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

15 JENNIFER FLETCHER,)
16)
17 Plaintiff,)
18)
19 v.)
20)
21 STATE OF ALASKA,)
22)
23 Defendant.)

CIVIL ACTION

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

24 **STATE OF ALASKA’S REPLY TO PLAINTIFF’S OPPOSITION TO**
25 **DEFENDANT’S CROSS-MOTION FOR SUMMARY JUDGMENT**

26 **INTRODUCTION**

The Plaintiff brought this case during the term of the prior administration and the litigation has continued but the issue has remained the same: who should pay for a particular medical treatment – the employer’s health plan or the employee. Typically, this would be a simple question in which one would refer to the terms of the health plan and that would answer the question. But the Plaintiff seeks reimbursement for the costs

1 of a treatment (gender reassignment surgery) indisputably excluded from coverage
2 under the plan.

3 Plaintiff attempts to overcome the terms of the plan by casting the exclusion as a
4 civil rights matter and bringing suit under Title VII. But Title VII is not a national
5 health insurance law. Title VII is an employment discrimination statute that applies to
6 nearly every employer in the country—public or private. There is no question that the
7 Congress that passed Title VII over fifty years ago in part to “eliminate subjective
8 assumptions and traditional stereotyped conceptions regarding the physical ability of
9 women to do particular work”¹ never expressed any intent that it be interpreted as a
10 national insurance law.² Instead, Title VII and the cases brought under the law have
11 concerned matters such as whether employees have been discharged, suspended, denied
12 a promotion, or suffered some similar adverse action because of their “race, color,
13 religion, sex, or national origin”³

14 Plaintiff essentially seeks a rewrite of the long established federal employment
15 discrimination law to greatly expand the scope of the statute and to mandate the specific
16 health plan coverage she seeks. But amending statutes is for Congress, not the judicial
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22 ¹ *Rosenfeld v. S. Pac. Co.*, 444 F.2d 1219, 1225 (9th Cir. 1971).

23 ² *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 717
24 (1978) (“we do not suggest that the statute was intended to revolutionize the insurance
25 and pension industries”) *see also Arizona Governing Comm. for Tax Deferred Annuity
26 & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1099–103 (1983) (Powell, J.
concurring in part and dissenting in part).

³ 42 U.S.C. Sec. 2000e-2.

1 branch. The current statute does not require that an employer sponsored health plan
2 provide coverage for the medical services Plaintiff sought. Accordingly, Plaintiff's
3 motion should be denied and the Court should enter an order granting the State's motion
4 for summary judgment and dismiss this action.
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6 **A. Plaintiff's argument that Title VII requires an employer health plan**
7 **to provide coverage for gender reassignment surgery rests on a faulty**
8 **legal premise and relies on evidence that does not demonstrate**
9 **unlawful sex discrimination.**

9 Plaintiff has a theory. The argument goes like this: (a) a case, *Schwenk v.*
10 *Hartford*,⁴ effectively stands for the proposition that transgender status is a specific
11 protected category under Title VII;⁵ (b) the Plaintiff identifies as a transgender woman;
12 (c) the state health plan provides coverage for vaginoplasty and mammoplasty in certain
13 circumstances for women but not for proposes of gender reassignment; and (d) this
14 constitutes sex discrimination under Title VII. This argument is without merit for
15 several reasons.
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17 First, the Plaintiff relies on a nearly twenty-year-old sex stereotyping case,
18 *Schwenk v. Hartford*, to stand for a proposition that goes far beyond its holding and that
19 would result in an interpretation of Title VII inconsistent with Supreme Court
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22 ⁴ 204 F.3d 1187, 1201-02 (9th Cir. 2000).

23 ⁵ ECF Dkt. 43 at pp. 2-3. To be sure, the Plaintiff formally denies that is her
24 position—*see* ECF Dkt. 28 at p. 24—but in practice that is how the Plaintiff applies
25 *Schwenk* to support her argument that a relevant Title VII comparator for sex
26 discrimination purposes would be a comparison between women and transgender
women in relation to the provision of health plan benefits.

1 precedent. *Schwenk* was not a Title VII case but instead was a case involving a prisoner
2 who brought claims under the Eighth Amendment and the Gender Motivated Violence
3 Act (“GMVA”), a statute creating a cause of action for victims of gender motivated
4 violence.⁶ The facts before the court reviewing a motion for summary judgment were
5 that a biological male prisoner who identified as female alleged abuse and assault by a
6 male prison guard who was attracted to males who—according to the court—
7 demonstrated female characteristics.⁷ The defendant moved for summary judgment
8 arguing that transsexuals (the court’s term) were not covered under the GMVA. The
9 court denied summary judgment not because of the victim’s transgender status but
10 because the evidence revealed that the attack was motivated because the victim was a
11 male displaying female behavioral characteristics and gender motivated violence is
12 unlawful under GMVA.⁸

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16 To be sure, the court in *Schwenk* did refer to Title VII and state that the Circuit’s
17 prior decision in *Halloway v. Arthur Anderson*, that held transsexual persons were
18 categorically not protected under Title VII had been essentially overruled by the
19 Supreme Court’s later decision in *Price Waterhouse v. Hopkins*.⁹ But the *Schwenk* court
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22 ⁶ 204 F.3d at 1198.

23 ⁷ 204 F.3d at 1202.

24 ⁸ *Schwenk*, 204 F.3d at 1202.

25 ⁹ *Id.* at 1201 (citing *Prince Waterhouse v. Hopkins* 490 U.S. 228 (1989)).
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1 did not state that transgender status was a protected class under Title VII. Instead, the
2 *Schwenk* court described the decision in *Price Waterhouse* as concluding that a female
3 plaintiff (Hopkins) who management refused to promote because she did not “act like a
4 woman” had established a sex discrimination claim and that “[w]hat matters, for
5 purposes of this part of the *Price Waterhouse* analysis, is that in the mind of the
6 perpetrator the discrimination is related to the sex of the victim.”¹⁰ The court then
7 analogized the facts in *Price Waterhouse* to the facts alleged in the *Schwenk* case stating
8 that “here, for example, the perpetrator’s actions stem from the fact that he believed the
9 victim was a man who ‘failed to act like’ one.”¹¹ The *Schwenk* court then observed that
10 “[d]iscrimination because one fails to act in the way expected of a man or woman is
11 forbidden under Title VII.”¹² This statement was consistent with the Supreme Court’s
12 statement in *Price Waterhouse* that “disparate treatment of men and women resulting
13 from sex-stereotypes”¹³ constituted sex discrimination.

14 Thus, it is clear that *Schwenk* does not stand for the proposition that transgender

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19 ¹⁰ 204 F.3d at 1202.

20 ¹¹ *Id.* at 1202.

21 ¹² *Id.* The court observed that both GMVA and Title VII prohibit discrimination on
22 the basis of gender but that observation was linked to the Court’s characterization of the
23 Supreme Court’s *Price Waterhouse* description of the facts of that case involving an
24 accountant who “failed to act like a woman” which the *Schwenk* court described as
25 meaning failing to conform to “socially constructed gender expectations.” *Id.* at 1201-
26 02.

¹³ 490 U.S. at 251.

1 status alone is a protected status under Title VII. Instead, as noted in in the State’s
2 motion for summary judgment, a transgender plaintiff could—based on facts such as
3 presented in *Price Waterhouse* or *Schwenk*—state a claim of sex discrimination under
4 the sex stereotyping theory of discrimination.¹⁴ This case, however, is not a sex
5 stereotyping case involving disparate treatment of men and women based on a sex
6 stereotype. This is a health benefits claim case. There is no distinction between men and
7 women in relation to the exclusion for sex reassignment surgery because coverage is not
8 provided for this gender conformation surgery for anyone under the health plan.

11 After misapplying *Schwenk*, the Plaintiff proceeds to argue that the facts show
12 unlawful sex discrimination in the health plan based on a comparison of the availability
13 of “vaginoplasty” and “mammoplasty” between transgender women and as non-
14 transgender women.¹⁵ But, this is an improper comparator for the purposes of Title VII.
15 A recent court of appeals decision described the correct comparator under Title VII as
16 the “tried-and-true comparative method [for determining sex discrimination] in which
17 we attempt to isolate the significance of the plaintiff’s sex to the employer’s decision:
18 has she described a situation in which, holding all other things constant and changing
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21 ¹⁴ Another example of this distinction is *Smith v. City of Salem, Ohio*, 378 F.3d
22 566, 570-75 (3d Cir. 2004). The Third Circuit did not find transgender status to be a
23 specific, protected category, rather the Third Circuit stated “[s]ex stereotyping based on
24 a person’s gender non-conforming behavior is impermissible discrimination,
25 irrespective of the cause of that behavior; a label, such as “transsexual,” is not fatal to a
sex discrimination claim where the victim has suffered discrimination because of his or
her gender non-conformity.” *Id.* at 575.

26 ¹⁵ ECF Dkt. 43 at p. 9.

1 only her sex, she would have been treated the same way?”¹⁶ In Plaintiff’s case, if
2 everything about her situation was held constant except for her sex,¹⁷ the outcome
3 would be exactly the same under the terms of the State Health Plan. Accordingly, if
4 Plaintiff had been a biological female seeking reassignment surgery to become a male,
5 Plaintiff’s request for phalloplasty and mastectomy would have been denied. Thus,
6 under the appropriate Title VII comparison test, Plaintiff has failed to demonstrate that
7 she has been discriminated against *because* of her sex.
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10 Additionally, even if one accepts Plaintiff’s assertion that a distinction between
11 transgender women and other women in relation to health benefits coverage issues
12 creates a Title VII issue, the health plan does not categorically deny payment for the
13 treatments Plaintiff identifies as vaginoplasty and mammoplasty to all persons who
14 identify as transgender. Instead, it authorizes payment for the procedures for all plan
15 beneficiaries including transgender persons who because of injury or disease are in
16 medical need of the procedures. Thus, insurance coverage is provided for all women for
17 some purposes (plan beneficiaries who have suffered from cancer or injury) but not for
18 other purposes (sex reassignment surgery).¹⁸
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21 ¹⁶ *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 345 (7th Cir. 2017).

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23 ¹⁷ The Alaska District Court has recently defined sex as “anatomical and
24 physiological processes that lead to or denote male or female.” Order Re Pending
25 Motions, *The Downtown Soup Kitchen v. Municipality of Anchorage, et al.*, No. 3:18-
26 CV-00190-SLG, 2019 WL 3769623, at *1 (D. Alaska Aug. 9, 2019).

¹⁸ See ECF Dkt. 38-1 pp. 6, 8-9 objecting to Plaintiff’s use of the terms
vaginoplasty and mammoplasty as vague and overbroad as the terms *continued* . . .

1 Plaintiff tries to work around the traditional comparison test by basically
2 contending that because the Health Plan exclusion uses the word sex, it must be
3 discrimination. [ECF Dkt. 43 at p.4] But the plan’s reference to sex does not mean that
4 the plan discriminates *because* of sex.¹⁹ Instead, the critical issue for Title VII purposes
5 “is whether members of one sex are exposed to disadvantageous terms or conditions of
6 employment to which members of the other sex are not exposed.”²⁰
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8 It is undisputed that the exclusion for gender transition surgery applies to
9 everyone covered under the State Health Plan. A recent decision of the Third Circuit
10 reviewing another sex discrimination case underscores the significance of this basic
11 fact:
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13 The appellants have not provided any authority—either in the District
14 Court or on appeal—to suggest that a sex-neutral policy can give rise
15 to a Title IX claim . . . The touchstone of both Title VII and Title IX
16 claims is disparate treatment *based on sex*. The School District’s
17 policy allows all students to use bathrooms and locker rooms that
18 align with their gender identity. It does not discriminate based on sex,

19 *continued* . . . cover a multitude of procedures and ECF Dkt. 38-2 at pp. 10-11 objecting
20 to Plaintiff’s request for admission that vaginoplasty and mammoplasty are medically
21 necessary.

22 ¹⁹ The Supreme Court has made clear that references to sex are not *per se* violations
23 of Title VII. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998);
24 *Arizona Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v.*
Norris, 463 U.S. 1073, 1104, (1983) (Powell, J. concurring in part and dissenting in
part).

25 ²⁰ *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80, 118 S. Ct. 998,
26 1002, 140 L. Ed. 2d 201 (1998).

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and therefore does not offend Title IX.²¹

Here, the health plan exclusion applies to all plan beneficiaries and thus does not discriminate on the basis of sex.

B. Plaintiff’s continued reliance on Eighth Amendment and other non-Title VII cases do not support the conclusion that the sex neutral health plan exclusion in this case violates Title VII.

Plaintiff relies on Eighth Amendment caselaw to support her Title VII claim but as pointed out in ECF Dkt. 35 (State’s Cross Motion for Summary Judgment), Eighth Amendment cases are not persuasive because the issues sought to be remedied by the Eighth Amendment are wholly divorced from Title VII. The Eighth Amendment prohibits cruel and unusual punishments and embodies the idea that when government takes sole custody of an individual, that person still retains his or her dignity and the government has certain responsibilities.²² This includes:

the government's obligation to provide medical care for those whom it is punishing by incarceration. An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst cases, such a failure may actually produce physical “torture or a lingering death,” the evils of most immediate concern to the drafters of the Amendment. In less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose. The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency as manifested in modern

²¹ *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 534–35 (3rd Cir. 2018), *cert. denied sub nom. Doe v. Boyertown Area Sch. Dist.*, 139 S. Ct. 2636, 204 L. Ed. 2d 300 (2019). The courts have found Title VII decisions instructive in Title XI claims. *See Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999).

²² *Estelle v. Gamble*, 429 U.S. 97, 102–03 (1976).

1 legislation codifying the common-law view that “(i)t is but just that
2 the public be required to care for the prisoner, who cannot by reason
3 of the deprivation of his liberty, care for himself.”²³

4 Plaintiff is an employee pursuing a Title VII claim. Title VII addresses
5 very different circumstances. Title VII concerns itself with “achiev[ing] equality
6 of employment opportunities.”²⁴ Plaintiff’s situation is thus not analogous to that
7 of a prisoner. The State of Alaska has not taken control or custody over Plaintiff.
8 The State of Alaska has not objected or prevented Plaintiff from receiving gender
9 transition surgery. Plaintiff remains free to seek medical treatment and to seek
10 other employment if she is unhappy with the nature and scope of benefits offered
11 by the State. Similarly, Plaintiff’s reliance on cases decided under the Affordable
12 Care Act, Medicaid, and the equal protection clause to support her contention
13 that Title VII mandates that nearly every employer insurance plan provide
14 coverage for gender transition surgery is without merit. Title VII is a specific
15 statute that prohibits employment discrimination against men because they are
16 men or women because they are women.²⁵

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21 ²³ *Estelle v. Gamble*, 429 U.S. 97, 103–04 (1976) (internal citations omitted).

22 ²⁴ *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30 (1971).

23 ²⁵ Title VII is concerned with discrimination because of sex. The district court
24 recently addressed the meaning of the word “sex” in another matter concerning
25 transgender individuals. The district court defined sex as the “anatomical and
26 physiological processes that lead to or denote male or female.” Order Re Pending
 Motions, *The Downtown Soup Kitchen v. Municipality of Anchorage, et al.*, No. 3:18-
 CV-00190-SLG, 2019 WL 3769623, at *1 (D. Alaska Aug. 9, 2019).

1 **C. Congress’s repeated failure to amend Title VII to include gender**
2 **identity or transgender status makes clear that the existing statutory**
3 **definition of sex does not include transgender status.**

4 Plaintiff contends that the expansive and new interpretation of Title VII that she
5 seeks is consistent with the purposes of that statute. But the repeated failure of Congress
6 to amend Title VII to specifically include gender identification makes clear that the
7 statute does not include transgender status within its scope of coverage. Although
8 Congressional inaction is often not a significant indicator of Congressional intent
9 regarding a law already passed, where there is overwhelming evidence of persistent and
10 unsuccessful attempts to amend legislation, an inference can be drawn that the statute
11 does not cover the subject of the amendments.²⁶ In this regard, the Supreme Court has
12 found that legislative inaction can demonstrate legislative intent where there were 13
13 unsuccessful attempts to amend legislation.²⁷ Since 1974, there has been a nearly annual
14 attempt to amend Title VII to expand the definition of sex, including at least 14 attempts
15 to specifically add gender identity.²⁸ Clearly, the level of “non-action here is

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19 ²⁶ *Bob Jones Univ. v. United States*, 461 U.S. 574, 599–600, (1983); *Heckler v.*
20 *Day*, 467 U.S. 104, 117-18, (1984) (noting that the repeated rejection of an amendment
21 can be a clear expression of congressional intent).

22 ²⁷ *Bob Jones Univ. v. United States*, 461 U.S. 574, 600, (1983).

23 ²⁸ 3 H.R. 14752, 93rd Cong. (1974); H.R. 15692, 93rd Cong. (1974); H.R. 16200,
24 93rd Cong. (1974); H.R. 166, 94th Cong. (1975); H.R. 5452, 94th Cong. (1975); H.R.
25 10389, 94th Cong. (1975); H.R. 2667, 94th Cong. (1975); H.R. 13019, 94th Cong.
26 (1976); H.R. 13928, 94th Cong. (1976); H.R. 451, 95th Cong. (1977); H.R. 2298, 95th
Cong. (1977); H.R. 4794, 95th Cong. (1977); H.R. 5239, 95th Cong. (1977); H.R. 7775,
95th Cong. (1977); H.R. 8268, 95th Cong. (1977); H.R. 8269, 95th Cong. (1977); H.R.
10575, 95th Cong. (1978); H.R. 12149, 95th Cong. (1977); *continued . . .*

1 significant”²⁹ and mitigates against Plaintiff’s expansive interpretation of Title VII.

2 In sum, it seems clear that what the Plaintiff actually seeks in this litigation is a
3 judicial “update” of Title VII³⁰ to mandate that employer health plans provide coverage
4 for gender reassignment surgery by effectively establishing transgender status as an
5 explicit protected category under Title VII. Regardless of whether or not such an
6 update would be a good idea, that decision is up to Congress and not the judiciary.³¹
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9 *Continued* . . . H.R. 2074, 96th Cong. (1979); S. 2081, 96th Cong. (1979); H.R. 1454,
10 97th Cong. (1981); H.R. 3371, 97th Cong. (1981); S. 1708, 97th Cong. (1981); H.R.
11 427, 98th Cong. (1983); S. 430, 98th Cong. (1983); H.R. 2624, 98th Cong. (1983); H.R.
12 230, 99th Cong. (1985); S. 1432, 99th Cong. (1985); H.R. 709, 100th Cong. (1987); S.
13 464, 100th Cong. (1987); S. 2109, 100th Cong. (1988); H.R. 655, 101st Cong. (1989);
14 S. 47, 101st Cong. (1989); H.R. 1430, 102nd Cong. (1991); S. 574, 102nd Cong.
15 (1991); H.R. 423, 103rd Cong. (1993); H.R. 431, 103rd Cong. (1993); H.R. 4636, 103rd
16 Cong. (1994); S. 2238, 103rd Cong. (1994); H.R. 382, 104th Cong. (1995); H.R. 1863,
17 104th Cong. (1995); S. 932, 104th Cong. (1995); S. 2056, 104th Cong. (1996); H.R.
18 365, 105th Cong. (1997); H.R. 1858, 105th Cong. (1997); S. 869, 105th Cong. (1997);
19 H.R. 311, 106th Cong. (1999); H.R. 2355, 106th Cong. (1999); S. 1276, 106th Cong.
20 (1999); H.R. 217, 107th Cong. (2001); H.R. 2692, 107th Cong. (2001); S. 1284, 107th
21 Cong. (2001); H.R. 214, 108th Cong. (2003); H.R. 3285, 108th Cong. (2003); S. 1705,
22 108th Cong. (2003); H.R. 288, 109th Cong. (2005); H.R. 3685, 110th Cong. (2007);
23 H.R. 2015, 110th Cong. (2007); H.R. 3017, 111th Cong. (2009); H.R. 2981, 111th
24 Cong. (2009); S. 1584, 111th Cong. (2009); H.R. 1397, 112th Cong. (2011); S. 811,
25 112th Cong. (2011); H.R. 1755, 113th Cong. (2013); S. 815, 113th Cong. (2013); H.R.
26 3185, 114th Cong. (2015); S. 1858, 114th Cong. (2015); H.R. 2282, 115th Cong.
(2017); S. 1006, 115th Cong. (2017); H.R. 5, 116th Cong. (2019); S. 788, 116th Cong.
(2019).

29 *Bob Jones Univ. v. United States*, 461 U.S. 574, 600, (1983).

30 *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 352–53 (7th Cir. 2017)
(Posner, J. concurring).

31 *Gunnison v. Comm. of Int. Rev.*, 461 F.2d 496, 499 (7th Cir. 1972) (“Further
expansion of the favored treatment specifically provided in §402(a)(2) as an exercise of
legislative grace is a function for the Congress, not for the Courts”).

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CONCLUSION

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

DATED: October 4, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2019, a copy of the foregoing was served electronically via ECF pursuant to the Court’s electronic filing procedures on the following parties of record:

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