BEFORE THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Sloan D. Manning,	:	
	:	EEOC No. 2021002979
Complainant,	:	
	:	OPM Case No. 2015024
v.	:	
	:	
U.S. Office of Personnel Management,	:	
	:	
Respondent,	:	

BRIEF OF *AMICI CURIAE* NATIONAL CENTER FOR LESBIAN RIGHTS, NATIONAL CENTER FOR TRANSGENDER EQUALITY, AND NATIONAL LGBTQ TASK FORCE IN SUPPORT OF COMPLAINANT'S NOTICE OF APPEAL

STATEMENT OF INTEREST OF *AMICI CURIAE*

The National Center for Lesbian Rights ("NCLR") is a national nonprofit legal organization dedicated to protecting and advancing the civil rights of lesbian, gay, bisexual, transgender, and queer people and their families through litigation, public policy advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for LGBTQ people and their families in cases across the country involving constitutional and civil rights. NCLR has a particular interest in eradicating discrimination against LGBTQ people in health care settings and represents LGBTQ people in cases relating to access to health care in courts throughout the country.

The National Center for Transgender Equality ("NCTE") is a national social justice organization devoted to ending discrimination and violence against transgender people through education and advocacy on issues of national importance to transgender people. Founded in 2003, NCTE advocates for policy reform at the federal level on a wide range of issues affecting transgender people, including employment discrimination; provides technical assistance to organizations and institutions at the state and local levels; and works to create greater public understanding of issues affecting transgender people.

The National LGBTQ Task Force ("Task Force") advances full freedom, justice and equality for lesbian, gay, bisexual, transgender and queer (LGBTQ) people. The Task Force is building a future where everyone is free to be themselves in every aspect of their lives. Today, despite all the progress that has been made to end discrimination, millions of LGBTQ people

face barriers in every aspect of their lives: in housing, employment, healthcare, retirement, and basic human rights. These barriers must go.

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, including Federal Employee Health Benefits Programs, continue to deny coverage for medically necessary and recognized treatments, most notably facial feminization surgeries, chest reconstruction, breast augmentation, and other treatments that bring the body into congruence with a person's affirmed gender to eliminate gender dysphoria. 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.

At issue in this case is the categorical exclusion from healthcare coverage of a chest reconstruction procedure—nipple areola reconstruction—when performed in connection with gender transition (the "Exclusion").[1] According to Aetna, the FEHB plan administrator, this procedure "is considered to be cosmetic and not a medically necessary component of a gender reassignment."[2] Aetna's categorical determination is misplaced. As Dr. Randi C. Ettner states in her expert report filed with the U.S. Office of Personnel Management (OPM), nipple areola reconstruction for transgender men is a "medically necess[ary,] . . . integral component of male chest reconstruction surgery."[3] Aetna's contrary conclusion contradicts 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.

Amici submit this brief to provide information to the Commission regarding the medical need for gender transition-related health care and the harm that bans on coverage for such care wreaks on transgender people's lives. *Amici* also seek to aid the Commission in its analysis of the Exclusion under Title VII of the Civil Rights Act of 1964 (Title VII) and Section 501 of the Rehabilitation Act of 1973 (Rehabilitation Act). *Amici* adopt and incorporate the factual

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[1] Compl.'s Letter to OPM Ex. 4 (July 15, 2019) (May 11, 2015 Letter from Aetna to Complainant's counsel, denying Complainant's appeal from denial of coverage).
[2] *Id.* Aetna's May 11, 2015 decision denying coverage referenced, *inter alia*, its Gender Reassignment Surgery Policy (9/19/14), which states that "nipple/areola reconstruction" is "considered cosmetic." Compl.'s Letter to OPM Ex. 7 (2017 Manning Affidavit, attaching Aetna Gender Reassignment Surgery Policy at Ex. F); *compare, e.g., Gender Affirming Surgery,* AETNA (Jan. 12, 2021), http://www.aetna.com/cpb/medical/data/600_699/0615.html ("Aetna considers the following procedures that may be performed as a component of a gender transition as cosmetic . . . Nipple reconstruction . . . ."), *with Breast Reconstructive Surgery,* AETNA (April 16, 2021), http://www.aetna.com/cpb/medical/data/100_199/0185.html ("Aetna considers associated nipple and areolar reconstruction . . . of the nipple area medically necessary.").
[3] Expert Report of Dr. Randi C. Ettner, Ph.D, OPM EEO Case No. 2015024, at 1 (July 16, 2019) [hereinafter Ettner Report].

allegations set forth in the Complainant's May 21, 2021 Brief in Support of Notice of Appeal and the Complainant's July 15, 2019 Letter to OPM and accompanying exhibits ("Letter to OPM"). Amici also adopt and incorporate the Complainant's discussion of gender dysphoria and the medical necessity of transition-related healthcare, generally, and nipple areola reconstruction, in particular, in the Complainant's Letter to OPM.

For the reasons set forth below, the Commission should enter an order of default judgment against OPM or, alternatively, direct OPM to issue a Final Agency Determination in this matter.[4]

ARGUMENT

A plaintiff may demonstrate disparate treatment under Title VII and the Rehabilitation Act through direct or circumstantial evidence.[5] "A policy is facially discriminatory and constitutes direct evidence when the terms of the policy classify employees based upon their protected trait . . . ."[6] Where a plaintiff presents no direct evidence of discrimination, he "may satisfy [his] burden by presenting . . . circumstantial evidence using *McDonnell Douglas's* burden-shifting framework."[7]

The categorical exclusion of healthcare coverage of certain treatments for gender dysphoria—because such treatments are deemed *per se* cosmetic or otherwise deemed not medically necessary—violates Title VII and the Rehabilitation Act[8] because it facially discriminates on the basis of sex and disability without any legitimate justification.[9] Specifically,

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[4] No party's counsel authored this Brief in whole or in part. No party or party's counsel, and no person other than *amici*, its members, or its counsel, contributed money intended to fund preparing or submitting this Brief.

[5] *See, e.g.*, *Lisan v. Wilkie*, No. 1:18cv969, 2020 WL 109066, at *11 (N.D. Ohio Jan. 9, 2020).

[6] *E.g.*, *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).

[7] *E.g.*, *Crawford v. Carroll*, 529 F.3d 961, 975–76 (11th Cir. 2008).

[8] As the Commission stated in this case, "insurance coverage is a fringe benefit of employment, and the denial of insurance coverage concerns a term, condition, or privilege of employment." *Darin B. v. McGettigan*, No. 0120161068, 2017 WL 1103712, at *3 (EEOC Mar. 6, 2017); *see also* 42 U.S.C. § 12112(a); 42 U.S.C. § 2000e-2(a).

[9] *See, e.g.*, *Cty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1049 (9th Cir. 2007) (stating that once a policy is shown to be facially discriminatory under Title VII, "the appropriate test [i]s whether sex was a 'bona fide occupational qualification,'" and holding that City had not shown that men-only policy at homeless shelter was justified by safety concerns); *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, . . . render[s] the statute facially discriminatory," and that "direct threat" defense was inapplicable).

Alternatively, such an exclusion constitutes evidence of disparate treatment based on sex and disability that is without any legitimate non-discriminatory justification. The only

such an exclusion singles out transgender people and people with gender dysphoria for the denial of coverage of medically necessary care. Such an exclusion also denies coverage of certain medically necessary procedures when sought by transgender people or people with gender dysphoria, while covering those same procedures when sought by non-transgender people or people with other health conditions. In either case, coverage of medically necessary care would not have been denied but for the person's transgender or disability status.

I. The Exclusion Facially Discriminates on the Basis of Sex Under Title VII.

As the Supreme Court held in *Bostock v. Clayton County, Georgia*, and as the Commission determined in *Macy v. Holder*, discrimination because a person is transgender is based on sex.[10] Numerous federal agencies, including the Department of Health and Human Services and Department of Justice have recently affirmed *Bostock*'s holding in agency guidance.[11]

According to the *Bostock* Court, a defining characteristic of being transgender is undergoing gender transition, i.e., "present[ing] as a different sex from the one assigned at birth."[12] The Exclusion prohibits healthcare coverage of a chest reconstruction procedure when

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justification Aetna offers for the Exclusion is that the surgery at issue is "cosmetic," which is incorrect and a pretextual basis for the Exclusion. *See infra* § III.

[10] *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1747 (2020) (stating that "it is impossible to discriminate against a person for being … transgender without discriminating against that individual based on sex" in violation of Title VII, and that "discrimination based on . . . transgender status necessarily entails discrimination based on sex"); *Macy v. Holder*, No. 0120120821, 2012 WL 1435995, at *11 (EEOC April 20, 2012) ("[I]ntentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination 'based on . . . sex,' and such discrimination therefore violates Title VII.").

[11] *See, e.g.*, Press Release, Dep't of Health and Human Servs., HHS Announces Prohibition on Sex Discrimination Includes Discrimination on the Basis of Sexual Orientation and Gender Identity (May 10, 2021), https://www.hhs.gov/about/news/2021/05/10/hhs-announces-prohibition-sex-discrimination-includes-discrimination-basis-sexual-orientation-gender-identity.html ("Consistent with the Supreme Court's decision in *Bostock* and Title IX, . . . OCR will interpret Section 1557's prohibition on discrimination on the basis of sex to include . . . discrimination on the basis of gender identity"); Mem. from the U.S. Dep't of Justice to the Fed. Agency Civil Rights Dirs. and Gen. Counsels 2 (March 26, 2021), https://www.justice.gov/crt/page/file/1383026/download ("[T]he best reading of Title IX's prohibition on discrimination 'on the basis of sex' is that it includes discrimination on the basis of gender identity and sexual orientation"); *see generally* Exec. Order No. 13988, 86 Fed. Reg. 7023, 7023–24 (Jan. 20, 2021), https://www.govinfo.gov/content/pkg/FR-2021-01-25/pdf/2021-01761.pdf (directing federal agencies to "fully implement statutes that prohibit sex discrimination" consistent with *Bostock*).

[12] 140 S. Ct. at 1734; *see also Macy*, 2012 WL 1435995, at *7 (stating that discrimination "against someone because the person is transgender" necessarily includes discrimination based on "the fact that the person has transitioned or is in the process of transitioning from one gender to another").

performed as part of "gender reassignment"—that is, when performed as part of a medically necessary gender transition.[13] Because only transgender people undergo gender reassignment, the Exclusion facially discriminates based on sex in two ways.

First, the Exclusion singles out transgender people for the denial of coverage of medically necessary care.[14] Second, the Exclusion intentionally denies coverage of a specific medical procedure—nipple areola reconstruction—when sought by transgender people as part of a medically necessary gender transition, while covering the *same* medically necessary procedure when sought by non-transgender people.[15] Because the Complainant is transgender, his surgery

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[13] *See supra* notes 1-2 and accompanying text (discussing Exclusion).

[14] *See, e.g., C.P. v. Blue Cross Shield of Illinois*, No. 3:20-cv-06145-RJB, 2021 WL 1758896, at *4 (W.D. Wash. May 4, 2021) (holding that insurance plan's exclusion of transition surgery for transgender minors constituted sex discrimination in violation of Title IX and Section 1557); *Fletcher v. Alaska*, No. 1:18-cv-0007-HRH, 443 F. Supp. 3d 1024, 1030–31 (D. Alaska 2020) (granting summary judgment on Title VII claim because excluding coverage for medically necessary surgery for transgender employees is "discriminatory on its face and is direct evidence of sex discrimination"); *Kadel v. Folwell*, 446 F. Supp. 3d 1, 14 (M.D.N.C. 2020) ("By denying coverage for gender-confirming treatment, the Exclusion tethers Plaintiffs to sex stereotypes . . . . This Court therefore finds that . . . Plaintiffs have properly alleged discrimination 'on the basis of sex'" under Title IX); *Toomey v. Arizona*, No. CV-19-00035-TUC-RM (LAB), 2019 WL 7172144, at *6 (D. Ariz. Dec. 23, 2019) (denying defendants' motion to dismiss and concluding that exclusion of transition-related healthcare "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."); *Flack v. Wis. Dep't of Health Servs.*, 328 F. Supp. 3d 931, 950-51 (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"); *Boyden v. Conlin*, 341 F. Supp. 3d 979, 997 (W.D. Wis. 2018) (holding that exclusion of transition-related healthcare "on its face treats transgender individuals differently on the basis of sex"); *Tovar v. Essentia Health*, 342 F. Supp. 3d 947, 952-53 (D. Minn. 2018) (holding that plaintiff stated claim that categorical exclusion of transition-related healthcare constituted sex discrimination in violation of Title IX and Section 1557); State of Connecticut Commission on Human Rights and Opportunities, Declaratory Ruling on Petition Regarding Health Insurers' Categorization of Certain Gender-Confirming Procedures as Cosmetic, at 24 (April 17, 2020) [hereinafter CT CHRO Ruling], https://ctchro.files.wordpress.com/2020/04/declaratory-ruling.pdf ("[T]he categorical exclusion of certain treatments for gender dysphoria provides inferior coverage for a condition specific to individuals who are not cisgender. It therefore discriminates on the basis of gender identity.").

[15] *See supra* note 2 (discussing Aetna policies covering nipple areola reconstruction except when performed in connection with a "gender reassignment"); *see also* Compl.'s Letter to OPM at 4 n.4 (noting "the Plan's express coverage of nipple-areola reconstruction for nontranssexual women for other medical conditions [such as cancer] but denial of the same procedure to transsexual men who sought treatment for gender dysphoria").

is not covered despite his medical need for it; if he were not transgender and had a medical need for the same surgery, it would be covered. As the *Toomey* court reasoned under analogous circumstances:

> 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.[16]

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. Therefore, the court concluded, the exclusion of healthcare coverage for transgender people for medical care that is covered when sought by non-transgender people is sex discrimination because "if plaintiffs' natally assigned sexes had *matched* their gender identities, their requested, medically necessary surgeries" would be covered.[17]

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[16] 2019 WL 7172144, at *6.

[17] 328 F. Supp. 3d at 948; *see, e.g.*, *Denegal v. Farrell*, No. 1:15-cv-01251-DAD-MJS (PC), 2016 WL 3648956, at *7 (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 (E.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."); CT CHRO Ruling, *supra* note 14, at 26 ("Where the State of Connecticut or a municipality offers a plan that denies coverage for treatments related to gender dysphoria as cosmetic, but grants coverage for the same treatments when related to other conditions as medically necessary, that is facial discrimination on the basis of . . . sex."); *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).

II. The Exclusion Facially Discriminates on the Basis of Disability Under the Rehabilitation Act.

The Rehabilitation Act prohibits employment discrimination "against a qualified individual on the basis of disability."[18] As discussed below, gender dysphoria easily meets the definition of "disability" under the Rehabilitation Act, and the Exclusion discriminates against the Complainant based on gender dysphoria.[19]

A. Gender Dysphoria is a Disability Under the Rehabilitation Act.

Gender Dysphoria is both a physical and a mental impairment. Specifically, gender dysphoria is a "physiological . . . condition . . . affecting . . . [the] neurological [and] . . . endocrine [systems]"[20] because it derives from an atypical interaction of sex hormones and the developing brain, which results in a person being born with circulating hormones and primary/secondary sex characteristics inconsistent with the person's gender identity.[21] Further supporting gender dysphoria's physiological etiology is the fact that treatment for the condition consists primarily of "physical interventions by means of hormones and/or surgery."[22] Gender dysphoria also meets the definition of a "mental impairment" because it is characterized by clinically significant distress associated with one's assigned sex.[23]

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[18] 42 U.S.C. § 12112(a). "The standards used to determine whether [Section 501 of the Rehabilitation Act] has been violated in a complaint alleging nonaffirmative action employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment." 29 U.S.C. § 791(f).

[19] There is no dispute that the Complainant is qualified; he "can perform the essential functions of the employment position." 42 U.S.C. § 12111(8).

[20] 29 C.F.R. § 1630.2(h)(1) (defining "physical . . . impairment" to mean a "physiological . . . condition . . . affecting one or more body systems," including "neurological . . . [and] endocrine").

[21] *See* Ettner Report, *supra* note 3, at 6 (discussing "scientific consensus that Gender Dysphoria has a biological, physiological etiology. . . It is now believed that Gender Dysphoria evolves as a result of the interaction of the developing brain and sex hormones."); Sec. Statement of Int. of the U.S. at 4, *Blatt v. Cabela's Retail, Inc.*, No. 5:14-cv-4822-JFL, 2015 WL 9872493 (E.D. Pa. Nov. 16, 2015), ECF No. 67 [hereinafter *Blatt* Statement] ("While no clear scientific consensus appears to exist regarding the specific origins of gender dysphoria (*i.e.,* whether it can be traced to neurological, genetic, or hormonal sources), the current research increasingly indicates that gender dysphoria has physiological or biological roots."); *id.* at 3 ("[T]he broad coverage of the term 'physical impairment' was designed to include 'any condition which is . . . physical but whose precise nature is not at present known,' 42 Fed. Reg. 22676, 22686 (May 4, 1977), thus leaving room for new scientific developments.").

[22] AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 451 (5th ed. 2013) [hereinafter DSM-5].

[23] 29 C.F.R. § 1630.2(h)(2) (defining "mental impairment" to include "any mental or psychological disorder"); DSM-5, *supra* note 22, at 451 ("Gender dysphoria refers to the distress

The Complainant satisfies the first prong of the definition of disability. If left untreated, gender dysphoria substantially limits major life activities like caring for oneself, interacting with others, eating, sleeping, concentrating, and communicating,[24] and also major bodily functions, such as neurological and brain functions.[25] Indeed, when left untreated, gender dysphoria can result in depression, anxiety, suicidality, and death.[26] Furthermore, even with medical treatment such as hormones and surgery,[27] gender dysphoria substantially limits the major life activity of reproduction.[28]

Similarly, under the second prong of the definition of disability, the Complainant's diagnosis of gender dysphoria establishes a "record of" a substantially limiting impairment.[29] Lastly, because the Complainant was refused coverage for a medically necessary treatment for gender dysphoria, he has been subjected to discrimination based on gender dysphoria and is therefore protected under the broad "regarded as" prong of the definition of disability.[30]

As the Commission determined in this case, the Rehabilitation Act's exclusion of "gender identity disorders not resulting from physical impairments" and "transsexualism" (the latter of which has always been understood to be interchangeable with gender identity disorder[31]), does

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that may accompany the incongruence between one's experienced or expressed gender and one's assigned gender.").

[24] 42 U.S.C. § 12102(1), (2)(A), (4); *see* 29 C.F.R. § 1630.2(i), (j).

[25] 42 U.S.C. § 12102(2)(B); *see* 29 C.F.R. § 1630.2(i)(1)(ii); *cf. id.* § 1630.2(j)(3)(iii) ("[I]t should easily be concluded that the following types of impairments will, at a minimum, substantially limit the major life activities indicated: . . . major depressive disorder . . . substantially limit[s] brain function.").

[26] DSM-5, *supra* note 22, at 454.

[27] *See* 29 C.F.R. § 1630.2(j)(4)(ii) ("[T]he *non*-ameliorative effects of mitigating measures, such as negative side effects of medication or burdens associated with following a particular treatment regimen, may be considered when determining whether an individual's impairment substantially limits a major life activity.") (emphasis added).

[28] Medical treatment for gender dysphoria renders transgender men incapable of reproduction. *See* Ettner Report, *supra* note 3, at 7 (discussing cessation of menses with the administration of testosterone); *see also* WORLD PROF'L ASS'N FOR TRANSGENDER HEALTH, STANDARDS OF CARE 36-38 (7th ed. 2012), https://s3.amazonaws.com/amo_hub_content/Association140/files/Standards of Care V7 - 2011 WPATH (2)(1).pdf (discussing cessation of menses in people taking masculinizing hormones and decreased sperm production in people taking feminizing hormones).

[29] 42 U.S.C. § 12102(1); *see* 29 C.F.R. § 1630.2(k).

[30] 42 U.S.C. § 12102(3)(A) ("An individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity."); *see* 29 C.F.R. § 1630.2(l).

[31] 42 U.S.C. § 12211(b)(1); *see* CHRISTINE MICHELLE DUFFY, GENDER IDENTITY AND SEXUAL ORIENTATION DISCRIMINATION IN THE WORKPLACE: A PRACTICAL GUIDE 16–48 (Christine Michelle Duffy ed., 2014) ("It was not uncommon at the time [the ADA was being debated] for

not apply to gender dysphoria that "results from a physical impairment."[32] The overwhelming weight of medical evidence demonstrates that gender dysphoria results from a physical impairment, namely, an atypical interaction of sex hormones and the developing brain.[33] Accordingly, the U.S. Department of Justice under two successive administrations has concluded that gender dysphoria resulting from a physical impairment is *not* excluded under the ADA or Rehabilitation Act.[34] A wall of caselaw holds likewise.[35]

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people to use the terms 'transsexualism' and 'GID' interchangeably."); *see also id.* at 16–98 to 16–103 (explaining that, beginning in 1980, successive versions of the DSM referred to transsexualism as a subtype of gender identity disorder applicable to adults and adolescents, until 1994, when transsexualism was removed from the DSM). Because the now obsolete diagnosis of transsexualism merely referred to gender identity disorder in adolescents and adults, the ADA's and Rehabilitation Act's exclusion of *transsexualism* does not apply to gender dysphoria for the very same reasons that the statutes' exclusion of *gender identity disorders* does not apply to gender dysphoria.

[32] 29 U.S.C. § 705(20)(F)(i); *Darin B.*, 2017 WL 1103712, at *4 n.3 (stating that an individual who alleges that "gender dysphoria results from a physical impairment" states a claim under the Rehabilitation Act).

[33] *See supra* note 21 and accompanying text (discussing physical etiology of gender dysphoria).

[34] *Blatt* Statement, *supra* note 21, at 5-6; Stat. of Int. of U.S. at 2-3, *Doe v. Dzurenda*, No. 3:16-CV-1934 (D. Conn. Oct. 27, 2017), ECF No. 57; Stat. of Int. of U.S. at 2, *Doe v. Arrisi*, No. 3:16-cv-08640 (D.N.J. July 17, 2017), ECF No. 49.

[35] *See, e.g.*, *Venson v. Gregson*, 2021 WL 673371, at *2-3 & n.2 (S.D. Ill. 2021) (rejecting argument that ADA excludes gender dysphoria, and holding that incarcerated transgender woman stated claim that defendants discriminated against her and failed to accommodate her gender dysphoria in violation of ADA); *Lange v. Houston Cnty.*, 499 F. Supp. 3d 1258, 1270 (M.D. Ga. 2020) ("Because [the plaintiff] has alleged that [she has a condition that results from physical impairment], the Court cannot conclude as a matter of law that the statutory exclusion of 'gender identity disorders' applies . . . ."); *Tay v. Dennison*, No. 19-cv-00501-NJR, 2020 WL 2100761, at *3 (S.D. Ill. May 1, 2020) ("[T]he Court cannot categorically say that gender dysphoria falls within the ADA's exclusionary language and will allow th[e plaintiff's ADA] claim to proceed."); *Shorter v. Barr*, No. 4:19CV108-WS/CAS, 2020 WL 1942785, at *10 (N.D. Fla. March 13, 2020) (holding that incarcerated transgender woman stated claim under Rehabilitation Act "on the basis of the Act's exclusion of 'gender identity disorder not resulting from physical impairments'"), *report and recommendation adopted*, 2020 WL 1942300 (N.D. Fla. Apr. 22, 2020); *Iglesias v. True*, 403 F. Supp. 3d 680, 688 (S.D. Ill. 2019) (concluding, on preliminary review pursuant to 28 U.S.C. § 1915A, that "the Court cannot categorically say that gender dysphoria falls within the [Rehabilitation Act's] exclusionary language and will err on the side of caution to allow Plaintiff's claim to proceed."); *Doe v. Mass. Dep't of Correction,* No. 1:17-cv-12255-RGS, 2018 WL 2994403 at *6-8 (D. Mass. June 14, 2018) (holding that incarcerated transgender woman stated claim under Rehabilitation Act and ADA, and distinguishing between gender identity disorder and gender dysphoria—suggesting that the latter is not excluded by the ADA or Rehabilitation Act because it is a new and distinct diagnosis or, alternatively, it "result[s] from [a] physical impairment[]"); *Edmo v. Idaho Dep't of Corr.*, No. 1:17-cv-00151-BLW, 2018 WL 2745898, at *8 (D. Idaho June 7, 2018) ("[T]he issue of whether Edmo's diagnosis falls under a specific exclusion of the ADA presents a genuine dispute of

B. The Exclusion Discriminates Against the Complainant Based on Gender Dysphoria.

The Rehabilitation Act prohibits covered entities from "limiting, segregating, or classifying . . . . [an] employee in a way that adversely affects the opportunities or status" of the employee because of the employee's disability.[36] The Exclusion prohibits coverage of a chest reconstruction procedure when performed as part of "gender reassignment"—that is, when performed as part of a medical treatment for gender dysphoria.[37] Because only people with gender dysphoria undergo "gender reassignment," the Exclusion facially discriminates based on disability in two ways.

First, the Exclusion singles out people with gender dysphoria for the denial of coverage of medically necessary treatment.[38] Second, the Exclusion intentionally denies coverage of a

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material fact in this case. Therefore, Edmo's ADA claim will not be dismissed."); *Blatt v. Cabela's Retail, Inc.,* No. 5:14-cv-04822, 2017 WL 2178123, at *2 (E.D. Pa. May 18, 2017) (holding that gender dysphoria "is not excluded by § 12211 of the ADA, and Cabela's motion to dismiss Blatt's ADA claims on this basis is denied"); *see also Doe v. Penn. Dep't of Corrections*, No. 1:20-cv-00023-SPB-RAL, 2021 WL 1583556, at *12 (W.D. Pa. Feb. 19, 2021) (holding that incarcerated transgender person "plausibly alleged facts that may place their gender dysphoria outside of the statutory exclusion") (citing *Mass. Dep't of Correction*, 2018 WL 2994403), *report and recommendation adopted*, 2021 WL 1115373 (W.D. Pa. March 24, 2021); *Doe v. Triangle Doughnuts, LLC*, 472 F. Supp. 3d 115, 134 (E.D. Pa. 2020) (holding that plaintiff stated hostile work environment claim under ADA "based on her alternative theories of disability related to either gender dysphoria or some other neuroanatomical disability related to her gender identity") (citing *Blatt*, 2017 WL 2178123).

Notably, at least two major employers, the University of Georgia and Wal-Mart, have conceded gender dysphoria's coverage under the ADA and Rehabilitation Act. *See* Defs.' Br. in Supp. of Part'l Mot. Dismiss, *Musgrove v. Bd. of Regents et al.*, No. 3:18-CV-00080-CDL, at 2-3 (M.D. Ga. Oct. 12, 2018), ECF No. 37-1 (declining to challenge gender dysphoria's coverage under ADA and Rehabilitation Act); Defs.' Br. Supp. Part'l Mot. Dismiss, *Bost v. Sam's East*, No. 1:17-cv-1148, at 2 (M.D.N.C. Mar. 15, 2018), ECF No. 11 (explicitly conceding that ADA does not exclude gender dysphoria).

[36] 42 U.S.C. § 12112(b)(1); *see also* 29 C.F.R. pt. 1630, app. ("Disparate treatment means, with respect to title I of the ADA, that an individual was treated differently on the basis of his or her disability."). The Rehabilitation Act also prohibits a covered entity from "participat[ing] in a contractual . . . arrangement or relationship" with another entity—such as "an organization providing fringe benefits to an employee of the covered entity"—that "has the effect of subjecting" employees to discrimination. 42 U.S.C. § 12112(b)(2).

[37] *See supra* notes 1-2 and accompanying text (discussing Exclusion).

[38] *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 Distrib. Ctr., Inc. v. Auto. 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

specific medical procedure—nipple areola reconstruction—when used to treat gender dysphoria, while covering the *same* procedure when used to treat other health conditions, such as cancer.[39] Where a medically necessary procedure is covered for people with a range of diagnoses, but is considered cosmetic and not covered when the diagnosis is gender dysphoria, the exclusion turns on the diagnosis of gender dysphoria.[40]

III. There is No Legitimate Justification for the Exclusion.

The Exclusion facially discriminates on the basis of sex and disability without any legitimate justification. The assertion that nipple areola reconstruction as a component of gender transition is *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.[41] It also ignores

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health plan could constitute discrimination under ADA); *see also Whitley v. Dr Pepper Snapple Grp., Inc.*, No. 4:17-CV-0047, 2017 WL 1739917, at *4 (E.D. Tex. May. 4, 2017) (denying motion to dismiss Title I ADA claim where employer-provided health plan excluded applied behavior analysis, a treatment for autism); *Fletcher v. Tufts Univ.*, 367 F. 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); *Iwata v. Intel Corp.*, 349 F. Supp. 2d 135, 155 (D. Mass. 2004) (holding that plaintiff stated claim that employer and third party administrator violated Title I of ADA by providing inferior disability benefits to people with mental health conditions); *E.E.O.C. v. Benicorp Ins. Co.*, No. IP 00-014-MISC, 2000 WL 724004, at *4 (S.D. Ind. May 17, 2000) (observing that third party administrator of health plan that excluded cochlear implant surgery could be held liable under Title I of the ADA); *Boots v. Nw. Mut. Life Ins. Co.*, 77 F. Supp. 2d 211, 214 (D.N.H. 1999) (holding that plaintiff stated claim that employer violated Title I of the ADA by adopting and maintaining a health plan that provided inferior benefits to people with mental health conditions); *Esfahani v. Med. Coll. of Pa.*, 919 F. Supp. 832, 836, 838 (E.D. Pa. 1996) (holding that plaintiff stated claim that employer violated ADA by providing inferior health insurance benefits to people with mental health conditions); *Morgenthal ex rel. Morgenthal v. Am. Tel. & Tel. Co., Inc.*, No. 97 CIV. 6443 DAB., 1999 WL 187055, at *2–3 (S.D.N.Y. Apr. 6, 1999) (holding that plaintiff stated claim that employer violated Title I of the ADA by providing a health plan that excluded coverage for treatment of "all developmental disorders").

[39] *See supra* note 2 (discussing Aetna policies covering nipple areola reconstruction except when performed in connection with "gender reassignment"); *see also* Compl.'s Letter to OPM at 4 n. 4 (noting that the Exclusion "deem[s] the same procedure simultaneously cosmetic for one diagnosis (gender dysphoria), but medically necessary for another diagnosis (nontranssexual women who have had their breasts removed in cancer treatment)").

[40] *Cf. Toomey*, 2019 WL 7172144, at *6 (holding that denial of coverage for medical treatments required for the purpose of gender reassignment, while covering the same medical treatments "for any medically necessary purpose other than gender reassignment," violates Title VII); *see also supra* note 17 (collecting sex discrimination cases).

[41] *See* Ettner Report, *supra* note 3, at 7 (describing social role transition as a "key component of medical treatment for gender dysphoric individuals"); Compl.'s Letter to OPM Ex. 7 (2017

authoritative medical guidance establishing the efficacy of nipple areola reconstruction for gender dysphoria.[42] As Dr. Ettner states in her report:

> A key component of medical treatment for gender dysphoric individuals is to live in role, and be regarded by others consistent with their gender identity. If any aspect of this social role transition is impeded, it will undermine an individual's core identity and psychological health. The failure to treat a man with Gender Dysphoria as a man intensifies the dysphoria, undermines medical treatment, increases emotional distress and can precipitate psychiatric disorders.[43]

According to Dr. Ettner, nipple areola reconstruction is an "inseparable," "inherent and irrefutable part of treatment for transgender . . . individuals undergoing mastectomy for gender dysphoria," and "has been positively correlated with patient wellbeing. . . . Without nipple-areola reconstruction, [transgender] individuals would be immediately identifiable, undermining their medical treatment and kindling the gender dysphoria."[44] Accordingly, "[w]hen insurance companies deny coverage of nipple-areola reconstruction" as *per se* cosmetic, "they transgress the standards of care by withholding medically-indicated treatment."[45]

Additionally, cost savings is not a defense under Title VII,[46] and the Exclusion does not fall within the ADA's safe harbor provision because it is not "justified by the risks or costs associated with the disability."[47] Numerous studies show that the cost of covering transition

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Manning Affidavit, attaching March 5, 2015 Letter of Support from Dr. Daniel A. Medalie) ("If mastectomies are performed, then the nipples are removed. The nipples then need to be re-contoured and replaced as grafts. It is not normal to have no nipples. They are a normal part of a person's anatomy and need to be restored.").

[42] *See* Ettner Report, *supra* note 3, at 9 (citing medical literature supporting necessity of nipple areola reconstruction in conjunction with male chest reconstruction); *see also* Compl.'s Letter to OPM at 18-20 (same).

[43] Ettner Report, *supra* note 3, at 7.

[44] *Id.* at 9 (citing medical studies).

[45] *Id.*

[46] 29 C.F.R. § 1604.9(e).

[47] U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, INTERIM ENFORCEMENT GUIDANCE ON THE APPLICATION OF THE AMERICANS WITH DISABILITIES ACT OF 1990 TO DISABILITY-BASED DISTINCTIONS IN EMPLOYER PROVIDED HEALTH INSURANCE, No. 915.002, at III(C)(2) (June 8, 1993), https://www.eeoc.gov/policy/docs/health.html (discussing 42 U.S.C. § 12201(c)). It is beyond cavil that the treatment at issue has medical value, and there is no actuarial basis for excluding transition-related healthcare, particularly where the very treatment that is excluded is routinely covered when administered to non-transgender people. *See, e.g.*, *Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New England, Inc.*, 987 F. Supp. 77, 83 (D.N.H. 1997) (denying summary judgment to defendant third party administrators under Titles I and III of the ADA because genuine issue of fact existed as to whether defendants' caps on AIDS-related care was based upon "unlawful discriminatory animus and/or upon unreasonable speculation regarding the medical and fiscal threat posed by the Human Immunodeficiency Virus and AIDS"), *on remand from*, 37 F.3d 12 (1994); *cf. Cloutier v. Prudential Ins. Co. of America*, 964

surgery is inconsequential or cost-neutral because transgender people comprise a relatively small percentage of the population and not all transgender people undergo all available treatments.[48]

F. Supp. 299, 307 (N.D. Cal. 1997) (denying summary judgment to insurer under Title III of the ADA because genuine issue of fact existed as to whether insurer's denial of life insurance to gay man whose partner had HIV was based on sound actuarial principles).

[48] *See, e.g.*, *Flack v. Wis. Dep't of Health Servs.*, 395 F. Supp. 3d 1001, 1021-22 (W.D. Wis. 2019) (stating that analyses of transition-related healthcare exclusion in state Medicaid plan "reveal such small estimated savings . . . that they are both practically and actuarially immaterial. Defendants estimate that removing the [exclusion] and covering gender-confirming surgeries would cost between $300,000 and $1.2 million annually, which actuarially speaking amounts to one hundredth to three hundredth of one percent of the State's share of Wisconsin Medicaid's annual budget."); *Boyden*, 341 F. Supp. 3d at 1000-01 ("From an actuarial perspective, there appears to be no dispute that the cost of coverage is immaterial at 0.1% to 0.2% of the total cost of providing health insurance to state employees, even adopting defendants' cost estimation . . . . [T]he court is hard-pressed to find that a reasonable factfinder could conclude that the cost justification was an 'exceedingly persuasive' reason or that this miniscule cost savings would further 'important governmental objectives.'"); *see also* Mem. from Transgender Legal Def. & Educ. Fund to Plan Adm'rs 13 (Feb. 16, 2021), https://transhealthproject.org/documents/43/Memo_on_transgender_health_exclusions.pdf (citing studies discussing negligible costs of transition-related healthcare coverage); William V. Padula et al., *Societal Implications of Health Insurance Coverage for Medically Necessary Services in the U.S. Transgender Population: A Cost-Effectiveness Analysis*, 31 J. OF GEN. INTERNAL MED. 394, 394 (2015), http://www.tgender.net/taw/SanFranciscoTGBenefitUpdateMar3106.pdf ("Health insurance coverage for the U.S. transgender population is affordable and cost-effective, and has a low budget impact on U.S. society."); JODY L. HERMAN, COSTS AND BENEFITS OF PROVIDING TRANSITION-RELATED HEALTH CARE COVERAGE IN EMPLOYEE HEALTH BENEFIT PLANS: FINDINGS FROM A SURVEY OF EMPLOYERS 2 (2013), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Herman-Cost-Benefit-of-Trans-Health-Benefits-Sept-2013.pdf ("Employers report very low costs, if any, from adding transition-related coverage to their health benefits plans or from actual utilization of the benefit after it has been added—with many employers reporting no costs at all.").

CONCLUSION

For the forgoing reasons, the Commission should enter an order of default judgment against OPM or, alternatively, direct OPM to issue a Final Agency Determination in this matter.

Respectfully Submitted,

NATIONAL CENTER FOR LESBIAN RIGHTS, NATIONAL CENTER FOR TRANSGENDER EQUALITY, AND NATIONAL LGBTQ TASK FORCE

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CERTIFICATE OF SERVICE

I certify that a copy of this Brief was sent this 18th day of June, 2021 by the method indicated to the following:

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