

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK

SEAN ALLEN SIMONSON,

*Plaintiff,*

v.

OSWEGO COUNTY, A MUNICIPAL  
CORPORATION OF THE STATE OF NEW  
YORK; and OSWEGO COUNTY  
DEPARTMENT OF SOCIAL SERVICES,

*Defendants.*

Case No. 5:17-CV-1309-MAD-DEP

**ORAL ARGUMENT**  
**REQUESTED**

**PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO**  
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Pursuant to Local Rule 7.1 and the Court's Individual Rules and Practices, Plaintiff Sean Allen Simonson ("Plaintiff"), by and through the undersigned counsel, hereby respectfully submits this memorandum of law in opposition to Defendants' Motion to Dismiss (the "Motion").<sup>1</sup> Because Plaintiff's Complaint asserts well-pleaded claims for relief and presents the court with a live case or controversy, Defendants' Motion should be denied.<sup>2</sup>

### **FACTUAL AND PROCEDURAL BACKGROUND**

For nearly 30 years, Plaintiff Sean Simonson worked for Oswego County's Department of Social Services. Compl. at 5, ¶ 1; Compl. ¶ 33. He retired as a Senior Case Worker at DSS on October 31, 2015. Compl. at 5, ¶ 1. Mr. Simonson is a man; he is also transgender. Compl. ¶ 35. As part of the terms, conditions, and benefits of his employment, Mr. Simonson was and continues to be enrolled in the County of Oswego Health Benefit Plan (the "Health Plan"). Compl. ¶¶ 26, 34. However, the Health Plan specifically excludes from coverage "Services or Supplies connected to sex change Surgery, transsexualism, gender dysphoria, sexual reassignment or change, or to any treatment of gender identity disorders including medications, implants, hormone therapy, Surgery, medical or psychiatric treatment," regardless of medical necessity (hereinafter, the "Categorical Exclusion"). Compl. ¶ 30.

In February 2015, Mr. Simonson was diagnosed with gender dysphoria. Compl. ¶ 39. As

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<sup>1</sup> From the outset, the Court should note the Motion was filed without following the Court's Individual Rules and Practices, which require the use of pre-motion letters and a conference, prior to the filing of a motion to dismiss. As per the Individual Rules and Practices, any motion to dismiss "that fail[s] to comply with these rules will be summarily denied by the Court."

<sup>2</sup> Plaintiff does not contest Defendants' request that the Oswego County Department of Social Services be dismissed as a party because it "has no separate legal existence." *DiBlanca v. Town of Marlborough*, No. 1:13-CV-1579 (MAD/RFT), 2014 WL 2866341, at \*3 (N.D.N.Y. June 24, 2014) (quoting *Polite v. Town of Clarkstown*, 60 F. Supp. 2d 214, 216 (S.D.N.Y.1999)). Plaintiff also does not contest Defendant's assertion that punitive damages are not available against a municipality, such as Defendant Oswego County.

part of his transition and ongoing medical care, Mr. Simonson's doctor determined that it was medically necessary for Mr. Simonson to be placed on hormone replacement therapy and prescribed him testosterone on February 19, 2015. Compl. ¶ 42. On March 4, 2015, and twice thereafter on March 15, 2015 and June 29, 2015, Mr. Simonson was denied coverage for his medically-necessary hormone replacement therapy because the Health Plan "does not cover care, services, or treatment for sexual reassignment or change." Compl. ¶¶ 43-46. Hormone replacement therapy is not excluded from coverage for cisgender individuals (meaning people who are not transgender) for whom it is medically necessary. Compl. ¶ 48.

In addition, Mr. Simonson's doctor also determined that a bilateral mastectomy was medically necessary for Mr. Simonson as part of his treatment for gender dysphoria, and he underwent this procedure on February 13, 2017. Compl. ¶¶ 49, 50. On March 20, 2017 and April 4, 2017, Defendants denied coverage for the bilateral mastectomy and related services as they considered these services "ineligible" due to a "benefit exclusion." Compl. ¶ 52.

On October 30, 2015, Mr. Simonson filed a timely Charge of Discrimination with the U.S. Equal Employment Opportunity Commission ("EEOC") against Defendants for sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* ("Title VII"), and the New York State Human Rights Law, N.Y. EXEC. LAW. § 290, *et seq.* ("NYSHRL"). Compl. at 5, ¶ 15. On June 26, 2017, the EEOC issued a determination finding reasonable cause to believe that Oswego County discriminated against Mr. Simonson "due to his sex (transgender status/gender identity) in violation of Title VII." Compl. at 5, ¶ 16. Specifically, the EEOC found that Defendants had "discriminated against [Mr. Simonson] by denying him medical benefit coverage for treatment due to his sex (transgender status/gender identity)." Compl. at 5, ¶ 16. On September 13, 2017, the U.S. Department of Justice issued Mr. Simonson a Notice of Right to

Sue. Compl. at 5, ¶ 17. On June 14, 2017, Mr. Simonson served a timely Notice of Claim, in which he provided notice that he intended to file a number of claims against Oswego County, pursuant to New York General Municipal Law § 50-e. Compl. at 5, ¶ 18.

On November 16, 2017, Defendants entered into an Assurance of Discontinuance (“AOD”) agreement with the New York Office of the Attorney General. Compl. ¶ 32; Mot. at 2. As a result of the AOD, Defendants amended the Health Plan to eliminate the Categorical Exclusion, retroactive to December 15, 2014. *See* Mot. at 2; Alnutt Aff. at ¶¶ 3-4. Notice of the amendment was purportedly sent out to all Health Plan participants on November 28, 2017 and then specifically to Mr. Simonson on December 20, 2017. Alnutt Aff. at ¶¶ 3-5. The Notice states Mr. Simonson may be able “to obtain reimbursement of any out-of-pocket expenses incurred since December 15, 2014 as a result of the exclusion,” Alnutt Aff. ¶ 5; it makes no mention of a compensatory award. *See* Mot. Ex. 3 to Alnutt Aff.

Defendants’ discriminatory actions and practices have caused Mr. Simonson injury and damages, including, *inter alia*, financial damages, emotional distress, humiliation, embarrassment, pain and suffering, stigmatization, and a loss of dignity. Compl. ¶ 62. Accordingly, Mr. Simonson timely commenced this action on November 30, 2017 asserting that Oswego County discriminated against him in violation of Title VII; the NYSHRL; the New York Civil Rights Law (“NYSCRL”), N.Y. CIV. RIGHTS LAW § 40-c; Section 1557 of the Patient Protection and Affordable Care Act (“ACA”), 42 U.S.C. § 18116 (“Section 1557”); and the Fourteenth Amendment of the United States Constitution, U.S. CONST. amend. XIV, § 1. Compl. at 1, ¶ 1.

### **STANDARD OF REVIEW**

When considering a motion to dismiss, whether under Rule 12(b)(1) or 12(b)(6), the Court must “accept as true all material factual allegations in the complaint.” *N.Y. State Corr. Officers & Police Benev. Ass’n, Inc. v. New York*, 911 F. Supp. 2d 111, 123 (N.D.N.Y. 2012); *see also Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 128 (2d Cir. 2003).

A district court can only “dismiss a case for lack of subject matter jurisdiction under Rule 12(b)(1) if it ‘lacks the statutory or constitutional power to adjudicate it.’” *Aurecchione v. Schoolman Transp. Sys., Inc.*, 426 F.3d 635, 638 (2d Cir. 2005) (quoting *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000)). A motion to dismiss under Rule 12(b)(1) “challenging subject matter jurisdiction may be either facial or fact-based.” *Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 56 (2d Cir. 2016). When a defendant asserts a “facial” challenge to subject-matter jurisdiction, “courts should continue to draw from the pleadings all reasonable inferences in the plaintiff’s favor and are to presume that general allegations embrace those specific facts that are necessary to support the claim.” *John v. Whole Foods Mkt. Grp., Inc.*, 858 F.3d 732, 737 (2d Cir. 2017) (cleaned up). As such, “the plaintiff has no evidentiary burden.” *Carter*, 822 F.3d at 56. When a defendant makes a “fact-based” challenge to subject-matter jurisdiction, “proffering evidence beyond the Pleading,” *id.* at 57, a “plaintiff bears the burden of proving subject matter jurisdiction by a preponderance of the evidence.” *Aurecchione*, 426 F.3d at 638. However, the plaintiff is “entitled to rely on the allegations in the Pleading if the evidence proffered by the defendant is immaterial because it does not contradict plausible allegations that are themselves sufficient to show standing,” or may “come forward with evidence of their own to controvert that presented by the defendant if the affidavits submitted on a 12(b)(1) motion reveal the existence of factual problems in the assertion of jurisdiction.” *Carter*, 822 F.3d at 57 (cleaned up).

To survive a motion to dismiss under Rule 12(b)(6), a party need only plead “a short and plain statement of the claim,” Fed. R. Civ. P. 8(a)(2), with sufficient facts to “state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Under this standard, the pleading’s “[f]actual allegations must be enough to raise a right of relief above the speculative level,” *id.* at 555, and present claims that are “plausible on [their] face.” *Id.* at 570. A complaint challenging discriminatory conduct “is sufficient with respect to the element of discriminatory intent . . . if it pleads specific facts that support a minimal plausible inference of such discrimination.” *Doe v. Columbia Univ.*, 831 F.3d 46, 56 (2d Cir. 2016).

### **ARGUMENT**

#### **I. THE COURT HAS SUBJECT-MATTER JURISDICTION DESPITE DEFENDANTS’ VOLUNTARY CESSATION OF THE CATEGORICAL EXCLUSION.**

Through their Motion, Defendants argue that this court lacks subject-matter jurisdiction because they have voluntarily ceased their unlawful and discriminatory policies by amending the Health Plan retroactively to December 15, 2014, which they argue moots Plaintiff’s claims. Defendants’ argument is without merit. First, it is black-letter law that voluntary cessation of allegedly illegal conduct does not deprive a district court of its power to hear and determine a case. Second, Defendants misapprehend the relief Plaintiff seeks. For example, Defendants completely ignore Plaintiff’s request for non-economic compensatory damages as well as broad injunctive relief prohibiting Defendants from discriminating on the basis of sex, nonconformity with sex stereotypes, gender identity, gender transition, and transgender status in the provision of compensation, terms, conditions or privileges of employment. Defendants’ eleventh-hour amendment of the Health Plan, even when retroactive, does not and cannot address these claims for relief.

Accordingly, and for the reasons set forth below, Plaintiff's case is not moot and the Court has subject-matter jurisdiction.

***a. The County cannot shield itself from liability by voluntarily ceasing its unlawful practices.***

“[V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot.” *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953) (cleaned up). Here, after more than two years of investigation by the EEOC, a reasonable cause finding, and a breakdown of conciliation, Defendants voluntarily amended the Health Plan at the last moment, just before this lawsuit was filed, and while still claiming that they are not prohibited from discriminating against transgender employees in the provision of compensation, terms, conditions, or privileges of employment. Such last-minute maneuvers cannot and should not prevent the Court from adjudicating this case.

“The voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed.” *Knox v. Serv. Emps. Int’l Union, Local 1000*, 567 U.S. 298, 307 (2012); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). “The test for mootness in cases such as this is a stringent one.” *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 289, n.10 (1982). As such, “a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.” *Friends of the Earth, Inc.*, 528 U.S. at 190.

Here, Defendants have argued consistently that neither federal nor state law bars them from discriminating against transgender employees in the provision of compensation, terms, conditions or privileges of employment. *See, e.g.*, Mot. at 6-10 (arguing the Categorical Exclusion is lawful

and that federal and state law do not protect Plaintiff, a transgender man, from such discrimination). Notwithstanding the fallaciousness of such arguments, their very proposition demonstrates why Defendants' voluntary amendment of the Health Plan on the eve of this lawsuit cannot be allowed to moot out this case. As with *City of Mesquite*, "repeal of the objectionable language would not preclude it from reenacting precisely the same provision" once the case is dismissed. 455 U.S. at 289; *see also Hispanic Leadership Fund, Inc. v. Walsh*, 42 F. Supp. 3d 365, 375 (N.D.N.Y. 2014) ("finding that Plaintiffs' challenge is now moot would allow Defendants to change their mind and enforce this provision as soon as this action is terminated").

The last-minute nature of Defendants' amendment to the Health Plan, on the eve of the filing of Plaintiff's complaint and after more than two-years of fervently defending the legality of their Categorical Exclusion, also "prompts questions of defendants' credibility and gives rise to suspicions that defendants have simply manufactured an argument of mootness." *Hilton v. Wright*, 235 F.R.D. 40, 49 (N.D.N.Y. 2006); *see also Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 574 (2d Cir. 2003); *Ahrens v. Bowen*, 852 F.2d 49, 53 (2d Cir. 1988) ("The fact that the Secretary, who had repeatedly refused to waive recoupment in the present case over a five year period, suddenly elected to do so on the eve of plaintiffs' motion for summary judgment . . . suggests an attempt by the Secretary to conjure up an argument for mootness and thwart adjudication of the issue.").

*United States v. New York City Transit Authority*, 97 F.3d 672 (2d Cir. 1996), is instructive on this point. There, the EEOC challenged a Transit Authority policy as violative of Title VII. 97 F.3d at 674. As with Defendants in this case, the Transit Authority instituted a change of policy "on the eve of the lawsuit" after approximately two years of administrative investigation and litigation, in which they stood by the legality of their policy. *Id.* at 675-76. The Second Circuit

rejected the Transit Authority's mootness argument because it found it "significant that the change of policy was instituted on the eve of the lawsuit" and Transit Authority's arguments about the policy "foreshadow[ed] the eventual abandonment of the policy or the modification of it in ways that would present again the same issues." *Id.* at 676. Similarly, here, Defendants stand by the legality of their Categorical Exclusion and, by their own admission, instituted the change in policy just a few days before Plaintiff's Complaint was filed. *See Alnutt Aff.* at ¶ 3. Accordingly, the Court should reject Defendants' mootness arguments.

Defendants argue the AOD with the Office of the Attorney General provides "'reasonable assurance' that the Categorical Exclusion will not be reinstated in the future" and that, unlike *De Funis v. Odegaard*, 416 U.S. 312 (1974), the change "occurred prior to and independent of [Plaintiff's] filing of the Complaint." Mot. at 5. Defendants' account is inaccurate in several ways. First, the Attorney General's investigation was related to and concurrent with the EEOC's investigation of Defendants' violations of Plaintiff's rights. Indeed, the Office of the Attorney General began investigating Defendants' Health Plan and policies *because of* Plaintiff's EEOC charge, which was filed *two years prior* to the entry of the AOD. As such, the AOD is not truly independent from the filing of this Complaint, and predates it only in the most academic sense of the word. Second, Defendant County entered into the AOD "freely and voluntarily" and the AOD "is not intended, and should not be construed, as an admission of liability." Assurance of Discontinuance, *In the Matter of: The Oswego Health Plan*, AOD No. 17-203 (N.Y. Att'y Gen. Nov. 16, 2017), at ¶¶ 16, 29, available at <https://perma.cc/5Y63-RNRQ>. Third, the AOD does not address the past discrimination suffered by Plaintiff. Finally, Defendants' disingenuous use of the AOD to attempt to moot Plaintiff's claims violates the spirit and terms of the AOD, which specifically states that, "Nothing contained herein shall be construed as to deprive any person of

any private right under the law.” *Id.* at ¶ 18.

Moreover, nothing but Defendants’ voluntary agreement prevents them from reverting to the discriminatory policy at any point in the future. Considering Defendants’ legal arguments in this case and the possibility that a change in Attorney General could eliminate the possibility of enforcement by said office, the existence of the AOD does not meet Defendants’ “formidable burden of showing that it is ***absolutely clear*** the allegedly wrongful behavior could not reasonably be expected to recur.” *Friends of the Earth, Inc.*, 528 U.S. at 190 (emphasis added); *cf. Hispanic Leadership Fund*, 42 F. Supp. 3d at 375 (“Although the Court does not doubt the sincerity of the Board of Elections, finding that Plaintiffs’ challenge is now moot would allow Defendants to change their mind and enforce this provision . . . when the composition of the Board of Elections changes.”).

Defendants have consistently demonstrated their inaccurate belief that they are legally entitled to discriminate against transgender employees. Thus, allowing them to escape liability for their discriminatory actions through a voluntary, eleventh-hour amendment to the Health Plan would not make Plaintiff whole, nor would it deter Defendants from further discriminating against transgender employees. Put simply, Plaintiff’s Complaint presents a live case or controversy for the Court to adjudicate.

***b. Defendants’ eleventh-hour retroactive amendment to the Health Plan does not and cannot address the totality of Plaintiff’s claims, including his claims for non-economic compensatory damages and broader injunctive relief.***

“[A]s long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.” *Knox*, 567 U.S. at 307-08 (citing *Ellis v. Bhd. Of Ry., Airline and S.S. Clerks*, 466 U.S. 435, 442 (1984) (cleaned up)); *see also Hispanic Leadership Fund*, 42 F. Supp. 3d at 374. Here, Plaintiff asserts claims for declaratory judgment, economic and non-

economic compensatory damages, and injunctive relief. Defendant’s retroactive amendment of the Health Plan does nothing to address Plaintiff’s claim for non-economic damages for the emotional distress and suffering, embarrassment, humiliation, pain and anguish, stigmatization, and loss of dignity he suffered as a result of Defendants’ discriminatory actions. Likewise, Defendants’ amendment of the Health Plan does not completely address Plaintiff’s request for injunctive relief as Plaintiff seeks enjoinder of discriminatory practices “on the basis of sex, nonconformity with sex stereotypes, gender identity, gender transition, and transgender status, in the provision of compensation, terms, conditions or privileges of employment,” of which the Health Plan is but a small part. Thus, the retroactive amendment to the Health Plan does not render this case moot as it does not and cannot address the entirety of Plaintiff’s claims.<sup>3</sup>

Under Title VII, should he prevail, Plaintiff is entitled to non-economic compensatory damages for “emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.” 42 U.S.C. § 1981a(b)(3). Likewise, compensatory damages may also be recovered under Sections 1981 and 1983, *see Smith v. Wade*, 461 U.S. 30, 56 (1983); *Carey v. Phipps*, 435 U.S. 247, 264 (1978); *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 460 (1975), as well as under Section 1557 of the Affordable Care Act and the New York State Human Rights and Civil Rights Laws, *see Prescott v. Rady Children’s Hosp.-San Diego*, 265 F. Supp. 3d 1090, 1101 (S.D. Cal. 2017); *Makinen v. City of New York*, 167 F. Supp. 3d 472, 489 (S.D.N.Y.

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<sup>3</sup> Notably, the affidavits and exhibits proffered by Defendants do not contradict or call into question any material factual allegations contained in Plaintiff’s Complaint. *See Carter*, 822 F.3d at 57 (noting how plaintiff is “entitled to rely on the allegations in the Pleading if the evidence proffered by the defendant is immaterial because it does not contradict plausible allegations that are themselves sufficient to show standing.”). Indeed, the entry of the AOD by Defendants with the New York Office of the Attorney General was included in the Complaint. Compl. ¶ 32. But, as noted herein, the AOD not only does not address Plaintiff’s claims for compensatory damages and request for broader injunctive relief, it also represents a voluntary cessation by Defendants that is insufficient to moot out the rest of Plaintiff’s claims for relief. *See N.Y.C. Transit Auth.*, 97 F.3d at 676.

2016).

The Second Circuit has repeatedly held that “[c]laims for damages or other monetary relief automatically avoid mootness, so long as the claim remains viable.” *Stokes v. Vill. of Wurtsboro*, 818 F.2d 4, 6 (2d Cir. 1987) (citing 13A C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3533.3 at 262 (1984 ed.)); *see also Dean v. Blumenthal*, 577 F.3d 60, 66 (2d Cir. 2009) (“Dean’s complaint, however, also seeks damages, and Blumenthal’s withdrawal of the challenged policy does not render moot Dean’s requested relief for past constitutional violations.”); *McGinty v. State*, 193 F.3d 64, 71 (2d Cir. 1999); *Beyah v. Coughlin*, 789 F.2d 986, 988–89 (2d Cir. 1986) (holding that an allegedly unconstitutional practice, which no longer affects plaintiff, does not moot the request for damages); *Craft v. Vill. of Lake George N.Y.*, 39 F. Supp. 3d 229, 240 (N.D.N.Y. 2014) (holding that “a claim for damages, even nominal in nature, generally prevents mootness”).

It is uncontroverted that for two years, Defendants discriminatorily denied health insurance coverage to Plaintiff based on his sex, nonconformity with sex stereotypes, gender identity, gender transition, and transgender status. Defendants’ change in policy on the eve of the filing of this lawsuit does not render moot Plaintiff’s requested relief for such past violations of federal and state law.

## **II. THE COUNTY’S CATEGORICAL EXCLUSION VIOLATES TITLE VII’S PROHIBITION AGAINST SEX DISCRIMINATION.**

An employee asserting a discrimination claim under Title VII must “allege two elements: (1) the employer discriminated against him (2) because of his race, color, religion, sex, or national origin.” *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 85 (2d Cir. 2015). The Second Circuit has described the plaintiff’s burden at this initial step as “de minimis.” *Zimmermann v. Assocs. First Capital Corp.*, 251 F.3d 376, 381 (2d Cir. 2001); *see also Meiri v. Dacon*, 759 F.2d

989, 996 (2d Cir. 1985) (“The elements of proof in employment discrimination cases were not intended to be ‘rigid, mechanized or ritualistic.’” (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978))). Here, Plaintiff has met his burden and alleged that he was discriminated against in the terms and conditions of his employment because of his sex. Accordingly, he has stated a plausible claim for relief under Title VII.<sup>4</sup>

***a. Through their Categorical Exclusion, Defendants discriminated against transgender employees, including Plaintiff.***

It cannot be reasonably controverted that Defendants discriminated against Plaintiff in the provision of compensation, terms, conditions or privileges of employment. *See* Compl. ¶¶ 30-31, 42-52. “Health insurance and other fringe benefits are ‘compensation, terms, conditions, or privileges of employment.’” *Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 682 (1983). Under the express terms of Title VII, “[it] shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to [his] compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex.” 42 U.S.C. § 2000(e). Here, Plaintiff’s Complaint alleges that Defendants discriminated against transgender employees, including Plaintiff, in the provision of compensation, terms, conditions or privileges of employment based on their sex in a couple of ways.

*First*, Plaintiff alleges that Defendants’ Categorical Exclusion is a facially discriminatory

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<sup>4</sup> Sometimes courts have further parsed out these elements into four, stating that to assert a *prima facie* Title VII discrimination claim, a plaintiff must establish that: (1) he is a member of a protected class; (2) he is competent to perform the job or is performing his duties satisfactorily; (3) he suffered an adverse employment decision or action; and (4) the decision or action occurred under circumstances giving rise to an inference of discrimination based on his membership in the protected class. *See Serrano v. N.Y. State Dep’t of Env’tl. Conservation*, No. 12-CV-1592 (MAD/CFH), 2017 WL 1194238, at \*4–5 (N.D.N.Y. Mar. 30, 2017). Here, Plaintiff has stated a plausible Title VII claim. Plaintiff is (1) a transgender man (2) who is indisputably entitled to participate in the Health Plan as a former employee of the County and (3) who has suffered an adverse employment action in the form of disparate treatment in the coverage medically-necessary care available to cisgender employees under the Health Plan (4) because of his sex.

employment policy. Compl. ¶¶ 30, 61, 70. Here, Defendants' Categorical Exclusion prohibited coverage of any medically-necessary transition-related care, regardless of what the care was, based on whether an employee was transgender. *See* Compl. ¶¶ 30-31, 42-52. Defendants admit as much. *See* Mot. at 2; Alnutt Aff. at ¶ 2; Mot. Ex. 1 to Alnutt Aff. Thus, Plaintiff "has shown sex discrimination by establishing the existence of a facially discriminatory employment policy." *Healey v. Southwood Psychiatric Hosp.*, 78 F.3d 128, 132 (3d Cir. 1996). "When open and explicit use of gender is employed, as is the case here, the systematic discrimination is in effect 'admitted' by the employer, and the case will turn on whether such overt disparate treatment is for some reason justified under Title VII." *Id.* No further proof of intent is necessary, since "[w]hether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination." *Int'l Union v. Johnson Controls*, 499 U.S. 187, 199 (1991).

In other words, this case is not a case about the denial of benefits, but rather about the facially disparate treatment in the provision of compensation, terms, conditions, or privileges of employment. *See generally Graham v. State of N.Y., Dep't of Civil Serv.*, 907 F.2d 324 (2d Cir. 1990); *see also Saks v. Franklin Covey Co.*, 316 F.3d 337, 347 (2d Cir. 2003). Indeed, other district courts have held that policies similar to the Categorical Exclusion constitute an adverse employment action sufficient to support a Title VII sex discrimination claim. *See Baker v. Aetna Life Ins. Co.*, 228 F. Supp. 3d 764, 771 (N.D. Tex. 2017) (holding that plaintiff "plausibly alleges that she was denied employment benefits based on her sex" in challenge "alleg[ing] that coverage under the Health Plan was denied because the plan does not cover breast implants for individuals with a male birth gender designation who are transitioning to the female gender").

*Second*, Defendants' Categorical Exclusion "has a discriminatory effect," *Legg v. Ulster*

*Cty.*, 820 F.3d 67, 72 (2d Cir. 2016), on transgender employees, including Plaintiff, by denying them coverage for medically-necessary treatments that are otherwise covered for cisgender employees. Compl. ¶¶ 48, 54-59. Under this theory, an employee “establishes a prima facie violation by showing that an employer uses ‘a particular employment practice that causes a disparate impact on the basis of . . . sex.’” *Ricci v. DeStefano*, 557 U.S. 557, 578 (2009) (quoting 42 U.S.C. § 2000e–2(k)(1)(A)(i)). Here, “[b]ecause only transgender people require medically-necessary care to treat gender dysphoria, denying coverage for such health care constitutes discrimination based on sex, nonconformity with sex stereotypes, gender identity, gender transition, and transgender status.” Compl. ¶ 60.

***b. Through their Categorical Exclusion, Defendants engaged in prohibited sex discrimination.***

Furthermore, “[e]mployment discrimination on the basis of transgender identity is employment discrimination ‘because of sex’ and constitutes a violation of Title VII of the Civil Rights Act.” *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 527 (D. Conn. 2016). As such, Defendants’ Categorical Exclusion discriminated against Plaintiff because of his sex because a policy that treats transgender people differently “is inherently based upon a sex-classification.” *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017). While the Second Circuit has not considered this question, the majority of circuit courts to have done so agree.<sup>5</sup> *See id.*; *Glenn v. Brumby*, 663 F.3d 1312, 1316-19 (11th Cir. 2011);

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<sup>5</sup> Defendants reliance on *Mario v. P&C Food Markets*, 313 F.3d 758 (2d Cir. 2002), is inapposite as the language cited by Defendants in unambiguously dicta. *Id.* at 767 (noting that the court “need not reach the[] question[]” of whether transgender employee was part of a protected class); *see also Fabian*, 172 F. Supp. at 518 (noting “the Second Circuit has [n]ever addressed” question of whether discrimination on the basis transgender status is sex discrimination and that *Mario* did not reach the question). Likewise, Defendants err by relying on *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), as *Ulane* has been abrogated by *Whitaker*, 858 F.3d 1034, and *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339 (7th Cir. 2017) (en banc).

*Smith v. City of Salem*, 378 F.3d 566, 573-75 (6th Cir. 2004); *Rosa v. Park W. Bank & Tr. Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000). Courts recognize that discrimination against transgender persons is sex discrimination, whether it is based on impermissible sex stereotyping, transgender status, or gender transition.

**Sex Stereotyping.** Discrimination against transgender employees is sex discrimination because it is inherently rooted in sex stereotypes. Sex discrimination encompasses any differential treatment on the basis of “sex-based considerations.” *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242, 251 (1989). And, “[f]or close to a half century,” the Supreme Court “has viewed with suspicion laws that rely on . . . fixed notions concerning [a particular] gender’s roles and abilities.” *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1692 (2017) (cleaned up).

Discrimination based on sex “is not only discrimination because of maleness and discrimination because of femaleness,” but also “discrimination because of the properties or characteristics by which individuals may be classified as male or female.” *Fabian*, 172 F. Supp. 3d at 526. As such, “discrimination based on transgender status . . . is essentially the epitome of discrimination based on gender nonconformity, making differentiation based on transgender status akin to discrimination based on sex for these purposes.” *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 285-86 (W.D. Pa. 2017). “By definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth.” *Whitaker*, 858 F.3d at 1048; *see also Glenn*, 663 F.3d at 1316; *Smith*, 378 F.3d at 575; *Rosa*, 214 F.3d at 215-16; *Schwenk*, 204 F.3d at 1201. Put simply, “[t]he defining characteristic of a transgender individual is that their inward identity, behavior, and possibly their physical characteristics, do not conform to stereotypes of how an individual of their assigned sex should feel, act and look.” *Doe I v. Trump*, No. CV 17-1597 (CKK), 2017 WL 4873042, at \*28 (D.D.C. Oct. 30, 2017).

As a result, district courts across the country have held that a transgender plaintiff can state a claim under Title VII for sex discrimination on the basis of a sex-stereotyping. *See Valentine Ge v. Dun & Bradstreet, Inc.*, No. 6:15-CV-1029-ORL-41GJK, 2017 WL 347582, at \*4 (M.D. Fla. Jan. 24, 2017); *Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001, 1014 (D. Nev. 2016); *Fabian*, 172 F. Supp. 3d at 527; *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, 100 F. Supp. 3d 594, 603 (E.D. Mich. 2015); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008); *Schroer v. Billington*, 577 F. Supp. 2d 293, 305 (D.D.C. 2008). In the same vein, Plaintiff has alleged here that by “excluding an entire category of people” from coverage based on their transgender status alone, the Categorical Exclusion “punish[es] individuals for failing to adhere to gender stereotypes.” *Doe I*, 2017 WL 4873042, at \*28.

**Transgender Status.** Policies that treat people consistent with their gender identity *only if* that identity matches their birth-assigned sex also unlawfully discriminate on the basis of sex, because necessarily take into account a person’s sex. It is no answer that the law treats everyone consistently based on their birth-assigned sex. *See Roberts*, 215 F. Supp. 3d at 1015; *cf. Loving v. Virginia*, 388 U.S. 1, 8 (1967). “What matters” is that “the discrimination is related to . . . sex.” *Schwenk*, 204 F.3d at 1202; *accord Fabian*, 172 F. Supp. 3d at 526-27. Here, that is beyond any material dispute. But for Plaintiff’s transgender status, the Health Plan would cover his mastectomy and hormone treatment. Compl. ¶¶ 57-59. Indeed, Plaintiff received coverage for hormone therapy before coming out as transgender. Compl. ¶ 58.

A robust body of case law has held that gender identity is a critical determinant of sex itself. *See, e.g., Schwenk*, 204 F.3d at 1201-02; *Evancho*, 237 F. Supp. 3d at 288 (“gender identity is entirely akin to ‘sex’”); *Roberts*, 215 F. Supp. 3d at 1011; *Fabian*, 172 F. Supp. 3d at 526-27; *Rumble v. Fairview Health Servs.*, No. 14-CV-2037 (SRN/FLN), 2015 WL 1197415, at \*2 (D.

Minn. Mar. 16, 2015). That is because gender identity “is deeply ingrained and inherent in the[] very beings” of transgender people, and like sex, “is neither transitory nor temporary.” *Evancho*, 237 F. Supp. 3d at 289. As such, discrimination based on gender identity—i.e., based on transgender status—is sex discrimination.

**Gender Transition.** Finally, discrimination based on gender transition is also discrimination based on sex, just as discrimination based on religious conversion is necessarily based on religion. Firing an employee because she converts from Christianity to Judaism “would be a clear case of discrimination ‘because of religion,’ even if the employer ‘harbors no bias toward either Christians or Jews but only ‘converts.’” *Schroer*, 577 F. Supp. 2d at 306; *accord Fabian*, 172 F. Supp. 3d at 527. Similarly, if Defendants treat men and women equally as a general matter but nonetheless discriminate against those who undertake gender transition, this conduct constitutes impermissible sex discrimination. *Schroer*, 577 F. Supp. 2d at 306.

\* \* \*

There is no question that Plaintiff has alleged that he was denied medically-necessary care under Defendants’ comprehensive Health Plan while cisgender employees received coverage for the *same* medical treatment he sought and was denied. Compl. ¶¶ 29, 48, 57-59. The only reason Plaintiff was denied coverage was because of his sex, based on his nonconformity with sex stereotypes, transgender status, and gender transition. Title VII bars such discrimination and courts have repeatedly held that similar categorical exclusions of coverage for transition-related care constitute sex discrimination in other contexts. *See, e.g., Stone v. Trump*, No. MJG-17-2459, 2017 WL 5589122, at \*12, \*15 (D. Md. Nov. 21, 2017) (enjoining “Sex Reassignment Surgery Directive [that] prohibits the expenditure of military resources on sex-reassignment surgical procedures” as “a form of discrimination on the basis of gender”); *Karnoski v. Trump*, No. C17-

1297-MJP, 2017 WL 6311305, at \*2, \*7 (W.D. Wash. Dec. 11, 2017) (same); *cf. Baker*, 228 F. Supp. 3d at 771. Plaintiff has thus plainly stated a claim for relief under Title VII.

### III. THE CATEGORICAL EXCLUSION VIOLATES SECTION 1557 OF THE ACA.

Defendants' Motion fails completely to address Plaintiff's Section 1557 claim. For this reason alone, Plaintiff's Section 1557 survives. Nevertheless, Plaintiff briefly addresses his Section 1557 claim here out of an abundance of caution. "Under section 1557 of the ACA, health programs or activities receiving federal financial assistance are prohibited from discriminating against individuals . . . on the basis of sex." *Prescott*, 265 F. Supp. 3d at 1098 (citing 42 U.S.C. § 18116(a); 20 U.S.C. § 1681); *see also Rumble*, 2015 WL 1197415, at \*10. For the same reasons that discrimination on the basis of transgender status is sex discrimination under Title VII, *see* Part II.b, *supra*, such discrimination is also prohibited under Section 1557. *See Prescott*, 265 F. Supp. 3d at 1099; *Rumble*, 2015 WL 1197415, at \*2. Indeed, the rule promulgated by the U.S. Department of Health and Human Services ("HHS") under the ACA defines "on the basis of sex" under Section 1557 to include "discrimination on the basis of . . . gender identity." 45 C.F.R. § 92.4.<sup>6</sup>

Moreover, a plaintiff states a plausible claim for discrimination under Section 1557 by alleging that the defendant is a covered entity under the law and that the plaintiff has been excluded from participation in, denied the benefits of, or been subjected to discrimination by that entity because of the plaintiff's membership in a protected class. *See, e.g., Callum v. CVS Health Corp.*, 137 F. Supp. 3d 817, 853 (D.S.C. 2015) (citing the express language of 42 U.S.C. §

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<sup>6</sup> While HHS's rule should be given deference under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), Plaintiff's claim is based on the text of the statute and is not dependent on the rule. The rule merely describes and elaborates what Section 1557 and applicable case law (which precedes the rule) have long provided: Discrimination against transgender individuals is discrimination based on sex. Courts can and do reach the same result without relying on the rule. *See Prescott*, 265 F. Supp. 3d at 1105.

18116(a)); *Rumble*, 2015 WL 1197415, at \*15. And “as long as part of an organization or entity receives federal funding or subsidies of some sort, the entire organization is subject to the anti-discrimination requirements of Section 1557.” *Rumble*, 2015 WL 1197415, at \*12. Moreover, a covered entity, such as Defendants, “shall not, in providing or administering health-related insurance or other health-related coverage: . . . Have or implement a categorical coverage exclusion or limitation for all health services related to gender transition; or . . . Otherwise deny or limit coverage, 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 C.F.R. §§ 92.207(b)(4)-(5).

Here, Plaintiff alleges that Defendants are a covered entity, Compl. ¶¶ 14, 77, and have discriminated against him based on sex, *id.* at ¶¶ 80-81. Accordingly, Plaintiff has properly pleaded a violation of Section 1557 by Defendants.

#### **IV. THE COUNTY’S CATEGORICAL EXCLUSION VIOLATES THE FOURTEENTH AMENDMENT’S EQUAL PROTECTION CLAUSE.**

“The Equal Protection Clause ‘is essentially a direction that all persons similarly situated should be treated alike.’” *Brown v. City of Oneonta*, 221 F.3d 329, 337 (2d Cir. 2000) (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985)); *see also Romer v. Evans*, 517 U.S. 620, 631 (1996). Yet, because of the Categorical Exclusion, transgender employees, including Plaintiff, “are being distinguished by governmental action from those whose gender identities are congruent with their assigned sex.” *Evancho*, 237 F. Supp. 3d at 285.

“There are several ways for a plaintiff to plead intentional discrimination that violates the Equal Protection Clause.” *Brown*, 221 F.3d at 337. For one, a plaintiff could point to a policy that expressly classifies persons on the basis of sex. *See Smith v. Perlman*, 658 F. App’x 606, 610 (2d

Cir. 2016) (citing *Pyke v. Cuomo*, 258 F.3d 107, 110 (2d Cir. 2001), and *Brown*, 221 F.3d at 337). Alternatively, “a plaintiff must show: (1) that they were treated differently from other similarly situated individuals, and (2) that such differential treatment was based on impermissible considerations.” *Wandering Dago Inc. v. N.Y. State Office of Gen. Servs.*, 992 F. Supp. 2d 102, 127 (N.D.N.Y. 2014) (cleaned up). Here, Plaintiff has pleaded both theories. First, the Categorical Exclusion by its very terms expressly classifies employees on the basis of their sex and transgender status. Compl. ¶ 30. Second, Plaintiff has pleaded that the “categorical exclusion treats transgender persons, including Plaintiff, differently from cisgender persons who are similarly situated.” Compl. ¶ 88. That is because, “[u]nder the Plan’s categorical exclusion, cisgender persons can obtain coverage for medically-necessary care, while transgender employees, like Plaintiff, are deprived of coverage for the same medically-necessary care.” Compl. ¶ 89; *see also* Compl. ¶¶ 55-59; *cf. Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1120 (N.D. Cal. 2015) (holding that transgender woman, who alleged “that, in considering her need for medically necessary surgery, . . . Defendants treated her differently from a similarly situated non-transgender woman in need of medically necessary surgery,” “adequately stated a claim under 42 U.S.C. § 1983 for a violation of the Equal Protection Clause”).

“[A]ll gender-based classifications . . . warrant heightened scrutiny.” *United States v. Virginia*, 518 U.S. 515, 555 (1996) (cleaned up); *see also City of Cleburne*, 473 U.S. at 440. Here, the Categorical Exclusion warrants heightened scrutiny because, as explained in Part II.b, *supra*, a policy that treats transgender people differently “is inherently based upon a sex-classification.” *Whitaker*, 858 F.3d at 1051; *see also Glenn*, 663 F.3d at 1316-19; *Norsworthy*, 87 F. Supp. 3d at 1119.

Similarly, discrimination based on transgender status itself warrants heightened scrutiny

because

transgender people as a class have historically been subject to discrimination or differentiation; . . . they have a defining characteristic that frequently bears no relation to an ability to perform or contribute to society; . . . as a class they exhibit immutable or distinguishing characteristics that define them as a discrete group; and . . . as a class, they are a minority with relatively little political power.

*Evancho*, 237 F. Supp. 3d at 288; *see also Karnoski*, 2017 WL 6311305, at \*7; *Stone*, 2017 WL 5589122, at \*15; *Doe 1*, 2017 WL 4873042, at \*27; *Bd. of Educ. of the Highland Loc. Sch. Dist. v. U.S. Dep’t of Educ.*, 208 F. Supp. 3d 850, 873-74 (S.D. Ohio 2016); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139-40 (S.D.N.Y. 2015); Compl. ¶¶ 93-97.<sup>7</sup>

Under heightened scrutiny analysis, Plaintiff does not need to prove intent to discriminate because, as a matter of law, the burden of proof shifts to Defendants. *See Virginia*, 518 U.S. at 532-33; *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994); *Price Waterhouse*, 490 U.S. at 267. It is “[t]he defender of legislation that differentiates on the basis of gender [who] must show ‘at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.’” *Morales-Santana*, 137 S. Ct. at 1690 (quoting *Virginia*, 518 U.S. at 533 (cleaned up)). The burden under heightened scrutiny “is demanding and it rests entirely on the State . . . . The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation.” *Virginia*, 518 U.S. at 533. Thus, the burden of justifying the Categorical Exclusion rests squarely on Defendants.

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<sup>7</sup> Defendants cite to *Lopez v. City of New York*, No. 05-cv-10321(NRB), 2009 WL 229956, at \*13 (S.D.N.Y. Jan. 30, 2009), for the proposition that discrimination based on transgender status is subject to rational basis review. *See Mot.* at 8. However, in *Lopez*, the plaintiff never asserted her claims were subject to heightened scrutiny, let alone alleged the necessary facts to show transgender classifications are subject to heightened scrutiny. *See Pl.’s Mem. in Opp’n to Defs.’ Mot. for Summ. J.*, *Lopez v. City of New York*, No. 05-cv-10321(NRB) (S.D.N.Y. filed June 24, 2008) (ECF No. 35), at 19-21. Moreover, six years later, a court within the same district held such discrimination is subject to heightened scrutiny, *see Adkins*, 143 F. Supp. 3d at 139-40, as have a myriad of others. Thus, not only is *Lopez* inapposite and outdated, its dicta runs counter to the weight of authority, which Defendants perplexingly ignore.

They **must** demonstrate that “the classification [] substantially serve[s] an important governmental interest **today**, for ‘in interpreting the equal protection guarantee, we have recognized that new insights and societal understandings can reveal unjustified inequality . . . that once passed unnoticed and unchallenged.’” *Morales-Santana*, 137 S. Ct. at 1690 (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015) (alterations omitted)). Moreover, Defendants **must** also show that the means used to discriminate are substantially related to achievement of that objective. *Virginia*, 518 U.S. at 524.

Moreover, “even in the ordinary equal protection case calling for the most deferential of standards, [courts] insist on knowing the relation between the classification adopted and the object to be obtained.” *Romer*, 517 U.S. at 632. The justifications offered must have a “footing in the realities of the subject addressed by the legislation.” *Heller v. Doe By Doe*, 509 U.S. 312, 321 (1993); *see also U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 533-38 (1973). And even when the government offers an ostensibly legitimate purpose, “[t]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.” *City of Cleburne*, 473 U.S. at 446.

Here, Defendants’ proffered rationale for the Categorical Exclusion fails all levels of scrutiny, let alone heightened scrutiny. Defendants argue that the Categorical Exclusion was not adopted “out of discrimination against individuals due to their transgender status,” but rather “was adopted on the basis that the[] [procedures] were not medically necessary.” Mot. at 8-9. This purported justification is so divorced from reality that it is irrational.

First, as clearly alleged in Plaintiff’s Complaint, the medical treatments for which Plaintiff was denied coverage were not themselves prohibited by the Categorical Exclusion if deemed medically necessary, rather they were prohibited *only if the employee seeking was transgender*.

Compl. ¶¶ 56-59. Indeed, Plaintiff himself had decades earlier received coverage for hormone therapy under the Health Plan, before he came out as transgender, Compl. ¶ 58, and a colleague of Plaintiff's has successfully received coverage for a mastectomy under the Health Plan for a condition other than gender dysphoria, Compl. ¶ 59. Thus, the Categorical Exclusion operated not to prohibit coverage of a particular treatment, but to improperly prohibit coverage for a particular class of employees, namely transgender employees. As such, the Categorical Exclusion's "relationship to [its] asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne*, 473 U.S. at 446.

Second, for decades before Defendants adopted the Categorical Exclusion, courts routinely held that gender dysphoria (previously referred to as gender identity disorder or transsexualism) is a serious medical need. *See, e.g., White v. Farrier*, 849 F.2d 322, 325 (8th Cir. 1988); *Phillips v. Mich. Dep't of Corr.*, 731 F. Supp. 792, 800 (W.D. Mich. 1990), *aff'd*, 932 F.2d 969 (6th Cir. 1991); *see also Battista v. Clarke*, 645 F.3d 449 (1st Cir. 2011); *Fields v. Smith*, 712 F. Supp. 2d 830, 862 (E.D. Wis. 2010), *aff'd*, 653 F.3d 550 (7th Cir. 2011); *see also* Compl. at 7, ¶¶ 11-12. Indeed, as far back as 1999, the Second Circuit recognized "transsexualism" and "gender identity disorder" as a medical condition, *Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999), contrary to Defendants' contention that "only relatively recently" was gender dysphoria "recognized as a diagnosable mental health condition." Mot. at 8. Additionally, almost two decades ago, the Second Circuit recognized in *Powell*, similar to other federal courts, that "hormone therapy and sex reassignment surgery are considered appropriate and effective treatments for [gender dysphoria]." *O'Donnabhain v. Comm'r of Internal Revenue*, 134 T.C. 34, 76 (U.S. Tax Ct. 2010); *see also Powell*, 175 F.3d at 111 (recognizing that treatment for transgender woman with gender dysphoria may consist of "estrogen therapy designed to create the

secondary sexual characteristics of a woman followed by genital surgery” (quoting *Maggert v. Hanks*, 131 F.3d 670, 671 (7th Cir. 1997) (cleaned up)); *De'lonta v. Johnson*, 708 F.3d 520, 522-23 (4th Cir. 2013); *Fields*, 653 F.3d 550; *Soneeya v. Spencer*, 851 F. Supp. 2d 228 (D. Mass. 2012).

Moreover, “the term ‘medical necessity’ must refer to what is medically necessary *for a particular patient*, and hence entails an individual assessment rather than a general determination of what works in the ordinary case.” *Mario*, 313 F.3d at 765. It is not up to a public employer, such as Defendants, to determine what treatment is or not medically necessary. As such, *Mario*, upon which Defendants heavily rely, requires the exact opposite of what the Categorical Exclusion does.

In any event, Plaintiff’s burden at this early stage is simply to plead enough facts that lend themselves to plausible inference that Defendants unconstitutionally discriminated against him. Plaintiff has met that burden.

#### **V. THE CATEGORICAL EXCLUSION VIOLATES THE NEW YORK STATE HUMAN RIGHTS LAW AND CIVIL RIGHTS LAW.**

Plaintiff’s NYSHRL claim is determined under the same principles that govern Title VII claims. *See Pfeiffer v. Lewis Cty.*, 308 F. Supp. 2d 88, 102 n.12 (N.D.N.Y. 2004) (citing *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1312-13 (2d Cir. 1995)). Thus, for the same reasons that discrimination on the basis of transgender status is unlawful sex discrimination under Title VII, *see* Part II.b, *supra*, such discrimination is also prohibited under the NYSHRL and the NYSCRL.

Indeed, the New York State Division of Human Rights has enacted rules and regulations, pursuant to NYSHRL, explicitly defining “[t]he term ‘sex’ when used in the Human Rights Law [to] include[] gender identity and the status of being transgender.” N.Y. COMP. CODES R. & REGS. tit. 9, § 466.13.<sup>8</sup> Moreover, every New York state court for the past 40 years to consider whether

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<sup>8</sup> Of course, the Division “has the power to promulgate rules and regulations to carry out the

the NYSHRL's prohibition on sex discrimination covers discrimination on the basis of transgender status has agreed that it does. *See, e.g., Doe v. City of New York*, 976 N.Y.S.2d 360, 363-64 (N.Y. Sup. Ct. 2013); *Hispanic Aids Forum v. Estate of Bruno*, 839 N.Y.S.2d 691, 696 (N.Y. Sup. Ct. 2007); *Buffong v. Castle on Hudson*, 824 N.Y.S.2d 752 (Table), 2005 WL 4658320, \*1 (N.Y. Sup. Ct. 2005); *Richards v. U.S. Tennis Ass'n*, 400 N.Y.S.2d 267, 272 (N.Y. Sup. Ct. 1977).

Finally, Defendants admit that Plaintiff has properly complied with all jurisdictional requirements under New York State law, *see* Compl. at 5, ¶ 18; Mot. at 10 (noting Plaintiff's state law claims arising out of denials on or after March 16, 2017 are not barred), and that Plaintiff's state law claims have been properly pleaded. *See* Compl. ¶ 52. As such, Defendants objections are limited to whether Plaintiff may recover damages under state law based on denials in 2015, Compl. ¶¶ 43-46. Defendant ignores the fact that such denials are not discrete instances of discrimination, but rather part of a continuous denial that persisted until November 28, 2017, when Defendants amended their Health Plain to remove the Categorical Exclusion on the eve of this lawsuit. As such, by its very terms, the Categorical Exclusion never ceased to operate between March 2015 and November 2017. In any event, Plaintiff has pleaded denials of coverage that fall within the 90-day window preceding June 14, 2017. Compl. ¶ 52.

Accordingly, Plaintiffs state law claims have been properly pleaded and survive Defendants' motion to dismiss.

### **CONCLUSION**

Based on the foregoing, Plaintiff, through the undersigned counsel, respectfully requests that the Court deny Defendants' Motion to Dismiss.

Dated this 22nd of January, 2018.

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provisions of the [NYSHRL] and the policies formulated by it." *Gaynor v. Rockefeller*, 15 N.Y.2d 120, 133 (1965); *see also* N.Y. EXEC. LAW § 295(5).

Respectfully submitted,

/s/ Omar Gonzalez-Pagan

Omar Gonzalez-Pagan (Bar No. 520915)

Carl Charles (*admitted pro hac vice*)

Demoya Gordon (*admitted pro hac vice*)

Richard Saenz (Bar No. 520983)

LAMBDA LEGAL DEFENSE AND  
EDUCATION FUND, INC.

120 Wall Street, 19th Floor

New York, New York 10005

t: (212) 809-8585 | f: (212) 809-0055

[ogonzalez-pagan@lambdalegal.org](mailto:ogonzalez-pagan@lambdalegal.org)

[ccharles@lambdalegal.org](mailto:ccharles@lambdalegal.org)

[dgordon@lambdalegal.org](mailto:dgordon@lambdalegal.org)

[rsaenz@lambdalegal.org](mailto:rsaenz@lambdalegal.org)

*Attorneys for Plaintiff Sean Allen Simonson*

**CERTIFICATE OF SERVICE**

I hereby certify that I filed the foregoing with the Clerk of the United States District Court for the Northern District of New York via the CM/ECF system this 22nd day of January, 2018. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Omar Gonzalez-Pagan  
Omar Gonzalez-Pagan (Bar No. 520915)  
LAMBDA LEGAL DEFENSE AND  
EDUCATION FUND, INC.  
120 Wall Street, 19th Floor  
New York, New York 10005  
t: (212) 809-8585 | f: (212) 809-0055  
ogonzalez-pagan@lambdalegal.org