City of Reading*, 490 F.3d 293, 304 (3d Cir. 2007) (holding that Pennsylvania zoning law that “facially singles out methadone clinics, and thereby methadone patients, for different treatment, thereby render[s] the statute facially discriminatory”).

1. Gender Identity Discrimination

The Exclusions facially discriminate on the basis of gender identity or expression for two reasons. First, the Exclusions deny coverage of medically necessary care to transgender people.²

² Discrimination against transgender people—that is, those whose gender identity is different from their sex assigned at birth—is plainly discrimination based on “gender identity or expression” under Conn. Gen. Stat. § 46a-60 and § 46a-51(21) (defining “gender identity or expression”). *See also* Ettner Aff. §§ 6 and 8; *Good v. Iowa Dep’t of Human Servs.*, 924 N.W.2d 853, 862 (Iowa 2019) (a “gender identity classification encompasses transgender individuals—especially those who have gender dysphoria—because discrimination against these individuals is based on the nonconformity between their gender identity and biological sex”). The legislative history of Public Act 11-55, An Act Concerning Discrimination, underscores the purpose to eliminate discrimination against transgender people. *See, e.g.*, Conn. Gen. Assemb., Senate Session Transcript at 267 (June 3, 2011) (statement of Sen. Bye) (stating that prohibition against discrimination based on gender identity provides “protections for people who are transgender”).

Only transgender people experience, and seek treatment for, gender dysphoria. Thus, the exclusion of various treatments for gender dysphoria targets transgender people. As one court explained, the exclusion of transition-related care “negatively impacts those, and only those, who do not conform to the gender identity typically associated with the sex they were assigned at birth . . . No cisgender person would seek, or medically require, gender reassignment. Therefore, as a practical matter, the exclusion singles out transgender individuals for different treatment.” *Toomey v. Arizona*, 2019 U.S. Dist. LEXIS 219781, at *18 (D. Ariz. Dec. 20, 2019) (order denying defendants’ motion to dismiss); *see also Good*, 924 N.W.2d at 862-863 (“[T]he rule expressly excludes Iowa Medicaid coverage for gender-affirming surgery specifically because this surgery treats gender dysphoria for transgender individuals . . . [but] the legislature specifically made it clear that individuals cannot be discriminated against on the basis of gender identity”).

Second, the Exclusions target treatments that bring one’s secondary sex characteristics into alignment with one’s gender identity. *See Ettner Aff.* ¶ 12. The categorical exclusion of treatments that align sex characteristics with gender identity is, by definition, discrimination based on gender identity or expression.

2. Sex Discrimination

By targeting transgender people and the treatments that transgender people undergo to change their secondary sex characteristics, the Exclusions also facially discriminate on the basis of sex. This Commission has already ruled in a groundbreaking decision in 2000 that transgender people are covered by the prohibition on sex discrimination in state antidiscrimination law. Declaratory Ruling on Behalf of John/Jane Doe (Conn. Comm’n Human Rights & Opportunities Nov. 9, 2000), at <https://www.ct.gov/chro/cwp/view.asp?a=2526&Q=315942>. In *Doe*, the

Commission examined federal precedents, including *Price-Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and concluded that the inclusion of transgender people within the scope of state sex discrimination law is “more in keeping with the letter and spirit of Connecticut antidiscrimination law than the more restrictive interpretations found in earlier cases.” *Doe* at ¶ 34.³ See also *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp.3d 509, 527 & n.12 (D. Conn. 2016) (“conclud[ing] that discrimination on the basis of transgender identity is cognizable” under the Connecticut Fair Employment Practices Act and stating that “[t]he fact that the Connecticut legislature added . . . ‘gender identity or expression’ to the list of protected classes . . . does not require the conclusion that gender identity was not already protected by the plain language of the statute”).

³ The Supreme Court recently granted a petition for writ of certiorari, and heard oral argument, to decide “[w]hether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*.” *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, 139 S. Ct. 1599, 1599 (2019) (granting certiorari). That grant and any subsequent decision from the Supreme Court does not affect the *Doe* ruling, which was based on the Commission’s assessment of the scope and meaning of state law and a rejection of more restrictive interpretations. Further, as the Commission noted, the Connecticut Supreme Court has observed “that the [Connecticut Fair Employment Practice Act] is in many respects stronger than” federal law. See Declaratory Ruling on Behalf of John/Jane Doe (Conn. Comm’n Human Rights & Opportunities Nov. 9, 2000), at <https://www.ct.gov/chro/cwp/view.asp?a=2526&Q=315942>, quoting *Evening Sentinel v. Nat’l Org. for Women*, 168 Conn. 34, 35 n. 5 (1975), and other cases cited therein. See also *Graham v. State of N.Y., Dep’t of Civil Serv.*, 907 F.2d 324, 327 (2d Cir. 1990) (“While the court noted the similarities between Title VII and the Connecticut law, it also acknowledged the state statute contemplates broader relief than its federal counterpart.”) (interpreting Title VII and distinguishing Connecticut law); *State v. Comm’n on Human Rights & Opportunities*, 211 Conn. 464, 470 (1989) (“Although we are not bound by federal interpretation of Title VII provisions, ‘[w]e have often looked to federal employment discrimination law for guidance in enforcing our own antidiscrimination statute’ . . . Nevertheless, we have also recognized that, under certain circumstances, federal law defines ‘the beginning and not the end of our approach to the subject.’”) (quoting from *Dep’t of Health Serv. v. Comm’n on Human Rights & Opportunities*, 198 Conn. 479, 489, 503 (1986); *Evening Sentinel v. Nat’l Org. for Women*, 168 Conn. 26, 34-35 n.5, (1975)); *Gaither v. Stop & Shop Supermarket Co. LLC*, 84 F. Supp. 3d 113, 117 (D. Conn. 2015); *Murphy v. Robert Burgess & Norwalk Econ. Opportunity Now, Inc.*, 1997 U.S. Dist. LEXIS 22750, at *4 (D. Conn. July 16, 1997); *Comm’n on Human Rights and Opportunities v. Savin Rock Condominium Ass’n, Inc.*, 273 Conn. 373, 386 (2005).

Since 2000, the view that sex discrimination provisions prohibit discrimination against transgender people - the interpretation adopted by this Commission - has become the prevailing view among federal courts.⁴ Several federal courts have ruled that exclusions of transgender-related healthcare in state Medicaid plans or, as here, employer-sponsored plans, discriminate on the basis of sex. These courts, and numerous decisions in different contexts, have held that discrimination based on transgender status is inherently linked to a person's sex and is based on impermissible gender stereotyping. *See, e.g., Toomey*, at *16 (in challenge to exclusion of treatments for gender reassignment in employer plan, the court concluded that “[t]he sex characteristic is inseparable from transgender identity: had Plaintiff been born a male, rather than a female, he would not suffer from gender dysphoria and would not be seeking gender reassignment”); *Flack v. Wis. Dept. of Health Servs.*, 328 F. Supp. 3d 931, 937-951 (W.D. Wis. 2018) (preliminarily enjoining categorical exclusion of coverage for medically prescribed “transsexual surgery” and concluding that the exclusion prevents “[plaintiffs] from getting medically necessary treatments on the basis of their natal sex *and* transgender status, which surely amounts to discrimination on the basis of sex”) (emphasis in original); *Tovar v. Essentia Health*, 342 F. Supp. 3d 947, 952 (D. Minn. 2018) (in challenge to categorical exclusion of health services related to gender transition, the court noted that Title VII included a cause of action for discrimination based on gender identity and gender transition); *Boyden v. Conlin*, 341 F. Supp. 3d 979, 997 (W.D. Wis. 2018) (“[W]hether because of differential treatment based on natal sex, or because of a form of sex stereotyping where an individual is required effectively to

⁴ The Sixth, Seventh, Ninth, and Eleventh Circuits have ruled that, under Title VII discrimination on the basis of transgender identity is discrimination on the basis of sex. *See EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 577 (6th Cir. 2018), *petition for cert. granted*, 139 S. Ct. 1599, 1599 (2019); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. Of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017); *Schwenk v. Hartford*, 204 F.3d 1187, 1200, 1206 n. 12 (9th Cir. 2000); *Glenn v. Brumby*, 663 F. 3d 1312, 1316-19 (11th Cir. 2011).

maintain his or her natal sex characteristics, this Exclusion on its face treats transgender individuals differently on the basis of sex.”)

3. Disability Discrimination

The categorical exclusion of certain treatments for gender dysphoria also facially discriminates based on disability. Gender dysphoria is both a “mental disability” and a “physical disability” for purposes of Connecticut’s employment nondiscrimination statute. *See* Conn. Gen. Statute § 46a-60(b)(1) (prohibiting discrimination on the basis of “mental disability” and “physical disability”).⁵ Health benefit plans that categorically exclude treatments for gender dysphoria deny medically necessary care to people with this disability; all others receive medically necessary care. This is disability discrimination. *See, e.g., Henderson v. Bodine Aluminum, Inc.*, 70 F.3d 958, 960 (8th Cir. 1995) (granting preliminary injunction to provide coverage for cancer treatment, and concluding that where “the evidence shows that a given treatment is non-experimental—that is, if it is widespread, safe, and a significant improvement on traditional therapies—and the plan provides the treatment for other conditions directly comparable to the one at issue, the denial of that treatment arguably violates the ADA”); *Carparts Distribution Center, Inc. v. Automotive Wholesaler’s Ass’n of New England, Inc.*, 37 F.3d 12, 14-16 (1st Cir. 1994) (holding that caps on AIDS-related care in employer-provided health plan could constitute discrimination under ADA); *Fletcher v. Tufts University*, 367 F.

⁵ Compare *id.* § 46a-51(20) (defining “mental disability” in reference to conditions covered in the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders), and *Comm’n on Human Rights & Opportunities v. Hartford*, 138 Conn. App. 141, 161–62 (2012) (approving of referee’s finding that gender dysphoria was mental disability within meaning of § 46a–51(20) because it appeared in DSM), *cert. denied*, 307 Conn. 929 (2012), with Conn. Gen. Statute § 46a–51 (15) (“‘Physically disabled’ refers to any individual who has any chronic physical handicap, infirmity or impairment, whether congenital or resulting from bodily injury, organic processes or changes or from illness.”), and *Comm’n on Human Rights & Opportunities v. City of Hartford*, 2010 Conn. Super. LEXIS 2727 at *9 n.10 (Conn. Super. Ct. Oct. 27, 2010) (holding that gender dysphoria “satisfies the statutory requirements for a physical disability under the Connecticut Fair Employment Practices Act”).

Supp. 2d 99, 104 (D. Mass. 2005) (holding that plaintiff stated claim that employer violated ADA by adopting and maintaining a health plan that provided inferior benefits to people with mental health conditions).

In sum, the Exclusions facially discriminate on the basis of gender identity or expression, sex, and disability status without any legitimate justification. The assertion that facial feminization surgery, breast augmentation, and related treatments are *per se* cosmetic reveals a fundamental misunderstanding of the treatment goals for gender dysphoria and, in particular, the vital imperative to avoid the stresses and risks associated with constant misidentification of a person's gender in everyday life. *See* Ettner Aff. ¶¶ 13-14, 16-17. It also ignores authoritative medical guidance and the “well-designed” and “consistently statistically significant and irrefutable” research establishing the efficacy of these treatments for gender dysphoria. *See* Ettner Aff. ¶ 36 (WPATH statement), and ¶¶ 30, 3, 34, and 38. Claims that the current research is inadequate because it is limited to case series studies, it does not include prospective research designs, or it fails to describe the impact of such procedures on gender dysphoria symptoms, reveal a lack of up-to-date knowledge of the research literature. In fact, the Ettner Affidavit details the copious research that satisfies all of these criteria and has been assessed as close to the maximal level of evidence for surgical procedures. *See* Ettner Aff. ¶¶ 22-28, 31-34.

B. State and Municipal Employer-Sponsored Health Benefit Plans that Exclude Coverage of Certain Procedures for the Treatment of Gender Dysphoria, While Covering the Same Procedures for the Treatment of Other Medical Conditions, Facially Discriminate on the Basis of Sex, Gender Identity, and Disability.

A health benefit plan's categorical exclusion of coverage of certain medically necessary procedures for the treatment of gender dysphoria, while covering the *same* procedures for the treatment of other health conditions, likewise facially discriminates on the basis of gender

identity, sex, and disability status in violation of Conn. Gen. Stat. § 46a-60(b)(1). Such health benefit plans discriminate not only because they purposefully deny coverage of medically necessary care for gender dysphoria for the reasons discussed in Section A, *supra*, but also because they purposefully deny coverage for certain medically necessary procedures used to treat gender dysphoria while covering the *same* procedures when they are used to treat other medical conditions. This is flagrant discrimination.

As Dr. Ettner explained, the procedures used as part of facial feminization surgery and other treatments, such as breast augmentation, include many of the same procedures used to treat other conditions. These include treatments used to correct droopy eyes that interfere with vision, facial reconstruction after cancer surgery or traumatic accident, or breast reconstruction following a medically indicated mastectomy. Ettner Aff. ¶ 32. By targeting transgender people and the procedures that transgender people undergo to change their secondary sex characteristics, while covering the same procedures for the treatment of other medical conditions, a health benefit plan plainly discriminates based on gender identity and sex. As the *Toomey* court reasoned:

The Plan at issue covers cisgender individuals requiring medically necessary hysterectomies but does not cover transgender individuals requiring medically necessary hysterectomies for the purpose of gender reassignment. Had Plaintiff required a hysterectomy for any medically necessary purpose other than gender reassignment, the Plan would have covered the procedure. This narrow exclusion of coverage for ‘gender reassignment surgery’ is directly connected to the incongruence between Plaintiff’s natal sex and his gender identity.

Toomey at *16-17. Similarly, the court in *Flack* observed that doctors recommend many of the same procedures for gender dysphoria that they use to treat other medical conditions and found sex discrimination because “if plaintiffs’ natively assigned sexes had *matched* their gender

identities, their requested, medically necessary surgeries to reconstruct their genitalia or breasts would be covered.” *Flack* at 948 (emphasis in original).⁶

Similarly, these exclusions also constitute discrimination on the basis of disability. Where a medically necessary procedure is covered for people with a range of diagnoses, but not when the diagnosis is gender dysphoria, the exclusion turns on the diagnosis of gender dysphoria.

In sum, the Commission should answer Questions 1 and 2 of the Petition in the affirmative. Employers that offer benefit plans that exclude treatments for gender dysphoria, or that cover procedures for certain diagnoses, but not when medically necessary for gender dysphoria, discriminate on the basis of sex, gender identity or expression, and disability in violation of Conn. Gen. Stat. § 46a-60(b)(1).

II. AN INSURER THAT SELLS HEALTH INSURANCE PLANS TO THE STATE AND/OR ITS MUNICIPALITIES CAN BE SUBJECT TO LIABILITY FOR ENGAGING IN DISCRIMINATORY PRACTICES IN VIOLATION OF VARIOUS STATUTES ENFORCED BY THE COMMISSION.

For the reasons set forth in Section I, *supra*, it is clear that both the State and its municipalities engage in discriminatory practices in violation of Connecticut law by offering and administering insurance plans that deny coverage for certain treatments for gender dysphoria.

⁶ See also *Cruz v. Zucker*, 195 F. Supp. 3d 554, 576–77 (S.D.N.Y. 2016) (holding that an exclusion that denied transgender patients certain procedures, including facial feminization surgery and breast augmentation, while allowing them for non-transgender patients, violated the Medicaid Comparability Provision); *Denegal v. Farrell*, 2016 U.S. Dist. LEXIS 88937, at *19 (E.D. Cal. July 8, 2016) (concluding that plaintiff’s equal protection claim survived a motion to dismiss where defendant allowed vaginoplasty for cisgender women but not transgender women without a legitimate state purpose); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1120–21 (N.D. Cal. 2015) (holding that plaintiff stated claim for violation of equal protection based on gender classifications that made it more difficult for transgender inmates to receive vaginoplasty than their cisgender peers); *Fields v. Smith*, 712 F. Supp. 2d 830, 867 (W.D. Wis. 2010) (upholding an equal protection challenge, both facially and as applied, to the Wisconsin Department of Correction’s policy of denying hormone therapy to treat gender identity disorder while allowing it to treat other conditions); *Minton v. Dignity Health*, 39 Cal. App. 5th 1155, 1162–63 (2019) (holding that plaintiff stated claim for gender identity discrimination where “[a hospital] allows doctors to perform hysterectomies as treatment for other conditions but refused to allow [a doctor] to perform the same procedure as treatment for . . . gender dysphoria.”)

Petition, Questions 1 and 2. For that reason, it is not essential for the Commission to consider its third question as to whether the insurers who devise, sell, and administer these governmental plans also engage in discriminatory practices in violation of Connecticut law. *Id.*, Question 3. Nonetheless, it is worthwhile to briefly note that these insurers also do, in fact, face exposure to liability under various Connecticut statutes enforced by the Commission. Three theories support these insurers' liability.

A. Employment Discrimination: Conn. Gen. Stat. §46a-60.

As noted above, Conn. Gen. Stat. § 46a-60(b)(1) provides that it “shall be a discriminatory practice . . . [f]or an employer, by the employer or the employer’s agent . . . to discriminate against such individual in compensation or in terms, conditions or privileges of employment because of the individual’s . . . sex, gender identity or expression . . . mental disability . . . [or] physical disability.”⁷ *Id.*

In addition, it “shall be a discriminatory practice . . . [f]or any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any act declared to be a discriminatory employment practice or to attempt to do so.” Conn. Gen. Stat. §46a-60(b)(5).

These insurers face potential liability under either of these provisions.

1. The Insurers are Liable as Agents of the Governmental Employers.

Connecticut “look[s] to federal law for guidance on interpreting state employment discrimination law,” *see Feliciano v. AutoZone, Inc.*, 316 Conn. 65, 73 (2015), but often defines Connecticut law more broadly. *See* n. 3, *supra*. As with Connecticut law, Title VII and the ADA

⁷ Under the Connecticut employment discrimination law, “employer” is defined to “include[] the state and all political subdivisions thereof.” Conn. Gen. Stat. §46a-51(10).

apply “to any agent of a covered employer.” *L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 718 n.33 (1978) (quoting Title VII, 42 U.S.C. § 2000e(b)); *see also* 42 U.S.C § 12111(5)(A) (ADA).

Under federal law, federal courts have consistently held that insurer/administrators can be held liable for discriminatory insurance policies that they administer as elements of employee benefit plans. *See, e.g., Carparts*, 37 F.3d at 17 (holding that administrators of self-funded health plan could be liable under ADA as agents “who act on behalf of the entity in the matter of providing and administering employee health benefits”)⁸; *Spirt v. Teachers Ins & Annuity Ass’n*, 691 F.2d 1054, 1063 (2d Cir. 1982) (holding that defendants, who managed retirement plans for colleges and universities, were are liable as agents under Title VII because “exempting plans not actually administered by an employer would seriously impair the effectiveness of Title VII” and because the Supreme Court’s decision in “*Manhart* would seem to compel a finding that delegation of responsibility for employee benefits cannot insulate a discriminatory plan from attack under Title VII”); *Brown v. Bank of Am., N.A.*, 5 F. Supp. 3d 121, 130, 134-135 (D. Me. 2014) (denying motion to dismiss ADA claim against third-party benefits administrator and discussing “agent” theory of liability); *Boots v. Northwestern Mut. Life Ins. Co.*, 77 F. Supp. 2d 211, 214 (D.N.H. 1999) (denying motion to dismiss ADA claim against third-party administrator of a long-term disability policy and stating that “an employer cannot insulate a discriminatory plan from attack simply by delegating its responsibility for employee benefits”); *Petty v. El*

⁸ *Carparts* was an action under the Americans with Disabilities Act (ADA) that, like Title VII, applies to agents of covered employers. *Carparts*, 37 F.3d at 17 n.7. “Just as ‘delegation of responsibility for employee benefits cannot insulate a discriminatory [retirement benefits] plan from attack under Title VII,’ [*Spirt v. Teachers Ins. & Annuity Ass’n*, 691 F.2d 1054, 1063 (2d Cir. 1982)], neither can it insulate a discriminatory health benefits plan under Title I of the ADA. *See id.* (recognizing that ‘exempting plans not actually administered by an employer would seriously impair the effectiveness of Title VII’).” *Carparts*, 37 F.3d at 17-18.

Dorado Eng'g, 1996 U.S. Dist. LEXIS 5981 at *7-*8 (E.D. La. April 19, 1996) (same); *see also Manhart*, 435 U.S. at 718 n. 33 (noting that “of course . . . an employer can[not] avoid his responsibilities by delegating discriminatory programs to corporate shells. Title VII applies to ‘any agent’ of a covered employer . . .”).⁹

For the previously discussed reasons, *see* Argument I, *supra*, an insurer’s exclusion of coverage of medically necessary care for gender dysphoria constitutes employment discrimination under Conn. Gen. Stat. § 46a-60 based on sex, gender identity or expression, and mental and physical disability. In applying §46a-60(b)(1) to insurer/administrators of employee benefit plans, the Commission would be following the federal law’s lead in holding insurers liable as agents of employers.

2. The Insurers are Aiding or Abetting the Discriminatory Actions of the Governmental Employers.

As noted above, Conn. Gen. Stat. §46a-60(b)(5) also applies to “any person, whether an employer or an employee or not.”¹⁰ Liability then turns on whether that person has aided or abetted “the doing of any act declared to be a discriminatory employment practice.” *Id.* As such, liability is derivative of an underlying discrimination claim alleged to have been committed by the principal offender. *See generally Lopez v. Commonwealth*, 463 Mass. 696, 713 (2012); *Rentz v. Cartwright P’ship*, 2004 Conn. Super. LEXIS 3282 at *12-*14 (Conn. Super. Ct., Nov. 23,

⁹ The EEOC has concluded that health insurers that administer employer-sponsored health insurance plans are agents of the employer and thus liable under Title I of the ADA: “[A]n insurance company that provides discriminatory benefits to the employees of [a separate entity] may be liable under the [equal employment opportunity] statutes as the [employer]’s agent.” *See* EEOC Compliance Manual, No. 915.003, 2-III(B)(2)(b) (May 12, 2000), <https://www.eeoc.gov/policy/docs/threshold.html>.

¹⁰ Under the Connecticut employment discrimination law, “person” is defined to include corporations along with individuals and various other entities. Conn. Gen. Stat. §46a-51(14).

2004) (implicitly applying the same principle).¹¹ Even if insurers are not liable as agents of the employers, *see supra* Section II (A)(1), insurers aid or abet the employers' underlying discriminatory employment practices, namely, the exclusion of coverage of medically necessary care for gender dysphoria, as discussed in Sections I and II above.

In considering whether a person has aided or abetted a discriminatory act, courts consider whether the person "ratified, endorsed, and perpetrated" such an act. *Bogdahn v. Hamilton Std. Space Sys. Int'l, Inc.*, 46 Conn. Super. Ct. 153, 159 (199). In *Bogdahn*, in the context of a workplace sexual harassment claim, the court held that there were sufficient, specific allegations of aiding and abetting based on asserted employer and other employees' actions that "ratified, endorsed and perpetrated" another employee's harassing conduct. *Id.* at 159; *see also Wasik v. Stevens Lincoln-Mercury, Inc.*, 2000 U.S. Dist. LEXIS 15438, at *24 (D. Conn. March 20, 2000) (observing that "[b]y its plain language, [§46a-60(a)(5)] appears to contemplate liability towards a party who in some way helps or compels another to act in a discriminatory manner").

It is beyond cavil that insurers aid and abet employers' discriminatory health benefit plan practices by offering and administering such plans, which generally includes preparing template benefits plans and providing customized plan design consultation and claims processing. Indeed, without the assistance of insurers, the State and its municipalities would not be able to provide the discriminatory employee benefits at issue. Under virtually identical statutory language, the Mass. Commission Against Discrimination refused to dismiss a claim by an employee who alleged that their employer's long-term disability insurer aided or abetted the employer by offering discriminatory employee health benefits in violation of Massachusetts law. *Samartin v.*

¹¹ The provisions in Connecticut and Massachusetts are virtually identical. *Rentz*, 2004 Conn. Super. LEXIS 3282 at *15 n.1.

Metropolitan Life Ins. Co., 27 MDLR 210, 2005 Mass. Comm. Discrim. LEXIS 43 at *6 (August 18, 2005).

B. Deprivation of Rights: Conn. Gen. Stat. §46a-58(a).

Conn. Gen. Stat. §46a-58(a) provides that it “shall be a discriminatory practice . . . for any person to subject, or cause to be subjected, any other person to the deprivation of any rights, privileges or immunities, secured or protected by the . . . laws of this state . . . on account of . . . sex, gender identity or expression, . . . mental disability, [or] physical disability.” As the commission recognized in its Petition, Connecticut statutes require that individual and group health insurance policies: (1) provide coverage for the diagnosis and treatment of “mental and nervous conditions”¹²; and (2) prohibit placing a greater financial burden on an insured for that coverage as opposed to medical, surgical or other physical health conditions. Conn. Gen. Stat. §38a-488a (individual health insurance); Conn. Gen. Stat. § 381-514 (group health insurance). Furthermore, the Commissioner of Insurance has interpreted the foregoing statutes to prohibit discrimination “against insured individuals with gender dysphoria” and to require that “individuals are not denied access to medically necessary care because of the individual’s gender identity or gender expression.” Conn. Ins. Dep’t, Bulletin IC-34: Gender Identity Nondiscrimination Requirements, at 2 (Dec. 19, 2013) [hereinafter Insurance Bulletin], <https://portal.ct.gov/-/media/CID/BulletinIC37GenderIdentityNondiscriminationRequirementspdf.pdf?la=en> .

An insurer’s exclusion of coverage of medically necessary care for gender dysphoria violates Conn. Gen. Stat. § 46a-58 because it deprives individuals of rights secured by

¹² “Mental or nervous conditions” means “mental disorders, as defined in the most recent edition of the American Psychiatric Association’s ‘Diagnostic and Statistical Manual of Mental Disorders’.” Conn. Gen. Stat. § 38a-488a(a)(1); Conn. Gen. Stat. §38a-514(a)(1).

Connecticut statutes and administrative rules, which prohibit discrimination in insurance based on “mental and nervous conditions,” generally, and “gender dysphoria,” specifically, as well as “gender identity or gender expression.” *See* Conn. Gen. Stat. §§ 38a-488a, 381-514; Insurance Bulletin, *supra*.¹³

C. Public Accommodations Discrimination: Conn. Gen. Stat. § 46a-64.

Conn. Gen. Stat. § 46a-64(a)(1) provides that it is a discriminatory practice to “deny any person within the jurisdiction of this state full and equal accommodations in any place of public accommodation, resort or amusement because of . . . gender identity or expression . . . of the applicant, subject only to the conditions and limitations established by law and applicable alike to all persons.” *Id.* A “place of public accommodation, resort or amusement” means “any establishment which caters or offers its services or facilities or goods to the general public.”

Conn. Gen. Stat. § 46a-63(1).

The Commission has indicated uncertainty as to whether “insurance policies are public accommodations under state or federal law.” Petition, p. 5 and n. 35. Intervenors submit that, under Connecticut law, an insurer is undoubtedly a public accommodation. In *Quinnipiac Council, Boy Scouts, Inc. v. Comm’n on Human Rights & Opportunities*, 204 Conn. 287 (1987), the Connecticut Supreme Court laid out some guiding principles in addressing whether the Boys

¹³ Insurers who offer and administer such discriminatory policies are clearly “persons” under Conn. Gen. Stat. §46a-58(a). *See id.* § 46a-51 (defining “person” to mean, *inter alia*, “one or more individuals, partnerships, associations, corporations, [and] limited liability companies”). Furthermore, there should be no question that the Commission and the Commissioner of Insurance have concurrent jurisdiction to hear claims alleging insurance discrimination under Conn. Gen. Stat. § 46a-58(a), and that jurisdiction does not reside solely with the Commissioner of Insurance. *See, e.g., Commission on Human Rights & Opportunities v. Bd. of Educ.*, 270 Conn. 665, 722 (2014) (holding that Commission on Human Rights and Opportunities and Board of Education had concurrent jurisdiction over racial discrimination claim); *id.* (“[T]here is nothing legislatively unusual about there being separate and independent remedies for racial and other types of discrimination, concurrent with those afforded by the commission under its statutory scheme.”) The Commissioner of Insurance would have no greater claim to exclusive jurisdiction here than did the Board of Education in *Commission on Human Rights, supra*.

Scouts were a public accommodation. Most important for the present question, the Court determined that “place of public accommodation” does not “necessarily involve[] a specific physical site,” noting that the legislature “linked its definition of ‘place’ not with a site, but rather with ‘any establishment.’” *Id.* at 295-96. After looking to legislative history, the Court concluded:

In conjunction, the unconditional language of the statute, the history of its steadily expanded coverage, and the compelling interest in eliminating discriminatory public accommodation practices persuade us that physical situs is not today an essential element of our public accommodation law. . . . [O]ur statute now regulates discriminatory conduct and not the discriminatory situs of an enterprise which offers its services to the general public.

Id. at 297-98.

More recently, in *Webster Bank v. Oakley*, 265 Conn. 539 (2003), the Supreme Court determined that “mortgage loan servicing and enforcement is a “[service]” provided by a “place of public accommodation” under the ADA. *Id.* at 570. In reaching this conclusion, the court analogized to insurance: “Just as the life insurance policy in *Pallozzi v. Allstate Life Ins. Co.*, 198 F.3d [28], 30-33 [2d Cir. 1999], was a good or service offered by an insurance office, a mortgage loan certainly is a service offered by a bank.” *Webster Bank*, 265 Conn. at 573.

Accepting that insurance is a “service” under the Connecticut statute and that a public accommodation is not limited to a physical site, it is clear that an insurer’s exclusion of coverage of medically necessary care for gender dysphoria constitutes discrimination by a public accommodation based on sex, gender identity or expression, and mental and physical disability under Conn. Gen. Stat. § 46a-64. *See also, e.g., Marques v. Harvard Pilgrim Healthcare of New Eng., Inc.*, 883 A.2d 742, 748-750 (R.I. 2005) (holding that private health insurer was a public accommodation for purposes of the ADA); *Samartin v. Metropolitan Life Ins. Co.*, 27 MDLR

210, 2005 Mass. Comm. Discrim. LEXIS 43 at *18-*21 (August 18, 2005) (holding that provider of long-term disability benefits was subject to Massachusetts state public accommodations law); *see also Carparts*, 37 F.3d at 18-20 (holding that trial court erred in dismissing ADA public accommodations claim against health insurance plan administrators).¹⁴

For all of the foregoing reasons, if the Commission reaches Question 3, it should answer it in the affirmative because insurers who sell health insurance plans to State and municipal employees can face liability for discriminatory practices under statutes enforced by the Commission.

CONCLUSION

For the foregoing reasons, the Intervenors Rylie Robillard, GLBTQ Advocates & Defenders, National Center for Transgender Equality, and Connecticut Women’s Education and Legal Fund respectfully request that the Commission issue a declaratory ruling answering Questions 1, 2, and 3 in the Petition in the affirmative for the reasons set forth in this Brief and the Affidavit of Randi Ettner, Pd.D.

¹⁴ In its Petition, the Commission indicated apparent concern that insurance provided as an employee benefit might foreclose the issuing insurer from being found to be a public accommodation, citing *Leonard F. v. Israel Discount Bank*, 199 F.3d 99, 107 n.8 (2d Cir. 1999) (noting, but not answering, the question). *See* Petition p. 5 and n. 35. The federal Courts of Appeals are divided on the question under the ADA with the First Circuit holding that such an insurer is a public accommodation, *Carparts*, *supra*, and with no resolution of the question in the Second Circuit since *Leonard F.* Under the Massachusetts state public accommodations law, the Mass. Comm’n Against Discrimination has held that the insurer that “issued the [employee] benefit plan . . . does not escape potential liability.” *Samartin v. Metropolitan Life Ins. Co.*, 27 MDLR 210, 2005 Mass. Comm. Discrim. LEXIS 43 at *21-*22 (August 18, 2005). Given the broad purpose of the Connecticut statute to eliminate discrimination, as well as the focus on “establishments” rather than “places,” there is good reason to interpret the Connecticut public accommodations law to reach all insurance policies, including those issued as part of employee benefit plans. *See, e.g., Lewis v. Aetna Life Ins. Co.*, 982 F. Supp. 1158, 1165 (E.D. Va. 1997) (concluding that an insurer may not discriminate in the terms of insurance, regardless of whether the insurance “is sold directly to a disabled individual or made available to that individual indirectly via an employer pursuant to a contractual or other relationship”).

RESPECTFULLY SUBMITTED,

INTERVENORS RYLIE
ROBILLARD, GLBTQ LEGAL
ADVOCATES & DEFENDERS,
NATIONAL CENTER FOR
TRANSGENDER EQUALITY, &
CONNECTICUT WOMEN'S
EDUCATION AND LEGAL FUND

BY THEIR COUNSEL,

/s/ Jennifer Levi

/s/ Bennett Klein

Jennifer Levi*
jlevi@glad.org
Bennett Klein*
bklein@glad.org
GLBTQ Legal Advocates & Defenders
18 Tremont St., Suite 950
Boston, MA 02108
(617) 426-1350 tel.
(617) 426-3594 fax

*Application for *pro hac vice*
admission pending.

/s/ Kevin Barry

Kevin M. Barry
Quinnipiac University
School of Law Legal Clinic
275 Mount Carmel Ave.
Hamden, CT 06518
(203) 582-3238 tel.
(203) 582-3237 fax
legalclinic@quinnipiac.edu
Juris No. 100612

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