Case No. 16-3186

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Brittany R. Tovar,

Plaintiff-Appellant,

v.

Essentia Health; Innovis Health, LLC, dba Essentia Health West; HealthPartners, Inc.; and HealthPartners Administrators, Inc.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Minnesota
The Honorable Richard H. Kyle, Presiding

BRIEF OF APPELLANT

GENDER JUSTICE

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

Brittany Tovar was an employee of Defendant Essentia, and participated in the self-insured health care plan offered to all employees. Defendant HealthPartners was the third-party administrator for the plan. The plan contained a categorical coverage exclusion for all health services related to gender transition, and Essentia and HealthPartners denied Tovar's son, who is transgender, coverage for medically necessary care under the terms of this plan.

Tovar brought this suit against Essentia and HealthPartners for violations of Title VII of the Civil Rights Act of 1964, the Minnesota Human Rights Act (MHRA), and Section 1557 of the Affordable Care Act. In lieu of Answers, HealthPartners, Inc. and Essentia each filed a motion to dismiss the counts in Tovar's Complaint. The district court granted the motions, issuing an order dismissing all counts in Tovar's Complaint and entering judgment. In granting the motions to dismiss, the district court erroneously held that Tovar lacked standing for her claims; that she could not bring a Title VII or MHRA claim when the target of her employer's discrimination was her son rather than herself; and that a third-party administrator could not be sued under Section 1557 for administering an employer's discriminatory self-insured plan.

Because of the many legal issues presented in this case, and because the issues raised under Section 1557 have not been addressed by any federal appellate court, Tovar requests the Court grant each side 30 minutes for oral argument.

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JURISDICTIONAL STATEMENT

This appeal is taken from a final judgment entered on June 23, 2016, by the United States District Court for the District of Minnesota. (J.A.339.) On January 15, 2016, Appellant Brittany R. Tovar filed her Complaint. (J.A.1.) She brought claims against Appellee Essentia Health and Innovis Health, LLC, dba Essentia Health West under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et. seq. (Title VII) and the Minnesota Human Rights Act, Minn. Stat. § 363A.01 et seq. (MHRA). (J.A.2.) She brought a claim against Appellee HealthPartners, Inc., under Section 1557 of the Patient Protection and Affordable Care Act, 42 U.S.C. § 18116 ("Section 1557"). (Id.) The District Court had subject matter jurisdiction over Tovar's Title VII and Section 1557 claims pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343(a)(4). (J.A.4.) The District Court had supplemental jurisdiction over Tovar's state law claim pursuant to 28 U.S.C. § 1367. (Id.)

On May 11, 2016, the District Court issued its memorandum and order and judgment granting Defendant/Appellee's Motions to Dismiss. (Add.1.) This order dismissed all counts of Tovar's Complaint, but Count III against Health Partners, Inc., was dismissed without prejudice and the other counts were dismissed with prejudice. (Add.16.) To clarify that this was a final, appealable order, Tovar filed a motion to alter or amend the May 11th judgment. (J.A.324.)

At the request of both Tovar and HealthPartners, Inc. seeking to promote efficiency in this matter, the District Court amended its order to add HealthPartners

Administrators, Inc. ("HPAI") as a Defendant on Count III. (Add.18.) The District Court vacated its previous judgment, then dismissed all claims in the amended complaint with prejudice. (Id.) The District Court's final order and judgment was entered on June 23, 2016. On July 21, 2016, Tovar filed her Notice of Appeal. (J.A.340.)

This Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291. This appeal is taken from the District Court's final, appealable order and appeal was timely filed.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the district court err in granting Defendants Essentia Health's and Innovis Health, LLC, dba Essentia Health West's (collectively, "Essentia") Motions to Dismiss, finding that Plaintiff did not have statutory standing to sue under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) and the Minnesota Human Rights Act (Minn. Stat. § 363A.08, subd. 2(3))?

   Apposite Cases:
   - *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014)
   - *Leyse v. Bank of Am. Nat'l Ass'n*, 804 F.3d 316, 320 (3d Cir. 2015)

   Apposite Rules:
   - Fed. R. Civ. Pro. 12(b)(6)

2. Did the district court err in finding that an employee cannot bring a claim of discrimination under Title VII or the Minnesota Human Rights Act when the person whose protected status is targeted by the alleged discrimination is not

the employee herself, but the beneficiary of her employer-provided health care benefits?

Apposite Cases:

- *Clark v. U.S. Dep't of Agric.*, 537 F.3d 934 (8th Cir. 2008)
- *Newport News Shipbldg. & Dry Dock v. EEOC*, 462 U.S. 669 (1983)
- *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170 (2011)
- *Frontiero v. Richardson*, 411 U.S. 677 (1973)

Apposite Rules & Statutes:

- Fed. R. Civ. Pro. 12(b)(6)
- 42 USC § 2000e–2(a)(1)

3. Did the district court err in granting Defendant HealthPartners, Inc.'s ("HealthPartners") Motion to Dismiss, finding that Plaintiff did not have standing to sue under Title VII and Section 1557 of the Patient Protection and Affordable Care Act (42 U.S.C. § 18116(a)) because HealthPartners was improperly named as a party?

Apposite Cases:

- *Cook v. Arrowsmith Shelburne, Inc.*, 69 F.3d 1235 (2d Cir. 1995)
- *Papa v. Katy Indus., Inc.*, 166 F.3d 937 (7th Cir. 1999)
- *Davis v. Ricketts*, 765 F.3d 823 (8th Cir. 2014)

Apposite Statutes & Regulations:

- 81 FR 31375

4. Did the district court err in granting Defendant HealthPartners' Motion to Dismiss, finding that Plaintiff did not have standing to sue under Section 1557, even if HealthPartners was properly named as the Third-Party Administrator, because the Plaintiff's injuries are not traceable or redressable by it?

Apposite Cases:

- *Cruz v. Zucker*, 116 F. Supp. 3d 334 (S.D.N.Y. July 29, 2015)
- *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984)
- *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945)
- *Gray v. FedEx Ground Package Sys.*, 799 F. 3d 995 (8th Cir. 2015)

Apposite Statutes & Regulations:

- 42 U.S.C. § 18116
- 45 CFR § 92.207(b)

5. Did the district court err in determining, in the absence of any discovery, that the proper defendant for a claim against the Third-Party Administrator of Plaintiff's employer-provided health care plan was HealthPartners Administrators, Inc., rather than the parent company HealthPartners, Inc.?

Apposite Cases:

- *Titus v. Sullivan*, 4 F.3d 590 (8th Cir. 1993)
- *Eaton v. Dorchester Dev., Inc.*, 692 F.2d 727 (11th Cir. 1982)

STATEMENT OF THE CASE

I. FACTS DRAWN FROM THE COMPLAINT

Appellant Brittany Tovar was employed by Essentia[1] beginning September 24, 2010. (J.A.5.) Tovar's employee benefits at Essentia include health insurance provided through the Essentia Health Employee Medical Plan ("the Plan"). (*Id.* at ¶ 22.) Essentia selected the Plan at issue, which was designed and offered by HealthPartners as Policy No. G008HPC-03. (*Id.* at ¶ 23.) HealthPartners serves as the third party administrator [or "TPA"] of the Plan.[2] (*Id.* at ¶ 24.) The Plan contains a categorical exclusion barring any insurance coverage for "[s]ervices and/or surgery for gender reassignment," regardless of medical necessity. (*Id.* at ¶ 25.)

Tovar's beneficiaries include her teenage son, who has been a beneficiary of the Plan since October 1, 2014. (*Id.* at ¶ 26.) In November 2014, Tovar's son was diagnosed with gender dysphoria, a condition recognized in the Diagnostic and Statistical Manual,

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[1] Tovar's Complaint names as her employer Essentia Health and Innovis Health, LLC, dba Essentia Health West. (J.A.2.) The Complaint refers to these defendants collectively as "Essentia." (*Id.*)

[2] Tovar does not know the exact relationship between Appellees HealthPartners, Inc., and HealthPartners Administrators, Inc., as this matter was dismissed prior to any discovery. Whether it is possible to know, on this record, which of the two entities took any action described here is in dispute as part of this appeal. This argument will be addressed in a subsequent section, but for ease of reference throughout the brief, Tovar refers to HealthPartners, Inc., and HealthPartners Administrators, Inc., collectively as "HealthPartners." When necessary to refer to these entities separately, Tovar will refer to HealthPartners Administrators, Inc., as "HPAI" and will use the full name for the parent company HealthPartners, Inc.

fifth edition ["DSM-5"], as arising when individuals' gender identity differs from the gender they were assigned at birth.[3] (*Id.* at ¶ 27.)

Such individuals may be referred to as "transgender," while individuals whose gender identity is aligned with the sex or gender they were assigned at birth may be referred to as "cisgender." (*Id.* at ¶ 28.) The DSM-5 includes among symptoms of gender dysphoria "clinically significant distress or impairment in social, occupational, or other important areas of functioning." (J.A.6 at ¶ 29.) These and other symptoms have been shown to be relieved by*, inter alia*, medical treatments such as mental health counseling, hormone therapy, and gender reassignment surgery. (*Id.* at ¶ 30.)

Because of the Plan's categorical exclusion of "[s]ervices and/or surgery for gender reassignment," Tovar's son was denied insurance coverage for health care that his providers deemed medically necessary. (*Id.* at ¶ 31.) Beginning in March 2015, Tovar used the pre-authorization and appeal processes outlined under the Plan to seek clarification regarding the enforcement of the exclusion, repeatedly emphasizing to

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[3] Our society links individuals' sex (as might be determined by their internal reproductive organs, external genitalia, chromosomes, hormones, and/or secondary sex characteristics) to particular gender roles, and vice versa, so it is also accurate to say that gender dysphoria arises when individuals' gender identity differs from their sex assigned at birth. Sex at birth is often determined simply by examining a baby's external genitalia. *See, e.g.*, World Professional Ass'n for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People, Version 7*, Int'l J. Transgenderism 165, 222 (2011) ("Standards of Care"), http://www.wpath.org/uploaded_files/140/files/IJT%20SOC,%20V7.pdf. The current scientific understanding is that external genitalia alone are an unreliable indicator of sex. Peggy T. Cohen-Kettenis & Louis Gooren, *Transsexualism: A Review of Etiology, Diagnosis and Treatment*, 46 J. of Psychosomatic Res. 318 (1999).

Defendants-Appellees the serious repercussions if her son were denied medically necessary care. (*Id.* at ¶ 32.)

In a letter dated April 9, 2015, HealthPartners reaffirmed its intent to enforce the categorical exclusion. (*Id.* at ¶ 33.) The representative stated in the letter that HealthPartners was "not questioning whether these services are medically necessary or appropriate" but was nonetheless enforcing the Plan's categorical exclusion. (*Id.*) When HealthPartners denied coverage, Tovar was forced to pay out of pocket for services or medications. (*Id.* at ¶ 34.) When this was not possible, Tovar's son was forced to go without necessary care. (*Id.*)

One of the treatments denied Tovar by HealthPartners and Essentia was her son's prescription for the drug Lupron, which was medically indicated for the window of time in which it was appropriate to suspend menstruation, prior to any use of testosterone supplements. (J.A.7 at ¶¶ 35-38, 42-44.) The cost of Lupron was approximately $9,000. (*Id.* at ¶ 40.) Because this otherwise covered drug (*id.* at ¶ 39) was being prescribed for Tovar's son as a "[s]ervice[] . . . for gender reassignment," coverage was categorically excluded under the Plan. (*Id.* at ¶ 38.) Tovar could not afford the high out-of-pocket cost of this drug, and her son had to forego its benefits. (*Id.* at ¶ 40.)

Providers also prescribed Androderm, a form of testosterone, to treat Tovar's son for gender dysphoria. (J.A.8 at ¶ 42.) As with the Lupron, Androderm was initially denied under the Plan, even though it would have been covered unquestionably for use by cisgender males. (*Id.* at ¶ 43.) Tovar was forced to pay out of pocket for this drug.

(*Id.* at ¶ 44.) Essentia later approved Androderm for Tovar as a one-time exception but kept the categorical exclusion in the Plan. (*Id.* at ¶ 45.)

In December 2015, when Tovar contacted HealthPartners Member Services regarding pre-authorization for gender reassignment surgery for her son, she was told that the surgery would not be authorized, due to the Plan's continuing exclusion of "[s]ervices and/or surgery for gender reassignment." (*Id.* at ¶ 46.) Had the surgery been recommended by a medical provider for a purpose other than gender reassignment necessitated by gender dysphoria – for instance, a mastectomy for a woman with breast cancer – it would have been covered by the Plan. (*Id.* at ¶ 47.)

Tovar's worry for her son, anger, disappointment, and sleeplessness made it difficult for her to focus on her job and caused a sharp increase in migraines. (J.A.7-8 at ¶ 41.) She frequently found herself in tears at work and was ultimately compelled to reduce her work hours because of the stress. (*Id.*)

II. PROCEDURAL FACTS

On or about May 1, 2015, Tovar filed a charge of sex discrimination against Essentia with the Equal Employment Opportunities Commission ("EEOC") under Title VII. (J.A.4.) She received a determination from the EEOC on January 13, 2016, finding that there was reasonable cause that Essentia had discriminated against Tovar when she was denied medical services for her child who was her beneficiary. (J.A.4-5.) The EEOC also found reasonable cause that Essentia's health insurance plan excluded

coverage for gender reassignment and as such discriminated on the basis of sex under Title VII. (Id.) Tovar filed this lawsuit on January 15, 2016.(J.A.1.)

On March 3, 2016, Defendants HealthPartners, Inc. and Essentia each filed a motion to dismiss the counts in Tovar's Complaint that were directed at them. (J.A.14, 25.) These motions were filed in lieu of Answers and no discovery has been conducted in this matter. The only facts the Court has available in this matter are Tovar's Complaint, documents necessarily embraced by the Complaint, and matters of public record. The parties agreed that Plan documents for the 2015 Plan at issue in the lawsuit are documents necessarily embraced by the Complaint. (Add.2.)

The district court heard oral argument on the motions to dismiss on April 14, 2016. (Add.4.) On May 11, 2016, the district court issued an order dismissing all counts in Tovar's Complaint and entering judgment. (Add.1.)

On Counts I and II, in which Tovar alleged that Essentia had violated Title VII and the MHRA, the District Court decided that Tovar did not have standing to sue. According to the District Court, because Essentia's actions discriminated against Tovar's son, a non-employee, based on his sex, the discrimination was perfectly legal. (Add.12-15.)

For Count III, in which Tovar alleged that HealthPartners had violated Section 1557 of the Affordable Care Act, the district court made two determinations. (Add.5.) First, it held that Tovar did not have standing to sue HealthPartners because her injuries could not be fairly traced to it. (Add.6.) In its motion, HealthPartners had argued that

this failure to trace injuries to HealthPartners was because any alleged injuries would have been caused by Essentia, as Tovar's employer. (J.A.25.) According to HealthPartners, Essentia selected the self-insured plan and HealthPartners merely administered it. (J.A. 25-28.)

The district court agreed with this but went a step further. (Add.6.) The court found that HealthPartners, Inc., was an incorrect defendant, and found that the correct defendant should be HealthPartners Administrators, Inc. (HPAI). (Id.) In support of this finding, the district court noted only two things: First, that HealthPartners, Inc., had said its third party administrator services were provided by a separate entity, HPAI, in an unsupported footnote in its brief. (Add.6.) Second, that the Plan document "explicitly lists HPAI as the TPA." (Add.5.)

The plan documents are an exhibit to HealthPartners' motion to dismiss. (J.A.58.) HPAI is mentioned under a section titled "Specific Information About the Plan," which lists the Plan Manager as HealthPartners Administrators, Inc., at an address in Minneapolis and states that it is the named fiduciary solely for purposes of determining coverage of claims. (J.A.81.) Throughout the rest of the Plan documents, the Plan refers to "HealthPartners." (J.A.81.) For example, the title page of the Summary Plan Description describes the Plan as a "HealthPartners Tiered Choice My Essentia HSA Plus Plan," and the page has HealthPartners printed in large font with the HealthPartners logo next to it in the upper left. (J.A.58.) For customer service, Plan participants are directed to HealthPartners Member Services or online at

www.healthpartners.com/essentia. (J.A.60, 73, 84.) "HealthPartners" is defined in the document as referring to HealthPartners, Inc., as opposed to HealthPartners Administrators, Inc., for which the document uses "HPAI" as the short version. (J.A.82.)

The district court's May 11, 2016, order dismissed Count III of the Complaint, against HealthPartners, without prejudice. (Add.8.) The language in the district court's order granting the motions to dismiss could have caused uncertainty about whether this dismissal was a final, appealable judgment. As noted above, the district court had concluded that HealthPartners, Inc., was an incorrect defendant and that HPAI should be substituted. (Add.4, 6.) However, the district court went on to conclude that even if HealthPartners, Inc., were the correct defendant that the court would still have granted the motion to dismiss. (Add.7.)

Therefore, Tovar filed a post-judgment motion requesting that the district court amend its order and judgment to clarify that Count III was dismissed *with* prejudice. (J.A.324.) At the request of both HealthPartners and Tovar, who were seeking to promote efficiency in this matter, the district court amended its order to add HPAI as a Defendant on Count III. (Add.17-18.) The district court then dismissed all claims in the amended complaint with prejudice. Judgment was entered on June 23, 2016. (Id.)

On May 12, 2016, the day following the district court's initial Order and Judgment in this matter, the Department of Health and Human Services (HHS) made available to the public its Rule on Section 1557. The document published with the Rule,

titled "Nondiscrimination in Health Programs and Activities" was officially published on May 18, 2016. 81 FR 31375, available online at https://www.federalregister.gov/documents/2016/05/18/2016-11458/nondiscrimination-in-health-programs-and-activities. This published document includes both the final Rule and a section titled "Supplementary Information" including a sub-heading for "Background" with commentary on HHS's Office for Civil Rights' (OCR) deliberations and public comments about the Rule. The Rule itself is codified in the Federal Regulations at 45 CFR Part 92.

These regulations for Section 1557 include several sections pertinent to this matter. For example: "A covered entity shall not, in providing or administering health-related insurance or other health-related coverage[,] … [h]ave or implement a categorical coverage exclusion or limitation for all health services related to gender transition …" 45 CFR § 92.207(b)(4)."

Covered entities are defined to include "[a]n entity that operates a health program or activity, any part of which receives Federal financial assistance," with "health program or activity" defined to include all operations of an entity "principally engaged in providing or administering health services or health insurance coverage." 45 CFR § 92.4.

In the "Background" section, OCR explains how the regulation applies to a third party administrator of an employer's self-insured health care plan. Unequivocally, OCR

"[is] not excluding third party administrator services from the final rule …" 81 FR 31432.

OCR goes on to note:

> Third party administrator services are undeniably a health program or activity, as they involve the administration of health services. … [T]here is no principled basis on which to exclude the law's application to the third party administrator services or to treat them differently from other entities and services covered by the rule. . . . Moreover, the fact that third party administrators are governed by other Federal laws such as ERISA is not a reason to exempt them from Section 1557. ERISA itself explicitly preserves the independent operation of civil rights laws.

Id.

In this "Background" section, OCR makes clear that the law holds third party administrators responsible even when they have not designed the plan they are administering. "Thus, if a plan has a discriminatory benefit design under Section 1557, a third party administrator could be held responsible for plan features over which it has no control." *Id.* Though OCR takes this into account when using its enforcement authority to refer a matter to either itself or the EEOC, depending on whether the employer or third party administrator is most responsible, OCR's interpretation of the statute and its own regulations are clear that even a third party administrator with no responsibility for plan design is violating the law when it agrees to administer a discriminatory plan. *Id.*

While the regulation includes an effective date subsequent to the Rule's publication, the "Background" section also notes that "Section 1557 has been in effect

since its passage as part of the ACA in March 2010, and covered entities have been subject to its requirements since that time." 81 FR 31430.

SUMMARY OF THE ARGUMENT

In granting HealthPartners' Motion to Dismiss, the District Court erroneously concluded that Tovar did not have Article III standing to pursue a claim for damages against HealthPartners because it was wrongly named as a Defendant. The District Court reasoned that HealthPartners did not have sufficient control to warrant liability as discriminatory health care plan administrator, therefore Tovar had suffered no direct injury that was traceable to or redressable by HealthPartners.

The regulations promulgated by the U.S. Department of Health and Human Services ("HHS") for explanation and enforcement of the Affordable Care Act (42 U.S.C. § 18116) – in particular 45 C.F.R. § 92 –clearly govern the acts of third-party administrators such as HealthPartners. HHS's interpretations of the statute and its own regulations must be given deference pursuant to the Supreme Court's holdings in *Chevron U.S.A., Inc. v. NRDC,* 467 U.S. 837 (1984) and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). The regulations state that health care plans must not contain categorical exclusions on medically necessary, gender-transition-related care, and that this includes both employer-funded plans and third-party administrators of those plans. Third-party

administrators in this context play the role of a staffing agency in the Title VII context, sharing liability for violations of the law.

The District Court erroneously held that Tovar had named HealthPartners, Inc., incorrectly as a defendant because even if a third-party administrator could be held responsible for administering a facially discriminatory plan, the third-party administrator in this matter was HPAI, a subsidiary. Therefore, the District Court reasoned, Tovar lacked standing to sue HealthPartners, Inc., the parent company. However, in order to decide whether one or both of these entities caused redressable injuries to Tovar, the parties need discovery. This is a fact-intensive inquiry, and what little evidence is available prior to discovery is not conclusive on this topic. The evidence is at best suggestive of both entities playing a role in administering the plan at issue.

The District Court also erroneously granted Essentia's Motion to Dismiss on Counts I and II for Title VII and the MHRA. The District Court again determined that Tovar did not have standing to sue her employer in this matter because Essentia's discriminatory conduct was actually directed at her son, who was not an employee, rather than directly at her based on her own protected status. But Title VII's promise to end discrimination in employment because of sex must extend to this behavior or its promise is hollow. Essentia provided Tovar, its employee, with a health care plan that on its face discriminated on the

basis of sex. To hold that Title VII and the MHRA do not reach this behavior would be an absurd result.

LEGAL ARGUMENT

III. STANDARDS OF REVIEW

Both Defendants challenge Tovar's standing to sue.

HealthPartners argues that Tovar lacks Article III standing to bring her Section 1557 claims. This is a threshold jurisdictional question. As such, it is considered under Federal Rule of Civil Procedure 12(b)(1). *Branson Label, Inc. v. City of Branson*, 793 F.3d 910, 914 (8th Cir. 2015). At this juncture, prior to any discovery, HealthPartners' challenge is essentially a facial challenge to the allegations in the Complaint. Because the Summary Plan Description for the health plan provided to Tovar by Essentia, effective January 2015, is necessarily embraced by the Complaint, the Court may consider it as well. *Minnesota Majority v. Mansky*, 708 F.3d 1051, 1056 (8th Cir. 2013).

On a Rule 12(b)(1) facial challenge, "the court merely [needs] to look and see if plaintiff has sufficiently alleged a basis of subject matter jurisdiction." *Branson Label* at 914 (internal quotation marks omitted). Accordingly, the court restricts itself to the face of the complaint and any documents necessarily embraced by the complaint, "and the non-moving party receives the same protections as it would defending against a motion brought under Rule 12(b)(6)." *Id.* (quoting *Osborn v. United States*, 918 F.2d 724, 729 n.6 (8th Cir. 1990)). This means the court must take the facts alleged in the complaint as true and construe all reasonable inferences from those facts most favorably to the

complainant. *See Ashcroft v. Iqbal*, 56 U.S. 662, 680 (2009); *Bell Atl. Corp. v. Twombly*, 440 U.S. 544, 554-56 (2007).

The Rule 12(b)(6) standard, as interpreted by *Iqbal* and *Twombly*, also applies to Essentia's statutory standing argument and to any portions of HealthPartners' motion that fall outside of its Article III standing argument. "If the plaintiff lacks statutory standing, the complaint essentially fails to state a claim upon which relief can be granted." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009); *see also Lexmark International, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014) (clarifying concept of "statutory standing"). In a statutory standing challenge, the court must assess whether the statute at issue (here, Title VII or the MHRA) "accords this injured plaintiff the right to sue the defendant to redress [her] injury." *Braden* at 594.

IV. THIS COURT SHOULD DENY HEALTHPARTNERS' MOTION TO DISMISS

A. From the Outset, OCR Has Interpreted Section 1557 to Bar Categorical Exclusions Based On Gender Identity

Section 1557 of the Affordable Care Act ("ACA") bars discrimination in health care on any of the grounds "prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. § 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. § 6101 et seq.), or section 794 of title 29"– that is, on grounds of race, color, national origin, sex, age, or disability. 42 U.S.C. § 18116(a).

In its Proposed Rule, the U.S. Department of Health and Human Services' ("HHS") Office for Civil Rights ("OCR") explained that it interpreted Section 1557 to address discrimination on the grounds of gender identity:

> We propose that discrimination on the basis of sex further includes discrimination on the basis of gender identity. OCR has previously interpreted sex discrimination to include discrimination on the basis of gender identity. Other Federal agencies have similarly interpreted the meaning of sex discrimination. In addition, courts, including in the context of Section 1557, have recognized that sex discrimination includes discrimination based on gender identity. We thus propose to formally adopt this well-accepted interpretation of discrimination "on the basis of sex."

80 FR 54171, 54176, Sept. 8, 2015. On its website, OCR further indicated that under Section 1557, explicit categorical exclusions in coverage for all health care services related to gender transition must be considered facially discriminatory. http://www.hhs.gov/civil-rights/for-individuals/section-1557/nondiscrimination-health-programs-and-activities-proposed-rule/index.html.

The recently issued regulations are consistent with this interpretation. They explain that "discriminatory actions" include "[h]av[ing] or implement[ing] marketing practices or benefit designs that discriminate on the basis of . . . sex . . . in a health-related insurance plan or policy, or other health-related coverage." 45 CFR § 92.207(b)(2). They provide that "[a] covered entity shall not . . . [h]ave or implement a categorical coverage exclusion or limitation for all health services related to gender transition; or . . . [o]therwise deny or limit coverage of a claim, or impose additional cost sharing or other limitations or restrictions on coverage, for specific health services

related to gender transition if such denial, limitation, or restriction results in discrimination against a transgender individual." 45 CFR § 92.207(b)(4), (5).

The regulations define "on the basis of sex" " to include "sex stereotyping, and gender identity" and define "gender identity" as "an individual's internal sense of gender, which may be male, female, neither, or a combination of male and female, and which may be different from an individual's sex assigned at birth." 45 C.F.R. § 92.4. They explain further that "[t]he way an individual expresses gender identity is frequently called "gender expression," and may or may not conform to social stereotypes associated with a particular gender. A transgender individual is an individual whose gender identity is different from the sex assigned to that person at birth." *Id.*

Plaintiff-Appellant Tovar brings this claim under Section 1557 of the ACA, against the third-party administrator ("TPA") of her health care plan, HealthPartners. HealthPartners' motion to dismiss did not reach the ultimate merits question of whether Section 1557 forbids categorical exclusions of transition-related care. In light of the regulatory language, however, it is clear that Tovar's Section 1557 claim rests on strong grounds.

B. This Court May Grant Deference to OCR's Interpretation of Section 1557

The pertinent rules regarding deference to OCR's interpretation of Section 1557 can be found in *Chevron*, 467 U.S. 837 (1984). In *Chevron,* the Supreme Court stated:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron, 467 U.S. 837, 842-43 (1984).

In *Chevron*, the Court recognized that it was within the purview of the Environmental Protection Agency to interpret and apply provisions of the Environmental Protection Act, as long as those interpretations were manifestly reasonable. The same is true of OCR's unique perspective on the Affordable Care Act. Given its brevity and reliance on reference statutes, Section 1557 is particularly subject to ambiguity, and *Chevron* makes clear that deference must therefore be given to OCR's reading of the law. *See Chevron* at 843; *see also Bowles v. Seminole Rock & Sand Co*, 325 U.S. 410, 413-14 (1945) ("[T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.").

Agency deference is demanded regardless of the extent to which the policy at issue is considered controversial. "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Chevron*,

467 U.S. at 843, *quoting Morton v. Ruiz*, 415 U.S. 199, 231 (1974) (internal quotes omitted). "Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844.

C. Third-Party Administrators Are Liable for Claims Arising From Discriminatory Policies They Design and Market.

HealthPartners argued in its motion to dismiss that Tovar did not have standing to sue under Section 1557 because her injuries are not traceable or redressable by it. With regard to this issue (laid out in Tovar's fourth Statement of Issues) the district court found that Tovar lacked Article III standing in her claim against HealthPartners because "HealthPartners plainly was not the administrator of either the 2015 or 2016 Plan." (Add.6.) The court also reasoned preliminarily that HealthPartners was improperly named as a Defendant and concluded that Tovar's injury was neither traceable to it nor redressable by it. *Id.*

The court went further, however, and concluded that "*[e]ven if* HealthPartners was involved in administering the Plan, Tovar's claims against it would still fail. (emphasis added)" (Add.7.)

To support its finding, the district court cited *Reid v. BCBSM, Inc.*, 984 F. Supp. 2d 949 (D. Minn. Nov. 21, 2013), and *Ark. ACORN Fair Hous. v. Greystone Dev.*, 160 F.3d 433 (8th Cir. 1998), both of which are distinguishable from the instant case. In *Reid*, the plaintiff was a mother with a child with autism spectrum disorder, seeking treatment for her son that was not covered by HealthPartners and for which coverage

was discontinued by Blue Cross Blue Shield of Minnesota ("BCBSM") after she switched to receiving insurance from the latter. The court did not dispute that the plaintiff there could legitimately claim exclusion of her son's treatment as an injury-in-fact to her, only noted that she "failed to state a claim under the ADA because she did not allege facts to indicate that the *review* of the insurance plan was discriminatory, only that the *plan* was discriminatory." (Add.8.) Ultimately, the *Reid* plaintiff's claim against HealthPartners was dismissed because she sought injunctive relief and was no longer in fact covered by its plan at all. *Reid*, 984 F. Supp. 2d at 954.

This differs from the present case in which Tovar seeks economic damages resulting directly from HealthPartners' administration of the discriminatory plan at the time the prohibited exclusion was applied. However, the *Reid* court found that the plaintiff *had* stated a claim for relief against BCBSM because *its* exclusion was only applied to disabled persons in violation of the ADA (*id.* at 955), exactly as Tovar asserts the HealthPartners plan exclusion violates the explicit Section 1557 prohibition of categorical exclusions applied only to transgender or transitioning individuals.

In *Ark. ACORN*, a fair housing organization brought suit against a real estate developer for its omission of either an Equal Housing Opportunity logo or African-American models in its advertisements. The lower court noted that the Eighth Circuit had upheld the district court's dismissal, noting, "'[T]he injury must also be traceable to some act of the *defendant*.' (emphasis added)" (Add.8.) It is important to note that in Ark. ACORN, the plaintiff was an organization suing on a generalized basis and

therefore claiming a generalized "injury" of the type prohibited by *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990), and could not show concrete damages. Tovar's case differs significantly. Tovar's injury was direct and personalized, manifested in measurable damages, and was, in fact, caused by an "act of the defendant," namely the construction and administration of a health care plan that is discriminatory on its face and as applied to Tovar.

Additionally, HealthPartners' argument below that it was a helpless bystander to Essentia's discriminatory acts fits poorly with the reality of relations between employers and TPAs, since in fact TPAs seem to play a large role in the frequency with which employers choose to include discriminatory exclusions. The regulations promulgated by HHS make clear that TPAs cannot hide behind employers in administering facially discriminatory policies.

Additionally, theories of joint employment under Title VII – particularly agency and control – support finding a TPA jointly liable with the employer/client under the circumstances present here. Discovery is warranted in this case, both to address the relationship between Defendants HealthPartners and HPAI, as discussed in the next section, and to address the employer-TPA relationship and determine the full extent of liability of both. The district court cited *Williams v. Grimes Aerospace Co.*, 988 F. Supp. 925, 934 (D.S.C. 1997) (Add.7) to emphasize the need to show control by both entities in order to show liability of both in a Title VII context. Tovar agrees that this is an issue

that must be explored, and if she is allowed to proceed through the discovery process, she believes that facts discovered would fully support her claims.

Important questions remain unasked at this point, much less answered. Applicable facts sought would likely resemble those gathered to show a joint employment relationship between an employer and a staffing agency in support of a discrimination claim against both entities under Title VII. The relationship between HealthPartners, as designer, marketer, and administrator of the plan, and Essentia, as purchaser of the plan and provider of it to its employees, already alludes to the necessary elements of common law agency, control, and economic realities that would support joint liability under Title VII and would therefore similarly support joint liability under the two applicable statutes at issue here – Title VII as applied to Essentia and Section 1557 as applied to HealthPartners.

Also of importance, the relevant factors to be gleaned from discovery and at least more appropriately considered as part of a motion for summary judgment would likely constitute genuine issues of material fact for consideration by a jury. *See*, *e.g.*, *Gray v. FedEx Ground Package Sys.*, 799 F. 3d 995 (8th Cir. 2015) (finding that facts underlying a test for determining employment status in Missouri were an issue for the jury).

HealthPartners also argued below that Tovar's claim is moot, as the plan was allegedly changed in January 2016. The lower court agreed but did not base its dismissal on this ground and addressed it only minimally (Add.8), so Tovar addresses it here only to point out that how the plan reads currently is immaterial to her claim; the exclusion

was in effect during the relevant period from which her concrete economic damages arise. Furthermore, Tovar seeks a clear ruling on the illegality of such exclusions to both protect herself in the future and all similarly situated employees covered by discriminatory plans offered and administered by TPAs such as HealthPartners.

D. The Parties Need Discovery To Determine What Role The HealthPartners Entities Each Played In Administering The Plan.

Without discovery or analysis beyond a reference to a single statement in the plan documents, the district court concluded that Tovar could not sue HealthPartners, Inc., under Section 1557 of the Affordable Care Act. According to the district court, Tovar's injuries could not be redressed by HealthPartners, Inc. specifically because "a separate entity, [HPAI] is actually the third-party administrator ("TPA") of Essentia's self-insured Plan." (Add.4.) The problem is that the analysis needed for this conclusion is fact-intensive and the district court did not have enough facts before it at the motion to dismiss stage to draw this conclusion.

This issue is separate from the main argument HealthPartners made, addressed in the previous section, that can be summarized as "no third-party administrator should be responsible for discriminatory coverage exclusions written into an employer's self-insured plan." Instead, this argument is about whether HealthPartners, Inc., or HPAI is the correct third-party administrator defendant. The only place this argument is even suggested in the briefing is in a footnote in HealthPartner's brief. The footnote reads,

"Contrary to Plaintiff's Complaint, HealthPartners Administrators, Inc., (rather than HealthPartners, Inc.) is the entity that serves as third-party administrator for the Essentia Health health plan at issue in this case. This motion should be granted even if Plaintiff amends her Complaint and properly identifies HealthPartners Administrators, Inc. ("HealthPartners"), as a defendant." (J.A.26.) HealthPartners made this bare statement without citation or support.

Nevertheless, the district court took this footnote and the Plan documents at issue, provided in an exhibit to HealthPartners' brief, and concluded that HealthPartners, Inc., should be dismissed from the lawsuit because it is incapable of redressing the Plaintiff's injuries. The unstated assumption here is that the parent company HealthPartners, Inc., can't redress injuries from a TPA plan where its subsidiary is identified in plan documents as the plan manager. Without discovery, the court has no basis from which to draw this conclusion.

In a Rule 12(b)1 motion for lack of subject matter jurisdiction, a court may consider two types of challenges: (1) a facial attack, which challenges the plaintiff's allegations within the complaint, and (2) a factual attack, which looks beyond the pleadings to resolve facts and determine jurisdiction. *Titus v. Sullivan*, 4 F.3d 590 (8th Cir. 1993). A facial challenge simply examines the words in the Complaint to determine whether the plaintiff has sufficiently averred subject matter jurisdiction. *Eaton v.*

Dorchester Dev., Inc., 692 F.2d 727, 731-32 (11th Cir. 1982). In a factual attack, a court may consider evidence outside the pleadings. *Titus*, 4 F.3d at 593.

The district's court decision in this matter must be considered a facial attack, rather than a factual attack, because the court did not have enough facts in front of it for a true factual attack. Though the district court in this matter did not discuss this distinction, it appears clear that it intended to address facts outside the scope of the jurisdictional paragraphs in Tovar's Complaint. However, to do so a court requires sufficient facts to make such a determination. *See Titus*, 4 F.3d at 593 (holding that in a factual attack a defendant should request an evidentiary hearing for the court to receive competent evidence on the issue). In this matter, there was no evidentiary hearing, and the only evidence considered by the district court was the Plan document at issue, a document that all parties and the district court agreed was embraced by the Complaint.

In a facial attack, a court must make a determination about subject matter jurisdiction based solely on the plaintiff's Complaint, documents necessarily embraced by the Complaint, and public record, just as in a Rule 12(b)6 motion to dismiss. *Branson Label, Inc. v. City of Branson*, 793 F.3d 910, 914 (8th Cir. 2015) (quoting *Osborn v. United States*, 918 F.2d 724, 729 n.6 (8th Cir. 1990)). This means the court must take the facts alleged in the complaint as true and construe all reasonable inferences from those facts most favorably to the complainant. *See Ashcroft v. Iqbal*, 56 U.S. 662, 680 (2009); *Bell Atl. Corp. v. Twombly*, 440 U.S. 544, 554-56 (2007).

HHS's regulations for Section 1557 provide some insight into the fact-intensive nature of the inquiry here regarding whether HealthPartners, Inc., or HPAI is the correct defendant. The OCR's supplemental "Background" to its regulations for Section 1557 provides guidance for determining when an insurance issuer is legally separate from a third party administrator. 81 FR 31375. In investigating claims brought to it, OCR proposes to deal with this on a case-by-case basis, following two examples from "longstanding civil rights case law." OCR specifically references two concepts, "the degree of common ownership and control between the two entities," citing to *Cook v. Arrowsmith Shelburne, Inc.*, 69 F.3d 1235, 1240-42 (2d Cir. 1995), and "whether the purpose of the legal separation is a subterfuge for discrimination," citing *Papa v. Katy Indus., Inc.*, 166 F.3d 937, 939 (7th Cir. 1999).

In *Cook*, the Second Circuit adopted a four-part test to determine when a parent company is liable for gender-based discrimination of a subsidiary's employee. The test includes the (1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control. *Id.* at 1240. This test has also long been used by this circuit in *Baker v. Stuart Broadcasting Co.*, 560 F.2d 389, 392 (8th Cir.1977), and more recently in *Davis v. Ricketts*, 765 F.3d 823, 827 (8th Cir. 2014). Under Title VII, this parallel "integrated enterprise" analysis is frequently described by courts as fact intensive, and routinely left until the conclusion of discovery. *Davis*, 765 F.3d at 826 (describing application of integrated enterprise

analysis after conclusion of discovery); *see also EEOC v. Jeff Wyler Eastgate, Inc.*, 2006 U.S. Dist. LEXIS 72344, *8-12 (S.D. Ohio Jan. 9, 2006) (noting necessity of discovery before the court can assess integrated enterprise issues).

The other case discussed in HHS's commentary to the regulations is *Papa v. Katy Indus., Inc.*, 166 F.3d 937, 939 (7th Cir. 1999). *Papa* dealt with employers under Title VII, the ADA, and the ADEA, considering when multiple entities should be aggregated to determine whether the collective entity has enough employees to meet the requirements of the statutes. *Id.* at 940. The court held that multiple firms could be aggregated when (1) creditors could "pierce the corporate veil" and sue the parent corporation, (2) the parent corporation splintered itself into separate corporations to avoid discrimination laws, and (3) the parent corporation directed the discriminatory policy in which the employee was complaining. *Id.* at 941-42.

In sum, HHS's supplemental "Background" to the regulations states that in investigating complaints, OCR will evaluate each case individually to determine if the third party administrator is separate from the issuer to determine which entity is subject to Section 1557. This analysis should consider the structure of the relationship between the two organizations, as outlined in *Cook*, and which entity directed the discriminatory action, as outlined in *Papa*. To properly analyze these questions a court requires facts. For example, Tovar would need to determine in discovery whether HealthPartners and HPAI have any interrelation of operations, common management, or common

financial control. In addition, Tovar would need discovery about where the discriminatory policy arose. Was it created by Essentia, by another self-insured employer, or by HealthPartners? If by HealthPartners, did it originate with HPAI, or was this exclusion in some way imported from plans designed by the parent company? Prior to any discovery, these facts are unavailable.

The Summary Plan Description considered by the district court in concluding that HPAI was the correct defendant does not shed much light on what respective roles HealthPartners, Inc., and HPAI play in administering Essentia's self-insured plan. The little evidence available in the Plan document actually suggests the district court is simply wrong about the parent company's ability to redress Tovar's injuries as a factual matter. HPAI is identified in the plan documents as the "plan manager," but several points in the Plan documents refer separately to HealthPartners, a short-hand defined in the document as referring to HPAI's parent company, HealthPartners, Inc. In fact, the sections in the Plan documents most suggestive of redress, the complaint and appeal sections, refer the plan participant to generic web sites and phone numbers for HealthPartners. (J.A.84.)

As far as Tovar is aware, no court in the country has yet addressed the question of when a parent company insurer with a subsidiary TPA may be held responsible for administering a plan that violates Section 1557 of the Affordable Care Act. This Court does not need to decide whether OCR's analysis for investigating complaints brought

under Section 1557 is correct, and whether an analogy to other civil rights law provides the correct legal standard here or if the standard should be more closely tailored to reflect the unique considerations of the insurance or healthcare industry. It is sufficient for this Court to conclude that this is a fact-intensive question and that at this stage in the proceedings, the parties do not have enough facts.

V. THIS COURT SHOULD DENY ESSENTIA'S MOTION TO DISMISS

A. Setting Aside Issues of Her Own Standing to Sue as a Cisgender Person, Tovar Plausibly Alleges that Essentia's Categorical Exclusion Violates Title VII and the Minnesota Human Rights Act

Tovar brings Title VII and MHRA claims against her employer, Essentia. Essentia's motion to dismiss did not reach the ultimate merits question for either claim – that is, whether these laws forbid employer healthcare plans to categorically exclude coverage for transition-related care. (J.A.14, 247) This Court can be confident, however, that Tovar's allegations on this ultimate question are plausible (in the *Iqbal* or *Twombly* sense) for both Title VII and the MHRA.

Title VII

In past years, some courts declined to read Title VII's bar on discrimination "because of sex" as extending to discrimination against transgender individuals, because they saw no evidence that Congress had intended to create such protections. *See* 42

U.S.C. § 2000e–2 (barring, but not defining, discrimination "because of sex"). And indeed, when it enacted Title VII in 1964, Congress may not have contemplated issues related to gender identity or transgender status. But as the Supreme Court has repeatedly emphasized, "[S]tatutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils." *Oncale v. Sundowner Offshore Oil Servs., Inc.*, 523 U.S. 75, 79-80 (1998); *see also Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 381 (1977) (noting that "[t]he evils against which [Title VII] is to be aimed are defined broadly").

With this admonition in mind, many courts now hold that Title VII's bar on discrimination "because of sex" must extend to discrimination against trans individuals, either under a *per se* analysis or under a gender-stereotyping analysis like that mandated by *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989).

The Sixth Circuit began holding employers liable for transgender discrimination more than a decade ago. *See Smith v. City of Salem*, 378 F.3d 566, 571-73 (6th Cir. 2004) (holding a fire department liable for threatening to terminate a transgender lieutenant). Some lower courts followed suit. *See, e.g., Schroer v. Billington*, 577 F. Supp. 2d 293, 303-08 (D.D.C. 2008) (holding the Library of Congress liable for withdrawing a job offer from an applicant after learning of her trans status). More recently, the Eleventh Circuit reached the same conclusion, *see Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011), as has the EEOC, s*ee Macy v. Holder,* Agency No. ATF-2011-00751 at *11, 2012 EEOPUB LEXIS 1181 (EEOC April 20, 2012). This Court has also indicated its

agreement by assuming for the purposes of Title VII analysis that transgender status is protected, *see Hunter v. United Parcel Service, Inc.*, 697 F.3d 697 (8th Cir. 2012), and district courts in the Eighth Circuit have ruled accordingly, *see, e.g.*, *Dawson v. H&H Electric, Inc.*, 2015 U.S. Dist. LEXIS 122723 (E.D. Ark. Sep. 15, 2015).

Once it is acknowledged that transgender rights are protected under Title VII, it requires only a few short steps to reach the conclusion that categorical exclusions for transition-related health care violate the statute. In fact, just two analytical steps are required: *First*, recognizing the fact that health insurance and other fringe benefits qualify as "compensation, terms, conditions, or privileges of employment" under Title VII. *See Newport News Shipbldg. & Dry Dock v. EEOC*, 462 U.S. 669, 682 (1983). *Second*, concluding that it must be a violation of the statute for an employer to provide compensation in the form of coverage for medically necessary health care to some employees but not others, based merely on the employees' gender identity. This would be the case, for example, where (as here) the employer's insurance covers medically necessary hormone replacement for cisgender individuals but not transgender individuals.

The EEOC presents this exact analysis in the amicus brief it recently submitted in a case running parallel to Tovar's, *Robinson v. Dignity Health*, brought in the Northern District of California. *See* Brief of EEOC as Amicus Curiae, *Robinson v. Dignity Health*, No. 4:16-cv-03035 YGR, N.D. Cal. (Aug. 22, 2016) [hereinafter *Robinson* Amicus], available online

https://www.aclu.org/sites/default/files/field_document/043_eeoc_amicus_brief_2016.08.22.pdf. The plaintiff in *Robinson*, a transgender man, has brought a Title VII challenge to his employer's categorical exclusion of transition-related care. The EEOC explained its support for the plaintiff's position as follows:

> [T]he plan's exclusion for "Treatment, drugs, medicines, services and supplies for, or leading to, sex transformation surgery" discriminates on its face against transgender people because it affects only people who need "sex transformation surgery" [more commonly referred to as "gender confirmation surgery"]. All such people are transgender. The plan would cover a mastectomy as treatment for cancer, for example, but not as treatment for gender dysphoria and for sex transformation purposes. This Court should find that these allegations of disparate treatment state a facially plausible claim for sex discrimination under Title VII.

Robinson Amicus at 17. If Tovar is permitted to go forward, she will pursue a similar and equally plausible argument on the merits of her Title VII claim.

MHRA

Tovar's allegations on the ultimate merits question under the MHRA are likewise plausible. The MHRA will not require the in-depth doctrinal interpretation laid out for Title VII in cases like *Smith*, *Schroer*, *Glenn*, *Macy,* or *Hunter*, since it expressly bars discrimination on the basis of gender identity or transgender status. Indeed, it has done so since 1993. *See* Minn. Stat. § 363A.03, subd. 44 (defining MHRA coverage as extending to "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness"); *see also Rumble v. Fairview Health Servs.,* No. 14-cv-2037 (SRN/FLN), 2015 U.S. Dist. LEXIS 31591, at *4-5 (D. Minn. Mar. 16, 2015) (following the MHRA's original usage which places these

gender identity protections under the label "sexual orientation" discrimination, but noting that current usage would treat sexual orientation and gender identity as independent protected characteristics, since it is now understood that "an individual's transgender status in no way indicates that person's sexual orientation").

As with Title VII, MHRA case law makes clear that the statute reaches discrimination in the provision of employee benefits like health insurance. *See Minnesota Mining and Mfg. Co. v. State*, 289 N.W. 2d 396 (Minn. 1979) [hereinafter *3M*] (finding exclusion of pregnancy benefits discriminated on the basis of sex, in violation of the MHRA); *cf. Newport News*, *supra.*

And like the EEOC, the Minnesota Department of Human Rights (MDHR) takes the position that categorical exclusions of transition-related care are unlawful. Faced with a similar question as that currently presented in *Robinson*, *see supra*, the MDHR concluded that the MHRA's express ban on gender identity discrimination forbids schools in Minnesota from excluding transition-related care from student health care plans:

> [T]he department believes that the charging party was correct in reasoning that as *3M* discriminated against women based on sex by excluding pregnancy-related benefits from its healthcare plan, the respondent has engaged in discrimination…against transgender individuals by excluding GID-related treatment from its Student Health Benefit Plan.

MDHR Memorandum, Ref. 58343 (2011) (determination of probable cause) at page 2, available online http://outfront.org/docs/UofM_PC_determination.pdf (using the older term "GID" or "Gender Identity Disorder" rather than gender dysphoria).

The MDHR went on to note:

> This reasoning is correct regardless of the respondent's financial concerns and apparent good intentions in contemplating the inclusion of GID-related treatment in its proposed 2012-2013 Plan; while the respondent's financial concerns and apparent good intentions are moving, they do not change the fact that as 3M's erstwhile healthcare plan discriminated against women based on sex by excluding pregnancy-related benefits (a class of benefits that would be used only by women),[4] the respondent's Plan discriminated against transgender individuals based on sexual orientation[5] by excluding GID-related treatment (a type of treatment that would be used only by transgender individuals).

Id. If Tovar is permitted to go forward with her MHRA claim, she will pursue a similar and equally plausible argument on the merits.

In doing so, Tovar will be able to draw support from a decision issued jointly last year by the Minnesota Department of Commerce and the Minnesota Department of Health. In a November 2015 Administrative Bulletin, the departments of Commerce and Health announced to all entities issuing individual or group health insurance policies in Minnesota that discrimination against an individual because of the individual's gender identity or expression is prohibited. *See* Administrative Bulletin 2015-5, Gender Identity Nondiscrimination Requirements (November 24, 2015)

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[4] Because some transgender men and some intersex individuals who do not identify as women have the physical capacity to be pregnant, this statement is a simplification of a more complex scientific reality; nonetheless, the court's reasoning in *3M* holds: singling out pregnancy benefits for exclusion does target cisgender women. *Accord Kolton v. Cty. of Anoka*, 645 N.W.2d 403, 409 (Minn. 2002) (noting that *3M*'s reasoning is based in the "direct correlation between the type of disability not covered and gender").

[5] As the MHRA uses this term; see *Rumble*, *supra*, at *4-5.

[hereinafter Administrative Bulletin], available online http://transgenderlawcenter.org/wp-content/uploads/2016/05/2015-11-24-Minnesota-bulletin-insurance-2015-5.pdf.

Thus, for entities whose insurance products are regulated by the Minnesota departments of Commerce and Health, it is already the case that "[b]lanket bans on medically necessary gender identity related care, including gender confirmation surgery, are prohibited as a discriminatory practice." http://www.health.state.mn.us/divs/hpsc/mcs/carrierltr2017.pdf. In that sense, Tovar's argument on the ultimate merits of her MHRA claim is more than just plausible: it is nearly inevitable, given the parallel between MDHR policy for employer-offered plans and Commerce and Health policy for insurer-offered plans.

B. Essentia's Statutory Standing Arguments Equate to Rule 12(b)(6) Arguments Asking Whether Tovar, as Cisgender Person, Can Challenge Essentia's Categorical Exclusion

Tovar's first Statement of Issues asks whether the district court erred in granting Essentia's motion to dismiss on the ground that she lacked statutory standing to sue under Title VII and the MHRA because she is not transgender. Given the doctrinal history of the term "statutory standing," Essentia's statutory standing argument could be interpreted to represent a jurisdictional argument distinct from a Rule 12(b)(6) failure to state a claim under the statute. *Compare Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998) (treating statutory standing as a jurisdictional inquiry, albeit one that overlaps substantially with a merits inquiry), *with Lexmark International, Inc. v. Static Control*

Components, Inc., 134 S. Ct. 1377 (2014) (clarifying that statutory standing, which can also be termed "prudential standing" or "zone of interest" standing, is in fact a merits inquiry); *see also* Richard Re, *The Doctrine Formerly Known as "Statutory Standing,"* available online https://richardresjudicata.wordpress.com/2014/08/27/the-doctrine-formerly-known-as-statutory-standing/ (analyzing changes in the meaning of the term); *Leyse v. Bank of Am. Nat'l Ass'n*, 804 F.3d 316, 320 (3d Cir. 2015) (concluding that post-*Lexmark*, "statutory standing is not jurisdictional").

Because both the district court and Essentia address Tovar's statutory standing as a pure merits inquiry, Essentia's arguments regarding statutory standing need not be addressed separately from its Rule 12(b)(6) arguments against Tovar's Title VII and MHRA claims.

C. Essentia's Rule 12(b)(6) Arguments Fail Because Tovar Does Fall Within the "Zone of Interests" Under Both Title VII and the MHRA: She is Not Barred from Challenging Essentia's Categorical Exclusion Under These Statutes Merely Because She is Cisgender

Essentia's statutory standing arguments reduce to the following merits inquiry (laid out in Tovar's second Statement of Issues): Can an employee bring a claim of discrimination under Title VII or the MHRA when the person whose protected status is targeted by the alleged discrimination is not the employee herself, but rather her beneficiary? Essentia argues that the employee cannot do so, and the district court agreed. In this, the district court erred.

Title VII

Title VII's enforcement provision does not suggest any particular restrictions on the characteristics of a person bringing suit under the statute, beyond that they be "aggrieved," *i.e.*, in the zone of interests protected. *See* 42 USC § 2000e–5(f)(1) (giving a right to sue to "the person claiming to be aggrieved"); *see also* 9 CFR § 1601.28 (same).

But the statute's definition of unlawful employment practices provides that it is unlawful "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of *such individual's* race, color, religion, sex, or national origin." 42 USC § 2000e–2(a)(1) (emphasis added). Does this definitional language mean that the statute only bars discrimination where the employee's *own* protected characteristic (race, color, religion, sex, or national origin) is at issue? This is the core question Essentia raises.

If the definitional language has this meaning, as Essentia argues, no one disputes that Tovar would be permitted to challenge Essentia's categorical exclusion *if she were transgender* herself – and as the analysis above indicates, she would likely be successful with such a challenge. *See* Part VI.A, *supra*; *see also Newport News*, 462 U.S. at 682 (healthcare benefits fall under the ambit of the statute); *Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1085-91 (1983) (Marshall, J., concurring) [hereinafter *Norris*] (finding employer liable for any discrimination in benefits, even if third party administers or provides them).

But under this reading of § 2000e–2(a)(1), such a challenge could *only* be lodged by a transgender employee. No matter how many plan beneficiaries were wrongfully denied benefits by an admittedly discriminatory plan, and no matter how many Essentia employees were thereby provided with lesser overall compensation "because of [their beneficiary's] sex" – the plan would remain immune from challenge until and unless Essentia happened to employ a transgender employee.

This is not an intuitive result, but it is the reading of the statute adopted by the district court.

Of course, reaching an unintuitive result does not necessarily mean that one's reading of a statute is incorrect. Here, however, there are a number of reasons to conclude that the district court's reading was in error.

For one, the court's reading fails to treat the statute as a coherent whole, instead concentrating solely on two words ("such individual's") in the definition section. This is a mistake. *See Clark v. U.S. Dep't of Agric.*, 537 F.3d 934, 940 (8th Cir. 2008) ("In reviewing statutory language, we do not read individual words in isolation, but rather, we read them in the context in which they are used and in the context of the statute as a whole"). While the statute's plain language will generally control, no reading should be adopted that leads to absurd results. *Id.* at 941; *DeCouteau v. Schweitzer*, 774 F.3d 1190, 1192 (8th Cir. 2014). The court should reject an interpretation that "would be inconsistent with the general purpose of the statute," *Clark* at 941, or "will produce a result demonstrably at odds with the intentions of its drafters," *DeCouteau* at 1192.

Tovar submits that unintuitive result described above is demonstrably at odds with the intention of the drafters, inconsistent with the general purpose of the statute, and even, arguably, absurd.

The district court's reading of the statute also fits poorly with a body of Title VII case law in which – despite the two words "such individual's" in § 2000e-2(a)(1) – courts have found employers liable even though the employers did not discriminate on the basis of an employee's own protected characteristic. These are sometimes referred to as "associational discrimination" cases. *See, e.g., Newport News Shipbldg. & Dry Dock v. EEOC*, 462 U.S. 669 (1983) (permitting non-pregnant employees to bring claim alleging pregnancy discrimination); *EEOC v. Puget Sound Log Scaling & Grading Bureau*, 752 F.2d 1389 (9th Cir. 1985) (same); *Tetro v. Elliot Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.*, 173 F.3d 988 (6th Cir. 1999) (permitting White employee to bring claim alleging bias against his biracial child); *Parr v. Woodman of World Life Ins. Co.,* 791 F.2d 888 (11th Cir. 1986) (permitting White employee to bring claim alleging bias against his Black wife); *Boyd v. Ill. State Police*, 2001 U.S. Dist. LEXIS 3792 (N.D. Ill. March 28, 2001) (permitting non-minority employees to bring claim alleging that their pay was impacted by bias against their minority colleagues). *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170 (2011), can be also be considered an associational discrimination case, since it recognized the right of an employee to bring a retaliation claim when it was the plaintiff's fiancée, not the plaintiff, who had carried out a protected activity.

The court and Essentia suggest such associational discrimination cases can be harmonized with their narrow reading of the statute because all such cases could be categorized as (for want of a better term) "reciprocal characteristic" cases. In *Newport News*, for example, the sex of the employees was actually implicated, because (the Court presumed) only women become pregnant, and a woman's spouse can only be a man (and vice versa). With these presumptions in mind, *Newport News* can be read as a case about the plaintiff employees' own sex (male). Similarly, in *Tetro* and *Parr*, the plaintiff employees' own race was implicated, to the extent that the employer's objection was not to Black or biracial family members *per se*, but rather to interracial relationships.

But this attempt to harmonize the case law fails to account for associational discrimination cases that *cannot* be understood as involving a "reciprocal characteristic." *Boyd*, *supra*, is an example. The alleged discrimination in *Boyd* was not rooted in any objection to interracial relations (the employer was not punishing employees for working in a mixed-race lab) nor could any presumption be made about the race of the plaintiff employees, as the Court could presume the sex of spouses of pregnant individuals in *Newport News*. *Boyd* is a non-reciprocal, pure associational discrimination case, and as such, incompatible with the district court's reading of § 2000e-2(a)(1).

Moreover, it is not clear, as a conceptual matter, that it is actually correct to say that *Thompson*, *supra*, involved a reciprocal characteristic; instead, the alleged retaliation turned on the close personal relationship (engagement) between the plaintiff and the individual with the protected characteristic.

Looking across the landscape of statutory civil rights cases demonstrates that cases like *Boyd* and *Thompson* are no anomaly. In *Chiara v. Town of New Castle*, 2 N.Y.S. 3d 132 (App. Div. 2d Dep't 2015), for example, the appellate court held an employer liable for non-reciprocal associational discrimination, tied to an employee's spouse's Jewish religion. The plaintiff, Jeffry Chiara, was harassed by his co-workers because his wife was Jewish. *Id.* at 134-35. Although co-workers on at least one occasion derided "Jew lovers," the harassment was not primarily based on an objection to inter-religious relationships; rather, it was based on across-the-board anti-Semitism. *Id.* at 137. Concretely, this means the harassment would apparently not have been any less had Chiara himself been Jewish. That the court permitted Chiara's claims to proceed seems correct – that is, in line with the general purposes of workplace antidiscrimination law. Yet under the district court's reading of Title VII, Chiara's claim would have to be rejected.

Similarly, the Supreme Judicial Court of Massachusetts ("SJC") recently approved a non-reciprocal associational discrimination claim on the basis of disability under Massachusetts human rights law. *See Flagg v. AliMed, Inc.*, 992 N.E.2d 354 (Mass. 2013). The plaintiff in *Flagg*, Marc Flagg, was fired by his employer, allegedly because his wife suffered from cancer. According to the SJC, although the state statute at issue did not expressly provide for a claim under such circumstances, it should be read to permit the claim because to do so furthered the aims of the statute. *See id.* at 359 (rejecting argument that Chiara could not bring suit because he himself did not have

cancer); *see also Fenn v. Mansfield Bank,* 2015 U.S. Dist. LEXIS 17235 (D. Mass. Feb. 12, 2015) (following *Chiara* in similar non-reciprocal disability case, where spouse was disabled with lupus); *Perez v. Greater New Bedford Voc. Tech. Sch. Dist.*, 988 F. Supp. 2d 105, 111 (D. Mass. 2013) (noting that the analysis in *Flagg* was specifically tied to the close family relationship at issue; it did not encompass an association based in advocacy on behalf of cancer victims or the disabled, generally).

Other courts commonly recognize non-reciprocal associational discrimination under such circumstances. *See, e.g., Berry v. Frank's Auto Body Carstar*, Inc., 817 F. Supp. 2d 1037, 1047-50 (S.D. Oh. 2011) (recognizing trend); *Manon v. 878 Educ., LLC*, 2015 U.S. Dist. LEXIS 27016 (S.D.N.Y. 2015) (claim under ADA Title I); *Huynh v. Bracamontes*, 2016 U.S. Dist. LEXIS 90443 (N.D. Cal. July 12, 2016) (claim under ADA Title II).

None of these cases is an exact parallel to the facts here, of course, since Tovar is alleging sex discrimination and the cases described above concern race, religion, or disability. But drawing such a doctrinal line would contradict longstanding precedent that requires courts to analyze the various protected classes in parallel ways, absent any strong basis not to do so. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 244 n. 9 (1989) ("The statute on its face treats each of the enumerated categories exactly the same."). Thus, courts should be prepared to recognize the possibility of non-reciprocal associational discrimination cases based on sex discrimination.

And, in fact, there are such cases already extant. In *Allen v. Am. Home Foods, Inc.*, 644 F. Supp. 1553 (N.D. Ind. 1986), *modified* 658 F. Supp. 451 (N.D. Ill. 1987), for example, the court recognized the right of male employees to bring a claim of sex discrimination, where they alleged that they lost their own jobs because of the employer's decision to close a plant because so many women worked there. *Id.* at 1555-57.

That Congress did not expressly draft Title VII to reflect the legitimacy of associational claims (whether reciprocal or not) is of no moment; as noted above, courts regularly "read in" such intent, consistent with the overall purpose of the statute. *See Chiara, supra; Flagg, supra*; *see also Barkhorn v. Ports Am. Chesapeake, LLC*, 2012 U.S. Dist. LEXIS 82385 at *5 (D. Mary. June 14, 2012) (rejecting attempt to limit associational claims under the ADA to dates after passage of an amendment expressly permitting such claims, since it was proper to conclude that "Congress intended to prohibit associational discrimination as part of the original 1990 ADA Act").

In sum: the two words "such individual's" in 42 USC § 2000e–2(a)(1) should not control courts' interpretation of Title VII, forcing them to reject non-reciprocal associational discrimination claims like Tovar's. Instead, consistent with the statute's broad remedial purpose, *Norris*, *supra*, at 1090-91, many prior cases, and the whole landscape of other civil rights laws, courts should recognize such claims. Doing so will allow courts to fully embrace Congress's intent in passing Title VII, which was to "achieve equality of employment opportunities and remove barriers," *Albemarle Paper*

Co. v. Moody, 422 U.S. 405, 417 (1975), and to "eradicate[e] discrimination throughout the economy," *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 771 (1976).

The facts here, as alleged in the Complaint, show that these are not merely lofty words. Essentia's discriminatory healthcare plan created barriers for Tovar and limited her employment opportunities, since she was forced under the circumstances to consider seeking new employment in order to obtain nondiscriminatory healthcare benefits. Such discriminatory limits operate as a drag on the economy, s*ee Albemarle, supra; Franks, supra,* and they operate as dignitary wrongs that cause harm both to individuals and to the broader community.

This analysis does not imply that civil rights statutes create unbounded rights, permitting any bystanders who choose to do so to bring claims to challenge what they see as discrimination. The developing doctrine of associational discrimination shows that courts can recognize appropriate and prudential boundaries, under the auspices of interpreting the correct "zone of interests" of each statute. *See Perez, supra* (noting that the zone of interests for the Massachusetts human rights statute included employees who suffered discrimination due to their association with close family members, but not employees experiencing adverse action due to their general advocacy for the disabled).

Cases like the instant one, which turn on discrimination in employee benefits, actually present an easy "zone of interests" issue, since beneficiaries of such benefit plans are by definition closely related to the employee (typically, a spouse or a child).

Returning full circle, it is helpful to imagine the further untoward repercussions if courts do not recognize the type of associational discrimination claim that Tovar is pursuing. Consider, for example, an employer whose compensation package to employees includes some form of lodging. As with discrimination in fringe benefits, *see Newport News, supra,* discrimination in lodging could be the basis of a Title VII claim. *See Boykin v. Comm'r*, 260 F.2d 249 (8th Cir. 1958). But under the reading of Title VII adopted by the district court, an employer could not be held liable under any of the following circumstances:

- Due to anti-Muslim bias and anxieties arising in the aftermath of 9.11, the employer bars employees from the employer-provided lodging if any family members who would live onsite are Sikh men (who, by virtue of their attire, are often mistaken for Muslims).

- Based on stereotypes about the supposed "dangerousness" of Black male teens, the employer similarly bars employees from the employer-provided lodging if their family members living onsite would include any Black male teens.

- Based on a stereotyped assumption that all Muslim women are wrongly oppressed by the religious strictures, the employer bars employees from the employer-provided lodging if their family members living onsite would include any women who wear the headscarf or hijab.

Like the outcome of the district court's ruling here, such results would be demonstrably at odds with the intention of the drafters, inconsistent with the general purpose of Title VII, and quite arguably absurd.[6]

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[6] Because the discrimination in each circumstance is intersectional – involving intertwined aspects of sex and race, ethnicity, or religion – these hypotheticals also further highlight the error of permitting non-reciprocal associational discrimination claims for some protected categories and not others. If race or religion receives such

Finally, it should be noted that any number of pillars of Title VII law would be undone if the district court's cramped interpretation were adopted. *Newport News* is one example. Under the analysis outlined above, nothing about the holding changes in light of marriage equality (or the recognition that in fact, some individuals who can become pregnant are not women. But if the district court's ruling is upheld, decades of settled expectations (and employer policies) would be upended, because it is no longer possible to presume that men only marry women and vice versa.

Similarly, if the district court's ruling is upheld, cases as venerable as *Frontiero v. Richardson*, 411 U.S. 677 (1973), would no longer be good law. In *Frontiero*, as in *Newport News*, the discrimination at issue turned on spousal relationships. *Id.* at 678. The Court found that female servicemembers had a cause of action because quarters (lodging) and medical and dental benefits were being provided on different terms to them than to their male colleagues. *Id.* at 690. This was because female spouses but not male ones were presumed to be dependent. *Id.* at 678. At the time – long before marriage equality – the Court could express this scenario as one involving reciprocal characteristics; in that sense, one could say the servicemembers were being treated differently depending on their own sex. *See id.* at 688. But now, four decades later and several years past the

protection, but not gender, a rational analysis of these intersectional circumstances would not be possible. Nor would it make any sense to impose a "reciprocal characteristic" requirement before claims would be permitted, since that would, for example, grant Title VII rights to a Sikh man in a same-sex marriage with another Sikh man, but not to a woman married to a Sikh man.

recognition of nationwide marriage equality, that framing is no longer possible. The only way *Frontiero* remains good law is if courts recognize – whether under Title VII or the Equal Protection Clause – that non-reciprocal associational discrimination on the basis of sex is actionable.

MHRA

In light of the analysis above, little more need be said about the errors in the district court's analysis of Tovar's MHRA claim. The only pertinent difference between the statutes lies in the statutory language itself, since unlike Title VII, the MHRA does not contain any language defining discrimination as being linked to an employee's own protected characteristics. *See* Minn. Stat. § 363A.08, subd. 2(3). In that sense, the district court's interpretation of the MHRA is even less supported than its interpretation of Title VII. The Court should reject the district court's analysis of both claims and permit Tovar to proceed in her action against Essentia.

CONCLUSION

For the reasons set forth herein, Appellant Tovar respectfully requests that Court overturn the District Court's Order.

CERTIFICATE OF COMPLIANCE

Certificate of compliance with the type-volume limitation, the typeface requirements, and the type style requirements of Fed. R. App. P. 32(a) and with the technical requirements of 8th Cir. R. 28A(h):

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,995 words, excluding portions of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) (table of contents, table of authorities, statement with respect to oral argument and certificates of counsel).

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Dated: October 4, 2016

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I hereby certify that on October 4, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeal for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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