

1 KEVIN G. CLARKSON  
2 ATTORNEY GENERAL

3 William Milks (Alaska Bar No. 0411094)  
4 Kevin Dilg (Alaska Bar No. 1406053)  
5 Assistant Attorneys General  
6 Department of Law  
7 P.O. Box 110300  
8 Juneau, AK 99811-0300  
9 Telephone: (907) 465-3600  
10 Facsimile: (907) 465-2520  
11 Email: bill.milks@alaska.gov

12 *Attorneys for defendant*

13 **IN THE UNITED STATES DISTRICT COURT**  
14 **FOR THE DISTRICT OF ALASKA**

15 JENNIFER FLETCHER, )

16 Plaintiff, )

17 v. )

18 STATE OF ALASKA, )

19 Defendant. )

CIVIL ACTION

CASE NO. 1:18-cv-00007-HRH

20 **STATE OF ALASKA’S COMBINED MEMORANDUM IN SUPPORT OF**  
21 **CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO**  
22 **PLAINTIFF’S MOTION FOR PARTIAL SUMMARY JUDGMENT**

23 **INTRODUCTION**

24 The Defendant, State of Alaska, (“State”) provides health insurance for its  
25 employees through the AlaskaCare Employee Health Plan (“Health Plan”). Like many  
26 health plans, it contains exclusions of coverage for conditions that some other health

1 plans cover. One exclusion which is at issue here is for gender transition surgery.<sup>1</sup>  
2 Plaintiff acknowledges that the Health Plan provides coverage for hormone therapy and  
3 counseling related to gender transition and gender dysphoria, but she contends that the  
4 surgery exclusion constitutes unlawful sex discrimination even though the exclusion  
5 applies to all employees and thus does not treat employees of one sex less favorably  
6 than employees of another sex. To support this novel claim, she invites the judiciary to  
7 interpret a half century old federal statute, Title VII, (42 U.S.C. Section 2000e-2(a)  
8 (“Title VII”), in a manner not supported by the text of the statute and to support a  
9 conclusion that no one believes was ever in the thoughts of the Congress that passed the  
10 law. That invitation should be declined. Congress could pass a law establishing a  
11 national health insurance requirement that all health plans cover gender transition  
12 surgery but it has not done so. Given these basic facts, the complaint should be  
13 dismissed. As the Supreme Court has made clear the “proper role of the judiciary” is “to  
14 apply, not amend, the work of the People’s representatives.”<sup>2</sup>

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18 The text and history of Title VII make clear that the prohibition against sex  
19 discrimination is intended to prohibit discrimination “because of such individual’s . . .

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23 <sup>1</sup> Plaintiff refers to this procedure as gender confirmation surgery, transition-  
24 related care, or sex reassignment surgery. [ECF Dkt. 1 at ¶25; ECF Dkt. 28 at p. 1] The  
25 exclusion in the State Health Plan refers to surgery “related to changing sex or sexual  
26 characteristics.” The State will refer to the requested procedure as gender transition  
surgery for the purposes of this motion.

<sup>2</sup> *Henson v. Santander Consumer USA Inc.*, 137 S.Ct. 1718, 1726 (2017).

1 sex,”<sup>3</sup> and here there is no question that the State Health Plan excludes gender transition  
2 surgical services for all plan beneficiaries—regardless of their sex. Plaintiff attempts to  
3 overcome this basic obstacle by asserting that “because of...sex” can include  
4 discrimination against an individual because the individual presents themselves in a  
5 gender nonconforming manner or because of an individual’s gender identity. But a  
6 health plan exclusion applying to *all* plan beneficiaries regardless of individual  
7 characteristics is simply not analogous to discrimination against an individual by the  
8 denial of employment opportunities because the individual does not “act like a woman”<sup>4</sup>  
9 or act like a man.  
10

11  
12 Ultimately, this case requires interpretation of Title VII. As set forth below, the  
13 only reasonable interpretation of the statute is that it does not prohibit an exclusion  
14 under a health plan that applies equally to all employee plan beneficiaries. Plaintiff’s  
15 effort to expand the interpretation of “sex” under Title VII to provide otherwise is far  
16 beyond any reasonable interpretation of what Congress intended over fifty years ago  
17 when it passed the statute.<sup>5</sup> The complaint should be dismissed.  
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21 <sup>3</sup> 42 U.S.C. § 2000e-2(a).

22 <sup>4</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

23 <sup>5</sup> It should be noted that since the initiation of this litigation, the Supreme Court  
24 has accepted a case to be argued this autumn that considers whether Title VII prohibits  
25 sex discrimination against transgender people based on either their status as transgender  
26 or under the sex stereotyping theory established in *Price Waterhouse v. Hopkins*.  
*R.G.&G.R. Harris Funeral Homes v. EEOC*, Docket No. 18-107 (cert. granted  
4/22/2019).

1 **STATEMENT OF FACTS**

2 The material facts in this case are straight forward. The State offers health  
3 insurance to State employees through a program of self-insurance.<sup>6</sup> The State contracts  
4 with a Third-Party Administrator (“TPA”)—currently Aetna Life Insurance, Co.  
5 (“Aetna”)—to handle the claims administration and day-to-day operation of the State  
6 Health Plan. [Affidavit of Counsel, Ex. B at ¶¶ 11 & 13] Despite the retention of the  
7 TPA, the State remains financially responsible for the payment of claims and services  
8 provided under the Health Plan and the Commissioner of Administration retains  
9 administrative control over the Health Plan.<sup>7</sup>  
10

11 The Health Plan is a major medical insurance benefit plan that provides coverage  
12 for services that are medically necessary *and* not otherwise excluded from the terms of  
13 the plan.<sup>8</sup> The parties agree that the issue in this case is whether the Health Plan’s  
14 exclusion for gender transition surgery violates Title VII. [ECF Dkt 28 at p. 1, 8] <sup>9</sup> In  
15

16  
17 \_\_\_\_\_  
18 <sup>6</sup> AS 39.30.091.

19 <sup>7</sup> The Division of Retirement and Benefits handles most administrative functions  
20 of the State Health Plan as the commissioner’s designee. AS 39.35.003(a).

21 <sup>8</sup> Affidavit of Ajay Desai, Ex. A at SOA000498; Affidavit of Ajay Desai, Ex. A at  
22 SOA000721.

23 <sup>9</sup> While Plaintiff’s motion occasionally uses confusing terms, both parties also  
24 agree that prior to January 1, 2018, the Health Plan covered mental health counseling  
25 for gender dysphoria. It excluded gender transition surgery and transition related  
26 hormone therapy and counseling related to gender transition. . [Affidavit of Counsel,  
Ex. A at No. 12; ECF Dkt. 14 at ¶¶ 33, 35, & 37; ECF Dkt. 28 at p. 8] Beginning  
January 1, 2018, the Heath Plan was amended to allow coverage for hormone treatment  
and mental health counsel associated related to gender transition (counseling already

1 particular, the Health Plan excludes coverage for surgery “related to changing sex or  
 2 sexual characteristics” but it provides coverage for hormone therapy and counseling  
 3 related to gender transition and gender dysphoria.<sup>10</sup> There are numerous other  
 4 exclusions from coverage for recognized medical conditions including:  
 5

- 6 • Gynecomastia (surgery to correct abnormal breast growth in males)<sup>11</sup>
- 7 • Infertility treatments including any services, treatments, procedures, or  
 8 supplies that are designed to enhance fertility or the likelihood of  
 9 conception<sup>12</sup>
- 10 • Surgery, drugs, implants, devices or preparations to correct or enhance  
 11 erectile function, enhance sensitivity, or alter the shape or appearance of a  
 12 sex organ<sup>13</sup>
- 13 • Any treatment, drug service or supply intended to decrease or increase  
 14 body weight, control weight or treat obesity, including morbid obesity,  
 15

16  
 17 \_\_\_\_\_  
 18 covered for gender dysphoria). [*Id.*] Consequently, after January 1, 2018, gender  
 19 reassignment surgery is excluded under the terms of the Health Plan while other  
 20 treatments for gender dysphoria and gender transition are covered.

21 <sup>10</sup> Affidavit of Ajay Desai, Ex. A at SOA000560; Affidavit of Ajay Desai, Ex. A at  
 22 SOA000784.

23 <sup>11</sup> Affidavit of Ajay Desai, Ex. A at SOA000554; Affidavit of Ajay Desai, Ex. A at  
 24 SOA000778.

25 <sup>12</sup> Affidavit of Ajay Desai, Ex. A at SOA000558-559; Affidavit of Ajay Desai, Ex.  
 26 A at SOA000782.

<sup>13</sup> Affidavit of Ajay Desai, Ex. A at SOA000561; Affidavit of Ajay Desai, Ex. A at  
 SOA000784.

- 1                   regardless of the existence of co-morbid conditions<sup>14</sup>
- 2                   • Spinal disorders, including ... physical treatment of any condition caused
- 3                   by or related to biomechanical or nerve conduction disorders of the spine<sup>15</sup>
- 4
- 5                   • Any treatment, drug, service or supply to stop or reduce smoking<sup>16</sup>
- 6
- 7                   • Therapies for the treatment of delays in development . . . Examples of
- 8                   non-covered diagnoses include Pervasive Developmental Disorders
- 9                   (including Autism), Down Syndrome, and Cerebral Palsy<sup>17</sup>
- 10
- 11                  • Any treatment, device, drug, service or supply (including surgical
- 12                  procedures, devices to stimulate growth and growth hormones), solely to
- 13                  increase or decrease height or alter the rate of growth<sup>18</sup>
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<sup>14</sup> Affidavit of Ajay Desai, Ex. A at SOA000563-000564; Affidavit of Ajay Desai, Ex. A at SOA000787.

<sup>15</sup> Affidavit of Ajay Desai, Ex. A at SOA000563; Affidavit of Ajay Desai, Ex. A at SOA000787.

<sup>16</sup> Affidavit of Ajay Desai, Ex. A at SOA000562; Affidavit of Ajay Desai, Ex. A at SOA000786.

<sup>17</sup> Affidavit of Ajay Desai, Ex. A at SOA000561; Affidavit of Ajay Desai, Ex. A at SOA000785.

<sup>18</sup> Affidavit of Ajay Desai, Ex. A at SOA000557; Affidavit of Ajay Desai, Ex. A at SOA000781.

<sup>19</sup> Affidavit of Ajay Desai, Ex. A at SOA000560; Affidavit of Ajay Desai, Ex. A at SOA000784.

- Applied Behavioral Analysis<sup>20</sup>

While the Health Plan may provide treatment for the medical condition that causes—for example—the abnormal breast growth or infertility,<sup>21</sup> the Plan does not cover the surgical correction of those conditions regardless of whether the correction is deemed medically necessary.<sup>22</sup> Likewise, while the Health Plan offers coverage for gender dysphoria, it does not cover every possible treatment option for every symptom.

In late November, early December 2016, Plaintiff contacted Aetna to: (1) determine if gender transition surgery would be covered as of January 1, 2017; (2)

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<sup>20</sup> Affidavit of Ajay Desai, Ex. A at SOA000554; Affidavit of Ajay Desai, Ex. A at SOA000777).

<sup>21</sup> Diseases such as pelvic inflammatory disease [2018 ICD-10-CM Diagnosis Code N73.9 *available at* <https://www.icd10data.com/ICD10CM/Codes/N00-N99/N70-N77/N73-/N73.9>], poly-cystic ovarian syndrome [2018 ICD-10-CM Diagnosis Code E28.2 *available at* <https://www.icd10data.com/ICD10CM/Codes/E00-E89/E20-E35/E28-/E28.2>], endometriosis [2018 ICD-10-CM Diagnosis Code N80.9 *available at* <https://www.icd10data.com/ICD10CM/Codes/N00-N99/N80-N98/N80-/N80.9>], and varicocele [2018 ICD-10-CM Diagnosis Code I86.1 *available at* <https://www.icd10data.com/ICD10CM/Codes/I00-I99/I80-I89/I86-/I86.1>] can cause infertility. While the State Health Plan will pay for the treatment of the disease, it will not cover fertility treatments to mitigate the symptom of the disease.

<sup>22</sup> Medical necessity is a term of art in the insurance industry and has been explicitly defined in the State Health Plan. *See* Affidavit of Ajay Desai, Ex. A at SOA000498-000500; Affidavit of Ajay Desai, Ex. A at SOA000721-000722. In general, a treatment that is medically necessary is provided to a patient for the purpose of evaluating, diagnosing, or treating an illness, an injury, a disease, or its symptoms by a physician or other health care provider, exercising prudent clinical judgment when the treatment or service is in accordance with generally accepted standards of medical practice; clinically appropriate and considered effective to treat the injury or illness; not for the convenience of the patient or physician; and not more costly than an alternative treatment or service of the same efficacy.

1 determine if gender transition surgery would be covered if performed outside the United  
2 States; and (3) “pre-authorize the procedure.” [Affidavit of Counsel, Ex. C at  
3 FLETCHER 003541] Through a series of communications, Aetna informed Plaintiff  
4 that the State Health Plan excludes coverage for gender transition surgery and that non-  
5 emergency charges incurred outside the United State were excluded. [Affidavit of  
6 Counsel, Ex. C at FLETCHER 003541-3561] The Plaintiff proceeded to have gender  
7 transition surgery outside of the United States in June 2017. [ECF Dkt. 28 at p. 16] On  
8 or about May 30, 2017, Plaintiff filed a discrimination complaint with the Equal  
9 Employment Opportunity Commission. [Affidavit of Ajay Desai, Ex. A at SOA004488-  
10 004489] On May 17, 2018, the U.S. Department of Justice, Civil Rights Division  
11 determined that it would not file suit against the State regarding the exclusion of gender  
12 transition surgery from the Health Plan. [Affidavit of Counsel, Ex. C at FLETCHER  
13 002728] This lawsuit followed. Plaintiff seeks a declaratory judgment that the exclusion  
14 of transition-related surgical treatment discriminates on the basis of sex in violation of  
15 Title VII and that compensatory and consequential damages should be awarded to Ms.  
16 Fletcher to compensate her for the State’s denial of coverage for such surgical  
17 treatment. [ECF Dkt. 1 at Prayer for Relief]

21 **LEGAL STANDARD**

22 The parties have filed cross motions for summary judgment. Summary judgment  
23 is properly entered if “there is no genuine issue as to any material fact and the moving  
24

1 party is entitled to judgment as a matter of law.”<sup>23</sup> On cross-motions for summary  
2 judgment, the Court must consider each motion separately to determine whether that  
3 party has met its burden with the facts construed in the light most favorable to the other  
4 side.<sup>24</sup>

5  
6 Plaintiff contends that summary judgment should be entered in her favor because  
7 it is undisputed that the State does not provide health plan coverage for gender transition  
8 surgery. [ECF Dkt. 28 at p. 18] The State agrees that there are no material issues of fact  
9 in dispute but asserts that the State is entitled to judgment as a matter of law because  
10 Plaintiff’s claims do not state a violation of Title VII. Thus, summary judgment should  
11 be entered in favor of the State.

## 12 ARGUMENT

### 13 A. The statutory language of Title VII plainly prohibits disparate 14 treatment between men and women as the statute prohibits 15 discriminatory treatment “because of . . . sex.”

16 The text of Title VII clearly defines the scope of coverage regarding sex  
17 discrimination: it prohibits discrimination against an individual “because . . . of sex.”<sup>25</sup>  
18 As the United States Supreme Court has made clear: “the critical issue, Title VII text  
19 indicates, is whether members of one sex are exposed to disadvantageous terms or  
20 conditions of employment to which members of the other sex are not exposed.”<sup>26</sup> Here,  
21

22  
23 <sup>23</sup> Fed .R. Civ.P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

24 <sup>24</sup> *Matter of Angelette, LLC*, 329 F. Supp. 3d 814, 817 (D. Alaska 2018).

25 <sup>25</sup> 42 U.S.C. § 2000e-2(a).

26 <sup>26</sup> *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998); *See also*

1 there is no question that the State’s Health Plan excludes gender transition surgery (and  
2 provides coverage for counselling and hormone therapy) for all employees and applies  
3 neutrally to both men and women. Accordingly, it does not result in disparate,  
4 disadvantageous treatment of similarly-situated male or female employees because  
5 neither male nor female employees can obtain coverage for gender transition surgery.<sup>27</sup>  
6 Thus, a plain application of the statutory language of Title VII demonstrates that the  
7 complaint should be dismissed.  
8

9 **B. The legislative history does not contradict the plain language of the**  
10 **statute: Title VII’s prohibition against sex discrimination was**  
11 **intended to prohibit disparate treatment between women and men on**  
12 **the basis of an individual’s sex.**

13 Congress did not define the term “sex” when it enacted Title VII. Indeed, “sex”  
14 was added as a protected trait in a floor amendment “at the last minute” before the  
15 House passed the 1964 bill.<sup>28</sup> But the text of Title VII as described above, and the  
16 historical context makes it clear that the term “sex” referred to the biological differences  
17 between males and females.<sup>29</sup>  
18

19 \_\_\_\_\_  
20 *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 569, 577 (1978) (The touchstone of the  
21 Title VII analysis is whether the employer has treated “some people less favorably than  
22 others because of their . . . sex.”).

23 <sup>27</sup> *See United Airlines Inc. v. Evans*, 431 U.S. 63, 71 (1997) (liability under Title  
24 VII requires proof that an employer “differentiates between similarly situated males and  
25 females on the basis of sex.”).

26 <sup>28</sup> *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 63-64 (1986).

<sup>29</sup> When Title VII was enacted in 1964, the “ordinary meaning” of the term “sex”  
was biological sex: “either of two divisions of organisms distinguished respectively as

1           Significantly, Congress did choose to amend Title VII in order to provide  
2 specific additional protections for employees. In 1978, Congress amended Title VII's  
3 definition of "sex" after the Supreme Court ruling in *General Elec. Co. v. Gilbert*<sup>30</sup> held  
4 that Title VII's prohibition on discrimination because of sex did not cover an  
5 employer's exclusion of pregnancy from coverage under an insurance plan. The  
6 congressional response was to pass the Pregnancy Discrimination Act by specifying that  
7 Title VII's prohibition on "sex" discrimination would be deemed to "include"  
8 discrimination "because of or on the basis of pregnancy, childbirth, or related medical  
9 conditions."<sup>31</sup> However, Congress did not otherwise alter the use of the term "sex" as it  
10 was classically understood.<sup>32</sup> Additionally, Congress has passed legislation that  
11 prohibits discrimination based on "gender identity" as a separate category (in addition to  
12 "sex" or "gender") in other contexts.<sup>33</sup> Despite those decisions, Congress has thus far  
13 not enacted proposed legislation that would add "gender identity" to the list of protected  
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17 \_\_\_\_\_  
18 male or female." Webster's Seventh New Collegiate Dictionary 795 (1963).

19 <sup>30</sup> 429 U.S. 125, 135-40 (1976).

20 <sup>31</sup> 42 U.S.C. 2000e(k).

21 <sup>32</sup> Congress further amended Title VII without expanding the definition of the term  
22 "sex." See Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

23 <sup>33</sup> See e.g. 18 U.S.C. § 249(a)(2)(A) and (c)(4) (prohibiting acts or attempts to  
24 cause bodily injury to any person "because of the actual or perceived religion, national  
25 origin, gender, sexual orientation, gender identity, or disability of any person"); 34  
26 U.S.C. § 12291(b)(13)(A) (prohibiting discrimination in federally funded programs "on  
the basis of actual or perceived race, color, religion, national origin, sex, gender identity  
(as defined in paragraph 249(c)(4) of Title 18), sexual orientation, or disability").

1 classes for employment non-discrimination purposes.<sup>34</sup>

2 Accordingly, there is no basis to conclude based on the legislative history of Title  
3 VII that Congress intended, despite the language of the law, to prohibit an employer  
4 from excluding from a health plan certain treatments where all employees regardless of  
5 their sex are subject to the same exclusion.  
6

7 **C. The fact that Plaintiff’s claim should be dismissed does not mean that**  
8 **no transgender person could ever have a valid claim under Title**  
9 **VII—it simply means that the sex neutral health insurance exclusion**  
10 **challenged in this case does not violate Title VII.**

11 Plaintiff refers to her self-described identity as transgender [ECF Dkt. 28 at p.  
12 10] and contends that discrimination on the basis of sex under Title VII can include  
13 discrimination on the basis of “gender nonconformity, gender identity, transgender  
14 status, and gender transition.” [ECF Dkt. 1 at ¶ 76] The State does not dispute that a  
15 transgender individual could have a valid claim of sex discrimination under Title VII.  
16 But this is not such a case.

17 The Supreme Court held in *Price Waterhouse v. Hopkins* that an employer can  
18 engage in sex discrimination if it subjects a woman to disparate treatment in the  
19 workplace by denying her a promotion because in the employer’s view she does not “act  
20 like a woman.”<sup>35</sup> This is the gender stereotype theory of sex discrimination and it can,  
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23 \_\_\_\_\_  
24 <sup>34</sup> See The Equality Act H.R. 2282, 115th Cong. (2017). In fact, one bill currently  
25 before Congress seeks to add “gender identity” as a protected class in employment. The  
26 Equality Act, H.R. 5, 116th Cong. (2019).

<sup>35</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

1 based on certain facts, support a claim that a transgender person is subject to sex  
2 discrimination. For example, the Ninth Circuit in *Schwenk v. Hartford*,<sup>36</sup> applied *Price*  
3 *Waterhouse* to a claim under a different law brought by a transgender prison inmate  
4 who alleged she was subjected to hostile treatment and assault because she presented in  
5 “a feminine rather than a typically masculine appearance or demeanor.”<sup>37</sup>  
6

7 But this is not a gender stereotyping case. There is no claim that the State denied  
8 Plaintiff a promotion or subjected her to a hostile work environment because she failed  
9 to “act like a woman” or “act like a man.” Instead, the claim is that the Health Plan does  
10 not cover gender transition surgery, although Plaintiff acknowledges it covers other  
11 treatments for gender dysphoria—hormone therapy and counseling—and there is no  
12 question that the exclusion applies to all employees regardless of their sex. Clearly,  
13 therefore, Plaintiff’s case does not fall under the gender stereotyping standard  
14 announced in *Price Waterhouse*. Instead, the facts of this case are more analogous to  
15 the Ninth Circuit decision in *Jespersen v. Harrah’s Operating Co., Inc.*, rejecting a Title  
16 VII challenge to an employer’s appearance and dress policy that did not treat members  
17 of one sex worse than members of the other sex and did not involve improper sex  
18 stereotyping harming members of one sex in comparison to similarly situated members  
19 of the other sex.<sup>38</sup>  
20  
21  
22

23 <sup>36</sup> 204 F.3d 1187 (9th Cir. 2000).

24 <sup>37</sup> *Id.* at 1202. The complaint in *Schwenk* was brought under the Violence Against  
25 Women Act but the court indicated that the same analysis would apply under Title VII.

26 <sup>38</sup> *Jespersen v. Harrah’s Operating Co., Inc.*, 444 F.3d 1194, 1111-1112 (9th Cir.

1 Plaintiff nevertheless tries to support her Title VII claim through heavy reliance  
2 on the *Schwenk* case but that is misplaced. As noted above, *Schwenk* was a prison  
3 sexual assault case. It was not a Title VII case but instead claims were brought by the  
4 plaintiff under the Eighth Amendment and the Gender Motivated Violence Act  
5 (GMVA). Moreover, *Schwenk* was another gender stereotyping case in which the Ninth  
6 Circuit referred to *Price Waterhouse* noting that “the perpetrator’s actions stem from the  
7 fact that he believed that the victim was a man who ‘failed to act like’ one.”<sup>39</sup> The Ninth  
8 Circuit has subsequently described its holding in *Schwenk* in terms of the sex-  
9 stereotyping analysis and an application of *Price Waterhouse*. For example, in *Kastl v.*  
10 *Maricopa Cty. Cmty. Coll. Dist.*, the Ninth Circuit stated “[a]fter [*Price Waterhouse*]  
11 and *Schwenk*, it is unlawful to discriminate against a transgender (or any other) person  
12 because he or she does not behave in accordance with an employer’s expectations for  
13 men or women.”<sup>40</sup> Accordingly, *Schwenk* does not support the conclusion that  
14 transgender status alone is a protected class under Title VII or the conclusion that a  
15 health plan exclusion that applies to all employees regardless of sex constitutes unlawful  
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21 \_\_\_\_\_  
2006).

22 <sup>39</sup> 204 F.3d at 1202. (9th Cir. 2000).

23 <sup>40</sup> *Kastl v. Maricopa Cty. Cmty. Coll. Dist.*, 325 F. App’x 492, 493 (9th Cir. 2009).  
24 The Ninth Circuit has clarified that *Price Waterhouse* “applies with equal force to a man  
25 who is discriminated against for acting too feminine,” and described *Schwenk* as  
26 “comparing the scope of the [GMVA] with the scope of Title VII, which forbids  
‘[d]iscrimination because one fails to act in the way expected of a man or woman.’”  
*Nichols v. Azteca*, 256 F.3d 864, 874 (9th Cir. 2001).

1 sex discrimination.<sup>41</sup>

2 Likewise, Plaintiff's analogy to cases construing the Eighth Amendment—such  
3 as *Rosati v. Igbinoso*<sup>42</sup>—fails to provide meaningful support for her contention that  
4 Title VII mandates coverage for gender transition surgery. First, there is no basis for  
5 extending Eighth Amendment case law to a Title VII claim.<sup>43</sup> The Eighth Amendment's  
6 proscriptions serve a vastly different purpose than Title VII. Thus, the rules that apply to  
7 the government's responsibilities and obligations to individuals in its custody should not  
8 be conflated with an employment discrimination statute that regulates private and public  
9 employment. Employers providing employment and offering health benefits to  
10 employees obviously do not take complete control and custody over employees whereas  
11  
12

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14 <sup>41</sup> Several cases decided since *Price Waterhouse* acknowledge the viability of a  
15 sex-stereotyping theory but do not extend transgender discrimination beyond sex-  
16 stereotyping. *See e.g.* Report and Recommendation, *Toomey v. State of Arizona, et al.*,  
17 No. 4:19-cv-00035-RM-LAB Dkt. No. 46, at \*6 (D. Ariz. June 24, 2019); *Wittmer v.*  
18 *Phillips 66 Company*, 915 F.3d 328 (2019); *Etsitty v. Utah Transit*, 502 F.3d 1215 (10th  
19 Cir. 2007) (holding transgender persons are not a protected class; assuming without  
20 deciding that a sex stereotyping theory under *Price Waterhouse* is viable); *Johnston v.*  
21 *Univ. of Pittsburgh*, 97 F.Supp.3d 657 (W.D.Pa. 2015) (transgender status is not a  
22 protected status but considered plaintiff's sex stereotyping claim); *Eure v. Sage*, 61 F.  
23 Supp. 3d 651, 661-63 (W.D. Tex. 2014) (declining to find discrimination based on  
24 transgender status, but considering sex stereotyping claim); *Creed v. Family Exp.*, 2007  
25 WL 2265630, \*3-4 (N.D. Ind. 2007) (following *Ulane* as to transgender status  
26 discrimination but finding plaintiff had stated a viable claim for gender stereotyping).

22 <sup>42</sup> *Rosati v. Igbinoso*, 791 F.3d 1037, 1040 (9th Cir. 2015).

23 <sup>43</sup> “Baker also refers to cases holding that denial of medical treatment for Gender  
24 Dysphoria violates prisoners' Eighth Amendment rights. But Baker offers no reason  
25 why the court should extend the logic of these cases to a Title VII discrimination  
26 claim.” *Baker v. Aetna Life Ins. Co. & L-3 Commc'ns Corp.*, No. 3:15-CV-3679-D,  
2018 WL 572907, at \*5 (N.D. Tex. Jan. 26, 2018).

1 prisoners are essentially wards of the state. Moreover, the Eighth Amendment cases  
2 cited by Plaintiff generally involve prisoners who were completely deprived of the  
3 ability to express their gender identity and undergo medical procedures while  
4 incarcerated. That is not the case here. The Plaintiff has not alleged that she has been  
5 prohibited by her employer from expressing her gender identity at work or subjected to  
6 disciplinary actions as a result of expressing her gender identity and even in relation to  
7 health insurance coverage she does not dispute that the State Health Plan covers some  
8 treatments for gender dysphoria although not the surgery coverage that she sought. To  
9 hold that under Title VII an employer that voluntarily provides health benefits to  
10 employees shall have exclusions under the health plan considered to be analogous to  
11 cruel and unusual punishment strains all credulity.<sup>44</sup>

14 Similarly, the majority of the cases cited by Plaintiff for the proposition that  
15 denial of gender reassignment surgery is grounds for discrimination were decided under  
16 other laws such as the Affordable Care Act (*Prescott, Tovar, Rumble*), Medicare  
17 statutes (*Flack*), or equal protection grounds (*F.V. v. Barron*). However, as opposed to  
18 the Affordable Care Act, Title VII concerns itself with whether “members of one sex  
19 are exposed to disadvantageous terms or conditions of employment to which members  
20

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22 <sup>44</sup> Similarly, Plaintiff’s contention that *Rosati* holds “denial of medically necessary  
23 transition-related surgical care can constitute . . . [a] violation of the Constitution” is  
24 incorrect. [ECF Dkt. 28 at p. 18] The issue reviewed by the Ninth Circuit in *Rosati* was  
25 whether or not a complaint filed by a *pro se* plaintiff was subject to dismissal under  
26 FRCP 12(b)(6). The Ninth Circuit made no finding on the underlying claim but instead  
simply declined to grant a motion to dismiss to survive a motion to dismiss filed by the  
defendant. *Rosati v. Igbinoso*, 791 F.3d 1037, 1040 (9th Cir. 2015).

1 of the other sex are not exposed.”<sup>45</sup> And the fact remains that under Title VII burdens  
2 that befall men and women equally do not violate its proscription of discrimination  
3 because of sex.<sup>46</sup> The State Health Plan’s exclusion for gender reassignment surgery  
4 impacts everyone equally regardless of their sex, just as the proscription on gastric by-  
5 pass surgery impacts all people equally.<sup>47</sup> While not every individual covered under the  
6 State Health Plan requires or desires gastric by-pass surgery, the procedure is excluded  
7 for all.  
8

9 Finally it should be noted that recently the federal district court for the State of  
10 Arizona<sup>48</sup> considered a transgender plaintiff’s challenge of a health insurance exclusion  
11

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12 <sup>45</sup> *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998); *See also*  
13 *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 569, 577 (1978) (The touchstone of the  
14 Title VII analysis is whether the employer has treated “some people less favorably than  
others because of their . . . sex.”).

15 <sup>46</sup> *See Gerdom v. Cont'l Airlines, Inc.*, 692 F.2d 602, 605–06 (9th Cir. 1982)(“We  
16 thus agree with the numerous decisions defining permissible grooming rules for male  
and female employees as those which do not significantly deprive either sex of  
17 employment opportunities, and which are even-handedly applied to employees of both  
sexes”); *Bauer v. Lynch*, 812 F.3d 340, 351 (4th Cir. 2016)(“Put succinctly, an  
18 employer does not contravene Title VII when it utilizes physical fitness standards that  
distinguish between the sexes on the basis of their physiological differences but impose  
19 an equal burden of compliance on both men and women, requiring the same level of  
20 physical fitness of each. Because the FBI purports to assess physical fitness by imposing  
the same burden on both men and women, this rule applies to Bauer's Title VII claims.  
21 Accordingly, the district court erred in failing to apply the rule in its disposition of  
Bauer's motion for summary judgment”).  
22

23 <sup>47</sup> Affidavit of Ajay Desai, Ex. A at SOA000563-000564; Affidavit of Ajay Desai,  
Ex. A at SOA000787.  
24

25 <sup>48</sup> Report and Recommendation, *Toomey v. State of Arizona, et al.*, No. 4:19-cv-  
00035-RM-LAB Dkt. No. 46, at \*6 (D. Ariz. June 24, 2019). The magistrate’s decision  
26 will be reviewed by the district court judge.

1 for gender transition surgery under Title VII<sup>49</sup> arguing that the exclusion discriminated  
2 against him because he was transgendered and was denied a gender conforming  
3 procedure that would have been approved in different circumstances. The reviewing  
4 magistrate rejected this argument, stating that “[d]iscrimination under Title VII occurs if  
5 ‘the evidence shows treatment of a person in a manner which but for that person’s sex  
6 would be different.’”<sup>50</sup> The report noted that the plaintiff had produced no evidence that  
7 the plan exclusion would not apply if his sex were different.  
8

9           Ultimately, this is not a *Price Waterhouse* sex stereotyping claim, not a  
10 prisoner’s rights claim, and not a claim under the Affordable Care Act. It is a sex  
11 discrimination complaint brought under Title VII challenging an exclusion of a  
12 particular treatment under a health plan where the exclusion applies to all employees  
13 and where other treatments for the underlying condition are covered under the health  
14 plan. In these circumstances, there is no valid claim under Title VII and thus the  
15 complaint should be dismissed.  
16

17           **D. Even if transgender status is considered a protected class under Title**  
18           **VII, Plaintiff’s complaint must be dismissed.**

19           As set forth above, the Supreme Court recently accepted a case<sup>51</sup> considering  
20

21 \_\_\_\_\_  
22 <sup>49</sup> Report and Recommendation, *Toomey v. State of Arizona, et al.*, No. 4:19-cv-  
00035-RM-LAB Dkt. No. 46, at \*1-2 (D. Ariz. June 24, 2019).

23 <sup>50</sup> Report and Recommendation, *Toomey v. State of Arizona, et al.*, No. 4:19-cv-  
24 00035-RM-LAB Dkt. No. 46, at \*5 (D. Ariz. June 24, 2019) quoting *City of Los*  
25 *Angeles, Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978).

26 <sup>51</sup> *R.G.&G.R. Harris Funeral Homes v. EEOC*, Docket No. 18-107 (cert. granted  
4/22/2019).

1 whether Title VII prohibits sex discrimination against transgender people based on  
2 either their status as transgender or under the sex stereotyping theory established in  
3 *Price Waterhouse v. Hopkins*. For the reasons set forth above, there is no basis for  
4 application of a sex stereotyping theory in this case because both men and women are  
5 subject to the same Health Plan exclusions and this includes both men and women who  
6 may identify as and wish to transition to the opposite sex. Moreover, even if  
7 transgender status was determined to be a protected status under Title VII, the  
8 complaint should still be dismissed because the undisputed facts disclose that plaintiff  
9 was not discriminated against in her terms of employment because of that status.  
10

11  
12 When considering allegations of discrimination under Title VII in relation to  
13 particular employer policies, courts typically are considering whether the policy unfairly  
14 burdens either women or men. Thus, as noted above, the Ninth Circuit sitting *en banc* in  
15 *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104 (9th Cir., 2006) reviewed an  
16 employer's appearance policy that applied to all employees and concluded that it did not  
17 place an unequal burden on either men or women and did not violate Title VII.<sup>52</sup> Courts  
18 have also considered exclusions under employer provided health plans that apply to  
19 both men and women and concluded that the plan provisions do not violate Title VII  
20  
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22

23 <sup>52</sup> Similarly, the Fourth Circuit rejected a claim challenging different physical  
24 condition requirements between men and women for employment with the Court  
25 acknowledging that men were required to perform a greater number of particular  
26 physical exercises such as chin-ups but still concluding that the burdens fell equally  
upon men and women and thus there was no discrimination under Title VI. *Bauer v.*  
*Lynch*, 812 F.3d 340, 351 (4th Cir. 2016).

1 even where an exclusion may more frequently apply to members of one sex. For  
2 example, the Second and the Eight Circuit Court of Appeals rejected the argument that  
3 gender neutral infertility coverage exclusions violated Title VII.<sup>53</sup> In *Saks v. Franklin*  
4 *Covey Co.*, the Second Circuit rejected a claim that an employer's exclusion of surgical  
5 infertility treatments violated Title VII<sup>54</sup> because surgical infertility treatments were  
6 performed predominantly on women and thus the exclusion of infertility treatments  
7 affected female employees because of their sex.<sup>55</sup> Similarly, the Eighth Circuit Court of  
8 Appeals reached a similar conclusion in *Krauel v. Iowa Methodist Med. Ctr.*<sup>56</sup> where the  
9 defendant's health plan contained a blanket exclusion for fertility treatments,<sup>57</sup> finding  
10 that the exclusion was not unlawful sex discrimination under Title VII because it  
11 applied to all individuals, male or female.<sup>58</sup>

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15 <sup>53</sup> *Saks v. Franklin Covey Co.*, 316 F.3d 337, 347 (2d Cir. 2003) (“Because male  
16 and female employees afflicted by infertility are equally disadvantaged by the exclusion  
17 of surgical impregnation procedures, we conclude that the Plan does not discriminate on  
18 the basis of sex.”); *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674 (8th Cir. 1996)  
19 (exclusion of infertility coverage was not impermissible sex based classification).

20 <sup>54</sup> *Id.* at 340. The health plan at issue in *Saks* covered medically necessary  
21 treatments similar to the AlaskaCare plan. *Id.* at 341. The defendants in *Saks* did not  
22 contest that infertility was an illness or that the treatments were medically necessary. *Id.*  
23 at 342. Rather, the defendants argued that because surgical infertility treatments were  
24 specifically excluded under the plan, plaintiff was not entitled to coverage.

25 <sup>55</sup> *Id.* at 346.

26 <sup>56</sup> 95 F.3d 674 (8th Cir. 1996).

<sup>57</sup> *Id.* at 675-76.

<sup>58</sup> *Id.* at 680-81. Following *Krauel*, the Eighth Circuit confirmed its holding that  
neutral health plan exclusions do not offend Title VII. In *In re Union Pac. R.R.*  
*Employment Practices Litig.*, the court dealt with a health plan's refusal to cover

1 The State Health Plan provides coverage for gender dysphoria and gender  
2 transition services—just not every treatment option, which is not unusual because as  
3 described above there are many treatments not covered under employer provided health  
4 plans. For example, the Health Plan covers some—but not every treatment for  
5 reproductive dysfunction experienced by women, and some—but not every—treatment  
6 available to men.

8 Plaintiff nevertheless contends that she “has been denied coverage for medically  
9 necessary transition-related care because she is transgender” [ECF Dkt. 1 at ¶ 1] and  
10 contends that the Health Plan would cover chest reconstruction surgery for a female  
11 breast cancer survivor, but will not cover augmentation mammoplasty for a  
12 transgendered individual.<sup>59</sup> However, Plaintiff advances a false equivalency. The State

14 \_\_\_\_\_  
15 contraceptives. While the majority of the opinion deals with whether the Pregnancy  
16 Discrimination Act of 1978 modified Title VII to the point that the denial of female  
17 contraception was a violation of the PDA, the court did analyze Title VII standing  
18 alone. The Eighth Circuit held that under Title VII there is no disparate impact when the  
19 exclusion is gender neutral and men and women are denied the same benefits. The court  
20 also went on to note that “[w]hile an employer must treat its employees similarly, it  
21 does not have to treat employees in a protected class more favorably than other  
22 employees.” *In re Union Pac. R.R. Employment Practices Litig.*, 479 F.3d 936, 944 (8th  
23 Cir. 2007) *citing Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 259 (1981).

24 <sup>59</sup> The State notes that breast augmentation is a cosmetic procedure regardless of  
25 the reason for the augmentation. *Compare* Affidavit of Ajay Desai, Ex. A at  
26 SOA049604-049653 (Chest Reconstruction Surgery/Breast Reduction Surgery Clinical  
Policy Bulletin) vs. Affidavit of Ajay Desai, Ex. A at SOA049654-049674 (Cosmetic  
Surgery CPB). *See also Baker v. Aetna Life Ins. Co.*, 260 F. Supp. 3d 694, 704 (N.D.  
Tex. 2017), *appeal dismissed sub nom. Baker v. L-3 Commc'ns Corp.*, No. 17-10630,  
2017 WL 6021831 (5th Cir. July 6, 2017)(stating that breast augmentation for  
transgendered female was cosmetic after she had developed breasts following hormone  
therapy); *Baker v. Aetna Life Ins. Co. & L-3 Commc'ns Corp.*, No. 3:15-CV-3679-D,  
2018 WL 572907, at \*4 (N.D. Tex. Jan. 26, 2018)(dismissing Title VII claim regarding

1 Health Plan provides coverage for medical necessary services not otherwise excluded  
2 from the plan and the sex or gender of the individual seeking services is not a  
3 controlling factor. The State Health Plan would cover chest reconstruction in certain  
4 circumstances regardless of the sex of the claimant, just as it would deny coverage for  
5 breast augmentation flowing from an individual's dissatisfaction of his or her chest size.  
6 [See generally Affidavit of Counsel, Ex. A at No. 6; Affidavit of Counsel, Ex. B at Nos.  
7 28-32]  
8

9 Plaintiff argues nonetheless that since the Health Plan will pay for the  
10 reconstruction of breasts damaged by cancer, it must also follow that Title VII mandates  
11 that the Health Plan pay for breast augmentation for a transgendered woman when her  
12 breasts did not develop as desired after hormone treatment. Setting aside the fact that  
13 even transgendered women can receive breast augmentation for purely cosmetic  
14 reasons,<sup>60</sup> even Plaintiff's own authorities recognize that "[u]nfortunately, in the field of  
15 plastic and reconstructive surgery (both in general and specifically for gender-related  
16 surgeries), there is no clear distinction between what is purely reconstructive and what  
17 is purely cosmetic."<sup>61</sup> And Plaintiff's argument typifies this issue. Plaintiff argues that  
18  
19  
20

21 breast augmentation).

22 <sup>60</sup> *Baker v. Aetna Life Ins. Co. & L-3 Commc'ns Corp.*, No. 3:15-CV-3679-D, 2018  
23 WL 572907, at \*4 (N.D. Tex. Jan. 26, 2018) ("But Baker has provided no authority or  
24 argument for why denial of a *surgical* method [for breast augmentation] in particular is  
discriminatory when hormone replacement therapy is available").

25 <sup>61</sup> Affidavit of Ajay Desai, Ex. A at SOA001323. Plaintiff acknowledges that  
26 gender transition surgery is not necessary for every individual diagnosed with gender

1 vaginoplasty is a treatment that discriminates against transgender persons because it is  
2 available to some women in some instances. But Plaintiff’s claim relates to coverage for  
3 the alteration of a sexual organ, not the treatment of a medical condition of the vagina  
4 such as vaginal prolapse. Plaintiff’s use of the term vaginoplasty is solely focused on  
5 “alter[ing] the shape or appearance of a sex organ,” which is explicitly excluded from  
6 the Health Plan.<sup>62</sup>

8 Plaintiff is effectively requesting treatment not available to other members of the  
9 Health Plan. But the Supreme Court has made clear that “Title VII, however, does not  
10

11  
12 \_\_\_\_\_  
13 dysphoria [ECF Dkt. 28 at p. 5] and—in fact—even the World Professional Association  
14 for Transgendered Health recognizes that surgery is not necessary for everyone carrying  
15 a gender dysphoria diagnosis. [Affidavit of Ajay Desai, Ex. A at SOA001319] And  
16 importantly, Plaintiff recognizes that the Health Plan does cover some treatment options  
17 for gender dysphoria—therapy and hormone treatment. [ECF Dkt. 28 at p. 8] Thus, the  
18 question in this case is not whether or not the Health Plan provides treatment for gender  
19 dysphoria—it categorically does—rather the question is whether Title VII mandates  
20 coverage for a *particular* treatment option.

21 <sup>62</sup> Plaintiff broadly refers to terms like vaginoplasty which the State objected to in  
22 its response to interrogatories. [Affidavit of Counsel, Ex. A at No. 6] The State admitted  
23 the terms vaginoplasty or mammoplasty are not specifically excluded from the Health  
24 Plan; the State noted that either of these procedures could be excluded depending on the  
25 facts and circumstances surrounding the request for coverage. [Affidavit of Counsel, Ex.  
26 D at No. 6] And Plaintiff’s arguments, if accepted, would lead to absurd results. For  
example, Plaintiff states she is a woman and argues repeatedly that she is being denied  
treatments that would be provided to a women. However, the Health Plan excludes  
gynecomastia (surgery to correct abnormal breast growth in males).<sup>62</sup> [Affidavit of Ajay  
Desai, Ex. A at SOA0049631-49632] Accepting Plaintiff’s argument that she is being  
denied service that a biological female would receive (which is not true), Plaintiff’s  
interpretation of the Health Plan a transgendered male would be denied surgery for his  
gynecomastia, but Plaintiff would receive a breast augmentation under the auspices of  
“reconstruction.” Title VII would not dictate such an irrational result even if gender  
status was a protected class.

1 demand that an employer give preferential treatment to minorities or women”<sup>63</sup> and  
2 therefore, even assuming transgender status is protected under Title VII, Plaintiff’s  
3 claim that all possible treatments for gender transition must be provided under a health  
4 plan is without merit and should be dismissed. And to the extent that Plaintiff is  
5 essentially arguing that she has been subjected to a discriminatory impact due to the  
6 Health Plan exclusion, the Supreme Court has concluded that such claims are not  
7 actionable under Title VII.<sup>64</sup> For example, in response to the argument that gender-  
8 neutral survivor benefits violated Title VII because of their impact on female  
9 employees, the Ninth Circuit stated “this suggestion has been firmly rejected by the  
10 Supreme Court.”<sup>65</sup>

11  
12  
13 **E. A health plan can validly exclude a treatment even if at times it can be**  
14 **considered medically necessary.**

15 Finally, Plaintiff’s motion alludes to the fact that the State does not deny the  
16 existence of gender dysphoria or that gender transition surgery may be medically  
17 necessary and apparently contends that this somehow supports her argument that Title  
18 VII mandates all employers provide coverage for gender transition surgery.<sup>66</sup> As noted

19  
20 <sup>63</sup> *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 259 (1981).

21 <sup>64</sup> *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 710 n.  
22 20 (1978) accord *Wood v. City of San Diego*, 678 F.3d 1075, 1085 (9th Cir. 2012).

23 <sup>65</sup> *Wood*, 678 F.3d at 1086.

24 <sup>66</sup> Plaintiff also intimates that the fact there are not significant costs associated with  
25 covering gender transition surgery supports her argument. [ECF Dkt. 28 at p. 7]  
26 However, the State is not aware of—and Plaintiff fails to explain—why the State must  
take on additional costs to provide special treatment to an allegedly protected class.

1 above, the Health Plan contains numerous exclusions for various treatments and  
2 surgeries that are considered medically necessary. This is the nature of health insurance  
3 plans—there are exclusions. Medical necessity is a broad term applies to medical  
4 services and a potential medical consumer; however this concept is separate from  
5 whether a health insurance policy or contract will cover the cost of a treatment or  
6 service. The State Health Plan requires procedures to be medically necessary *and* not  
7 otherwise excluded, and there is no federal law requiring that gender transition surgery  
8 be covered by all health plans.<sup>67</sup> And as noted above, Title VII liability is not  
9 established simply because a treatment that might be considered medically necessary is  
10 not covered under an employer health plan.  
11

12  
13 Moreover, health plan policy exclusions have been upheld by the Ninth Circuit  
14 under statutes *actually* regulating employee benefits.<sup>68</sup> For example, in *Winters v.*  
15 *Costco Wholesale Corp.*, the Ninth Circuit upheld the exclusion for a gamete  
16 intrafallopian transfer (“GIFT”) procedure under plan language that excluded “[c]harges  
17 not reasonably necessary for the diagnosis and treatment of Illness or Injury” and  
18 “[c]harges in connection with in-vitro fertilization.”<sup>69</sup> Accordingly, it is clear that health  
19

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21 \_\_\_\_\_  
*Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 259 (1981).

22 <sup>67</sup> Affidavit of Ajay Desai, Ex. A at SOA000498; Affidavit of Ajay Desai, Ex. A at  
23 SOA000721.

24 <sup>68</sup> *Winters v. Costco Wholesale Corp.*, 49 F.3d 550, 552 (9th Cir. 1995). It should  
25 be noted that *Winters* was decided under the Employee Retirement Income Security Act  
26 (“ERISA”). The Plan is exempt from ERISA pursuant to 29 U.S.C. § 103(b)(1).

<sup>69</sup> *Winters v. Costco Wholesale Corp.*, 49 F.3d 550, 552 (9th Cir. 1995).

*Fletcher v. SOA*

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plan exclusions are valid and enforceable, especially when the exclusion burdens everyone equally.

**CONCLUSION**

For the reasons stated above, the State respectfully urges that this case be dismissed.

DATED: August 16, 2019.

KEVIN G. CLARKSON  
ATTORNEY GENERAL

By: /s/William Milks  
William Milks  
Assistant Attorney General  
Alaska Bar No. 0411094  
Kevin Dilg  
Assistant Attorney General  
Alaska Bar No. 1406053

