

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

JENNIFER FLETCHER,)
)
 Plaintiff,)
)
 vs.) CASE NO. 1:18-cv-00007-HRH
)
 THE STATE OF ALASKA,)
)
 Defendant.)
 _____)

TRANSCRIPT OF SUMMARY JUDGMENT MOTION HEARING
BEFORE THE HONORABLE H. RUSSEL HOLLAND, DISTRICT JUDGE
February 19, 2020; 9:01 a.m.
Anchorage, Alaska

FOR THE PLAINTIFF:

Lambda Legal Defense and Education Fund, Inc.
BY: TARA L. BORELLI
730 Peachtree Street, Suite 640
Atlanta, GA 30308
404-897-1880

Croft Law Office
BY: ERIC C. CROFT
738 H Street
Anchorage, AK 99501
907-272-3508

FOR THE DEFENDANT:

Alaska Office of the Attorney General
BY: WILLIAM E. MILKS and KEVIN DILG
PO Box 110300
Juneau, AK 99811
907-465-3600

R. JOY STANCEL, RMR-CRR
Federal Official Realtime Reporter
222 West 7th Avenue, #4
Anchorage, Alaska 99513
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1 (Call to Order of the Court at 9:01 17 a.m.)

2 DEPUTY CLERK: All rise. His Honor, the Court, the
3 United States District Court for the District of Alaska is now
4 in session, with the Honorable H. Russel Holland presiding.

5 Please be seated.

6 THE COURT: Good morning, ladies and gentlemen. We
7 are convened in Case 18-Civil-7, Fletcher versus the State of
8 Alaska. We have cross motions for summary judgment. We've
9 suggested 20 minutes per side for oral argument, and I'll
10 appreciate your abiding by that suggestion. If people want to
11 divide their arguments between their opening and closing, you
12 may do so. Because we've got cross motions, both sides will
13 get to do a reply if you wish.

14 I'd like to start with the plaintiff, and who's going
15 to be -- Mr. Croft, who's going to talk to me for your side?

16 MS. BORELLI: I'll be speaking today, Your Honor.

17 THE COURT: And you are?

18 MS. BORELLI: My name is Tara Borelli, and I'm with
19 Lambda Legal, appearing on behalf of the plaintiff, Jennifer
20 Fletcher.

21 THE COURT: Ms. Borelli, welcome. Thank you. And
22 Mr. Milks, I guess?

23 MR. MILKS: Actually, my colleague, mr. Dilg.

24 MR. DILG: Kevin Dilg. I'll be arguing on behalf of
25 the State of Alaska.

1 THE COURT: Okay. Ms. Borelli, let's go.

2 MS. BORELLI: Thank you, Your Honor. Do you prefer
3 counsel at the podium or seated at counsel -- seated at
4 counsel's table?

5 THE COURT: Your choice.

6 MS. BORELLI: Great. Thank you, Your Honor. I just
7 wanted to begin with mentioning that we are joined in the
8 courtroom today by Ms. Fletcher, who is seated in the front row
9 of the gallery.

10 THE COURT: Ms. Fletcher.

11 MS. BORELLI: This case asks whether it violates
12 Title VII's promise of workplace equality to maintain a blanket
13 ban on surgical care for transgender employees only, when
14 non-transgender employees face no such exclusion, and even
15 though that medical treatment can be lifesaving. The answer is
16 yes, this violates Title VII.

17 There is notable clarity about the record before the
18 Court. The State does not contest a single fact in plaintiff's
19 statement of undisputed facts, and the pending motions present
20 pure questions of law for this Court to decide. There's no
21 material dispute about the underlying science in the case, and
22 the State has conceded everything necessary to decide
23 plaintiff's motion. The State admits that gender dysphoria is
24 a recognized medical condition, that it can be treated, that
25 treatment can be medically necessary, and that surgery could be

1 medically necessary to treat gender dysphoria in certain
2 individuals.

3 These admissions are confirmed by the testimony of
4 two experts, Dr. Ettner and Dr. Schechter. Defendant does not
5 contest their qualifications or their testimony, and has not
6 offered any affirmative or rebuttal testimony of its own.
7 Indeed, defendant's admissions concede the core aspects of
8 their testimony.

9 As the summary judgment standard makes clear, having
10 failed to rebut any of this testimony, defendant cannot stand
11 now on mere allegations or denials, but must set forth specific
12 facts showing a genuine issue for trial. Defendant has failed
13 to do that.

14 It is uncontested that Ms. Fletcher was denied
15 coverage pursuant to the exclusion in the plan for surgery
16 related to changing sex or sexual characteristics. This is
17 facial sex discrimination, no matter how one looks at the
18 exclusion.

19 Schwenk tells us that the central query for a
20 Title VII claim is whether, quote, the discrimination relates
21 to sex. With that test in mind, there are multiple reasons why
22 this exclusion must be understood as sex discrimination.
23 First, this is sex stereotyping. Schwenk tells us at Page 1201
24 that, by definition, transgender people are those, quote, whose
25 outward behavior and inward identity do not meet social

1 definitions associated with their sex assigned at birth.

2 Second, this is facial discrimination. The terms of
3 the exclusion, itself, prohibit surgery for changing sex or
4 sexual characteristics.

5 THE COURT: Why isn't it neutral? It applies to both
6 males and females.

7 MS. BORELLI: Well, Your Honor, Title VII is very
8 clear that the focus of the statute is on the individual, and
9 Manhart is one decision that explained this at some length.
10 That's a case, of course, where the fight was about retirement
11 benefits and the employer said, well, in the aggregate, men and
12 women receive the same benefits because women live longer than
13 men, so requiring women to pay a little bit more into the
14 retirement plan doesn't discriminate against them, and Manhart
15 established that even when the -- there are measured, actuarial
16 differences, for example differences in the average lifespan
17 between men and women, that cannot justify discriminating
18 against women by treating them as merely components of a
19 gender-based class. That employer owed every individual woman
20 the same treatment as each individual man. So Manhart says you
21 can't require women to make larger contributions into a
22 retirement plan.

23 Arizona Governing Committee also says you can't pay
24 women a smaller amount each month on the back end for the same
25 reason, because of those actuarial differences, and that's

1 because each individual woman has a right to be treated equally
2 as compared to each individual man.

3 Additionally, Your Honor, there isn't actually equal
4 treatment, as compared to men and women. The exclusion does
5 not apply neutrally to them. It subjects them each to distinct
6 sex stereotypes. For example, if someone was assigned female
7 at birth, the stereotype is you must not have surgery to remove
8 your breasts. If you were assigned male at birth, you must not
9 have surgery to have a vagina. This violates Title VII, and I
10 would point the Court to the extensive history of decisions
11 affirming the idea that equal application is not necessarily a
12 defense at all to discrimination against the individual. The
13 very terms of Title VII, itself, for example, say that
14 employers cannot discriminate against, quote, any individual
15 because of such individual's sex. And the Supreme Court has
16 applied that concept repeatedly and unequivocally.

17 In *Oncale versus Sundowner*, that case wasn't about
18 the treatment of men versus women. Instead, that one male
19 plaintiff had a right not to be sexually harassed by other men
20 in an all-male workplace. And if a female employee had been
21 harassed in Mr. Oncale's workplace, both would seek relief
22 rather than neither of them being able to seek relief.

23 In *Connecticut versus Teal*, the Supreme Court held
24 that an African-American employee could challenge a written
25 promotion test with discriminatory impact against

1 African-Americans, even though the employer ultimately promoted
2 a higher percentage of African-American employees than white
3 employees, and had Price Waterhouse simultaneously denied
4 partnership both to Ann Hopkins for being too macho and to a
5 male employee for not being not macho enough, their claims
6 would not cancel each other out. They would each have
7 independent claims. And I think we could probably agree that
8 an employer could not fire everyone in an interracial
9 relationship, even though that's equal application, nor could
10 an employer use racial epithets for every employee's race.

11 So of course, if a policy does burden one sex and not
12 the other, that's one way to show a Title VII violation, but it
13 simply is not the only way, and that extensive body of case law
14 solidifies that concept in Title VII jurisprudence.

15 Your Honor, turning back to the (Indiscernible -
16 garbled speech) was covering about the reasons, many reasons
17 that we think this has to be understood as sex discrimination,
18 because I understand that to be the primary crux of defendant's
19 argument. These are arguments that are pure questions of law,
20 and I understand their primary defense to be, this just isn't
21 sex discrimination, for various reasons.

22 So as mentioned, we also believe this is facial
23 discrimination. The terms of the exclusion, itself, prohibit
24 surgery for changing sex or sexual characteristics, and the
25 discrimination is thus plain on the face of the exclusion.

1 Third, this discriminates based on gender transition,
2 which is inherently about gender. Firing an employee, as an
3 analogy, because she converts from Christianity to Judaism
4 would be a very clear case of discrimination because of
5 religion. Even if the employer harbors no bias towards
6 Christians or Jewish people and only towards converts, the same
7 principle applies here.

8 And fourth, this discriminates based on sex assigned
9 at birth. So even under the narrowest possible construction,
10 that is, even if we assume the statute protects people based
11 only on the sex that they were assigned at birth, the exclusion
12 discriminates on that basis.

13 For example, someone who's birth-assigned sex was
14 female can obtain vaginoplasty to correct the congenital
15 absence of a vagina, but because plaintiff was assigned male at
16 birth, she cannot. As the Boyden case found, that is a
17 straightforward case of sex discrimination.

18 We believe that the --

19 THE COURT: Why do you have to deal with all these
20 kind of slippery arguments about whether this is or isn't
21 stereotyping if -- if what the case boils down to is a
22 biological male who seeks surgery to transition to female under
23 this plan can't get surgery?

24 MS. BORELLI: That's correct, Your Honor.

25 THE COURT: But --

1 MS. BORELLI: Yes, Your Honor.

2 THE COURT: But if we had a female, biologic female,
3 who had the same problem, needed the same surgery, you could
4 get the surgery. Why isn't this case that simple? That's a
5 question for both sides, incidentally.

6 MS. BORELLI: I appreciate that question, Your Honor.
7 We think this case is that simple. The Court doesn't actually
8 have to resort to sex stereotyping analysis, even though we
9 think that there is a clear sex stereotyping framework that
10 describes what the State is doing. What the Court --

11 THE COURT: Help me here, because I just don't see
12 this as a stereotyping case. The case where the person is
13 hired as, what, a librarian or something, and then when he or
14 she showed up, presented differently, no job, gone, that -- I
15 understand that's a stereotyping situation, but I don't see
16 that as being analogous to what's going on here.

17 MS. BORELLI: I understand, Your Honor. There are at
18 least two ways that this should be understood as stereotyping,
19 although let me begin by saying, as the Court just described,
20 there is a very clear literal way to understand this as being
21 related to sex. That's all that has to be answered to find
22 that this is within the kind of discrimination that Title VII
23 prohibits. The Court doesn't have to go any farther than that.
24 That answers the question.

25 But if the Court is inclined to consider whether this

1 is also sex stereotyping, there are at least two reasons to
2 find that it is.

3 First, in Schwenk, and this is at Page 1201, the
4 Court says that, by definition, transgender people are those
5 whose outward behavior and inward identity do not meet social
6 definitions associated with their sex assigned at birth. And
7 so, by definition, to discriminate against a transgender person
8 because they are transgender is bound up in stereotypes about
9 how proper men and women should behave, relies on the idea that
10 a proper man should always behave in accordance with that
11 person's birth-assigned sex, and a proper woman should always
12 behave in accordance with that person's birth-assigned sex.

13 But a second reason, Your Honor, to see this as sex
14 stereotyping -- again, not that it's necessary to answer the
15 basic question of whether there's sex discrimination here --
16 the second reason to see it as a sex stereotyping can be found
17 in the Boyden and the Flack cases. The judge there said that
18 these sorts of exclusions entrench the stereotype that a person
19 should never undertake medical treatment to live to align their
20 body in a way that doesn't match their birth-assigned sex. And
21 so an individual, even over the pain of severe distress from
22 gender dysphoria, and even though clear medical recommendations
23 from medical providers and psychological providers, that person
24 should be a proper man or woman and live in accordance with
25 their birth-assigned sex. That rests on stereotypes, Your

1 Honor.

2 So again, while not necessary to answer the question
3 here, we do think that that theory is correct.

4 THE COURT: Sounds like legislating from the bench,
5 to me.

6 MS. BORELLI: Your Honor, what I would say in
7 response to that is, we actually think that it would be very
8 difficult for the defendants to make out a persuasive argument
9 that this case is not controlled by Schwenk, because Schwenk
10 has already looked at whether Title VII applies to transgender
11 people, and has found that it does. And in fact, has said that
12 discrimination against transgender people constitutes gender
13 discrimination. And this case really matches the facts of
14 Schwenk. The reason that that plaintiff was able to state a
15 Title VII discrimination under that case -- sorry, a
16 Gender-Motivated Violence Act claim, which parallels, as the
17 Court said, Title VII, that reason parallels the reason that
18 Ms. Fletcher experienced discrimination as well. And that is
19 as follows; in Schwenk, the facts are very clear that that
20 prisoner was subjected to escalating sexual harassment and
21 ultimately assaults only after the prison guard learned that
22 she was transgender. The opinion uses an outdated term now.
23 The word transsexual. But the Court was very clear; it was
24 after the guard learned that rather than having a male gender
25 identity that matches her sex assigned at birth, Crystal

1 Schwenk had a female gender identity. That is what caused the
2 prison guard to undertake the harassing actions towards her.

3 THE COURT: That sounds like stereotyping on the part
4 of --

5 MS. BORELLI: I think that's correct.

6 THE COURT: -- the guard. But I don't see that as
7 analogous to what's going on here.

8 MS. BORELLI: Well, the same thing happened to
9 Ms. Fletcher in the following way; it is only because she --
10 and I will answer this question, Your Honor, and see if the
11 Court has any others, and then try to reserve the balance of my
12 time. But it is only because Ms. Fletcher's gender identity
13 does not match her sex assigned at birth that she is subjected
14 to discrimination, precisely as this Court outlined. That was
15 the -- what characterizes the facts in Schwenk. Crystal
16 Schwenk had a female gender identity. That subjected her to
17 harassment. Jennifer Fletcher has a female gender identity.
18 She -- it doesn't match her male sex assigned at birth, and
19 that is why she could not obtain this surgery. So there really
20 is a direct parallel between the two cases. And again, Schwenk
21 said very clearly that discrimination based on gender equally
22 violates the Gender-Motivated Violence Act and Title VII. So
23 we believe that that issue really has been settled now for a
24 matter of 20 years.

25 Your Honor, does that answer the Court's question? I

1 want to make sure that I have.

2 THE COURT: I think it does.

3 MS. BORELLI: Thank you, Your Honor.

4 THE COURT: I still find it a very slippery concept.
5 As I've suggested earlier, it seems to me that this case is a
6 lot simpler than all the arguments that people are making. But
7 yes, you've answered my questions --

8 MS. BORELLI: Great.

9 THE COURT: -- sufficiently. And you wish to reserve
10 at this point?

11 MS. BORELLI: Yes. Thank you, Your Honor.

12 THE COURT: All right. Let's go.

13 MR. DILG: Good morning, Your Honor. So the State
14 agrees this is a fairly simple case. Jennifer Fletcher is
15 seeking to amend federal insurance law by using an employment
16 discrimination statute. This is an improper use of Title VII.
17 It's been recognized by the federal courts, and actually cuts
18 against the history and plain language of the statute.

19 The Supreme Court recognized that Title VII isn't
20 intended to revolutionize insurance and pen -- pension
21 industries, and there's three independent reasons why this
22 Court should reject Fletcher's offer to use Title VII as a
23 force to require all Title VII employers to affirmatively
24 provide gender confirming surgery.

25 First, the text and legislative history of Title VII

1 makes clear that its focus is on the differences between men
2 and women, and that discrimination on the prohibit -- pro --
3 prohibition, there we go, on the basis of sex refers to
4 disadvantages between men and women.

5 Second, the Title VII analysis offered by Fletcher
6 comparing transgender women to non-transgender women is an
7 inappropriate comparator for the purposes of Title VII.

8 And third, the sex-neutral health plan exclusions
9 have been upheld by other courts. The U.S. Supreme Court has
10 been clear that the critical issue under Title VII is whether
11 one member of -- whether members of one sex are exposed to
12 disadvantageous terms or conditions in employment which members
13 of the other sex are not exposed. Of course, the contours of
14 this issue have been subject to a considerable amount of
15 debate, including a pair of cases in front of the Supreme Court
16 related to the application of Title VII to sexual orientation
17 and transgender status, but what's clear is when congress
18 passed Title VII, the commonly understood definition of "sex"
19 was that of biological sex, the physical differences between
20 men and women.

21 The 9th Circuit has also recognized that the purpose
22 of Title VII was to eliminate subjective assumptions and
23 stereotypes regarding the physical ability of women to do
24 particular work. That was in the Rosenfeld versus South
25 Pacific Company case. Even this Court has recently adopted a

1 definition of "sex" that as the physiological process that
2 leads to or denotes male or female, and that was in the
3 Downtown Soup Kitchen case.

4 It's clear when Title VII discusses discrimination on
5 the basis of sex, the statute is focused on disadvantages in
6 the terms and conditions and opportunity of employment for
7 biological men or biological women. Provided men and women are
8 treated to the same advantages and disadvantages, there's no
9 claim for discrimination under Title VII.

10 Importantly, I think we need to keep in mind that
11 there was no traditional employment action taken in this case.
12 We're dealing with an exclusion to a health plan that prevents
13 everyone from getting the services requested, regardless of
14 race, sex, national origin. There's no hiring or promotion
15 decision made, and Ms. Fletcher lost no employment opportunity.
16 There's also no allegations of sex-based workplace animus or
17 any adverse action at all.

18 While the benefits of employment are covered under
19 Title VII, Ms. Fletcher gets the same health benefits as are
20 offered to everybody else, medically necessary benefits not
21 otherwise excluded from the terms of the plan. Fletcher's sex
22 was irrelevant to whether or not she would be compensated for
23 getting gender conforming surgery, and there's no indication
24 anywhere that the State made the decision to exclude this
25 coverage on the basis of her sex.

1 What Ms. Fletcher is really seeking is to change the
2 law regulating insurance, but Title VII isn't really the
3 vehicle to make this change, and there's nothing that's in
4 Title VII's text that's equipped to deal with all the nuances
5 that would come with that type of decision.

6 I think that Fletcher's reliance on Schwenk really
7 doesn't do a lot to mitigate the fact that Title VII's Texas
8 concern with disadvantages between men and women. All Schwenk
9 really does is recognize that focusing on stereotype character
10 traits is actionable under Title VII. In Schwenk, the
11 9th Circuit recognized the theory of sex stereotyping the
12 Supreme Court laid out in the Price Waterhouse decision, but
13 Schwenk doesn't stand for the proposition that any employment
14 action directed towards a transgender member equates sex
15 discrimination. Schwenk simply recognizes that targeting an
16 individual because of sex-based stereotypes creates a cause of
17 action under Title VII regardless of the gender status of the
18 individual that's been targeted. And if you actually read
19 Schwenk closely, the terms are -- the decision is still couched
20 in the terms of differences and disadvantages between men and
21 women. The 9th Circuit noted that the plaintiff in Schwenk was
22 targeted specifically because he was a man that failed to act
23 like one. Nothing in Schwenk provides a categorical protection
24 as advocated by Ms. Fletcher, and the case was decided on sex
25 stereotyping grounds, as you've noted.

1 However, this isn't a sex stereotyping case, as you
2 know. This is a health benefits case, and at no time did the
3 State dictate that Fletcher act or present herself in a
4 particular way. In fact, the State's freely accepted her
5 gender expression at work. Really, the only impact that she's
6 had is the refusal to pay for the gender confirming surgery, a
7 refusal that's applied to men and women equally, regardless of
8 their transgender status.

9 Because the exclusion applies to both men and women,
10 there's no claim for sex discrimination, as that term is
11 understood under Title VII. It's also important to distinguish
12 that the State, as an employer, has not interfered with
13 Ms. Fletcher's transition, beyond just accepting it. The State
14 hasn't dictated when, where, or how Fletcher should express or
15 act in regard to her gender role, and this is demonstrated by
16 the fact Ms. Fletcher's obtained gender reassignment surgery
17 and the State has taken no action beyond accepting her gender
18 expression. But nothing in Title VII compels the State to be
19 an active participant in the individual's gender decision.
20 However, Fletcher does argue that it's employment
21 discrimination for the state health plan to refuse to pay for
22 her gender expression.

23 However, even if Title VII does apply to this case,
24 Fletcher's analysis is still flawed. If you look through the
25 case law, the traditional test for determining sex

1 discrimination is if all facts are held the same, except for
2 the plaintiff's sex, would the outcome be the same. And the
3 answer to this question -- to this question in this case is
4 yes. The State's action passes this traditional test in two
5 ways. If all the facts are held the same and a biological
6 female requested gender confirming surgery, the request would
7 be denied. Likewise, if all the facts were held the same and a
8 biological female requested surgery designed to change sex or
9 sexual characteristics, the request would be denied. It
10 doesn't matter if they're a biological male, a biological
11 female, transgender, race, national origin -- the request would
12 be denied. The health plan exclusion functions regardless of
13 the sex of the requester, just like all members are prevented
14 from getting fertility treatments or, at the time under the
15 state health plan 2017, obesity treatments.

16 Now, Fletcher's trying to sidestep this issue by
17 arguing that she's been discriminated when you compare
18 transgender women to non-transgender women. However, that's
19 not what Title VII protects against. Title VII concerns itself
20 with the differences between men and women. Even in *Oncale*,
21 which has been mentioned, where the Supreme Court recognized
22 same sex harassment, the Court reiterated that the crucial
23 issue Title VII text indicates is whether members of one sex
24 are exposed to disadvantageous terms or conditions of
25 employment which the members of the other sex are not exposed

1 to. The health plan exclusion exposes everyone to the same
2 advantages or disadvantages.

3 Moreover, even if the Court were to accept Fletcher's
4 comparator of transgender women to other women, the health plan
5 does not categorically deny coverage for all the treatments
6 that Fletcher sought. Rather, coverage is provided for women,
7 regardless of gender status, for some purposes, such as cancer
8 or injury, but not for other purposes, such as changing sex or
9 sexual assignment. In fact, I think the flaw in Fletcher's
10 comparator argument was highlighted in the recent Supreme Court
11 case, the R.G. and G.R. Harris Funeral Home case where Chief
12 Justice Roberts noted that if you relied on the traditional
13 discrimination analysis comparing men to women, there's no
14 issue under Title VII that the discrimination wasn't on the
15 basis of the sex. Everybody's being treated the same in
16 relation to their sex. However, if you analyze the issue
17 treating transgender as a special classification under Title
18 VII, then Fletcher's comparator may be relevant, but based on
19 the current Title VII case law, transgender status isn't the
20 comparator and Schwenk doesn't require you to find that it is
21 the comparator. Schwenk was decided on sexual stereotyping
22 grounds laid out in the Price Waterhouse case.

23 The health plan doesn't expose men or women to
24 disadvantageous terms or conditions of employment which other
25 members of the other sex are not exposed to. Expansion of

1 Title VII is better left to Congress and the democratic process
2 than redefining the term of discrimination under the basis of
3 sex at this time.

4 And the Supreme Court also noted that when dealing
5 with statutes that are old -- and Title VII has been around for
6 over 50 years -- courts are to use modesty in interpreting
7 these statutes. They're not supposed to be given expansive
8 definitions, which is what Fletcher's advocating for.

9 So turning to my third point, Title VII has long
10 recognized that health care exclusions are not the same thing
11 as sex discrimination. The federal circuit courts have
12 reviewed gender neutral exclusions related to birth control and
13 fertility. Significantly, the plaintiff, in the Second Circuit
14 decision Saks versus Franklin Covey Company made an argument
15 similar to Fletcher's argument in this case. The Saks
16 plaintiff argued, in part, that because surgical infertility
17 treatments were performed predominantly on women, the exclusion
18 of infertility treatments affected female employees because of
19 their sex. This is a direct analogy to Fletcher's contention
20 that only transgender individuals are burdened by the State's
21 health plan's exclusion for gender conforming surgery.

22 In reviewing Saks' Title VII claim, the Second
23 Circuit noted that a benefit exclusion only violated Title VII
24 if the exclusion resulted in a plan that provides inferior
25 coverage to one sex. The Second Circuit then stated that since

1 surgical infertility treatments may be necessary regardless of
2 the gender of the individual, the exclusion does not
3 discriminate under the terms of Title VII.

4 We believe this Court should follow this analysis for
5 two reasons. First, it's well-grounded in Title VII precedent,
6 and on the -- that the discrimination on the basis of sex is
7 designed to prevent disadvantageous conditions from burdening
8 one sex over the other. Second, the Saks court properly
9 recognized that health plan exclusion that affects male and
10 female employees equally doesn't violate Title VII. The health
11 plan's exclusion for gender confirming surgery does not provide
12 male employees with more comprehensive coverage than female
13 employees because gender transition surgery is excluded for
14 everyone.

15 Fletcher's -- yeah, to reiterate, Fletcher is asking
16 this Court to basically revolutionize the field of health
17 insurance law by declaring a sex-neutral health plan exclusion
18 discriminates on the basis of sex, but this is inconsistent
19 with the text and purposes of Title VII. It is contrary to the
20 current body of case law. Title VII concerns itself with
21 remediating discrimination between men and women because they
22 are men and women. Health coverage that is not available to
23 either men or women simply does not provide a disadvantage to
24 one sex over the other.

25 And if the Court doesn't have any questions at this

1 time, I'd reserve the bulk of --

2 THE COURT: Thank you, sir.

3 Ms. Borelli, back to you.

4 MS. BORELLI: Thank you, Your Honor. Your Honor,
5 it's notable that there is not one case in this circuit that
6 adopts their arguments, and to the contrary, there's several
7 cases in health care context that have rejected their
8 arguments, including most recently the Toomey case, which
9 examined a very similar question to the one before this Court.
10 Let me just run quickly through several of the arguments I
11 heard from my colleague, and try to respond to them in turn.

12 So with respect to the argument that Title VII is not
13 health insurance law, there is no dispute, however, that Title
14 VII applies to fringe benefits, and that the purpose of the
15 statute is to root out arbitrary sex discrimination, both in
16 the office, but also in the health plan that employees rely on
17 as a key part of their compensation.

18 With respect to the legislative history arguments
19 that have been raised by defendant, Schwenk is the answer.
20 Schwenk held 20 years ago, I think to the month, actually, that
21 Title VII shields transgender people from gender
22 discrimination, and that to discriminate against transgender
23 people is gender discrimination. That answers any and all
24 legislative history arguments that try to claim that Title VII
25 doesn't apply. The 9th Circuit has already held that it does.

1 In terms of the argument that this statute should
2 only be understood to cover what defendants refer to as
3 biological sex -- and I will flag that we don't use that term
4 because every human being is a collection of a variety of
5 sex-related characteristics. There is no one defining
6 biological characteristic. In fact, gender identity is
7 considered the most important component of what determines a
8 person's sex.

9 At any rate, even if this covers only what defense
10 called "biological sex", what we call "sex assigned at birth",
11 even if this statute only covers that, this policy
12 discriminates on that basis. For a woman who is assigned
13 female at birth, she can obtain a vaginoplasty. Chest
14 reconstructive surgery is not excluded from the plan for her.
15 For a woman like Ms. Fletcher who is assigned male at birth,
16 that care is explicitly excluded. That discriminates against
17 Ms. Fletcher on the basis of her sex.

18 Regardless, it hasn't been a law since either Price
19 Waterhouse or Schwenk that that's all the statute reduces to,
20 but this case meets that test, even if that is the test
21 applied.

22 As for Downtown Soup Kitchen, that case cited a
23 series of factual findings entered after an evidentiary hearing
24 on preliminary injunction motion in Boyertown. So that is what
25 Downtown Soup Kitchen is citing.

1 The evidence in Boyertown that is cited in Downtown
2 Soup Kitchen parallels our expert testimony because the medical
3 consensus is now so settled in understanding who transgender
4 people are and how to treat them is so well established that
5 these facts and this testimony looks the same. And so
6 Boyertown is actually quite an instructive opinion. It
7 parallels the expert testimony here, and in any event,
8 defendant doesn't contest any of those scientific facts,
9 regardless.

10 Defendant relies on and tries to refer the Court to
11 Saks, a decision out of a district court in Texas. So that
12 invites the Court to ignore the many, many cases in this
13 circuit that have all applied Schwenk to protect transgender
14 people from sex discrimination and to look at a case where
15 there actually was no exclusion; that is what distinguishes
16 Saks. Chest reconstructive surgery was not excluded from the
17 health plan there as it is here, and so that case doesn't shed
18 any light on the question before this Court.

19 I think, Your Honor, I just want to make sure that I
20 return to -- this may have been the Court's first question, why
21 isn't this a simple and straightforward application of the
22 following fact, which is someone who is assigned female at
23 birth can obtain this surgery, someone who is assigned male at
24 birth cannot, and that is sex discrimination, and that meets
25 every test that defendants have laid out here as -- as

1 governing a Title VII analysis. For example, all facts are
2 held the same except for a person's gender. That formulation
3 meets that analysis. If Fletcher had been assigned female at
4 birth, she would access the surgery. She was assigned male at
5 birth; she can't access it. That is sex discrimination, plain
6 and simple.

7 Your Honor, if the Court has no other questions, I
8 think that -- I hope that I have answered and responded to each
9 of the points that defendants have raised, but does the Court
10 have any other questions?

11 THE COURT: No, thank you.

12 MS. BORELLI: Thank you, Your Honor.

13 THE COURT: Anything further, Mr. Milks?

14 MR. DILG: Yeah, I believe just three -- three quick
15 points. Going back, going back to Schwenk, this Court
16 doesn't -- or the State doesn't disagree that transgendered
17 individuals could bring claims under Title VII, but Schwenk
18 does not stand for the proposition that there's a categorical
19 protection for transgender status as advocated by Ms. Fletcher
20 in this case. And if you do review of the in-court or
21 in-circuit decisions quoted, most of those decisions do
22 recognize that Schwenk does not create this categorical
23 protection. It simply just allows for -- it removes a prior
24 theory that was issued by circuit courts where there was a
25 categorical exclusion, and it allows transgender individuals to

1 move forward either under a traditional analysis or under a sex
2 stereotyping analysis.

3 In regard to the argument about sex assigned at
4 birth, yeah, sex assigned at birth, simply because a health
5 plan excludes something does not mean that the employer
6 endorses the opposite. Our health plan excludes fertility
7 treatments, but that does not mean that the health plan is
8 interested in everyone being childless -- childless. Our health
9 plan excluded, in 2017, obesity treatments, but that does not
10 mean the health plan wants everyone to be obese. It is simply
11 an exclusion that applies equally to -- to everyone and is
12 not -- does not form the basis for sex discrimination.

13 And just the last point, in returning to the various
14 circuit cases that were cited in the briefing, reading through
15 those cases, quite honestly, often there are other causes of
16 action that are brought with the Title VII claim and the Title
17 VII analysis is not -- does not typically follow the
18 traditional analysis that's set out in, say, McDonnell Douglas,
19 or any of the other cases that look at Title VII. It simply is
20 a -- a lot of time, it's a self-preferential analysis. The
21 best case of that, I think, are the Boyden and Flack decisions
22 where Flack was decided first on Medicaid grounds and in the
23 support for that decision, the Boyden decision used the Court's
24 prior decision in Flack in order to support its Title VII
25 analysis. So the other cases in the circuit typically do bring

1 a claim that deals with health insurance. However, this
2 case -- that is missing from this case and Title VII does not
3 provide a categorical protection for transgender status.

4 And if the Court doesn't have a any further
5 questions --

6 THE COURT: No. I have my work cut out for me at
7 this point. Thank you very much for your additional input
8 today. The matter is taken under advisement. We will get you
9 a decision as quickly as we can. We're in recess, subject to
10 call.

11 DEPUTY CLERK: All rise. This matter is now
12 adjourned. This court stands in recess subject to call.

13 (Proceedings concluded at 9:38:08 a.m.)

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CERTIFICATE

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I, R. Joy Stancel, Federal Official Realtime Court Reporter in and for the United States District Court for the District of Alaska, do hereby certify that the foregoing transcript is a true and accurate transcript from the digital record in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

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Dated this 17th day of March, 2019.

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/s/ R. Joy Stancel

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R. JOY STANCEL, RMR-CRR
FEDERAL OFFICIAL COURT REPORTER

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